

**THE NORMATIVE VALUE SYSTEM UNDERPINNING
THE COMPANIES ACT 71 OF 2008**
with specific reference to the protection of creditors and employees

by

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I dedicate this thesis to our beautiful country and its diverse people and sincerely hope that it makes some contribution to the common good of our society.

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CHAPTER 1

INTRODUCTION

- 1 THE DOMINANCE OF COMPANIES
 - 2 AIM AND METHODOLOGY OF THE RESEARCH
 - 3 OVERVIEW OF THE RESEARCH
 - 4 LIMITATION OF SCOPE
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1 THE DOMINANCE OF COMPANIES

Companies play a vital and integral role in society. In the past 150 years the company has become the dominant vehicle through which economic activity is conducted.¹ Today companies govern our lives. It has infiltrated and commercialised virtually all spheres of our society and now even targets the public sphere such as water and power utilities, police, fire and emergency services, day care centres, universities, schools, airports, broadcasting, public parks and highways.² Companies are sometimes even referred to as partners of government.³ We are, in the words of Bakan “inescapably surrounded by their culture, iconography, and ideology.”⁴ The successes and failures of companies do not only affect its shareholders but also other stakeholders⁵ such as its creditors, employees,

¹ Naudé *Die Regsposisie van die Maatskappydirekteur met besondere verwysing na die Interne Maatskappyverband* (1970) (hereinafter “Naudé *Die Regsposisie van die Maatskappydirekteur*”) 1; McBride “General corporation laws: History and economics” (2011) *Law and Contemporary Problems* 1 2; Keay *The Corporate Objective* (2011) 2; Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) (hereinafter “Keay *The Enlightened Shareholder Value Principle*”) 3.

² Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2005) (hereinafter “Bakan *The Corporation*”) 111-138.

³ Bakan *The Corporation* 108 and 118-138; Keay *The Corporate Objective* 4; Keay *The Enlightened Shareholder Value Principle* 4.

⁴ Bakan *The Corporation* 5.

lenders, suppliers, customers, regulators, trade unions, the media, analysts, consumers, society in general, communities, auditors, institutional investors and potential investors.⁶

The company as an institution has been prodigiously successful. Some regard the company as one of the best systems that man has ever designed.⁷ Berle and Means wrote in their seminal work, *The Modern Corporation & Private Property*, first published in 1932 that:

“... [T]he modern corporation may be regarded not simply as one form of social organization but potentially (if not yet actually) as the dominant institution of the modern world. ... The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state – economic power versus political power, each strong in its own field. ... The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organisation.”⁸

There is empirical support for these conclusions. The turnover of the five top companies is more than double the gross domestic product of the world’s 100 poorest nations.⁹ In 2009 there were

⁵ The stakeholders of a company is defined in the King Report on Corporate Governance for South Africa 2009 (the King III Report) as “[a]ny group affected by and affecting the company’s operations.” See Institute of Directors in Southern Africa *King III Report on Corporate Governance for South Africa 2009* (2009) (hereinafter referred to as “the King III Report”) 99. The King IV Report on Corporate Governance for South Africa 2016 (the King IV Report) defines stakeholders as “[t]hose groups or individuals that can reasonably be expected to be significantly affected by an organization’s business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organization to create value over time.” See Institute of Directors in Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (2016) (hereinafter referred to as “the King IV Report”) 17 quoting from the International Integrated Reporting Council “The International <IR> Framework” (2013) (available at <http://intergratedreporting.org/resource/international-ir-framework/> (accessed 2017-02-04)). The King IV Report distinguishes between internal and external stakeholders. Internal stakeholders are directly affiliated with the company and include its board of directors, management, shareholders and employees. External stakeholders include trade unions, civil society organisations, government, customers and consumers. Internal stakeholders are always material stakeholders, but external stakeholders may or may not be material. Keay defines stakeholders as people or groups who have a stake (an asserted or real interest, claim or right, whether legal or moral, or an ownership share) in the company. See Keay *The Enlightened Shareholder Value Principle* 12 with reference to Ryan “The evolution of stakeholder management: Challenges and potential conflicts” (1990) *International Journal of Value Based Management* 105 108.

⁶ Cassim R “Corporate Governance” in Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2nd ed (2012) (hereinafter “*Contemporary Company Law*”) 495.

⁷ Tricker *Corporate Governance Principles, Policies and Practices* (2009) 8; Keay *The Enlightened Shareholder Value Principle* 6.

⁸ Berle & Means *The Modern Corporation & Private Property* (1991) (hereinafter “Berle & Means *The Modern Corporation*”) 313.

more than a 100 countries with a gross domestic product of less than \$20 billion. By comparison there were 123 American corporations with annual revenues in excess of \$20 billion.¹⁰ The 300 largest corporations control more than 25% of the world's productive assets.¹¹ In 2013, the cash reserves of many corporations such as Apple (\$158,8 billion), Microsoft (\$83,9 billion) and Google (\$58,7 billion) were more than those of countries like the United States (\$47,6 billion), Australia (\$42,5 billion) or the Netherlands (\$11,7 billion).¹² It is estimated that of the 100 largest economies in the world by gross revenue, 51 are multinational companies and only 49 are governments.¹³ The impact that these great multinational companies have on earth is enormous. Companies are far greater agencies for change than governments. The previous King Code on Governance for South Africa 2009 (King III Code) states:

“The company is integral to society, particularly as a creator of wealth and employment. In the world today, companies have the greatest pools of human and monetary capital.”¹⁴

The company however also has its pathologies. The role that companies play in society has not always been positive. Even early in its history there were some spectacular corporate failures. One of the earlier examples is the collapse of the legendary South Sea Company by the end of 1720, when the share price of the shares of the company sank from £1000 to under £100.¹⁵ There were

⁹ Esser “Corporate social responsibility: A company law perspective” (2011) *South African Mercantile Law Journal* 317 333.

¹⁰ Goforth “A corporation has no soul – modern corporation, corporate governance and involvement in the political process” (2010) *Houston Law Review* 617 619.

¹¹ Naidoo *Corporate Governance An Essential Guide for South African Companies* 2nd ed (2009) (hereinafter “Naidoo *Corporate Governance*”) 26.

¹² “Who has the most cash” *Time* (2014-09-08) 56. See also Keay *The Enlightened Shareholder Value Principle* 4.

¹³ King “The Synergies and interaction between King III and the Companies Act 71 of 2008” (2010) AJ 446 449; Keay *The Corporate Objective* 3; Keay *The Enlightened Shareholder Value Principle* 4.

¹⁴ The King III Report 8. See also Mongalo *Corporate Law and Corporate Governance A Global Picture of Business Undertakings in South Africa* (2003) (hereinafter “Mongalo *Corporate Law and Corporate Governance*”) 179-180 in which the author notes that companies dominate the economic life in South Africa and other developed and developing nations.

¹⁵ The South Sea Company's monopoly rights were supposedly backed by the Treaty of Utrecht, signed in 1713, as a settlement following the War of Spanish Succession, which gave the United Kingdom *assentia* to trade in South America for 30 years. But in fact the Spanish remained hostile and let only one ship a year enter those regions. Unaware of the problems, investors in the United Kingdom enticed by extravagant promises of profit, bought thousands of shares. By 1717 the South Sea Company was so wealthy (still having done no real business) that it assumed the public debt of the United Kingdom. This accelerated the inflation of the share price further, as did the *Bubble Act*. This was the first

so many companies that were liquidated and so many frauds perpetrated on the public in the United Kingdom during the 1860's that it led to an official inquiry.¹⁶ In the United States the loss in the market value of WorldCom, Tyco, Qwest, Enron and Global Crossing during the bursting of America's stock-market bubble between 2000 and 2002, was \$427 billion. To put this into perspective, \$400 billion would be enough to fund the United Nations for the next 400 years.¹⁷ Still later followed the global financial crisis of 2007 to 2009 with more spectacular collapses that reverberated around the world and left countless people destitute. The total wealth of American families fell by \$11 trillion in 2008, an amount equal to the combined annual output of Germany, Japan and the United Kingdom.¹⁸ Many commentators are of the view that failures in corporate governance in financial institutions caused the crisis.¹⁹

In South Africa a string of corporate failures during the early nineties, including the collapse of the Masterbond Group, caused extreme hardship.²⁰ In *Ex parte Lebowa Development Corporation Ltd*²¹ Stegman J lamented the huge number of default and summary judgements against companies in the Transvaal courts and the widespread practice of companies trading under insolvent circumstances at the time as a "social evil". A public outcry led to the appointment of the Nel Commission of Enquiry which completed its report in April 2001.²² The liquidation of Leisurenet Ltd in 2000 with debts of about R390 million affected the lives of its 5000 employees and 900 000

speculative bubble that the United Kingdom had seen. See Nel Commission *The final report of the Commission of Enquiry into the affairs of the Masterbond Group and investor protection in South Africa* (2001) (hereinafter referred to as "the Nel Commission Report") par 2.13.

¹⁶ The Nel Commission Report par 2.48.

¹⁷ Naidoo *Corporate Governance* 105.

¹⁸ Sandel *Justice What's the Right Thing to Do?* (2009) (hereinafter "Sandel *Justice*") with reference to Kalita "Americans see 18% of Wealth Vanish" Wall Street Journal (2009-03-13).

¹⁹ Goforth (2010) *Houston Law Review* 617 642-643; Keay "The duty to promote the success of the company: Is it fit for purpose in a post-financial crisis world?" in Loughry (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (2013) 50-52; King IV Report 5. *Contra*, however, King III Report 9.

²⁰ The Nel Commission Report, chapter 1 n 1, lists numerous examples of these corporate failures. See also Mongalo *Corporate Law and Corporate Governance* 195.

²¹ 1989 (3) SA 71 (T) 114 and 116.

²² The Nel Commission Report.

club members while liquidators negotiated the sale of its business.²³ The collapse of the King Group and Fidentia are more recent examples of corporate failures in South Africa.

In recent years there has been a surge in industrial and social protest action in South Africa. Where strike action on average led to the loss of approximately a million working days each year for the first eight years of democracy, this rose to 9.2 million days in 2007 and to 20 million days in 2010.²⁴ In a particularly bleak day in our history, police brutally crushed a strike in the mining community of Marikana on the 16th of August 2012 leaving 34 dead and 78 injured. This incident raised questions about the very foundations of our new democracy.²⁵ Anstey states that “[s]ophisticated systems of representation and collective bargaining may ensure a degree of procedural stability in workplace relations, but will always be fragile in a context of economic scarcity and perceived inequalities, and the deep resentment that accompany these.”²⁶ He accentuates that unemployment stands at 27% in formal terms, but is more likely in the region of 40%, and in some townships is estimated to be as high as 60%.²⁷ In South Africa, the average remuneration of the chief executive officer of a listed company is 53 (or even more) times that of the income of the lowest band of its employees. This disparity fuels resentment.²⁸ Victims of these corporate failures would probably prefer the more cynical definition of a corporation that appears in Ambrose Bierce’s *Devil’s Dictionary* namely, that the company is “[a]n ingenious device for obtaining individual profit without individual responsibility.”²⁹

²³ Steyn “Insolvency Law and the Constitution” in Du Plessis & Pete (ed) *Constitutional Democracy in South Africa 1994-2004 Essays in Honour of the Howard School of Law* (2004) (hereinafter “*Constitutional Democracy*”) 182-183.

²⁴ Anstey “Marikana – and the push for a new South Africa pact” (2013) SAJLR 133 137.

²⁵ Anstey (2013) SAJLR 133 133.

²⁶ Anstey (2013) SAJLR 133 141.

²⁷ Anstey (2013) SAJLR 133 141.

²⁸ Anstey (2013) SAJLR 133 142. Peacock “Pay gap yawns widest at Shoprite” Sunday Times, Business Times (2014-06-01) 4 refers to a study conducted by Mergence Investment Managers, which revealed that the average chief executive officer compensation to the average company wage in South Africa is 73:1.

²⁹ Bierce “*The Devil’s Dictionary*” (available at <http://www.commissionedwriting.com/THE%DEVILS%DICTIONARY%AMBROSE%BIERCE.pdf> (accessed 2013-10-10)). Bakan describes the corporation as “a pathological institution, a dangerous possessor of the great power it wields over people and societies”. See Bakan *The Corporation* 2.

The company has therefore been one of history's great catalysts for both good and evil. The question is whether we as society will find a way of exploiting an institution that has become so dominant and indispensable, yet so unpredictable?³⁰ Is it possible to correct or at least limit the pathologies and failures of this dominant institution? In order to answer these questions we need to consider and analyse the fundamental principles underlying the company and company law, more particularly what exactly is a company and what is its *raison d'être*?

The company is a social (and very often also economic) institution that developed through an evolutionary process of trial and error. Social structures formed for a common purpose evolved all through our history – from the family, to tribes, to agricultural settlements, to nation states and the modern company.³¹ These structures were created for various purposes, for example to protect and defend, to conquer and occupy, to rule, for ecclesiastical purposes, for commercial purposes, and so on.

A central argument of this thesis is that our conceptualisation of the company and its position in law is determined by the philosophical approach to justice (or underlying system of belief) and the resultant theory of law that we adopt. Most of our arguments about justice these days are about how to distribute the fruits of prosperity, or the burdens of hard times and how to define the basic fundamental rights of persons. Arguments about the rights or wrongs of economic arrangements or institutions, like the company, often lead us back to the question of what persons morally deserve and why. The bailout outrage during the global financial crisis of 2007 to 2009 illustrates this. In October 2008, the American Congress reluctantly appropriated \$700 billion to bail out the big banks and financial firms of America. Whilst it did not seem fair that the taxpayer had to bail out these institutions, which enjoyed huge profits during the good times and were at least partially to blame for the crisis, they had grown so big and so intertwined with every aspect of the economy that their collapse may have brought down the entire financial system. No one claimed that these institutions deserved the bailout, but the welfare of the economy as a whole seemed to outweigh the

³⁰ Compare Micklethwait & Wooldridge *The Company a Short History of a Revolutionary Idea* (2003) (hereinafter referred to as "Micklethwait & Wooldridge *The Company*") 191.

³¹ See, generally McBride (2011) *Law and Contemporary Problems* 1, who refers to the economic evolution theory of Beinhocker *The Origin of Wealth: Evolution, Complexity and the Radical Remaking of Economics* (2006) (hereinafter "Beinhocker *The Origin of Wealth*").

considerations of fairness. In other words, they had become too big to fail. The real outrage was however triggered by the bonuses that were paid to the former executives. Shortly after the bailout money began to flow, some of the companies that were beneficiaries of these funds awarded millions of dollars in bonuses to their former executives.³² This led to a public outcry. At the heart of this outcry was a sense of injustice – that the executives did not deserve the bonuses. One possible reason for this outcry is that the bailout appeared to reward greed. Another possible reason is that it rewarded failure. Sandel argues that the problem with the greed critique is that it does not distinguish the rewards that the previous executives received as a result of the bailout after the crash from the rewards that were bestowed to those same executives by the markets during the good times. Were the recipients any greedier during the financial crisis than they were during the good times, when they reaped even greater rewards? Sandel also poses the question whether the bailout really awarded failure? Many executives claimed that the failure of their companies were caused by systemic economic forces beyond their control (a “financial tsunami”). But if that is so, could it also not be argued that those same systemic economic forces accounted for the dazzling gains during the good times? Then there is good reason to question the enormous compensation that those executives received during the good times. On what grounds, if any, do executives deserve to earn so much more than the average employee. Most executives are probably hardworking and talented. But in 1980 chief executive officers in the United States earned only 42 times more than the average worker did. Were chief executive officers less talented and hardworking in 1980 than they were in 2007, when they earned 344 times more than the average worker?³³ During the period 2004 to 2006 American executives earned on average twice as much as their European counterparts and nine times as much as their Japanese counterparts.³⁴ Are American executives twice as deserving as their European counterparts, and nine times as deserving as Japanese executives? These arguments raise hard questions as to who deserves what.

³² The American International Group (A.I.G.) paid \$165 million of the massive \$173 billion that it received to executives in the very division that had precipitated the crisis. See Sandel *Justice* 13 with reference to Calmes & Story “418 Got A.I.G. Bonuses; Outcry Grows in Capital” *New York Times* (2009-03-18) A1; Saporito “How AIG Became Too Big To Fail” *Time* (2009-03-30) 16.

³³ Sandel *Justice* 18 with reference to Francis “Should CEO Pay Restrictions Spread to All Corporations?” *The Christian Science Monitor* (2009-03-09).

³⁴ Sandel *Justice* 18 with reference to Hall “No Outcry about CEO Pay in Japan” *Business Week* (2009-02-10).

Three broad philosophical approaches to justice are identified in this thesis. The first connects justice to the idea of maximizing welfare. The doctrine of utilitarianism is the most influential within this approach. The second approach connects justice to freedom. This approach emphasizes respect for individual rights. There are two rival camps within this group namely, the *laissez-faire* camp led by the free-market libertarians and the fairness camp consisting of theorists with a more egalitarian approach. The case for free markets is typically rooted in a libertarian as well as a utilitarian approach. The last approach sees justice as bound up with virtue and the good life.³⁵

As indicated before, our philosophical approach to justice (or underlying system of belief) shapes and informs the theory of law that we adopt. Company theory generally deals with one of three issues. From approximately the late 1920s it most often deals with the issues of corporate governance and corporate behaviour. Less often, it deals with the more abstract issue of the purpose or the *raison d'être* of a company, for example should the purpose of the company be to pursue not only the holy grail of profit but also more general social goods. Rarely, especially during the period roughly between the late 1920s and the 1970s, did it deal with the most abstract issue of all: What is a company? Instead of considering the company from this abstract perspective, company theorists have concerned themselves with organization theory and economic analyses of company behaviour. However in recent times the debate about the nature of the company has again been revived. People have begun to speak about companies in ways that indicate that the meaning of the word is unsettled.³⁶ The question as to the nature of the company also has constitutional ramifications. Section 8(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that one of the factors that needs to be considered in determining whether a company (or any other legal person) is a bearer (or beneficiary) of a particular fundamental right contained in the Bill of Rights is the nature of the company (or other legal person).³⁷

³⁵ Sandel *Justice* 6 and 19-20.

³⁶ Coates “State takeover statutes and corporate theory: The revival of an old debate” (1989) *New York University Law Review* 806 806-808; Colombo “The corporation as a Toquevillian enterprise” (2012) *Temple Law Review* 1 10; Petrin “Reconceptualizing the theory of the firm - from nature to function” (2013) *Penn State Law Review* 114; Blair “Corporate personhood and corporate persona” (2013) *University of Illinois Law Review* 785 807-808.

³⁷ The other factor is the nature of the fundamental right in question.

The concept of a company and the consequences that the law ascribes to incorporation is also a function of the underlying socio-economic world in which it operates.³⁸ A company must, as Means stated, increasingly follow the mandate of the state, embodied in social attitudes and in case, statute and constitutional law “like the slave of Aladdin’s lamp”.³⁹ The prevailing economic, political and social environment shapes companies and company law. The underlying normative value system will determine the *raison d’être* of the company and also determine if, to what extent and how the interests of creditors and employees of a company should be protected. The maxim *actio sequitor esse*, action follows from whom we are, is just as much applicable to juristic persons as it is to natural persons. In this regard it is particularly important to note that the South African Constitution embodies an objective normative value system that acts as a guiding principle and stimulus for the legislature, executive and judiciary.⁴⁰ The Constitution is more than a law. It is the legal and moral framework within which we agreed to live.⁴¹ As South Africa is now a constitutional state, the normative values that shape our conceptualisation of the company, our company law and the manner in which it is interpreted are found in the Constitution. The Companies Act 71 of 2008 (the Companies Act of 2008) gives express recognition to the constitutional imperative to bring company law within our constitutional framework.⁴²

2 AIM AND METHODOLOGY OF THE RESEARCH

The aim of the research is to establish what the underlying normative value system that underpins the Companies Act of 2008 is. This value system informs and shapes our conceptualisation of the

³⁸ 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” (2011) SALJ 686 688; Keay *The Corporate Objective* 6.

³⁹ Means “Property, production and revolution: A preface to the revised edition” in Berle & Means *The Modern Corporation* xxxvii

⁴⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) 54; Cheadle & Davis “Structure of the Bill of Rights” in Cheadle, Davis and Haysom *South African Constitutional Law The Bill of Rights* 2nd ed (2005) (Loose-leaf, update October 2014) (hereinafter “Cheadle et al *The Bill of Rights*”) par 2.1.3.

⁴¹ *De Lange v Presiding Bishop of the Methodist Church* 2016 (1) BCLR 1 (CC) par 83.

⁴² Bilchitz “Corporate law and the Constitution: Towards binding human rights responsibilities for corporations” (2008) SALJ 754 773-774; Katzew (2011) SALJ 686 686.

company - its nature, purpose and position in law. The related aim is to establish what the nature and purpose of a company is, with specific reference to the protection of creditors and employees.⁴³

The research is approached from a historical, theoretical, comparative and constitutional perspective. Three comparative jurisdictions are considered namely, the United Kingdom, Canada and India. The United Kingdom is chosen because our company law originates therefrom. Our courts have also traditionally relied extensively on British authorities. The United Kingdom differs from South Africa in that it does not have a mixed legal system. The United Kingdom is also not a constitutional state. It is a developed nation with a liberal democracy.

Canada, like South Africa, is a constitutional state and has a bill of rights. Like South Africa it has a mixed legal system.⁴⁴ Phillip Knight, a plain language drafting expert and legal practitioner based in Vancouver, Canada was the chief drafter of the Companies Act of 2008.⁴⁵ The Companies Act of 2008 will thus inevitably have a Canadian influence. India is chosen because of its socio-economic similarities with South Africa. Like South Africa it has a colonial past. The caste system remains deeply ingrained in the Indian society.⁴⁶ India and South Africa are both developing nations and members of the BRICS⁴⁷ association of emerging national economies. India, as is the case with South Africa, is a constitutional state with a bill of rights. It also has a mixed legal system.⁴⁸

⁴³ In broad terms a creditor of a company is someone who is owed a debt or money by the company. This includes trade creditors, lenders, suppliers with a retention of title clause, customers who paid a deposit for goods and services, persons with damages claims against the company and even employees. See generally Keay *Company Directors' Responsibilities to Creditors* (2007) 13-22. Employees supply human and intellectual capital to the company. See Naidoo *Corporate Governance* 248.

⁴⁴ Canada applies civil law, common law and customary law.

⁴⁵ Mongalo "An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008" in Mongalo (ed) *Modern Company Law for a Competitive South African Economy* (2010) (hereinafter "Mongalo *Modern Company Law*") xvi n 9.

⁴⁶ Fredman *Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South African and India* European Network of Legal Experts in the Non-discrimination Field, European Commission, Directorate-General for Justice (2012) (available at ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf (accessed 2014-08-29)) (hereinafter Fredman *Comparative Study of Anti-discrimination and Equality Laws*) 19.

⁴⁷ Brazil, Russia, India, China and South Africa.

⁴⁸ India applies common law, Muslim law and customary law.

3 OVERVIEW OF THE RESEARCH

This thesis is structured as follows: Chapter 2 traces the history of the company. The company concept is the product of a process of continuous evolution.⁴⁹ It is accordingly not possible to understand the concept of the company without a historical analysis.⁵⁰ Tracing the history of the company helps us to understand what the underlying values, objectives, socio-economic and political circumstances are that shaped it.⁵¹ Chapter 2 commences with a discussion of the evolution of the company from its ancient ancestors to its modern form, with reference to the underlying socio-economic and political world in which it operated. Then follows an analyses of the history of the company and company law in the United Kingdom, Canada, India and South Africa. The chapter concludes with some of the important lessons that we may learn from the history of the company.

The more prominent theories of the nature of the company and their normative features are considered in chapter 3. Consideration is specifically be given to whether these theories provide a normative basis for the protection of creditors and employees. Chapter 3 commences with a discussion of the key attributes or distinguishing features of the modern company. A definition of the company is proposed. Thereafter the different types of companies are considered. This is followed by an evaluation of some of the more prominent theories about the nature of the company namely, the contractarian theories (which can in turn be divided into legal contractarianism and

⁴⁹ Cilliers *A Critical Enquiry into the Origin, Development and Meaning of the Concept 'Limited Liability' in Company Law* LLD thesis (1963) University of South Africa 8; Armour, Hansmann & Kraakman "What is Corporate Law" in Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda & Rock *The Anatomy of Corporate Law A Comparative and Functional Approach* (2009) (hereinafter "*The Anatomy of Corporate Law*") 29; Ripken "Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle" (2009) *Fordham Journal of Corporate & Finance Law* 97 106; O'Kelley "The evolution of the modern corporation: Corporate governance reform in context" (2013) *University of Illinois Law Review* 1002 1002.

⁵⁰ Cilliers 20; Gower *Gower's Principles of Modern Company Law* 6th ed (1979) (hereinafter "*Gower's Principles of Modern Company Law* 6th ed") ix; De La Rey "Aspekte van die vroeë maatskappyereg: 'n Vergelykende oorsig (Deel 1)" (1986) 1 *Codicillus* 4 4; Berle & Means *The Modern Corporation* 119; Lombard "'n Historiese perspektief op die ontwikkeling van die maatskappy as ondernemingsvorm met besondere verwysing na die posisie van maatskappyskuldeisers en die aanspreeklikheid van direkteure (deel 1)" (2002) DJ 236 236-237; Mc Bride "General corporation laws: History and economics" (2011) *Law and Contemporary Problems* 1 6-7, citing Beinhocker *The Origin of Wealth*.

⁵¹ Berle & Means *The Modern Corporation* 119. The authors further say at 294 that the legal argument pertaining to the question in whose interest a corporation must be operated is predominantly a historical argument. See also Dine *The Governance of Corporate Groups* (2000) 1.

economic contractarianism), the communitarian or progressive theories, the concession theory and the organisational theories. Consideration is then given to how Berle and Means conceptualised the company in their seminal work, *The Modern Corporation & Private Property*.⁵² Any discussion of the nature of the company would be incomplete without a consideration of this work. This is followed by a discussion of the different models of company constitutions. The distinction between contractarian companies and division of power corporations is particularly important from a South African perspective. Next follows a brief discussion of the application of the theories on the nature of the company in the comparative jurisdictions and in South Africa. Finally certain conclusions are drawn about the nature of the company.

The most important attribute of the modern company is its separate corporate personhood or legal personality.⁵³ Any study of the nature of the company will be incomplete without an analyses of its corporate personhood and the normative consequences thereof. The answer to this question provides us with a normative framework for how we should view companies - more particularly what their rights, duties, capacities and obligations are, how we expect them to behave and how they should be treated.⁵⁴ The purpose of Chapter 4 is to examine the corporate personhood or legal personality of the company and its normative consequences. The more prominent corporate personhood theories namely, the fiction (or artificial entity) theory, the aggregate (contractual or associational) theory, the real entity (natural entity or organic) theory and the juridical reality theory are considered first. Thereafter consideration is given to the application of the corporate personhood theories in the United Kingdom, Canada, India and South Africa. The focus is on the particular

⁵² Berle & Means *The Modern Corporation*.

⁵³ The company derived this attribute from the medieval corporation or *universitas*. The characteristics of perpetual succession and asset partitioning (including limited liability) are consequences of the company's separate legal personality. See Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2010) (hereinafter "Welling et al *Canadian Corporate Law*") 128; Katzew (2011) SALJ 686 688; Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 35-41; Blair (2013) University of Illinois Law Review 785 787-788 and 795-796; Harris "The history of team production theory" (2015) Seattle University Law Review 537 550. Berle and Means explain in Berle and Means *The Modern Corporation* 120:

"The real privilege which the state grants is that of corporate entity - the right to maintain business in its own name, to sue and be sued on its own behalf irrespective of the individuals; to have perpetual succession - i.e. to continue this entity although the individuals in it changed. From all this necessarily flowed a limited liability of the associates."

⁵⁴ Ripken (2009) Fordham Journal of Corporate & Financial Law 97 100; Padfield "Corporate social responsibility & concession theory" (2015) William & Mary Business Law Review 1 19.

jurisdiction's treatment of the corporate personhood of the company (in other words the 'entity-ness' or 'entityless-ness' of the company), the capacity of the company and the legal position of the directors in relation to the company. Finally certain conclusions are drawn.

The purpose of the company is considered in Chapter 6. Defining the corporate objective is regarded as one of the most important theoretical and practical issues confronting us today.⁵⁵ Our approach to the *raison d'être* of a company determines the corporate governance measures that we formulate and adopt. It shapes our views on the rights, protections and remedies that creditors and employees enjoy under the Companies Act of 2008.⁵⁶ It also has important implications for the welfare of society.⁵⁷ The corporate objective and the nature of the company are separate, yet related issues.⁵⁸ They are related because the theories about the nature of the company inform and shape the model of corporate governance that is adopted.⁵⁹ It is often said that the debate about the corporate objective has its origins in an exchange between Berle and Dodd in the Harvard Law Review in the early 1930s.⁶⁰ This exchange is the starting point of the analyses of the corporate objective. Thereafter consideration is given to what Berle and Means considered the corporate objective to be in their seminal work, *The Modern Corporation & Private Property*.⁶¹ This is

⁵⁵ Hu "Buffet, corporate objectives, and the nature of sheep" (1997) *Cardoza Law Review* 379 380; Walsh "Introduction to the 'Corporate Objective Revisited' exchange" (2004) *Organization Science* 349 349; Keay *The Corporate Objective* 19.

⁵⁶ Carver "A case for global governance theory" (2010) *Corporate Governance: An International Review* 149 at 149-150; Keay *The Corporate Objective* 9-10 and 20-21.

⁵⁷ Jensen "Value maximisation, stakeholder theory and the corporate objective function" (2002) *Business Ethics Quarterly* 235 236.

⁵⁸ Keay *The Corporate Objective* 24; Talbot *Palgrave Great Debates in Company Law* (2014) (hereinafter referred to as "*Talbot Great Debates in Company Law*") vii.

⁵⁹ Dine *The Governance of Corporate Groups* 24; Esser *Recognition of Various Stakeholder Interests in Company Management* LLD thesis (2008) University of South Africa 19. The theories of the company deals with the debate of what the company is. The models of corporate governance deals with the further debates of what the purpose of the company is, whose interests are paramount and how should the company be managed? See Esser 32; Keay *The Enlightened Shareholder Value Principle* 14-15; Talbot *Great Debates in Company Law* vii. Padfield states that the competing models of corporate governance not only seeks to explain what the purpose of the company is, but also where the locus of control over the company resides. See Padfield (2015) *William & Mary Business Law Review* 3 6.

⁶⁰ Berle "Corporate powers in trust" (1931) *Harvard Law Review* 1049; Dodd "For whom are corporate managers trustees?" (1932) *Harvard Law Review* 1145; Berle "For whom corporate managers are trustees: A note" (1932) *Harvard Law Review* 1365. See Keay *The Corporate Objective* 10-13.

⁶¹ Berle & Means *The Modern Corporation*.

followed by a discussion of the more prominent models of corporate governance namely, the shareholder primacy model, the stakeholder model, the enlightened shareholder value model and the entity maximization and sustainability (EMS) model. The discussion of the models of corporate governance will focus on the historical and socio-economic context of each model; its content and how it perceives the corporate objective; how it treats the creditors and employees of the company; how it can be enforced (the emphasis in this thesis will be on certain selected non-contractual legal enforcement mechanisms, particularly derivative proceedings and the oppression remedy); and the normative basis of each model. Thereafter, consideration will briefly be given to the application of the models of corporate governance and the conceptualisation of the corporate objective in the United Kingdom, Canada, India and South Africa. Finally certain conclusions will be drawn.

The interim Constitution⁶² (the interim Constitution), which came into effect on the 27th of April 1994, and the final Constitution, which came into effect on 4 February 1997, not only brought about a constitutional revolution in South Africa⁶³ but also introduced a new era in South African company law. As South Africa is now a constitutional state, the normative values that shape our company law and the manner in which it is interpreted are found in the Constitution. In other words, the values of the Constitution now underpin the very purpose and object of the company, and consequently also the relationship between the company and its creditors and employees. The values of our Constitution are integrated into the core operation of companies.⁶⁴ The Constitution is the supreme law, and all law, including the Companies Act of 2008 and the common law, derives its force from the Constitution and is subject to constitutional control.⁶⁵ Structures established by the Companies Act of 2008 must conform to the Constitutional requirements.⁶⁶ The Companies

⁶² Constitution of the Republic of South Africa Act 200 of 1993.

⁶³ Ackermann “The legal nature of the South African constitutional revolution” (2004) *New Zealand Law Review* 633; Currie & De Waal *The Bill of Rights Handbook* 6th ed (2015) 1-2.

⁶⁴ Katzew (2011) *SALJ* 686 693.

⁶⁵ *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) *BCLR* 241 (CC) par 44.

⁶⁶ Section 2 of the Constitution. See also section 172(1) which provides that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. See further *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA); [1999] 4 All SA 241 (A); 1999 (11) *BCLR* 1339 (A) par 14; Freedman “Constitutional Law: Structures of Government” in Joubert (ed) *LAWSA* vol 5 part 3 2nd ed (2012) (hereinafter “*LAWSA* vol 5 part 3”) par 6. For the proposition that all

Act of 2008 gives express recognition to the constitutional imperative to bring company law within our constitutional framework.⁶⁷ The purpose of chapter 7 is to establish what the normative values are that underpin the Constitution and to analyse how the provisions of the Constitution (and the normative values that underpin it) affect companies and our company law. Specific consideration is given to the question of whether the Constitution provides a normative basis for the protection of creditors and employees. The more relevant provisions of the Constitution, excluding those contained in chapter 2 (the Bill of Rights), are considered first. This is followed by an analyses of the provisions of the Bill of Rights, with specific emphasis on the operational provisions and the application of the Bill of Rights to companies. Are companies beneficiaries and/or bearers of the rights contained in the Bill of Rights? The constitutional values and ideologies that underpin the Constitution are considered next. This is followed by a brief consideration of the constitutional orders in the United Kingdom, Canada and India. The alignment of the Companies Act of 2008 with the Constitution is considered next. Finally certain conclusions are drawn.

The conclusions of the study are summarised in Chapter 8. Where appropriate, recommendations are made on the application, interpretation and possible improvement of the Companies Act of 2008. Consideration is also given to the protection of creditors and employees under the Act.

4 LIMITATION OF SCOPE

There are a diversity of companies. This study focusses primarily on companies engaged in commerce and more particularly the large public companies. When considering the position of creditors and employees, the focus will be on their statutory rather than their common law remedies.⁶⁸ The thesis will not deal with the rights, protections and remedies of creditors and

law derives its force from the Constitution and all law and all conduct sourced in law must be consistent with the Constitution, see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* supra.

⁶⁷ Bilchitz (2008) SALJ 754 773-774; Katzew (2011) SALJ 686 686.

⁶⁸ The thesis of Lombard (*Lombard Directors' Duties to Creditors* LLD thesis (2006) University of Pretoria) focuses on the common law position. She makes out a compelling argument for the extension of directors' duties to protect creditors' interests. She argues that such a duty should not be a continuous duty, but one that is triggered by insolvency, doubtful solvency and actions causing insolvency. The duty should be an indirect duty mediated through the juristic person of the company. The interests of the company, which was traditionally equated with those of its shareholders,

employees afforded by the law of insolvency, securities regulation or legislation other than the core company law statutes.⁶⁹

should comprise those of its creditors in the case of a triggering event. *Locus standi* to the creditors could be provided through statutory intervention, either through the creditors being regarded as becoming “members” or by way of a derivative action.

⁶⁹ It appears that a new comprehensive Insolvency and Business Rescue Bill may be on the cards. See *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* Government Gazette 26493 of 3 June 2004 (the Policy Document) par 4.6.

CHAPTER 2

THE HISTORY OF THE COMPANY

- 1 INTRODUCTION
 - 2 A SYNOPSIS OF THE EVOLUTION OF THE COMPANY
 - 3 THE HISTORY OF ENGLISH COMPANY LAW
 - 4 THE HISTORY OF CANADIAN COMPANY LAW
 - 5 THE HISTORY OF INDIAN COMPANY LAW
 - 6 THE HISTORY OF SOUTH AFRICAN COMPANY LAW
 - 7 CONCLUSION
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1 INTRODUCTION

It is not possible to understand company law without a historical analysis.¹ The company concept is the product of a process of continuous evolution, rooted in the past but changing along with the fortunes of men and nations. The place of the company in our lives depends on our own continuing changing moral, legal, philosophical, political and economic perceptions. The company was shaped by trial and error. Over the years a variety of social or economic organisations were developed, tried and tested and the successful forms were retained and

¹ Cilliers *A Critical Enquiry into the Origin, Development and Meaning of the Concept 'Limited Liability' in Company Law* LLD thesis (1963) University of South Africa 20; Gower *Gower's Principles of Modern Company Law* 6th ed (1979) (hereinafter "*Gower's Principles of Modern Company Law* 6th ed") ix; De La Rey "Aspekte van die vroeë maatskappyereg: 'n Vergelykende oorsig (Deel 1)" (1986) 1 *Codicillus* 4 4; Berle & Means *The Modern Corporation & Private Property* (1991) (hereinafter "*Berle & Means The Modern Corporation*") 119; Lombard "'n Historiese perspektief op die ontwikkeling van die maatskappy as ondernemingsvorm met besondere verwysing na die posisie van maatskappyskuldeisers en die aanspreeklikheid van direkteure (deel 1)" (2002) DJ 236 236-237; Mc Bride "General corporation laws: History and economics" (2011) *Law and Contemporary Problems* 1 6-7, citing Beinhocker *The Origin of Wealth: Evolution, Complexity and the Radical Remaking of Economics* (2006).

replicated.² This evolutionary nature of the company also means that it changes and adapts with time. As the company changed over time, so did its conceptualisation. This, in turn, impacted on the ways in which the company was regulated.³ Tracing the history of the company therefore deepens our insight into the evolution of the company. It helps us to understand what the underlying values, objectives and socio-economic and political circumstances are that shaped it. It also reminds us of the important lessons that we learned from the past. Without a historical analysis no fair comprehension of the present system can be obtained.⁴

The word “corporation” or “company” refers to an association of persons bound together in a *corpus*, a body sharing a common purpose in a common name.⁵ In the past that purpose was often communal or religious. Today the purpose is usually commercial in nature.⁶ Social or organisational structures formed for a common purpose evolved all through our history - from the family, to tribes, to agricultural settlements, to ecclesiastical organisations, to boroughs, to nation states, to partnerships, to craft and merchant organisations, to trade unions, to trade and business

² Cilliers 8; Armour, Hansmann & Kraakman “What is Corporate Law” in Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda & Rock *The Anatomy of Corporate Law A Comparative and Functional Approach* (2009) (hereinafter “*The Anatomy of Corporate Law*”) 29; O’Kelley “The evolution of the modern corporation: Corporate governance reform in context” (2013) *University of Illinois Law Review* 1002 1002; Ripken “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle” (2009) *Fordham Journal of Corporate & Finance Law* 97 106.

³ McBride “General corporation laws: History and economics” (2011) *Law and Contemporary Problems* 1 6-7; Colombo “The corporation as a Tocquevillian association” (2012) *Temple Law Review* 1 5.

⁴ Berle & Means *The Modern Corporation* 119. The authors further say at 294 that the legal argument pertaining to the question in whose interest a corporation must be operated is predominantly a historical argument. See also Dine *The Governance of Corporate Groups* (2000) 1.

⁵ The noun “corporation” and the verb “to incorporate” are both derived from the Latin verb *corporare*, which means to form into or furnish with a body or to infuse it with substance. See McGuinness “Business Corporations” in Brecher *Halsbury’s Laws of Canada* 1st ed (2013) (hereinafter “*McGuinness Business Corporations*”) 206. At 214 n1 the author points out that although the terms “company” and “corporation” are often used interchangeably, they are not strictly speaking synonymous. A company is an association of two or more persons formed to conduct a business or some other activity in the name of that association. A corporation is one type of such association and differs from the others in that it is incorporated. See also Hannigan “Companies” in MacKay *Halsbury’s Laws of England* 5th ed (2009) Vol 14 (hereinafter “*Hannigan Companies*”) paras 1 and 2; Bone “Legal perspectives on corporate responsibility: Contractarian or communitarian thought?” (2011) *Canadian Journal of Law and Jurisprudence* 277 279; Blair “Corporate personhood and the corporate persona” (2013) *University of Illinois Law Review* 785 788-789.

⁶ Blackman “Companies” in Joubert (ed) *LAWSA vol 4 part 1* (1995) par 1; McBride (2011) *Law and Contemporary Problems* 1 2, citing Trachtenberg *The Incorporation of America: Culture and Society in the Gilded Age* (1982) 5-6.

associations and to the modern company.⁷ These structures were created for various purposes, for example to protect and defend, to conquer and occupy, to rule, for ecclesiastical purposes, for commercial purposes, and so on. The commercial structures served as a solution for various multi-dimensional problems which entrepreneurs and investors encountered in different historical periods.⁸ Carter postulates that any study about the nature of the company “would begin with the interests that first impel individuals to effect an organization, and would include a survey of the characteristics of the group in operation.”⁹ It is therefore necessary to take note of the origin of the company and to understand its development in relation to changing economic, social and political conditions.¹⁰

Cooke states that the concept of the corporation falls into place in the range of social concepts of how persons may or may not act together, but with the one particularity of its own namely, “that the persons who compose it are not regarded as persons acting together, but as persons acting as an entity, a source of action independent of themselves.”¹¹ He concludes further that the corporation is a social form clothed by the law with dress suitable to its time and occasion. But although it appeared in society through legal recognition, it is not an institution created by the law. He compares it with a child who is not created by law, but is clothed with a personality which the law recognizes at birth. So social groups appear first and are recognized by the law after their

⁷ Khanna “The economic history of the corporate form in ancient India” (2005) (available at http://www.law.yale.edu/documents/pdf/cbl/Khanna_Ancient_India_informal.pdf (accessed 2014-04-02)) (hereinafter “Kanna ‘The economic history of the corporate form in ancient India’”) 2–6; Pacala “The evolution of the company idea as a distinct form of separation an(sic) protection for business in antiquity” (2011) *Journal of Electric & Electronic Engineering* 77 81.

⁸ Harris “The history of team production theory” (2015) *Seattle University Law Review* 537 538.

⁹ Carter *The Nature of the Corporation as a Legal Entity with especial reference to the Law of Maryland* Doctor of Philosophy dissertation (1919) John Hopkins University 1.

¹⁰ Carter 1.

¹¹ Cooke *Corporation, Trust and Company: An Essay in Legal History* (1950) (hereinafter “Cooke *Corporation, Trust and Company*”) 7.

creation.¹² The concept of a company and the consequences that the law ascribes to incorporation is a function of the underlying socio-economic world in which it operates.¹³

The history of the company is an extraordinary tale. This chapter commences with a synopsis of the evolution of the company from its ancient ancestors to its modern form, with reference to the underlying socio-economic and political world in which it operated. Then follows an analysis of the history of the company and company law in the United Kingdom, Canada, India and South Africa. The emphasis will be on the United Kingdom as it was in the nineteenth century Britain, the most powerful economic power at the time, in which the modern company was born when the fundamental principles of a separate legal personality, transferable shares and limited liability were finally brought together.¹⁴ The chapter concludes with some of the important lessons that we may learn from the history of the company.

2 A SYNOPSIS OF THE EVOLUTION OF THE COMPANY

2.1 The period until the end of the Middle Ages

Commercial associations were established as long ago as 3000 BC in Mesopotamia amongst Sumerian families who traded along the Euphrates and Tigris rivers. The Assyrians (2000 - 1800 BC) concluded partnership agreements on terms not dissimilar to a modern venture capital fund. The Phoenicians and Athenians spread similar organizations around the Mediterranean.¹⁵ Business people on the Indian subcontinent utilised a corporate form, the *sreni*, which displayed significant similarities with the modern Anglo-American corporation from at least 800 BC.¹⁶

¹² Cooke *Corporation, Trust and Company* 187-188. Cooke thus subscribes to the natural entity or organic theory that will be discussed in chapter 4.

¹³ 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 2007" (2011) SALJ 686 688.

¹⁴ Micklethwait & Wooldridge *The Company a Short History of a Revolutionary Idea* (2003) (hereinafter referred to as "Micklethwait & Wooldridge *The Company*") xvii.

¹⁵ Micklethwait & Wooldridge *The Company* 4-5.

¹⁶ Khanna "The economic history of the corporate form in ancient India" 51-55. This is discussed further in the section dealing with the history of Indian company law in section 5 hereafter.

The Roman Empire¹⁷ was not only a formidable political and military power, but also had a vibrant economy and sophisticated legal institutions. It produced a number of commercial associations. Generally speaking, however, these associations do not seem to have been endowed with legal personality or entity shielding.¹⁸ Hansmann, Kraakman and Squire believe that the reason for this may be that securing commercial capital was not important for the Romans. They state: “Perhaps Roman society was unwilling to risk the stability and status of prominent families for the sake of commerce.”¹⁹ Another reason is that Romans were wary of associations of individuals that assumed authority to act without the sanction of the state. Group activity was held under strict surveillance.²⁰ The simplest business association in ancient Rome was the *societas*, which is often translated as a partnership because it referred to an agreement between Roman citizens to share the profits or loss of an enterprise. However the *societas* had little in common with modern partnerships. It lacked mutual agency and the partners’ liability was *pro rata* rather than joint and several.²¹

A further business association in ancient Rome was the family or *familia*. The Roman family was a broader concept than the present nuclear family and consisted of the oldest male (the *pater*

¹⁷ The Roman Empire started to develop in approximately 500 BC. In 395 AD Constantine divided the Roman Empire between his two sons into a Western Roman Empire and an Eastern Roman Empire. The Western Roman Empire fell in 476. The Eastern Roman (or Byzantine) Empire declined from 395 and finally ended when Constantinople fell to the Ottomans in 1453. See Terreblanche *Western Empires, Christianity and the Inequalities between the West and the Rest 1500-2010* (2014) (hereinafter “Terreblanche *Western Empires*”) 24-34, 32, 51 and 58.

¹⁸ Hansmann, Kraakman & Squire “Law and the rise of the firm” (2006) *Harvard Law Review* 1333 1356; Pacala (2011) *Journal of Electric & Electronic Engineering* 77 77-79. “Entity shielding” involves shielding of the assets of the company from the creditors of the shareholders. It is a component of legal personality. “Owner shielding” is the converse of “entity shielding” and protects the assets of the shareholders from the company’s creditors. Limited liability is a form of owner shielding. Historically limited liability has not always been associated with the corporate form. See Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6-11. Entity shielding and owner shielding are both forms of asset partitioning. For a full discussion of these concepts, see Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1337-1343. It should be borne in mind that a variety of sanctions have been used across history for enforcing contracts, including the debtor’s imprisonment or enslavement. The principal sanction employed by modern legal systems is to permit an unpaid creditor to seize the assets of the defaulting debtor. Machen “Corporate personality” (1910) *Harvard Law Review* 253 255 states that Roman law gave little consideration to what we call corporations.

¹⁹ Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1362.

²⁰ Carter 33.

²¹ Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1356-1357; Pacala (2011) *Journal of Electric & Electronic Engineering* 77 77.

familias), his wife, unmarried children, his slaves, as well as all of his adult male descendants and their household members. A prosperous Roman family had sufficient economic capacity to finance the typical commercial firm. This capacity was further extended by the institution of the *peculium*.²² Roman families often delegated trading activities to their slaves as the Romans considered engaging in business activities demeaning. It was common practice for the master to provide his slave with a set of assets called the *peculium* to be used in a business venture. The *peculium* and any profits remained the property of the master. The *peculium* exhibited a degree of asset partitioning in that the liability of the master was limited to the *peculium* (plus any distributions that he had received from it) as long as he had not participated in the management of the *peculium* business. However personal creditors of the master could turn to all of his assets, including the *peculium*. In other words the *peculium* provided complete owner shielding (limited liability), but no entity shielding.²³

An exception to the lack of legal personality or entity shielding was the multi-owner firms known as *societas publicanorum*. These organisations dating from the third century BC consisted of groups of investors, known as *publican*, who bid for contracts with the state such as the construction of public works, provision of armaments and collection of taxes. The lead investor had to pledge his estate as security for the performance of the contract. Other investors could either act as general partners who exercised control and were liable for the debts of the firm, or as limited partners who enjoyed limited liability but lacked control. By the end of the first century BC the largest *societas publicanorum* were comparable in size and internal structure with modern companies with many partners who could trade their shares on a market resembling a modern stock exchange.²⁴

²² Hansmann, Kraakman & Squire (2006) Harvard Law Review 1333 1357-1358; Pacala (2011) Journal of Electric & Electronic Engineering 77 78.

²³ Hansmann, Kraakman & Squire (2006) Harvard Law Review 1333 1358-1360; Pacala (2011) Journal of Electric & Electronic Engineering 77 78.

²⁴ Kuran “The absence of the corporation in Islamic Law: Origins and persistence” (2005) The American Journal of Comparative Law 785 789-790; Hansmann, Kraakman & Squire (2006) Harvard Law Review 1333 1360-1361; Pacala (2011) Journal of Electric & Electronic Engineering 77 78-79; Bone (2011) Canadian Journal of Law and Jurisprudence 277 279.

For the greatest part of the Roman history, the emperors did not interfere in commerce. However from the end of the first century BC the emperors ordered the state to take over much of the construction of public works and the *societas publicanorum* faded. Later on the Roman Empire entered into a period of despotism in which the state seized private land and wealth to fund its wars. The end result was a total economic collapse by the fourth century.²⁵

When the Roman Empire crumbled, the focus of commercial life initially moved eastward to India, China²⁶ and the Islamic world.²⁷ The East would however later lose its economic lead to the West. This was partially due to its relative failure to develop corporations or companies.²⁸ Kuran concludes that the failure of Islamic Middle East to develop a corporate form was a result of its unique background leading to inheritance and contract laws that impeded the development of such corporate form.²⁹

To trace the history of the company further, the focus must shift to medieval Europe. Central state authority was weak in Europe for centuries after the fall of Rome. Southern Europe's population declined as a result of a series of epidemics in the fifth and sixth centuries and was then held in

²⁵ Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1363-1364; Hansmann, Kraakman & Squire *Law and the rise of the firm* (2006) European Corporate Governance Institute (ECGI) Law Working Paper No 57 of 2006; Yale Law, Economics Research Paper No 326 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368748 (accessed 2014-04-09)) (hereinafter "Hansmann, Kraakman & Squire *Law and the rise of the firm*") 26-27.

²⁶ See generally Terreblanche *Western Empires* 20-24. The Chinese Empire emerged about the same time as the Roman Empire and disintegrated from about 220 to 600 AD. From a technological and economic perspective it was superior to the West.

²⁷ The Ottoman Empire was the greatest Muslim state in terms of territorial extent and in duration. Terreblanche states that "[t]he rise of Western Europe in the centuries after 1500 could not have taken place without the multiple influences that were transmitted through Islamic 'globalisation' in the period from circa 750 until circa 1700." This included the scientific works of Greek, Persian and Indian scholars, products such as spices, carpets, silk and glass mirrors, Indo-Arabic numerals, algebra, astronomy, banking practices and architecture. The Crusades also had the consequence of stimulating trade between the Italian cities and the Islamic Middle East. See Terreblanche *Western Empires* 32-34.

²⁸ Micklethwait & Wooldridge *The Company* 5-7; Hansmann, Kraakman & Squire *Law and the rise of the firm* 27; Blair (2013) *University of Illinois Law Review* 785 789. There were, of course, many other reasons. For a comprehensive study from a political and economic perspective, see Terreblanche *Western Empires*.

²⁹ Kuran (2005) *The American Journal of Comparative Law* 785 831-832. Kuran's insightful article explores why Islamic law did not develop a concept akin to the corporation, or borrow one from another legal system. It was only in the early 20th century that the company or corporation was transplanted to the legal systems of the Islamic world. See Kuran (2005) *The American Journal of Comparative Law* 785 788, 831 and 834. See also Pacala (2011) *Journal of Electric & Electronic Engineering* 77 80-81.

check by a decline in agricultural productivity. The economy was weak and there was a severe decrease in commercial ventures during this period.³⁰ The Middle Ages, and more particularly the period from approximately the tenth to the fifteenth centuries, saw the establishment of a feudal order in Western Europe.³¹ In the 500 years preceding the rise of the Western maritime empires in the sixteenth century, Europe consisted of a mixture of separate, fragile kingdoms, aristocratic serfdoms and the Holy Roman Empire of the German nation on the western side of Eurasia.³²

In the absence of a strong central authority, jurists, elaborating on Roman and canon law, slowly began to recognise the existence of juristic persons.³³ A critical step in the development of the corporation was when the Roman Catholic Church began calling itself a corporation following the split of Christianity in 1054 and during the struggle to emancipate religion from the control of emperors, kings and feudal lords from 1075-1122. There was a wave of incorporations during the sixth to the eleventh centuries.³⁴ Incorporations were not limited to ecclesiastical associations - towns, universities as well as guilds of merchants and tradesmen acquired a corporate identity, in some cases through royal charter and in other cases simply through the will of residents and the recognition of outsiders. These associations not only provided security and fellowship in a

³⁰ Kuran (2005) *The American Journal of Comparative Law* 785 791-793; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1363-1364; Terreblanche *Western Empires* 187-189. The early part of the Middle Ages until the commercial revolution of the 12th and 13th centuries is known as the Dark Ages.

³¹ The feudal system was based on the principle of tri-functionality that the Roman Catholic Church introduced to improve Christian Europe's military capacity to deal with foreign intruders (the Magyars from the east, the Saracens (or Muslims) from the south and the Vikings from the north). According to this system God assigned three separate orders to humankind: the ecclesiastical bureaucracy had the task to pray for all; the Christian kings and feudal lords had to protect all; and the serfs (or peasantry) who had the task of labouring in order to provide the resources necessary to support themselves and the other two orders. This created an unjust and unequal social hierarchy that, according to Duby, remained in place until at least the French Revolution of 1789. After the French Revolution the "medieval" inequality was perpetuated between the elite (including the emerging bourgeoisie) and the lower classes until the Second World War, and again after 1980. See Duby *The Three Orders: Feudal Society Imagined* (1980); Terreblanche *Western Empires*" 27-29.

³² Terreblanche *Western Empires* 49.

³³ As opposed to natural persons. The term "juristic" meaning they are deemed to be persons in the eyes of the law. In common law jurisdictions, the term "corporation" is universally and exclusively linked to artificial or juristic persons. See McGuinness *Business Corporations* 206. The canon law did however not develop any well-defined corporate personality theory. See Machen (1910) *Harvard Law Review* 253 255.

³⁴ Micklethwait & Wooldridge *The Company* 12; Kuran (2005) *The American Journal of Comparative Law* 785 791; Blair (2013) *University of Illinois Law Review* 785 789.

forbidding world, but also a means of transmitting traditions and wealth to future generations.³⁵ An important purpose of incorporation was perpetual succession. In the case of corporations involving only a single individual such as the King or a bishop their purpose was to make it clear that the property that they controlled did not belong to them personally, but was held on behalf of the institution or public function that they served. In the case of aggregate corporations a further important purpose was self-governance among a group of people.³⁶ The medieval corporation or *universitas*, which is rooted in public law, was the basis of the emergence of the concept of legal personality.³⁷ Several of the oldest companies in the world date back to this period. Ignoring non-commercial entities like monasteries, the oldest company may be the Aberdeen Harbour Board, which was established in 1136. The oldest existing private-sector company is probably Stora Enso of Sweden, whose direct ancestor, a copper mine, began trading in 1288 and was issued with a royal charter in 1347.³⁸

Guilds were the most important form of business organisation in the Middle Ages.³⁹ In nature, however, the guilds were nearer to trade unions than companies. The emphasis was on protecting their members' interests rather than conducting business. It regulated trade, set standards for quality and trained its members.⁴⁰ The guilds consisted of both masters and workers and contributed to the later advancement and establishment of labour organisations.⁴¹ These guilds typically enjoyed a monopoly of trade within a certain area in return for monetary donations to the

³⁵ Micklethwait & Wooldridge *The Company* 12; Kuran (2005) *The American Journal of Comparative Law* 785 791-793; Pollman "Reconceiving corporate personhood" (2011) *Utah Law Review* 1629 1631; Blair (2013) *University of Illinois Law Review* 785 789.

³⁶ Blair (2013) *University of Illinois Law Review* 785 789-790.

³⁷ Compare Blair (2013) *University of Illinois Law Review* 785 788-790; De Jongh *Between societas and universitas. The listed company in historical perspective (Tussen societas en universitas. De beursvennootskap en haar aandeelhouders in historisch perspectief)* (2013) Supreme Court of Netherlands – Research Department (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368748 (accessed 2014-04-09)) (hereinafter "De Jongh *Between societas and universitas*") 556–557.

³⁸ Micklethwait & Wooldridge *The Company* 12.

³⁹ Micklethwait & Wooldridge *The Company* 13.

⁴⁰ Cilliers 23; Micklethwait & Wooldridge *The Company* 13.

⁴¹ Van Jaarsveld & Van Eck *Principles of Labour Law* 3rd ed (2005) 204-205.

sovereign.⁴² This concept is closely related to the regulated company.⁴³ An important feature of the guilds was that it enjoyed perpetual succession.⁴⁴

Maritime firms began to appear in Italian ports from the ninth century onwards. At the end of the tenth century agricultural yields and population levels began to increase, stimulating a revival of trade. This was followed by a remarkable economic development in several Italian city-states such as Venice, Florence, Genoa and Pisa during the eleventh and twelfth centuries in the fields of trade, banking and bookkeeping as well as developments in the financial and handicraft industries.⁴⁵ Traces of limited liability can be found in the *commenda* partnership which arose in Italy in the tenth and eleventh centuries as a device for financing maritime trade. The *commenda* was the forerunner of the limited partnership. It consisted of two classes of partners. The travelling trader contributed labour, expertise, initiative and bodily risk, whilst the passive partner provided the capital in the form of goods and cash. The passive partner was only liable for the losses of the partnership up to the amount of his contributions. A *commenda* only lasted a single round-trip voyage, at the end of which the merchandise obtained in foreign ports was sold off and the profits divided.⁴⁶ Successive missions were organized as new partnerships. These organizations did accordingly not have the feature of perpetual succession.⁴⁷ The *commenda* was not always a bilateral agreement. For example, the *commenda* sometimes consisted of several passive partners. The main problem that the *commenda* had to contend with was agency. The traveling trader was geographically separated from the passive partner and did not work under direct supervision or instructions. There was a major information asymmetry problem. The

⁴² Micklethwait & Wooldridge *The Company* 13.

⁴³ Micklethwait & Wooldridge *The Company* 13; Kuran (2005) *The American Journal of Comparative Law* 785 804.

⁴⁴ Scott *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720, Volume 1 The General Development of the Joint-Stock System to 1720* (1912) (hereinafter “Scott *The General Development of the Joint-Stock System to 1720*”) 3; Cilliers 22-23; Kuran (2005) *The American Journal of Comparative Law* 785 824-826.

⁴⁵ Terreblanche *Western Empires* 191-193; Micklethwait & Wooldridge *The Company* 7-12. Terreblanche describes Venice as the first truly capitalist state and a prototype of the capitalist-imperialist states of the modern period.

⁴⁶ De La Rey (1986) 1 *Codicillus* 4 5-6; Kuran (2005) *The American Journal of Comparative Law* 785 803-804; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1372-1374; Harris (2015) *Seattle University Law Review* 537 539. In Italy the passive partner often received three-quarters of the net profits and the traveling trader received one-quarter.

⁴⁷ Blair (2013) *University of Illinois Law Review* 785 790-791.

solutions to this problem included a clear mandate issued by the passive partner, a reporting obligation on the traveling trader, a fiduciary duty of the traveling trader to the passive partner and a limitation of the liability of the passive partner.⁴⁸

In the twelfth century a medieval firm or partnership known as the *compagnia* emerged in Italy. These began as family firms that operated on the principle of joint liability. However they became more sophisticated with time in order to attract investments from outside the family.⁴⁹ The *compagnia* is the forerunner of the general partnership.⁵⁰ The term *compagnia* appears to be derived from the Latin “*cumpanis*”, meaning eating the same bread. This is indicative of the strong social and economic ties that existed between the partners. These ties were further strengthened by intermarriage. The partners were expected to invest their labour exclusively in the *compagnia* on a full time basis. In turn the *compagnia* provided for them and their families. The exclusivity of the partners’ contribution to a single partnership, the physical proximity of the partners (that enabled a fuller flow of information) and the social ties between them (that made the effective imposition of sanctions possible) allowed the partners to deal with organisational problems.⁵¹ The *compagnia* was mainly used for artisanal and manufacturing businesses.⁵² Medieval Italy introduced a regime whereby partnership creditors enjoyed a claim to partnership assets prior to the creditors of the partners (a weak form of entity shielding), a system of bankruptcy law and double entry bookkeeping in the 14th century.⁵³ Probably the largest of these firms was the Medici Bank, which was established 1397 and had branches in many countries. As this firm expanded, it minimised its exposure by organizing each branch as a separate

⁴⁸ Harris (2015) Seattle University Law Review 537 540.

⁴⁹ Micklethwait & Wooldridge *The Company* 7-8; Hansmann, Kraakman & Squire (2006) Harvard Law Review 1333 1365-1366; Harris (2015) Seattle University Law Review 537 538.

⁵⁰ Harris (2015) Seattle University Law Review 537 538.

⁵¹ It mitigated shirking and made it possible to monitor the contributions of the partners. Punishment could entail the deprivation of benefits and ultimately ostracism. See Bone (2011) Canadian Journal of Law and Jurisprudence 277 279; Harris (2015) Seattle University Law Review 537 539.

⁵² Harris (2015) Seattle University Law Review 537 539.

⁵³ Micklethwait & Wooldridge *The Company* 8; Hansmann, Kraakman & Squire (2006) Harvard Law Review 1333 1366-1372; Hansmann, Kraakman & Squire *Law and the rise of the firm* 29-34.

partnership.⁵⁴ Hansmann, Kraakman and Squire believes that Genoa, where shares in public monopolies engaged in a variety of ventures were sold since the fourteenth century, is the creator of the joint stock company.⁵⁵

2.2 The Western maritime empires and the chartered companies of the sixteenth and seventeenth centuries

The Renaissance of the fifteenth and sixteenth centuries introduced a period of intellectual and spiritual awakening, of social and technological innovation and of transformation of the feudal system.⁵⁶ The next important development in the history of the company was the rise of the Western maritime empires and the emergence of the “chartered company” in the sixteenth and seventeenth centuries. It was a period during which the economic doctrine of mercantilism dominated Western economic policy and discourse. Mercantilism was the cause of frequent European wars and colonial expansion.⁵⁷ The global trading opportunities that opened up during the sixteenth and seventeenth centuries spawned the rise of the Western maritime empires. Portugal⁵⁸ and Spain⁵⁹ were the first Western maritime empires. Thereafter the hub of the commercial world shifted first to the Low Countries, specifically the new Dutch Republic,⁶⁰ and then to England⁶¹, and the chartered company was born.⁶²

⁵⁴ Micklethwait & Wooldridge *The Company* 9-10; Kuran (2005) *The American Journal of Comparative Law* 785 804-805; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1371-1372; Hansmann, Kraakman & Squire *Law and the rise of the firm* 34-35.

⁵⁵ Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1376.

⁵⁶ Terreblanche *Western Empires* 51, 58 and 187-188.

⁵⁷ Mercantilism is based on the theory that a nation benefits by accumulating monetary reserves through a positive balance of trade, especially of finalised goods. See Snider *Introduction to International Economics* 7th ed (1979) 203; Terreblanche *Die Wording van die Westerse Ekonomie 'n Strukturele Analise met toepassing op die Suid-Afrikaanse Situatie* (1980) (hereinafter “Terreblanche *Die Wording van die Westerse Ekonomie*”) 59-83; Terreblanche *Western Empires* 202 and 220.

⁵⁸ See Terreblanche *Western Empires* 196-199.

⁵⁹ See Terreblanche *Western Empires* 199-207.

⁶⁰ See Terreblanche *Western Empires* 212-227.

⁶¹ See Terreblanche *Western Empires* 228-245.

⁶² Kuran (2005) *The American Journal of Comparative Law* 785 806; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1374-1376.

The history of the Western maritime empires and capitalism are closely intertwined - each empire created new opportunities for capital accumulation and for the development of capitalist institutions and orientations. These empires not only plundered the natural resources of the rest of the world, but also the surplus labour that was available in the Americas and in the populous Asian and African continents in a variety of ways, most notably through slavery and oppressed labour. Those parts of the world that became colonies or satellite states of the Western maritime empires, including South Africa, Canada and India, regained their independence over the past 500 years, often after violent and extended struggles.⁶³

These new global trading opportunities required fleets of deep-water ships, overseas ports and infrastructure, even armies, and thus also organisational forms capable of attracting capital on an unprecedented scale. Portugal and Spain did so through the state. The Dutch and English, on the other hand, established chartered companies that bestraddle the public and private sectors by combining private investment with state-granted monopoly privileges.⁶⁴ The Dutch and English companies thus replaced Portuguese state capitalism with a kind of private capitalism that deployed much more energy and dynamism than were possible under the state system.⁶⁵ These chartered companies were granted exclusive privileges and powers to trade in a particular region in the world. The state shared in the resulting profits through taxes and cheap loans.⁶⁶ The most important purpose of incorporation was initially most likely the monopoly rights that came with the charters. At a later stage perpetual succession also became important.⁶⁷ By their very nature these chartered companies were exercises in inequality and intrusions in the free market.⁶⁸ They even had governmental powers. Kinsey describes the unusual and unique nature of these chartered companies as follows:

⁶³ Terreblanche *Western Empires* 63-66. The author also discusses what he believes to be eight characteristics of the Western maritime empires.

⁶⁴ Micklethwait & Wooldridge *The Company* 17-21; Kuran (2005) *The American Journal of Comparative Law* 785 806-808; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1376.

⁶⁵ Terreblanche *Western Empires* 214 with reference to Münkler *Empires: The Logic of World Domination from Ancient Rome to the United States* (2007) 51.

⁶⁶ Kuran (2005) *The American Journal of Comparative Law* 785 807; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1376-1378; Blair (2013) *University of Illinois Law Review* 785 791.

⁶⁷ Blair (2013) *University of Illinois Law Review* 785 792.

⁶⁸ Talbot *Critical Company Law* (2008) 5-6.

“The sixteenth century saw the creation of a new kind of commercial entity, the mercantile company. Chartered by the state to engage in long-distance travel and establish colonies, the mercantile company drove European imperialism for the next 350 years. They were unusual institutions in that they distorted the distinction between economics and politics, non-state and state, property rights and sovereignty, and public and private. As a consequence of these distortions they presented their rulers with complex dilemmas.”⁶⁹

Pairing the legal concept of the corporation or *universitas* with the financial tool of equity investment in joint stock represented a major innovation. But information asymmetry between the outside passive investors and the insiders created an agency problem that was dealt with in a manner not altogether different than was the case with the *commenda*. Chartered joint stock companies were designed to facilitate cooperation between outside passive investors and the insiders. Provision was made to provide credible information to the outside passive investors and to act thereon. The passive investors were given voice. They were afforded the option to invest, or not to invest, in future ventures. In this sense the chartered joint stock companies were clubs of potential, though not necessarily actual, investors.⁷⁰

The first chartered joint stock company was the English Muscovy Company. This company received its charter granting it a monopoly over trade routes to Russia in 1555.⁷¹ The English East India Company, that received its charter in 1600 and left a lasting impression in India, will be discussed further hereafter.⁷² The Hudson’s Bay Company, that received its charter in 1670, had a trade monopoly over a large area of Canada.⁷³ The Dutch East India Company, that received its

⁶⁹ Kinsey *Corporate Soldiers and International Security: The Rise of Private Military Companies* (2006) 38; Terreblanche *Western Empires* 118.

⁷⁰ Harris (2015) *Seattle University Law Review* 537 541-543.

⁷¹ Micklethwait & Wooldridge *The Company* 18.

⁷² See the discussion of the history of English company law in section 3. For a discussion of the impact of the English East India Company on India see Terreblanche *Western Empires* 84, 245-250 and 327-334.

⁷³ See the discussion of the history of Canadian Company law in section 4.

charter in 1602 and established an outpost in South Africa in 1652, will be also be discussed further hereafter.⁷⁴

Chartered companies did however not become the commercial norm for the sixteenth and seventeenth centuries. Most business life continued in smaller enterprises, for example, partnerships. However, the chartered companies stole the limelight. It was due to their abuses that, as late as 1800, many reformers saw the joint stock company as dangerous and old-fashioned.⁷⁵

2.3 The birth of the modern company (1750 to 1862)

The late eighteenth century saw the rise of classical liberism⁷⁶ and the *laissez-faire*⁷⁷ economic ideology due largely to a revolution in economics led by Adam Smith. The view that a company is primarily a vehicle to maximize profits for its shareholders has its roots in the classical liberal theories of the Anglo-American company law of the eighteenth and nineteenth centuries.⁷⁸ As the

⁷⁴ See the discussion of the history of South African Company law in section 6. See also Terreblanche *Western Empires* 100, 118, 213-214 and 216-223.

⁷⁵ Micklethwait & Wooldridge *The Company* 20-21.

⁷⁶ Classical liberism is a political philosophy and ideology belonging to liberism in which the primary emphasis is placed on securing the freedom of the individual by limiting the power of government. The philosophy emerged as a response to the Industrial Revolution and urbanization of the 19th century Europe and the United States. It advocates civil liberties with limited government intervention under the rule of law, private property and belief in laissez-faire economic policy. See Terreblanche *Die Wording van Westerse Ekonomie* 93-95; Goodman “What is Classical Liberism” National Centre for Policy Analysis (2005) (available at http://www.ncpa.org/pub/what_is_classical_liberism (accessed 2013-10-10)).

⁷⁷ *Laissez-faire* is an economic environment in which transactions between private parties are free from government restrictions, tariffs and subsidies, with only enough regulations to protect property rights. See Terreblanche *Die Wording van Westerse Ekonomie* 89-93; Samaras “Laissez-faire, the ‘Freer Global Market Economy’, the Investment Banks and Policy Makers” (2009) Pytheas Market Focus (available at http://www.pytheas.net/docs/Laissez_faire_and_policymakers.pdf (accessed 2013-10-10)); Terreblanche *Western Empires* 133-134.

⁷⁸ Katzew (2011) SALJ 686 687-688. Interestingly, both Adam Smith and Karl Marx saw the corporation as unworkable. See Mongalo *Corporate Law and Corporate Governance A Global Picture of Business Undertakings in South Africa* (2003) (hereinafter “Mongalo *Corporate Law and Corporate Governance*”) 192.

Industrial Revolution⁷⁹ unfolded, the company proved useful, especially in capital and labour intensive industries.⁸⁰

Textiles and iron were the leading sectors of the first stage of the Industrial Revolution and began to revolutionize technology in the 1760s and 1770s. The firms in these sectors grew in size from cottage industries to large factories. The main problem facing these firms was the coordination of team production, much like the Italian *compagnias* that emerged in the twelfth century. The teams involved included inventors, entrepreneurs, cotton and iron suppliers, credit providers, employees, wholesalers, retailers and the supporting communities. Despite the size of these firms they were organised throughout the Industrial Revolution, a full century, in the form of family firms and partnerships.⁸¹

The railway and canal sectors and on the other hand used the joint stock company as its vehicle from the start. New company formations peaked in two boom periods, one between 1834 and 1837 and the other from 1843 to the end of the decade. Between 1830 and 1850 some 6000 miles of public railway was built in Britain alone in what is known as Railway Mania. By 1850 the annual number of passengers transported reached 68 million, and by 1870 it had reached 322 million. This was the fastest economic growth any economic sector had ever experienced. From the start these companies were very big and demanded massive capital. The directors of these giant companies were primarily engaged in coordinating highly complex team production projects. The constituencies of these companies included shareholders, bondholders, landowners, passengers, freight customers, constructors, suppliers and service providers, employees and the communities.⁸²

⁷⁹ The first stage of the Industrial Revolution was from 1760-1820 and the second stage from 1830-1870. See Terreblanche *Western Empires* 21-22.

⁸⁰ Bakan *The Corporation the Pathological Pursuit of Profit and Power* (2005) (hereinafter “Bakan *The Corporation*”) 9; Kuran (2005) *The American Journal of Comparative Law* 785 809.

⁸¹ Harris (2015) *Seattle University Law Review* 537 545-546.

⁸² Harris (2015) *Seattle University Law Review* 537 546-548.

Britain emerged as the first industrialised country.⁸³ Its powerful navy and territorial expansion in North America and India enabled it to become the dominant empire early in the eighteenth century. By the end of the Napoleonic wars in 1815 Britain was the undisputed leader of the Western world.⁸⁴ This period is important in the historical evolution of the company for it is generally accepted that it is in the nineteenth century Britain that the modern company was born.⁸⁵ The historical development and birth of the modern company in the England will be discussed separately hereinafter. As Canadian company law (that undoubtedly had an influence on our new Companies Act 71 of 2008 (the Companies Act of 2008)) was heavily influenced by American company law, it is necessary to briefly differentiate the evolution of the company in England and the United States during this period.

The United States inherited the corporation from English law as it stood at the close of the eighteenth century.⁸⁶ At that stage formal incorporation in English law had to be obtained by charters and private acts. Each petition was considered against a somewhat vague criteria of public policy. As a result of the *Bubble Act*⁸⁷ of 1720 and the financial catastrophe following the bursting of the South Sea Bubble,⁸⁸ the English Government was generally reluctant to grant charters of incorporation. This encouraged the use of partnerships and unincorporated companies as business associations. The position was different in the United States. The American process of incorporation was by charter from the state legislatures, easy to obtain and very general in form. The expressed purpose of all companies was quite clearly for the public benefit. As a result there was no reason for a joint stock company to remain unincorporated and every reason to take formal corporate powers, including limited liability.⁸⁹ According to Gower this meant that

⁸³ Terreblanche *Western Empires* 67.

⁸⁴ O'Kelley (2013) *University of Illinois Law Review* 1002 1008-1009; Terreblanche *Western Empires* 235 and 293.

⁸⁵ Micklethwait & Wooldridge *The Company* xvii and 47. See also generally Formoy *The Historical Foundations of Modern Company Law* (1923) for a comprehensive discussion of the birth of the modern company.

⁸⁶ Berle & Means *The Modern Corporation* 120; Pollman (2011) *Utah Law Review* 1629 1631.

⁸⁷ *6 Geo 1 c 18*.

⁸⁸ See discussion in section 3.1 hereafter.

American law distinguished the corporation as a public body rather than as a creature of contract earlier than English law.⁹⁰

In the newly independent United States of America, companies had been responsible for the country's very existence. Chartered corporations endowed with special monopoly rights were used in the early American states to provide some of the vital infrastructure of the new country such as universities, banks, churches, canals, railways and roads. The corporate form was particularly well-suited to developing capital-intensive large-scale businesses. The limited liability of investors facilitated the accumulation of capital while limiting the investors' participation in management.⁹¹ In contrast to England, the corporation did not have a negative connotation or bad track record and was widely used in the United States by the end of the eighteenth century.⁹² This led to an early trend towards general acts of incorporation and non-interference by the states.⁹³ The first general Act of incorporation for business concerns was passed in New York State in 1811.⁹⁴ Cooke states:

“It may be suggested that the use of the term ‘corporation’ and ‘incorporated’ in American business names, as compared with the English use of ‘company’ and ‘limited’ is due to the differentiation of the structure which began in the eighteenth century. In America business was never troubled with the difference between corporate and incorporate form after the

⁸⁹ Cooke *Corporation, Trust and Company* 92-93; Blair (2013) *University of Illinois Law Review* 785 792; Talbot *Critical Company Law* 5-7.

⁹⁰ Gower “Some contrasts between British and American corporation law” (1956) *Harvard Law Review* 1369 1372-1373.

⁹¹ Micklethwait & Wooldridge *The Company* 43; Goforth “A corporation has no soul - modern corporation, corporate governance and involvement in the political process” (2010) *Houston Law Review* 617 625; Talbot *Critical Company Law* 7; Pollman (2011) *Utah Law Review* 1629 1633-1634; O’Kelley (2013) *University of Illinois Law Review* 1002 1009; Blair (2013) *University of Illinois Law Review* 785 793-794 and 805.

⁹² Cooke *Corporation, Trust and Company* 92-93; Blair (2013) *University of Illinois Law Review* 785 793-794.

⁹³ Berle & Means *The Modern Corporation* 126; Cooke *Corporation, Trust and Company* 93-94; Micklethwait & Wooldridge *The Company* 45-46; Goforth (2010) *Houston Law Review* 617 627-628; Pollman (2011) *Utah Law Review* 1629 1640.

⁹⁴ Cooke *Corporation, Trust and Company* 93-94. Talbot states: “General incorporation laws tended to create a two-tier market for incorporations based on price; the wealthier capitalists maintaining their economic superiority through the ‘purchase’ of special charters, whilst the poorer capitalists endured the more restrictive criteria set out in their State’s general incorporation Act.” See Talbot *Critical Company Law* 8. This inequality was, however, gradually removed as the use of special charters deteriorated. See further Talbot *Critical Company Law* 7-10.

Revolution. It moved rapidly towards corporations on the one hand and partnerships on the other. In England the main trend of development was towards an intermediate form - not corporation, not partnership, but company acting under a deed. And claims by those companies to be able to include limited liability in the deed eventually brought about the statutory addition of 'limited' to the name as a warning to all men of the company's position."⁹⁵

2.4 A brief overview of the developments after 1862

Britain lost its industrial dominance in the 1880s and was replaced by Germany as Europe's leading industrial power. Whilst Britain still clung to its *laissez-faire* economic policy, Germany and the United States adopted a more protectionist and nationalist orientated policy.⁹⁶ By 1900, there were clear differences between the German and British corporate models. The banks provided the capital and were represented on the supervisory boards of Germany's great industrial companies. Germany also adopted a two-tier system of corporate governance consisting of a management board, responsible for the management of the company, and a supervisory board, elected by the shareholders and other stakeholders. Germany further emphasised the social role of companies.⁹⁷

In the second half of the nineteenth century the United States of America had become a highly industrialised economy.⁹⁸ By the First World War the corporation had become the dominant business institution in the United States of America.⁹⁹ This development was spawned by the railroads from approximately 1850. The 1850s and 1860s saw the emergence of large wholesalers, followed by the modern mass retailers in the 1870s and 1880s, and then the industrial

⁹⁵ Cooke *Corporation, Trust and Company* 94. See also Blair (2013) *University of Illinois Law Review* 785 792.

⁹⁶ Micklethwait & Wooldridge *The Company* 90; Terreblanche *Western Empires* 297.

⁹⁷ Delport "Korporatiewe reg en werkplekforums" (1995) DJ 409 415; Micklethwait & Wooldridge *The Company* 90-95.

⁹⁸ Talbot *Critical Company Law* 10.

⁹⁹ Micklethwait & Wooldridge *The Company* 95; See O'Kelly (2013) *University of Illinois Law Review* 1002 1008-1019 for a discussion of the period from the end of the Civil War in 1865 to the First World War.

companies.¹⁰⁰ It is estimated that companies controlled four-fifths of the wealth of the United States by 1890.¹⁰¹ The United States followed a model of “financial capitalism” in which large capital intensive businesses were financed and monitored by a concentrated group of banks led by the Morgan bank.¹⁰² This period saw the rise of great tycoons such as Andrew Carnegie, John D Rockefeller, Jay Gould and J.P. Morgan that played a key role in the rapid ascendance of the United States.¹⁰³ The consolidation of capital in these companies led to the growth of labour unions. Between 1897 and 1904 union membership multiplied almost fivefold.¹⁰⁴ A quintessential feature of American company law is the competition between the various states for incorporations since the end of the 19th century. This resulted in the promulgation of liberal corporate laws and the emergence of monopolies and trusts.¹⁰⁵ The 1920s (the Roaring Twenties) was a period of unprecedented wealth creation and growth. The stock market in the United States boomed and the industry was dominated by a handful of truly giant corporations, and a few hundred very large ones. The modern corporation, an economic engine of unparalleled efficiency, had conquered the market.¹⁰⁶ Branding became a key part of the corporate persona as it became necessary to devise ways to market the products of companies across great geographic, social and economic distances.¹⁰⁷

During the late nineteenth and early 20th century, several major legal jurisdictions started to divide companies into public and private companies. Generally speaking, private companies gained

¹⁰⁰ Micklethwait & Wooldridge *The Company* 60-71; Bakan *The Corporation* 10-11; Blair (2013) *University of Illinois Law Review* 785 805 and 809; Talbot *Critical Company Law* 10 and 16; Harris (2015) *Seattle University Law Review* 537 546-548. Examples of these large companies are Woolworths, Ford and the American Tobacco Company.

¹⁰¹ Blair (2013) *University of Illinois Law Review* 785 809.

¹⁰² Rock “Adapting to the new shareholder-centric reality” (2013) *University of Pennsylvania Law Review* 1907 1912.

¹⁰³ O’Kelley (2013) *University of Illinois Law Review* 1002 1011-1012.

¹⁰⁴ Micklethwait & Wooldridge *The Company* 71-73.

¹⁰⁵ Bakan *The Corporation* 13-14; Talbot *Critical Company Law* 14-16. Examples of these monopolies are the United States Steel Corporation and Rockefeller’s Standard Oil Company. See also Greenfield “The third way: Beyond shareholder or board primacy” (2014) *Seattle University Law Review* 749 751-752.

¹⁰⁶ See O’Kelley (2013) *University of Illinois Law Review* 1002 1019-1023 for a discussion of the Roaring Twenties.

¹⁰⁷ Blair (2013) *University of Illinois Law Review* 785 810-814.

increased governance flexibility, lower public disclosure requirements and less formal procedures in return for giving up access to stock markets and external equity.¹⁰⁸

The Great Depression (1929-1933) had a devastating impact on the world economy and led to high levels of unemployment.¹⁰⁹ The politico-economic model of *laissez-faire*, which was adopted in Britain from 1846 until 1914 and in the United States from approximately 1870 to 1929, was discarded.¹¹⁰ The governments of Britain, Europe and the United States became more involved in their domestic economies and social spending. Britain's economic system changed from one of *laissez-faire* capitalism to a system of welfare state capitalism and imperial preference. The role of trade unions was strengthened.¹¹¹ Earlier Brandeis had already expressed his concern about the rise and dominance of "finance capital".¹¹² In the seminal study of Berle and Means, *The Modern Corporation and Private Property*,¹¹³ the authors, using data from companies in the United States, drew attention to the growing separation of power between the executive management of major public companies and their increasingly diverse and remote shareholders.¹¹⁴ This led to a reconsideration of the role of business corporations in society and the appreciation of the importance of corporate governance.¹¹⁵ In the United States President

¹⁰⁸ Harris (2015) Seattle University Law Review 537 549.

¹⁰⁹ O'Kelley (2013) University of Illinois Law Review 1002 1023-1032; Terreblanche *Western Empires* 370-371.

¹¹⁰ Talbot *Critical Company Law* 18; O'Kelley (2013) University of Illinois Law Review 1002 1023; Terreblanche *Western Empires* 372. Wall Street crashed in 1929. This was followed by the promulgation of legislation aimed at correcting informed market investments and share trading abuses.

¹¹¹ Terreblanche *Western Empires* 369-370 and 375.

¹¹² Brandeis *Other People's Money: And how the Bankers Use It* (1914) (hereinafter "Brandeis *Other People's Money*"). See also Talbot *Critical Company Law* 16-19 and 109-110.

¹¹³ Berle & Means *The Modern Corporation*.

¹¹⁴ Berle & Means *The Modern Corporation* book one, chapters III-VI. See also Micklethwait & Wooldridge *The Company* 104-114; Talbot *Critical Company Law* 18-19. Until the 1920s and 1930s the shares of most companies (even the great manufacturing and mercantile companies) were held privately. The exceptions were perhaps the utility companies like the railroads and canal companies. See also Branson "Corporate governance 'reform' and the new corporate social responsibility" (2001) University of Pittsburgh Law Review 605 605; Branson "Proposals for corporate governance reform: Six decades of ineptitude and counting" (2013) Wake Forest Law Review 673 (also published as University of Pittsburgh Legal Studies Research Paper Series Working Paper No 2013-16 (available at <http://ssrn.com/abstract=2260406> (accessed 2014-04-02)) 675-676; O'Kelley (2013) University of Illinois Law Review 1002 1002.

¹¹⁵ Bakan *The Corporation* 19-20; Greenfield (2014) Seattle University Law Review 749 752.

Roosevelt implemented the New Deal, a package of regulatory reforms designed to restore economic health by *inter alia* curbing the powers and freedoms of corporations.¹¹⁶ The corporation was in general no longer conceived as an economic institution in the classical sense of the term, but as a historically peculiar, quasi-public institution whose characteristics and effects were more appropriately deciphered through the lens of political as opposed to economic theory.¹¹⁷ Since Berle and Means identified this separation of ownership and control, there have been endless debates and theories on how to resolve this problem. Managing this separation is one of the key functions of company law and corporate governance.¹¹⁸

It is however important to note that in some jurisdictions (and certain instances) strengthening managerial accountability may not be a pressing corporate governance issue. In certain jurisdictions, for example in continental Europe and in certain emerging economies, the system of ownership and control is referred to as “insider” or “control orientated”. This means that large companies are seldom listed on the stock exchange and even if they are they tend to have a majority or controlling shareholder who actively participates or directs the management of the company. The vital corporate governance issue in this system is to protect minorities within the company.¹¹⁹

¹¹⁶ Bakan *The Corporation* 20-21. For an interesting discussion of an attempted conspiracy to overthrow President Roosevelt as a result of his reforms, see Bakan *The Corporation* 85-95. See also O’Kelley (2013) *University of Illinois Law Review* 1002 1025-1032 for an interesting insight on the role that Berle played in formulating the New Deal, and O’Kelley (2013) *University of Illinois Law Review* 1033-1035 for a discussion of the New Deal.

¹¹⁷ Berle *Power Without Property: A New Development in American Political Economy* (1959) 91-92; Berle & Means *The Modern Corporation* 310-313 referred to in Moore *Corporate Governance in the Shadow of the State* (2013) (hereinafter “*Moore Corporate Governance*”) 69-70.

¹¹⁸ See Branson (2001) *University of Pittsburgh Law Review* 605 605; Mongalo *Corporate Law and Corporate Governance* 190-193; Talbot *Critical Company Law* 111; Naidoo *Corporate Governance An Essential Guide for South African Companies* 2nd ed (2009) (hereinafter “*Naidoo Corporate Governance*”) 4-5. Branson (2013) *Wake Forest Law Review* 673 676 states that:

“The ensuing years have engaged in seemingly endless debate upon what is the solution to the Berle and Means problem, with one lengthy hiatus (the economic analyses of law era) in which scholars questioned whether the separation of ownership from control was a problem at all. For the most part, though, corporate governance reform efforts have opined as to what would render unaccountable managers, no longer answerable to rank-and-file shareholders, accountable. Would nationalization, installation of public interest directors, mandatory social accounting and disclosure, federal chartering of larger public corporations, market forces (including the market for corporate control), activism by institutional investors, the forces of globalization, or reinforced powers for gatekeepers, to name a few, align managers’ interests with those of owners and other constituencies?”

¹¹⁹ Mongalo *Corporate Law and Corporate Governance* 180-181. Mongalo further states at 181-182 that whilst the majority of companies listed on the stock exchange in South Africa do not have a majority shareholder, a substantial

After the Second World War, especially after the Cold War erupted in 1947, the Western countries, led by the United States, reached consensus to build a new world order based on a social democratic ideological approach.¹²⁰ This led to increased statutory regulation of the company. In Western Europe post-war governments nationalised companies that were involved in the key industries.¹²¹ The United States government did not go as far but nevertheless enacted legislation to protect other stakeholders of the corporation.¹²² Insofar as employees are concerned, Wedderburn states that “[f]or some decades after 1945, a cautious capitalism felt the need to placate and harness the apparent new strength of working class organisation affecting its social and economic relationship.”¹²³ In 1953 the economist Howard Bowen coined the term “corporate social responsibility”.¹²⁴ He believed that firms could strive to make a profit whilst also introducing broader societal goals into its decision making process.¹²⁵ The corporate social responsibility movement played a dominant role from the 1960s to the 1970s. This coincided with the recognition and acceptance of Keynesian welfare by governments around the world.¹²⁶ Environmental law, anti-discrimination law, anti-corruption law and consumer law were

number of them have a concentrated ownership structure with a clearly dominant shareholder. From a South African perspective, corporate governance reforms should give attention to both the strengthening of managerial accountability and the protection of minorities.

¹²⁰ Talbot *Critical Company Law* 116-119; O’Kelley (2013) *University of Illinois Law Review* 1002 1033 and 1037-145; Terreblanche *Western Empires* 134.

¹²¹ Micklethwait & Wooldridge *The Company* 115.

¹²² Micklethwait & Wooldridge *The Company* 114-115; Greenfield (2014) *Seattle University Law Review* 749 752-753.

¹²³ Wedderburn “Employees, Partnership and Company Law” (2002) *Industrial Law Journal* 99 100. See also Terreblanche *Western Empires* 56.

¹²⁴ Bowen *Social Responsibilities of the Businessman* (1953).

¹²⁵ Nehme and Wee “Tracing the historical development of corporate social responsibility and corporate social reporting” (2008) *James Cook University Law Review* 129 145; Bellish “Towards a more realistic vision of corporate social responsibility through the lens of the *lex mercatoria*” (2012) *Denver Journal of International Law & Policy* 548 556.

¹²⁶ The Keynesian welfare state assumes that government expenditure leads to public spending, which stimulates the economy and leads to higher tax revenue leading to more generous spending. See Nehme & Wee (2008) *James Cook University Law Review* 129 145; Bellish (2012) *Denver Journal of International Law & Policy* 548 556.

strengthened. On the corporate side there was a rise in so-called stakeholder statutes.¹²⁷ By the early 1970s companies were expected to look after other stakeholders.¹²⁸

From 1979 there was a shift from Keynesian social democracy towards neoliberalism and globalism.¹²⁹ The failures of *laissez-faire* capitalism and the free-market ideology of the first half of the 20th century was forgotten.¹³⁰ Both the Thatcher administration in the United Kingdom and the Reagan administration in the United States believed that public expenditure was no longer a solution but a problem. The Keynesian welfare state was replaced with a new-liberal agenda of privatisation and deregulation.¹³¹ The deregulatory revolution started in Britain, where Margaret Thatcher privatised the state owned companies after she came into power in 1979. Other European governments followed suit. Even the Yeltsin government in Russia embarked on a programme of privatisation after the fall of the Soviet Union in 1991. The Chinese followed more cautiously.¹³² Terreblanche argues that in the United States “the capitalist or corporate sector was the *agent provocateur* behind the Reagan counter-revolution in the early 1980s.”¹³³

This period also saw the rise of the “law and economics” movement. The law and economics movement played a particularly dominant role in the corporate field where the corporation was re-conceptualised as a nexus of contracts with corporate law basically providing a set of enabling default rules. This movement believes that market forces should regulate corporate and

¹²⁷ Greenfield (2014) *Seattle University Law Review* 749 753. See also Bellish (2012) *Denver Journal of International Law & Policy* 548 558-559; Branson (2013) *Wake Forest Law Review* 673 678-680.

¹²⁸ Micklethwait & Wooldridge *The Company* 126.

¹²⁹ Talbot *Critical Company Law* 119-129 and 124-125; Moore *Corporate Governance* 65 and 69-72; O’Kelley (2013) *University of Illinois Law Review* 1002 1045-1046; Terreblanche *Western Empires* 70, 135-136. According to the neoliberalist ideology the market is a self-regulating and natural mechanism in which the state should not intervene. See Terreblanche *Western Empires* 163. The multinational company was an important instrument in the drive towards globalism. See Terreblanche *Western Empires* 137. See also Micklethwait & Wooldridge *The Company* 162-179 for a discussion of the influence of multinational companies.

¹³⁰ O’Kelley (2013) *University of Illinois Law Review* 1002 1048; Terreblanche *Western Empires* 137.

¹³¹ Bakan *The Corporation* 21; Talbot *Critical Company Law* 119-124; Nehme and Wee (2008) *James Cook University Law Review* 129 153-155; Greenfield (2014) *Seattle University Law Review* 749 753.

¹³² Micklethwait & Wooldridge *The Company* 126-127; Terreblanche *Western Empires* 70. Over the past 30 years the economies of China and India have risen spectacularly. See Terreblanche *Western Empires* 86.

¹³³ Terreblanche *Western Empires* 137.

managerial behaviour rather than the law. Shareholder primacy trumps stakeholder concerns.¹³⁴ The law and economics movement played a dominant role in the corporate field until the Global Financial Crisis of 2007 to 2008.¹³⁵

The last quarter of the 20th century saw a movement towards the unbundling of the big corporations.¹³⁶ In the 1990s European governments increased the regulation of the company.¹³⁷ A number of corporate scandals in the 1990s in the United Kingdom and the United States, followed by the bursting of America's stock-market bubble in 2000 to 2002¹³⁸ led to stricter regulation. In the United States the strict *Sarbanes-Oxley Act*¹³⁹ was promulgated in 2002.¹⁴⁰

The Global Financial Crisis of 2007 to 2008¹⁴¹ again put corporate governance under the spotlight and, according to Greenfield, finally marked the end of the law and economics movement.¹⁴²

¹³⁴ Branson (2001) *University of Pittsburgh Law Review* 605 618-620; Talbot *Critical Company Law* 124-129; Mongalo *Corporate Law and Corporate Governance* 193; Bellish (2012) *Denver Journal of International Law & Policy* 548 559; Branson (2013) *Wake Forest Law Review* 673 678-681; Greenfield (2014) *Seattle University Law Review* 749 753-756;

¹³⁵ Mongalo *Corporate Law and Corporate Governance* 193; Bellish (2012) *Denver Journal of International Law & Policy* 548 559; Branson (2013) *Wake Forest Law Review* 673 678-681; Greenfield (2014) *Seattle University Law Review* 749 753-756.

¹³⁶ Micklethwait & Wooldridge *The Company* 131-149. The authors believe that this was a result of the influence of the Japanese experience, the developments in the stock market, the business ideas pioneered in Silicon Valley and the increasing regulation of the corporation.

¹³⁷ Micklethwait & Wooldridge *The Company* 149; Bakan *The Corporation* 98-102.

¹³⁸ This included the 2001 accounting fraud induced collapse and bankruptcy of the Enron Corporation and the numerous other corporate scandals that were uncovered at the same time.

¹³⁹ *Pub.L. No 107-204, 116 Stat. 745 (2002)*.

¹⁴⁰ Micklethwait & Wooldridge *The Company* 151-157; O'Kelley (2013) *University of Illinois Law Review* 1002 1002.

¹⁴¹ See Keay "Risk, shareholder pressure and short-terminism in financial institutions: Does enlightened shareholder offer a panacea?" (2011) *Law and Financial Markets Review* 435 435-439 for a discussion of the crisis and its causes.

¹⁴² Greenfield (2014) *Seattle University Law Review* 749 757; Nehme & Wee (2008) *James Cook University Law Review* (2008) 129 155.

Whereas the 20th century was the century of management, the 21st century may become the century of governance.¹⁴³

3 THE HISTORY OF ENGLISH COMPANY LAW

The history of English company law may conveniently be dealt with in six distinct periods: The period until the passing of the *Bubble Act* in 1720; the aftermath of the *Bubble Act* until its repeal in 1825; the period of the evolution of general Acts governing corporations, from 1825 to 1844; the period of the Joint Stock Companies Acts, from 1844 to 1856; the period of the modern Acts, from 1856 to 1973; and the period from 1973 to present.¹⁴⁴

3.1 The period until the passing of the *Bubble Act* in 1720¹⁴⁵

There were two main lines of development that resulted in the formation of the joint stock company. These were the medieval partnership (*societas*) and the growth of the idea of a corporation (*universitas*).¹⁴⁶ According to Cooke:

“Corporate form and partnership (of the *societas* type) came together in the field of foreign trade as it developed in the second half of the sixteenth and seventeenth centuries. In this period the two things which contributed most to the emergence of the joint-stock company were the series of grants by the sovereign of extensive powers and privileges to companies of merchants trading abroad, and the application of partnership to the practice of this business on a larger scale than at any earlier time.”¹⁴⁷

¹⁴³ Tempelhoff “Where are we again? Corporate history and the South African historian” (2003) *Historia* 6 6.

¹⁴⁴ See Cilliers 20-21; Esser *Recognition of Various Stakeholder Interests in Company Management* LLD thesis (2008) University of South Africa 43. See also Gower *Gower’s Principles of Modern Company Law* 5th ed (1992) (hereinafter “*Gower’s Principles of Modern Company Law* 5th ed”) 19-54; Williams “Companies” in Joubert ed *LAWSA* vol 4 part 1 (2014) (hereinafter “*LAWSA* vol 4 part 1”) par 4 and Esser 43-46 for summaries of the history of English company law.

¹⁴⁵ See Scott *The General Development of the Joint-Stock System to 1720* for a detailed discussion of the history of the company in the United Kingdom during this period. See also Cilliers 22-46 and Formoy *The Historical Foundations of Modern Company Law* 3-29.

¹⁴⁶ Scott *The General Development of the Joint-Stock System to 1720* 1; Cooke *Corporation, Trust and Company* 47; Cilliers 22; Harris (2015) *Seattle University Law Review* 537 541.

¹⁴⁷ Cooke *Corporation, Trust and Company* 47.

The use of the corporate form in England started with ecclesiastical bodies. This use spread to boroughs in the twelfth and thirteenth centuries when they drew strength from the growth of their economic power to struggle for emancipation from feudal, ecclesiastical and political control.¹⁴⁸ These ecclesiastical and public bodies had corporate personality conferred upon them by charter from the crown or their feudal lords, or were deemed by prescription to have received such grant.¹⁴⁹

The beginning of the use of the corporate form in the commercial field can be traced back to the merchant guilds.¹⁵⁰ The merchant guild was a fundamental feature of the municipal organisation in England in the twelfth and thirteenth centuries.¹⁵¹ All the traders at a town were expected to become members of the merchant guild as soon as their business rose above a comparatively low level. The function of the guild was to regulate trade so that every member was able to maintain himself.¹⁵² A characteristic of the guilds that reappeared in the modern company is perpetual succession.¹⁵³ The officers of the guild were appointed in “morning speech” and usually comprised of an “older man” who presided with a small number of assistants and a council.¹⁵⁴ An interesting feature of the guild was a degree of corporate responsibility of the merchants of any borough guild for the debts of any of their fellow members to members of other borough guilds.¹⁵⁵

¹⁴⁸ *Cooke Corporation, Trust and Company* 19; Cilliers 22; *Gower’s Principles of Modern Company Law* 5th ed 19; Harris (2015) *Seattle University Law Review* 537 540.

¹⁴⁹ *Cooke Corporation, Trust and Company* 19-21; *Gower’s Principles of Modern Company Law* 5th ed 19.

¹⁵⁰ Scott *The General Development of the Joint-Stock System to 1720* 2; Cilliers 23; *Gower’s Principles of Modern Company Law* 5th ed 20; Lombard (2002) DJ 236 238. See *Cooke Corporation, Trust and Company* 19-26 for a comprehensive discussion of the merchant guilds.

¹⁵¹ *Cooke Corporation, Trust and Company* 22.

¹⁵² *Cooke Corporation, Trust and Company* 22-23. Guilds had little resemblances to modern companies and corresponded roughly with our trade protection associations such as bar councils, law societies, health professions associations etc. See *Cooke Corporation, Trust and Company* 23; *Gower’s Principles of Modern Company Law* 5th ed 20.

¹⁵³ Scott *The General Development of the Joint-Stock System to 1720* 3; Cilliers 23. Scott *The General Development of the Joint-Stock System to 1720* 26-27 also mentions further features of the merchant guilds that would possess significance for the later history of the corporate organisation.

¹⁵⁴ *Cooke Corporation, Trust and Company* 24.

¹⁵⁵ *Cooke Corporation, Trust and Company* 26.

Through the fifteenth to the sixteenth centuries the merchant guilds were replaced by craft guilds and companies of merchants.¹⁵⁶ The craft guild represents the first stage in the differentiation of the corporation for purposes of local government from the corporation for economic purposes. The differentiation was one of field rather than function - the corporate form in both was still applied for a public purpose.¹⁵⁷ Craft guilds were still civic organs and part of the structure of municipal government.¹⁵⁸ The great feature of craft guilds came to be apprenticeship. It represented the interests of all its classes of members and regulated general conditions, such as wages of journeymen and the price paid by the consumer. Apprentice, journeyman and master represented stages in seniority in a common undertaking rather than a division between capital, management and labour.¹⁵⁹ Gradually the craft guild divided into the interests of employers and employees. The employing class became traders and owners of businesses concerned only with management, while the employed provided craftsmanship and labour.¹⁶⁰ The guild system started to disappear during the sixteenth century.¹⁶¹

The first type of English association to which the name “company” was generally applied was that adopted by the merchant adventurers for the purpose of overseas trade and colonialization.¹⁶² These companies were founded from the fourteenth century.¹⁶³ The earliest of these companies were the so-called “regulated companies”. The name arose from the fact that these companies did not themselves trade, but regulated the trade with which they were involved. The regulated companies basically represented an expansion of the guild principle to overseas trade. Each

¹⁵⁶ Scott *The General Development of the Joint-Stock System to 1720* 8; Cooke *Corporation, Trust and Company* 27; Cilliers 25.

¹⁵⁷ Cooke *Corporation, Trust and Company* 27.

¹⁵⁸ Cooke *Corporation, Trust and Company* 28.

¹⁵⁹ Cooke *Corporation, Trust and Company* 28-29.

¹⁶⁰ Cooke *Corporation, Trust and Company* 36; Cilliers 26.

¹⁶¹ Gower's *Principles of Modern Company Law* 5th ed 20-21.

¹⁶² Gower's *Principles of Modern Company Law* 5th ed 20-21.

¹⁶³ The first organised body for trade, the Mayor, Constables and Fellows of the Merchants of the Staples of England, was formed by merchants to regulate the wool trade on a national basis. It received a charter in 1391. The second regulated company was the Fellowship of the Merchant Adventurers of England, which received a charter in 1407. See Cooke *Corporation, Trust and Company* 34-35; Cilliers 26-27.

member traded with his own stock and on his own account, and was accordingly liable for his own debts. Asset partitioning and specifically limited liability did not receive much attention. Incorporation was accordingly not strictly speaking necessary. However, it was nevertheless obtained largely because such charters included exclusive privileges or monopolies to trade in a particular region of the world and even governmental powers over that region. The grant of the privileges of incorporation was not a grant for private benefit but, in theory at least, a grant for public benefit. It was deemed in the national benefit to engage in the discovery of new lands and trades and it also provided a source of revenue for the state.¹⁶⁴ These regulated companies thus bestraddle the private and public sectors.¹⁶⁵

Two forms of partnership contributed to the evolution of the business association, the *commenda*¹⁶⁶ and *societas*.¹⁶⁷ The *commenda* was rare in England.¹⁶⁸ The *societas* became the typical English partnership. Each partner in this partnership is an agent of the others and responsible individually for the partnership debts.¹⁶⁹

When the partnership principle of trading on joint account was adopted by the regulated companies they became joint commercial enterprises instead of trade protection associations and

¹⁶⁴ Cooke *Corporation, Trust and Company* 51-54; Cilliers 27; Gower's *Principles of Modern Company Law* 5th ed 8; Lombard (2002) DJ 236 238-240; Blair (2013) University of Illinois Law Review 785 791.

¹⁶⁵ Micklethwait & Wooldridge *The Company* 17.

¹⁶⁶ The *commenda* was, as indicated before, a partnership in which one of the partners (the *commendator*) supplied the capital to another partner (the *commendatarius*) without actively taking part in the management of the venture. The liability of the *commendator* was limited to the capital that he advanced. In a more advanced form two additional practices were incorporated: The continuance of the partnership for a definite or indefinite period and the growth in the contributions of capital until a number of investors supplied one or more managing partners with capital. This is an approach nearly to the modern company except that it lacks the element of incorporation.

¹⁶⁷ Scott *The General Development of the Joint-Stock System to 1720* 1-2; Cooke *Corporation, Trust and Company* 45-46.

¹⁶⁸ The *commenda* is the direct ancestor of the French *société en commandite* and was only introduced in England in 1907 by the *Limited Partnerships Act, 1907* (7 Edw c 24). See Formoy *The Historical Foundations of Modern Company Law* 44-47 for a general discussion of limited partnerships.

¹⁶⁹ Scott *The General Development of the Joint-Stock System to 1720* 1-2; Cooke *Corporation, Trust and Company* 46-47; Cilliers 25.

the joint stock company was born.¹⁷⁰ Chartered joint stock companies played a crucial role in the establishment of the British maritime empire in the sixteenth and the seventeenth centuries.¹⁷¹ Besides charters for trading in foreign parts many charters were granted for other purposes such as mining, manufacturing, banks, fire and life assurance.¹⁷² Many of these companies furthermore acted as a corporation without seeking a charter.¹⁷³ A feature of the early joint stock companies was the fact that the shares were of no fixed amount. If further capital was required, the sum called upon each share could be increased.¹⁷⁴

It is an established principle in common law that the debts of a corporation are not the debts of its members.¹⁷⁵ However, this asset partitioning was to an extent negated by the fact that certain corporations had the power to make calls or “levitations” on its members. In the case of *Salmon v The Hamborough Company*¹⁷⁶ it was decided that the creditors could by a sort of subrogation force the members through such calls to indirectly pay the debts of the corporation. This ability to make calls could, however, be limited by agreement between the company and its members.¹⁷⁷ Cilliers states that the position at the end of the seventeenth century was thus that “the concept of ‘limitation of liability’ was known only in the limited sense of the restriction of a corporation’s

¹⁷⁰ Formoy *The Historical Foundations of Modern Company Law* 1-5; Cilliers 28-32; Gower’s *Principles of Modern Company Law* 5th ed 20-21; Lombard (2002) DJ 236 239; Blair (2013) University of Illinois Law Review 785 792; Harris (2015) Seattle University Law Review 537 541.

¹⁷¹ Micklethwait & Wooldridge *The Company* 17; Terreblanche *Western Empires* 102 and 118. Examples of these companies include the Russia Company, the Levant Company, the East India Company, the Newfoundland Company, the Hudson’s Bay Company and the South Sea Company. See Formoy *The Historical Foundations of Modern Company Law* 16-22; Cooke *Corporation, Trust and Company* 54-58.

¹⁷² Formoy *The Historical Foundations of Modern Company Law* 16-22; Cooke *Corporation, Trust and Company* 60; Gower’s *Principles of Modern Company Law* 5th ed 24. The Bank of England was, for example, incorporated in 1694 to serve as the English government’s banker and debt manager, which it continues doing today. See Harris (2015) Seattle University Law Review 537 543-545.

¹⁷³ Formoy *The Historical Foundations of Modern Company Law* 22; Gower’s *Principles of Modern Company Law* 5th ed 22.

¹⁷⁴ Formoy *The Historical Foundations of Modern Company Law* 7; Cilliers 30-31.

¹⁷⁵ *Anon (1441)*, Y.B. 19 Hy. VI, 80; *Edmonds v Brown (1668)*, 1 Lev. 237; *Case of the City of London (1680)*, 1 Ventr. 351, 86 ER 226; Cooke *Corporation, Trust and Company* 77; Cilliers 25; Lombard (2002) DJ 236 241.

¹⁷⁶ *Salmon v The Hamborough Company (1671)*, 1 Ch. Cas. 204.

¹⁷⁷ Cooke *Corporation, Trust and Company* 77-78; Cilliers 34-38.

call-making power and the corresponding limitation of the shareholder's responsibility towards the corporation."¹⁷⁸

The corporation was regarded as a political institution incorporated for a public purpose.¹⁷⁹ This view of the corporation remained the basis of the legal theory of the corporation from the seventeenth century into the nineteenth century.¹⁸⁰

Dealings in stocks and shares in incorporated and unincorporated companies began on the developing stock market in 1696.¹⁸¹ Before the end of the seventeenth century there was an open and highly organised stock and share market in London.¹⁸² In the first two decades of the eighteenth century there was a frenetic boom in company flotations (incorporated and unincorporated) which led to the famous South Sea Bubble.¹⁸³ Impetus was given to this boom by the South Sea Company that was founded in 1711 with a monopoly of trade in South America. By 1711 the war with Spain had strangled its business and the directors decided to focus on the market for public debt. In 1720 the South Sea Company acquired virtually the whole of the national debt of Britain by buying out the holders or persuading them to exchange their holdings for shares in the company.¹⁸⁴ In an attempt to check the widespread gambling in stocks and

¹⁷⁸ Cilliers 41; Lombard (2002) DJ 236 241.

¹⁷⁹ *The Case of Sutton's Hospital (1612) 10 Co Rep 1a; 77 ER 937.*

¹⁸⁰ *Cooke Corporation, Trust and Company* 66.

¹⁸¹ Hahlo & Farrar *Hahlo's Cases and Materials on Company Law* 3 ed (1987) (hereinafter "Hahlo & Farrar *Cases and Materials*") 5, 17; Lombard (2002) DJ 236 240; Esser 45.

¹⁸² Formoy *The Historical Foundations of Modern Company Law* 9; *Cooke Corporation, Trust and Company* 81; Lombard (2002) DJ 236 240.

¹⁸³ Formoy *The Historical Foundations of Modern Company Law* 23-29; *Cooke Corporation, Trust and Company* 80-83; *Gower's Principles of Modern Company Law* 5th ed 24-25; Micklethwait & Wooldridge *The Company* 31-33; Bakan *The Corporation* 6-7; Talbot *Critical Company Law* 6-7. Scott *The General Development of the Joint-Stock System to 1720* gives a detailed account of the South Sea Bubble in chapters XVII to XXI.

¹⁸⁴ The government of France also used a chartered company, the Mississippi Company, to restructure the vast debts that it had accumulated. The aim of both Britain and France was to reduce the cost of servicing the public debt by converting government annuities, which paid fixed interest, into lower-yielding shares. However, the result in both cases was the creation of a financial bubble (in the case of Britain the biggest financial bubble in history). The disaster in France was set in motion by John Law, the son of a wealthy Scotsman who amassed a huge fortune through financial speculation. He eventually fled to Brussels in December 1720 with a false passport, leaving France in chaos. See *Cooke Corporation, Trust and Company* 81-82; Micklethwait & Wooldridge *The Company* 28-31.

shares that diverted capital away from the South Sea Company, the so-called *Bubble Act*¹⁸⁵ was passed on the 11th of June 1720.¹⁸⁶

The *Bubble Act* was poorly drafted. It prohibited, in vague language, acting as a corporation without a charter or statute as well as the use of obsolete charters. When proceedings were instituted against some companies that used obsolete charters it led to widespread panic and a collapse of the stock market. The South Sea Company, which had precious little trade to expand, collapsed. Eventually the company was effectively nationalised, leaving investors with large losses.¹⁸⁷

3.2 The aftermath of the *Bubble Act* until its repeal in 1825

The effect of the *Bubble Act* was that it restricted companies for the period of 105 years that the Act remained in force. Gower states:

“If the legislature had intended the *Bubble Act* to suppress companies they had succeeded beyond their reasonable expectations; if, as seems more probable, they had intended to protect investors from ruin and to safeguard the South Sea Company, they had failed miserably.”¹⁸⁸

There were only a few prosecutions under the Act.¹⁸⁹ These cases were not clear as to the effect and ambit of the prohibitions contained in the Act.¹⁹⁰

At the end of the eighteenth century the position in England was that companies could seek incorporation by petition for either a charter or a private act and each petition was considered on

¹⁸⁵ Supra.

¹⁸⁶ Formoy *The Historical Foundations of Modern Company Law* 23-29; Cilliers 43-44; Cooke *Corporation, Trust and Company* 80; Micklethwait & Wooldridge *The Company* 31-33.

¹⁸⁷ Formoy *The Historical Foundations of Modern Company Law* 23-29 and 47-48; Cooke *Corporation, Trust and Company* 82-88; Cilliers 44-46; Gower's *Principles of Modern Company Law* 5th ed 25-28; Lombard (2002) DJ 236 241-242; LAWSA vol 4 part 1 par 9; Micklethwait & Wooldridge *The Company* 31-33.

¹⁸⁸ Gower's *Principles of Modern Company Law* 5th ed 27-28. See also Cilliers 47.

¹⁸⁹ Lombard (2002) DJ 236 242-243. See Formoy *The Historical Foundations of Modern Company Law* 49-52 for a discussion of these cases.

¹⁹⁰ Formoy *The Historical Foundations of Modern Company Law* 52; Cooke *Corporation, Trust and Company* 84.

its own merits against a somewhat vague criteria of public policy. At that stage there was no thought of any general act of incorporation.¹⁹¹ The only general incorporation law at the time was a statute of Elizabeth that gave corporate form to all charitable institutions.¹⁹² For the first fifteen years after 1720 applications to the state for charters were numerous but few were granted. There was a general distrust of the joint stock company on the part of the state and charters of incorporation became relatively infrequent towards the end of the eighteenth century. Applications for incorporation by private act did not fare much better. Incorporations by private acts were mainly restricted to the field of semi-public utilities such as water, gas and canals.¹⁹³

Despite the bursting of the South Sea Bubble and provisions of the *Bubble Act*, the advantages of the corporate organisation in raising and applying large amounts of capital had been demonstrated.¹⁹⁴ Had authorities granted incorporation more readily during this period, incorporated companies might have become the dominant type, as was the case in the United States.¹⁹⁵ Instead, the authorities in England made it extremely difficult to incorporate, and left it to businessmen and their legal advisors to find an alternative device. This they found in the unincorporated or deed of settlement company. Unincorporated companies proliferated.¹⁹⁶ Paradoxically the *Bubble Act* in the end thus caused the rebirth of the very type of association which it had sought to destroy.¹⁹⁷

¹⁹¹ *Cooke Corporation, Trust and Company* 92. In practice incorporation by royal charter was limited to institutions such as universities as well as scientific, cultural, professional and charitable associations. Corporations for a public purpose were usually incorporated by special act of parliament. See Hannigan *Companies* par 2.

¹⁹² See *Cooke Corporation, Trust and Company* 68.

¹⁹³ *Cooke Corporation, Trust and Company* 88-92; Cilliers 48-50; *Gower's Principles of Modern Company Law* 5th ed 29.

¹⁹⁴ *Cooke Corporation, Trust and Company* 84; Cilliers 48.

¹⁹⁵ *Gower's Principles of Modern Company Law* 5th ed 29. As indicated before, the United States inherited the corporation from English law as it stood at the close of the eighteenth century, but without its negative connotation or bad track record.

¹⁹⁶ *Cooke Corporation, Trust and Company* 84.

¹⁹⁷ *Cooke Corporation, Trust and Company* 95; Cilliers 95; *Gower's Principles of Modern Company Law* 5th ed 29; Lombard (2002) DJ 236 243.

These unincorporated or deed of settlement companies were a cross between the partnership and the trust concepts. The company was normally formed by a “deed of settlement” in which the subscribers would agree to be associated in an enterprise with a prescribed joint stock divided into a specified number of shares. The deed could normally be amended with the consent of a specified majority of the members. The management was delegated to a committee of directors and the company’s property would be vested in a separate body of trustees.¹⁹⁸ As regards to third parties, shareholders stood on the same footing as an ordinary partnership.¹⁹⁹ This meant that all the members or partners had to be joined if a suit was brought by or against the company. This was a serious problem and several companies applied for a private act of parliament permitting it to sue or be sued in the name of one or more of its officials.²⁰⁰

A further problem was that members could not limit their personal liability, although limited liability appeared to be a secondary consideration during the eighteenth century.²⁰¹ By the nineteenth century, however, limited liability became openly recognised as a factor of prime importance. Any stipulation in the deed of settlement limiting the liability of individual members was only operative between the members themselves and could not bind a third party, unless that third party had expressly contracted on those terms. It became the practice to include such stipulations in contracts of the formal type, such as insurance contracts, where such clauses were incorporated in the policies.²⁰²

¹⁹⁸ Formoy *The Historical Foundations of Modern Company Law* 40-41; Cooke *Corporation, Trust and Company* 85-87; Cilliers 60.

¹⁹⁹ Formoy *The Historical Foundations of Modern Company Law* 41; Cilliers 60; *Gower’s Principles of Modern Company Law* 5th ed 32.

²⁰⁰ Formoy *The Historical Foundations of Modern Company Law* 36-37; Cooke *Corporation, Trust and Company* 96-99; Cilliers 61-62; Lombard (2002) DJ 236 243-244.

²⁰¹ Cilliers 63; *Gower’s Principles of Modern Company Law* 5th ed 32; Lombard (2002) DJ 236 244-245.

²⁰² Formoy *The Historical Foundations of Modern Company Law* 42-43; Cooke *Corporation, Trust and Company* 86-87; *Gower’s Principles of Modern Company Law* 5th ed 32-33; Lombard (2002) DJ 236 245-246.

In 1824 there was a new wave of extravagant speculations, investments and promotions. The first form of state intervention was to prosecute under the almost forgotten *Bubble Act*. These prosecutions were not successful.²⁰³ The state then decided to repeal the *Bubble Act* in 1825.²⁰⁴

3.3 The period of the evolution of the general Acts from 1825 to 1844

The Act²⁰⁵ that repealed the *Bubble Act* was divided into two parts. The first part repealed the *Bubble Act* with the effect that the unincorporated company was once again regulated by the common law. The second part gave the crown authority to declare the extent of the members' liability on the grant of charters so that incorporation no longer necessarily meant a clear separation between the liability of a corporation and that of its members.²⁰⁶ This provision was presumably for the benefit of creditors.²⁰⁷ The intention of the second part was to facilitate the grant of charters of incorporation to trading concerns.²⁰⁸ Whilst this provision might have been expected to encourage greater freedom in the grant of charters, the authorities remained as strict as ever.²⁰⁹

Application for statutory incorporation was the preferred approach during this period and fared better. The primary consideration for parliament was not the private interests of the petitioners,

²⁰³ *Cooke Corporation, Trust and Company* 102-104; Cilliers 64-65; *Gower's Principles of Modern Company Law* 5th ed 33-34; Lombard (2002) DJ 236 244.

²⁰⁴ Formoy *The Historical Foundations of Modern Company Law* 52-53; *Cooke Corporation, Trust and Company* 105-106; Cilliers 66; *Gower's Principles of Modern Company Law* 5th ed 34-35.

²⁰⁵ 6 *Geo. 4, c. 91*. This Act bore the long title "An Act to repeal so much of an Act passed in the sixth year of George I as relates to the restraining of several extravagant and unwarrantable practices in the said Act mentioned, and for conferring additional powers upon His Majesty with respect to the granting of charters of incorporation to trading and other companies".

²⁰⁶ As indicated before, members of a corporation were not liable for the corporation's debts in common law. See Formoy *The Historical Foundations of Modern Company Law* 52-55; Cilliers 67-68; *Gower's Principles of Modern Company Law* 5th ed 37; Lombard (2002) DJ 236 250.

²⁰⁷ Formoy *The Historical Foundations of Modern Company Law* 54; Lombard (2002) DJ 236 247. *Cooke Corporation, Trust and Company* 110-111 states that public concern at this stage centred on the creditors of the company and not so much the subscribers, although the idea that shareholders should be able to limit their liability without special application to and sanction from parliament and the crown started taking route. So did the idea that unlimited liability would discourage cautious men from investing in joint stock, specifically having regard to the separation of ownership and control.

²⁰⁸ Formoy *The Historical Foundations of Modern Company Law* 55; Cilliers 68.

²⁰⁹ *Gower's Principles of Modern Company Law* 5th ed 37.

but the effect of the proposed grant to the public at large.²¹⁰ Applications for statutory incorporation were stimulated by the boom in the railway industry and expanded to other public utilities such as canals, waterworks, gasworks and electricity works.²¹¹

Most promoters continued to use the unincorporated company. These companies grew spontaneously as a result of progress of commerce and industry and came to play an important role in England's economy.²¹² According to Talbot "[t]he generalized use of unincorporated forms in the eighteenth and nineteenth century, coupled with the early tendency to merge these forms with unincorporated forms, explains to a significant degree the enduring power of the shareholder primacy model in the United Kingdom today."²¹³

Shareholders in the unincorporated company were in effect partners. Partners are in common law co-owners of the partnership's property, jointly and severally liable for the partnership's debts and *prima facie* have equal claim to the profits and operational control. Unincorporated and incorporated associations were called "companies" and, as the legal norms relating to unincorporated associations began to merge with those of incorporated associations, the legal concepts that distinguish the two forms began to blur together.²¹⁴

The *Trading Companies Act 1834*²¹⁵ was intended to extend the availability of corporate attributes²¹⁶ to those companies who were unable to obtain incorporation by special act. In other

²¹⁰ This is still the case with companies incorporated by statute today, such as universities and utility providers. See *Cooke Corporation, Trust and Company* 118.

²¹¹ *Cooke Corporation, Trust and Company* 118-119; *Gower's Principles of Modern Company Law* 5th ed 37; Harris (2015) *Seattle University Law Review* 537 546-548.

²¹² *Cooke Corporation, Trust and Company* 112-114; *Gower's Principles of Modern Company Law* 5th ed 37-38; Lombard (2002) *DJ* 236 247-248.

²¹³ Talbot "Enumerating old themes? Berle's concept of ownership and the historical development of English company law in context" (2010) *Seattle University Law Review* 1201 1210; Blair (2013) *University of Illinois Law Review* 785 793.

²¹⁴ Talbot (2010) *Seattle University Law Review* 1201 1210; Blair (2013) *University of Illinois Law Review* 785 792.

²¹⁵ *4&5 Will. 4, c. 94*.

²¹⁶ Such as the power to sue or be sued.

words, it empowered the crown to grant corporate attributes to unincorporated associations.²¹⁷ It was ostensibly specifically aimed to obviate the need for such unincorporated associations to apply for special acts enabling them to sue and be sued in the name of their offices. The Act provided that the grant of these privileges were subject to such conditions for the prevention of abuses in management and for the protection of the interests of creditors, as the crown might impose.²¹⁸ It also expressly provided that judgments against the company are enforceable against all members of the corporation and that the liability of past members continued for a period of three years after the termination of their membership.²¹⁹

The modern view of shares as personal property was established since 1836 in *Bligh v Brent*.²²⁰ Prior to this case shares were conceived as an equitable interest in the whole concern, much as one would expect in a partnership agreement. In *Bligh v Brent*, however, the court held that shareholders had no claim on the assets but only on the surplus that those assets produced. The court conceptualised assets and the profits made with assets as two different forms of property, with the company owning the former and the shareholder the latter. A shareholder's interest thus became a tradable bundle of rights which were detached from company assets. A shareholder does not own company assets.²²¹ Talbot states that despite this, English company law still maintains the seemingly paradoxical position that shareholders are the owners of a company.²²²

²¹⁷ Formoy *The Historical Foundations of Modern Company Law* 56-57; Cilliers 69; *Gower's Principles of Modern Company Law* 5th ed 38; Lombard (2002) DJ 236 248.

²¹⁸ Section 2 of the *Trading Companies Act, 1834*.

²¹⁹ Section 3. See also Formoy *The Historical Foundations of Modern Company Law* 55-56; Cilliers 69-71; *Gower's Principles of Modern Company Law* 5th ed 38; Lombard (2002) DJ 236 250-251.

²²⁰ (1837) 2 Y. & C. 268.

²²¹ Formoy *The Historical Foundations of Modern Company Law* 7-8; *Cooke Corporation, Trust and Company* 71-72; Talbot (2010) *Seattle University Law Review* 1201 1216; Talbot *Palgrave Great Debates in Law: Great Debates in Company Law* (2014) ("hereinafter "Talbot *Great Debates in Company Law*") 27-28. The principle that shareholders do not own assets in the company is underpinned by cases on the doctrine of the separate corporate personality of a company. See, for example, *Salomon v Salomon* supra and *Macaura v Northern Assurance Ltd* 1925 AC 619. Note further that section 540(1) of the English *Companies Act 2006* provides that a share in a company is personal property.

²²² Talbot (2010) *Seattle University Law Review* 1201 1216-1217.

On 17th July 1837 the *Chartered Companies Act*²²³ was passed. This Act authorised the crown to incorporate companies by letters patent. The crown was expressly authorised to limit the liability of each member to a fixed maximum for each share.²²⁴ Cilliers states that this Act strictly speaking introduced a form of limited partnership based on the *société en commandite* rather than limited companies.²²⁵ Although the purpose of the Act was to facilitate the granting of charters and letters of patent, the official attitude remained to discourage rather than to encourage such grants.²²⁶ According to Gower some 50 letters of patent companies were incorporated under this Act in the ensuing seventeen years. Most unincorporated associations still preferred to rely on the *de facto* protection from personal liability conferred by the difficulties of suing and levying execution on the members of a fluctuating body.²²⁷

3.4 The period of the Joint Stock Companies Acts from 1844 to 1856

In 1841 a parliamentary committee was appointed to enquire into the state of the law respecting joint stock companies (except banking companies) with a view to the greater security of the public.²²⁸ The committee, under the chairmanship of Gladstone, completed its report in 1844.²²⁹ The importance of the report of the committee is that it resulted in the first general Companies Act

²²³ 7 Will. 4 & 1 Vict. c. 73.

²²⁴ Section 4 of the *Chartered Companies Act 1837*.

²²⁵ Cilliers 80. These companies were constituted by deeds of partnership.

²²⁶ It was considered advisable only in cases of enterprises of a hazardous character (such as mines), where large capital sums were needed (as with railways, canals and docks) and where extended responsibility was desirable (as with insurance companies). See *Cooke Corporation, Trust and Company* 130-131; Cilliers 77.

²²⁷ *Gower's Principles of Modern Company Law* 5th ed 38.

²²⁸ *Cooke Corporation, Trust and Company* 132; Cilliers 89; *Gower's Principles of Modern Company Law* 5th ed 38; Lombard (2002) DJ 236 249.

²²⁹ Report of the Select Committee on Joint Stock Companies (1844). See Formoy *The Historical Foundations of Modern Company Law* 60-63 and Cilliers 88-101 for a comprehensive discussion of this report. *Gower's Principles of Modern Company Law* 5th ed 39 describes the report as an "epoch-making report" and states that this report and the *Joint Stock Companies Act 1844* that followed it were mainly due to the genius and energy of Gladstone. According to Cilliers 91 the committee's "horizon was largely and not unnaturally, over clouded by the misuse that had been made of the joint stock company form."

in England, the *Joint Stock Companies Act 1844*.²³⁰ This Act set up the structure of modern company law.²³¹

Companies were defined as partnerships with capital divided in freely transferable shares or having more than 25 members. Insurance companies were specifically included and banks specifically excluded.²³² It provided for incorporation by mere registration, as opposed to a special act or charter. Registration took place in two stages namely, provisional registration which authorised the company to act for limited preliminary purposes and complete registration on filing of a deed of settlement containing prescribed particulars and other documents.²³³

Mongalo traces the foundations of corporate governance back to the transformation of company law in the nineteenth century and specifically the *Joint Stock Companies Act 1844*. The Act provided the foundation for the manner in which companies are currently governed and regulated. It required the directors to perform certain corporate governance activities such as conducting and managing the affairs of the company, holding of periodical meetings of members, keeping books of account and the production of balance sheets to the members. It also required the company to appoint auditors. The Act laid down the principle that company direction was generally to be effected through two primary bodies namely, the general meeting of members and the board of directors (elected by the members).²³⁴ At that stage there were very few mechanisms to ensure

²³⁰ 7 & 8 Vict. , c. 110. According to Cooke *Corporation, Trust and Company* 135-141 the report led to “the six great statutes concerning companies” which all became law in 1844-45 and that may be regarded as laying the foundations of the modern company system. These statutes are the *Railways Regulation Act 1844* 7 & 8 Vict. c. 85, the *Joint Stock Companies Act 1844*, the *Companies Winding Up Act 1844* 7 & 8 Vict. C 111, the *Act of 1844* 7 & 8 Vict. c.113 (to regulate joint stock banks in England), the *Companies Clauses Act 1845* 8 & 9 Vict. c. 16 and the *Railway Clauses Act 1845* 8 & 9 Vict. c. 20.

²³¹ Cooke *Corporation, Trust and Company* 138; Blair (2013) *University of Illinois Law Review* 785 792-793.

²³² Section 2 of the *Joint Stock Companies Act 1844*. See also Formoy *The Historical Foundations of Modern Company Law* 67-68; Cooke *Corporation, Trust and Company* 137; Cilliers 102; Lombard “n Historiese perspektief op die maatskappy as ondernemingsvorm met besondere verwysing na die posisie van maatskappyskuldeisers en die aanspreeklikheid van direkteure (deel 2)” (2003) DJ 32 32-33; LAWSA vol 4 part 1 9.

²³³ Sections 4 & 7. See also Formoy *The Historical Foundations of Modern Company Law* 61-72; Cooke *Corporation, Trust and Company* 137; Cilliers 102; Gower’s *Principles of Modern Company Law* 5th ed 39; Lombard (2002) DJ 236 249.

²³⁴ Mongalo *Corporate Law and Corporate Governance* 186-187.

good corporate governance and the directors possessed virtually unlimited powers.²³⁵ One such mechanism, the articles of association, played an important role in restricting the powers of directors and dividing powers between the directors and members of the company.²³⁶ The capital maintenance rule was a statutory control mechanism that restricted the powers of directors to manage the company without having regard to the interests of creditors.²³⁷

The general structure introduced by this Act in regard to matters such as directors, meetings of members, the keeping of books of account and the production of a balance sheet has essentially remained to the present day.²³⁸ The Act attached an important role to publicity as the most important safeguard against fraud.²³⁹

Members still remained liable for corporate obligations but their liability ceased three years after they had transferred their shares.²⁴⁰ However creditors had to proceed against the company first.²⁴¹ It is evident that this Act improved the position of creditors, who could now also sue the company directly.²⁴²

²³⁵ Mongalo *Corporate Law and Corporate Governance* 187 refers, as an example, to the case of *Automatic Self-Cleaning Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 35 in which the court held that it was not competent for the majority of the shareholders to alter the mandate originally given to the directors by the articles of association.

²³⁶ Mongalo *Corporate Law and Corporate Governance* 188 with reference to *Re Alma Spinning Company (Bottomley's)* 16 Ch D 681; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA) and *Scott v Scott* [1934] 1 All ER 582 (Ch).

²³⁷ Mongalo *Corporate Law and Corporate Governance* 189 refer to the 1887 case of *Trevor v Whitworth (1887) 12 App Cas 409 (HL)* at 423-424 where the court stated that “[o]ne of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors.”

²³⁸ LAWSA vol 4 part 1 9.

²³⁹ Cilliers 106; *Gower's Principles of Modern Company Law* 5th ed 39; Henning & Wandrag “’n Oorsig van die herkoms van die private maatskappy en die huidige posisie in enkele regstelsels” (1993) DJ 14 16; LAWSA vol 4 part 1 9.

²⁴⁰ Section 25.

²⁴¹ Section 66. See also *Cooke Corporation, Trust and Company* 138; Cilliers 108-114; *Gower's Principles of Modern Company Law* 5th ed 39; LAWSA vol 4 part 1 10. *Cooke Corporation, Trust and Company* 138-139 ascribes the absence of limited liability in the Act to its comparative unimportance in the case of the unincorporated and common law trust form of partnership or company. Cilliers 110-114 disagrees and states that the real reason is that the Act itself is the product of the historical development that preceded it. The history shows that there was a common legislative pattern of imposing regulated liability based on members' shareholding. There was no need for the legislation to say anything about limitation of liability if that was what was desired, as in common law members

Winding-up was dealt with in separate Acts until the promulgation of the *Joint Stock Companies Act 1856*.²⁴³ These Winding-up Acts contained serious deficiencies which the *Joint Stock Companies Act 1856* overcame by altogether removing companies from the bankruptcy jurisdiction and introducing a single system of winding-up under that Act.²⁴⁴

The *Companies Clauses Consolidation Act 1845*²⁴⁵ set out the standard provisions normally included in private statutes of incorporation. After the promulgation of this Act these terms were incorporated by reference, thus materially shortening the process of statutory incorporation.²⁴⁶ After the legislation of 1844 to 1845 there were four types of commercial associations: The first type was private partnerships of not more than 25 persons, as well as quasi-partnerships of unlimited size established before 1844 which had not reformed under the *Joint Stock Companies Act 1844*. These associations were unincorporated and its members' liability was therefore unlimited. The second type was the chartered and statutory companies. These companies were incorporated and its members were normally not liable or their liability was limited to a prescribed sum per share. The third type was companies incorporated under the *Joint Stock Companies Act 1844* with unlimited liability. The last type was the few companies that were granted letters of patent under the *Trading Companies Act 1834* and the *Chartered Companies Act 1837*. These associations were unincorporated (unless they registered under the *Joint Stock Companies Act 1844*) but with most of the advantages of incorporation except limited liability.²⁴⁷

The question of limited liability became the focus of attention in the decade following the *Joint Stock Companies Act 1844*. This was the high tide of *laissez faire* and public opinion began to

of an incorporated company cannot be held liable for corporate debts. The necessity for an express clause only arose if the legislature desired to impose liability.

²⁴² Lombard (2003) DJ 32 34-35.

²⁴³ 19 & 20 Vict. , c. 47. For a discussion of these Winding-up Acts, see Formoy *The Historical Foundations of Modern Company Law* 147-152; Cilliers 115-118; Lombard (2003) DJ 32 35-36.

²⁴⁴ LAWSA vol 4 part 1 10.

²⁴⁵ 8 & 9 Vict. c.16.

²⁴⁶ *Cooke Corporation, Trust and Company* 141; *Gower's Principles of Modern Company Law* 5th ed 40.

²⁴⁷ *Gower's Principles of Modern Company Law* 5th ed 40.

favour the extension of limited liability.²⁴⁸ The question of limited liability was considered by two parliamentary committees and a royal commission. The Select Committee on Investments for the Savings of the Middle and Working Classes of 1850 reported that the social revolution that had taken place in the middle and working classes made it expedient that changes should be made in the law to give them facilities to invest capital.²⁴⁹ The Select Committee on the Law of Partnership of 1851 considered it desirable that the benefit of limited liability should be made freely available in order to stimulate the investment in and growth of useful enterprises.²⁵⁰ The Royal Commission was unable to reach unanimity.²⁵¹

The *Limited Liability Act 1855*²⁵² was passed on the 14th of August 1855.²⁵³ In order to qualify for the privilege of limited liability the company had to meet certain conditions namely, that the shares had to have a nominal value of not less than £10 each; that the promoters had to state on their application for provisional registration that they propose that the company would have limited liability; that the word “limited” would be the last word of the name of the company; that the deed of settlement state that the company was formed with limited liability; and that at least 25 shareholders, holding at least 75 per cent of the nominal capital of which at least 20 per cent is paid up, signed the deed of settlement.²⁵⁴ Existing companies could also obtain limited liability subject to certain conditions.²⁵⁵ This Act clearly weakened the position of creditors.²⁵⁶

²⁴⁸Cilliers 119; *Gower's Principles of Modern Company Law* 5th ed 41. For a comprehensive discussion of the debates and reports on this issue, see Formoy *The Historical Foundations of Modern Company Law* 114-121; Cilliers 119-143; *Gower's Principles of Modern Company Law* 5th ed 42-45; Rajak “Director and officer liability in the zone of insolvency: A comparative analyses” (2008) PELJ 1 4-6.

²⁴⁹ Cilliers 120; *Gower's Principles of Modern Company Law* 5th ed 43.

²⁵⁰ Cilliers 121-122; *Gower's Principles of Modern Company Law* 5th ed 43.

²⁵¹ *Gower's Principles of Modern Company Law* 5th ed 43.

²⁵² *18 & 19 Vict, c. 133*.

²⁵³ See Formoy *The Historical Foundations of Modern Company Law* 114-116; *Cooke Corporation, Trust and Company* 152-156; Cilliers 143-148; *Gower's Principles of Modern Company Law* 5th ed 45; Henning & Wandrag (1993) DJ 14 17; LAWSA vol 4 part 1 10 for further and more comprehensive discussions of this Act.

²⁵⁴ Section 1 of the *Limited Liability Act 1855*. See also *Cooke Corporation, Trust and Company* 153; Cilliers 143-144; Lombard (2003) DJ 32 33-34.

²⁵⁵ Section 2. See also *Cooke Corporation, Trust and Company* 153.

²⁵⁶ Lombard (2003) DJ 32 37.

Limitation of liability was effected by limiting the liability of a shareholder upon execution against him (after execution against the company) to the amount of unpaid shares held by him. The method of limitation was thus substantially the same as that of the *Chartered Companies Act 1837*.²⁵⁷ The Act contained a remarkable provision imposing joint and several liability on directors who declare dividends knowing that the company was insolvent or that such dividends would render the company insolvent.²⁵⁸ The Act further made it obligatory for the company to be wound up in the case where three-quarters of the subscribed capital had been lost or became unavailable for purposes of trade.²⁵⁹

Even after the *Joint Stock Companies Act 1844* had provided for incorporation as a matter of general right, the partnership remained the dominant business form for approximately another 50 years. It was only during the 20th century that the corporate form became commonplace among even small and medium-sized firms.²⁶⁰

3.5 The modern Acts from 1856 to 1973

The *Joint Stock Companies Act 1856*²⁶¹ was the first of the modern Company Acts.²⁶² It repealed the *Joint Stock Companies Act 1844*, the short amending Act of 1847²⁶³ and the *Limited Liability Act 1855*.²⁶⁴ Banks and insurance companies were still excluded.²⁶⁵ This Act was passed in the

²⁵⁷ Section 8. See also Formoy *The Historical Foundations of Modern Company Law* 113; Cooke *Corporation, Trust and Company* 152; Cilliers 144-145; Gower's *Principles of Modern Company Law* 5th ed 45.

²⁵⁸ Section 9. See Cooke *Corporation, Trust and Company* 154; Cilliers 146-147.

²⁵⁹ Section 13. See also Cilliers 148.

²⁶⁰ Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1387; Rajak (2008) *PELJ* 1 3-4.

²⁶¹ 19 & 20 Vict. c. 47.

²⁶² Formoy *The Historical Foundations of Modern Company Law* 123; Cilliers 149; Gower's *Principles of Modern Company Law* 5th ed 45; LAWSA vol 4 part 1 10.

²⁶³ 7 & 8 Vict. , c. 111.

²⁶⁴ Section 107 of the *Joint Stock Companies Act 1856*. See also Formoy *The Historical Foundations of Modern Company Law* 122-123; Cooke *Corporation, Trust and Company* 158.

²⁶⁵ Section 2. See also Cooke *Corporation, Trust and Company* 163; Gower's *Principles of Modern Company Law* 5th ed 45-46.

height of *laissez-faire* and allowed incorporation to be obtained on complying with prescribed formalities and without being subjected to onerous requirements. All that was required was for seven or more persons to sign and register a memorandum of association. The system of provisional and final registration was discarded.²⁶⁶

Partnerships of more than 20 persons were forbidden unless they were constituted as a company under the Act.²⁶⁷ Conversely, if the number of shareholders in a company falls below seven, it becomes a partnership and may not carry on business as a company.²⁶⁸ Talbot states that the development of the company as a distinct business form in England by the end of the nineteenth century necessitated a corresponding delineation from the partnership form. As a result, the privilege of limited liability was specifically denied to general partners. It also explains the reluctance of the judiciary in England to deviate from the attribute of the separate personality of the company and to pierce the corporate veil.²⁶⁹

The deed of settlement (as constitutive document) was replaced by the memorandum and articles of association.²⁷⁰ Signature of the memorandum was to import a covenant by the person signing, and that person's heirs, executors and administrators to conform to all the regulations of such memorandum and articles, subject to the provisions of the Act.²⁷¹

²⁶⁶ Section 3. See also Formoy *The Historical Foundations of Modern Company Law* 123; Cooke *Corporation, Trust and Company* 159; Cilliers 154-158; Gower's *Principles of Modern Company Law* 5th ed 46.

²⁶⁷ Section 4.

²⁶⁸ Section 39. See also Formoy *The Historical Foundations of Modern Company Law* 123 and 125-126; Cooke *Corporation, Trust and Company* 159; Cilliers 169-172.

²⁶⁹ Talbot *Critical Company Law* 12-14. This must be contrasted with the position in the United States which did not make such a sharp delineation. Most states had adopted the limited partnership form from the 1820s onwards. The American judiciary has also been more willing to pierce the corporate veil.

²⁷⁰ Formoy *The Historical Foundations of Modern Company Law* 123-124; Cooke *Corporation, Trust and Company* 159; Cilliers 158-159; Gower's *Principles of Modern Company Law* 5th ed 45.

²⁷¹ Sections 7, 9 and 10. See also Formoy *The Historical Foundations of Modern Company Law* 124. Welling *Corporate Law in Canada The Governing Principles* 3rd ed (2006) (hereinafter "Welling *Corporate Law in Canada*") 66-67 points out that the deed of settlement was, of course, contractually binding as it was under seal. The *Joint Stock Companies Act 1856* specifically provided that the memorandum and articles were contractually binding (sections 7 and 10). The Act did not specifically state that the company was also bound thereto as if it too had signed and sealed it, as these companies were not yet fully appreciated as having legal personality on its own until the decision of *Salomon v Salomon & Co Ltd* supra. Welling *Corporate Law in Canada* 68-80 believes that the courts "have made a complicated mess of the simple notion of the statutory created contract."

Limitation of liability was integrated into the structure of the Act. The Act still retained the unlimited company as the basic form,²⁷² allowing liability to be limited but only requiring the use of the suffix “limited” for this privilege. Virtually all of the safeguards imposed by the *Limited Liability Act 1855* were abolished, which weakened the position of creditors.²⁷³ Gower states that “[t]he mystic word ‘Limited’ was intended to act as a red flag warning the public of the perils which they faced if they had dealings with the dangerous new invention.”²⁷⁴ Limitation of liability was based on freedom of contract and statutory notice.²⁷⁵ Directors were still liable if they paid dividends knowing the company to be insolvent.²⁷⁶ According to Gower the battle for incorporation with limited liability by simple registration was won by this Act and the issue has never been seriously re-opened although the victory has at times been unpopular.²⁷⁷

The Act removed companies from the bankruptcy jurisdiction and established its own machinery for the winding-up of companies.²⁷⁸ The Act for the first time gave creditors the right to institute proceedings for the winding-up of companies although they could no longer sue individual members.²⁷⁹

²⁷² Cilliers 151-153 mentions several historical reasons for this. This includes the important part that the law of partnership played in the development of company law; that the practice of imposing a certain degree of liability for corporate debts on members was well established; that the concept of limitation of liability had been in existence since the 16th century; and the critical attitude that prevailed as a result of the bursting of the South Sea Bubble and *Bubble Act* with the result that full incorporation was considered unsuitable.

²⁷³ Cilliers 160-168; *Gower's Principles of Modern Company Law* 5th ed 45-47; Henning & Wandrag (1993) DJ 14 17; LAWSA vol 4 part 1 10; Lombard (2003) DJ 32 38-39.

²⁷⁴ *Gower's Principles of Modern Company Law* 5th ed 46.

²⁷⁵ Cilliers 160-163 and 167.

²⁷⁶ Section 14. See also Cilliers 166; *Gower's Principles of Modern Company Law* 5th ed 46.

²⁷⁷ *Gower's Principles of Modern Company Law* 5th ed 46.

²⁷⁸ Formoy *The Historical Foundations of Modern Company Law* 126; *Cooke Corporation, Trust and Company* 161; LAWSA vol 4 part 1 10.

²⁷⁹ Sections 59-105. See also Formoy *The Historical Foundations of Modern Company Law* 127; Cilliers 168-169.

Shares were specified to be personal estate and not in the nature of real estate.²⁸⁰ The importance of publicity was maintained.²⁸¹ According to Cilliers publicity was regarded as an essential prerequisite to the grant of limited liability.²⁸² As it is the rights of creditors that are in issue insofar as limited liability is concerned, the concept of publicity may be confined to such publicity that is of importance to creditors in safeguarding their rights in dealing with the company.²⁸³ The Act strengthened the requirements regarding publicity in two important respects. First, the new provisions applied to all companies. Secondly, it required companies to keep their own register of members, which was to be accessible to the public.²⁸⁴

The subsequent pattern of company legislation was a stream of amending Acts followed by consolidating Acts at various intervals and can be sketched more briefly. It evidences a movement away from the almost complete freedom of the 1856 Act towards progressively stricter controls and increased provisions for publicity.²⁸⁵

The first consolidating Act in this period was the *Companies Act 1862*.²⁸⁶ It made little new law. The major changes were that it introduced a company limited by guarantee,²⁸⁷ simplified and rationalised the rules relating to winding-up and included insurance and banking companies.²⁸⁸ The Act applied to all companies already registered under the previous *Joint Stock Companies Acts*. It did not apply to chartered companies or companies created by statute unless they opted to register. It also did not preclude the formation of companies by charter, act of parliament or

²⁸⁰ Section 15. See also Cooke *Corporation, Trust and Company* 160.

²⁸¹ LAWSA vol 4 part 1 10.

²⁸² Cilliers 178.

²⁸³ Cilliers 174.

²⁸⁴ Sections 16, 19 and 20. See also Cilliers 178.

²⁸⁵ LAWSA vol 4 part 1 10.

²⁸⁶ *25 & 26 Vict. , c. 89*.

²⁸⁷ Section 1. See Cilliers 184-192 for a general discussion of these companies.

²⁸⁸ Formoy *The Historical Foundations of Modern Company Law* 130-134; Cooke *Corporation, Trust and Company* 173; Gower's *Principles of Modern Company Law* 5th ed 47-48; LAWSA vol 4 part 1 10.

letters of patent, although the ease of registration under the Act made these other modes of incorporation obsolete.²⁸⁹ Section 11 provided that the memorandum shall, when registered, bind the company and the members to the same extent as if each member had subscribed his name and affixed his seal thereto. The Act was the first to make provision for security for costs in actions by companies.²⁹⁰ There was an interesting attempt in 1867 to make provision for a company having directors with unlimited liability, while retaining limited liability for its shareholders.²⁹¹ It appears that no such company was ever registered.²⁹²

Blackburn points out that, especially during the nineteenth century, the English courts “borrowing from the law of partnership, trust, agency and corporations, and forging the policies underlying the provisions of the companies’ acts into legal principles, developed an extensive common law of companies”.²⁹³ One of the seminal cases during this period was *Salomon v Salomon & Co*²⁹⁴ that came before the House of Lords in 1897. The importance of this case is that the House of Lords held that a joint stock company registered under the *Joint Stock Companies Act 1862* is a juristic person separate from its shareholders and that the members were not liable for the company’s debts.²⁹⁵ With this decision, states Cooke, the older theory of corporations was applied to the joint

²⁸⁹ Formoy *The Historical Foundations of Modern Company Law* 133-134; Cooke *Corporation, Trust and Company* 174-175.

²⁹⁰ Section 69. Cilliers 210 states that this provision fits logically into a system of limitation of liability theoretically based on agreement with statutory notice. A person being sued has no choice and cannot refuse to be sued by a limited company with inadequate means.

²⁹¹ *Companies Act 1867 (30 & 31 Vict., c. 131)* section 4.

²⁹² Formoy *The Historical Foundations of Modern Company Law* 135-136; Cooke *Corporation, Trust and Company* 175-176; Cilliers 194-195. These companies can be compared to a personal liability companies in our Companies Act 71 of 2008.

²⁹³ LAWSA vol 4 part 1 11. The author specifically mentions the rule of *Foss v Harbottle* ((1843) 2 Hare 461; 67 ER 189), the doctrine of *ultra vires* (*Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653), the fiduciary duty of promoters (*Elangier v New Sombrero Phosphate Co* (1873) 3 AC 1218; *Gluckstein v Barnes* 1900 AC 240 (HL)) and directors (*Aberdeen Railway Co v Blaikie Bros* (854) 1 Macq 416; 2 Eq Rep 1281; 1843-1860 All ER 249 (HL)), the concept of fraud on the minority (*Menier v Hooper’s Telegraph Works* (1874) LR 9 CA 350), the *Turquand* rule (*Royal British Tank v Turquand* (1856) 6 E & B 327; 119 ER 886), the maintenance of share capital rule (*Trevor v Whitworth* (1887) 12 AC 409 (HL); *Ooregum Gold Mining Co of India v Roper* 1892 AC 125 (HL)) and liability for misleading statements in prospectuses (*Derry v Peek* (1889) 14 AC 337; 1886-90 All ER 1 (HL)).

²⁹⁴ 1897 AC 22 (HL); 1895-99 All ER Rep 33 (HL).

²⁹⁵ For a general discussion of this case, see Welling *Corporate Law in Canada* 96-97; Rajak (2008) PER 1 6-10; Talbot *Critical Company Law* 24-29; Abbey *An Insightful Study of the Oppression Remedy under South African and Canadian Corporate Law* Master of Laws Thesis (2012) University of Western Ontario, Canada 62-66. Welling

stock fund.²⁹⁶ This decision greatly strengthened the position of directors and shareholders at the expense of creditors. Much of the history of company law after the *Salomon* case has been the digesting of the dispensation which was created by this decision and seeking to restore, or at least maintain, the balance between these competing interests.²⁹⁷

The second consolidating Act in this period was the *Companies (Consolidation) Act 1908*.²⁹⁸ It introduced provisions relating to the issuing of prospectuses and established the private company.²⁹⁹ This was followed by the *Companies Act 1929*.³⁰⁰ This Act was notable for the introduction of the holding-subsidary relationship and redeemable preference shares.³⁰¹ The fourth consolidating Act in this period was the *Companies Act 1948*.³⁰² This Act contributed to minority protection, extending the powers of investigation of the company's affairs and the duty of disclosure, introduced the statutory right of the members to remove directors by ordinary resolution and granted statutory force to the generally recognised principles of accountancy.³⁰³

makes the interesting point that the House of Lords came to the conclusion that a joint stock company was a person separate from its shareholders and that the shareholders were not liable for the company's debts because that is what the *Companies Act 1862* provided. However, the Act did not state this particularly clearly. Section 7 provided that the liability of members "may" be limited to the amount of unpaid shares held by the shareholders. Section 18 provided that upon registration of the memorandum of incorporation "the Subscribers" shall be a body corporate capable of exercising all the functions of an incorporated company, but with such liability on the member as provided for in the Act. The common law view is that the corporation itself (not its members) is a body corporate. Section 38 further provided that, in the event of the liquidation of the company, the members shall be liable to contribute an amount sufficient for payment of the debts and liabilities of the company with the qualification that the contribution shall not exceed the amount of the members' unpaid shares.

²⁹⁶ *Cooke Corporation, Trust and Company* 176. As indicated before a corporation is in common law an entity separate from its members.

²⁹⁷ *Cooke Corporation, Trust and Company* 177-180; Lombard (2003) DJ 32 40; *Rajak* (2008) PER 1 3 and 8-9.

²⁹⁸ 8 *Edw. 7 c. 69*. The Act implemented the report of the Loreburn Committee (1906 Cmnd. 3052).

²⁹⁹ Formoy *The Historical Foundations of Modern Company Law* 145-146; *Cooke Corporation, Trust and Company* 181; *Gower's Principles of Modern Company Law* 5th ed 49; LAWSA vol 4 part 1 11.

³⁰⁰ 19 & 20 *Geo. 5 c. 23*. The Act implemented the reports of the Wrenbury Committee (1918 Cd. 9138) and the Greene Committee (1926 Cmd. 2657).

³⁰¹ *Gower's Principles of Modern Company Law* 5th ed 49; LAWSA vol 4 part 1 11.

³⁰² 11 & 12 *Geo. 6 c. 38*. The Act implemented the report of the Cohen Committee (1945 Cmd. 6659).

³⁰³ LAWSA vol 4 part 1 11.

3.6 The period from 1973

The United Kingdom became a member state of the European Communities (which later became the European Union) in 1973. The European Union has an ambitious programme for harmonising the company laws of member states and issues directives concerning this from time to time. The legislative development in the United Kingdom since 1973 was dominated by the need to comply with these directives.³⁰⁴

It must be borne in mind that although the final result in the law of both the United Kingdom and the continental systems of corporation law is that a shareholder is only liable for the debts of the company or corporation to the extent of the amount unpaid on his shares, this liability is based on widely divergent theories. The basic company form in the United Kingdom is the unlimited company which, according to Cilliers, cannot be regarded as a true corporation. The position in the continental system, based on the *Code de Commerce*, is that the absence of liability of a shareholder for corporate debts is considered to be an inalienable corporate attribute.³⁰⁵

Section 9 of the *European Communities Act 1972*³⁰⁶ implemented the First European Community Council Directive of Company Law (EC Council Directive) relating to publicity, pre-incorporation contracts, the *ultra virus* doctrine and the authority of directors.³⁰⁷ The *Companies Act 1980*³⁰⁸ implemented the Second EC Council Directive which, amongst others, introduced a new classification of companies, making the private company the residual form of company, abolished the limitation of a maximum membership in private companies, reduced the minimum members of a public company from seven to two, introduced minimum capital requirements for the public limited company, restricted dealings between directors and their companies and strengthened the provisions relating to the protection of minority shareholders. More importantly, the Act obliged directors to take the interests of employees into account in the performance of

³⁰⁴ *Gower's Principles of Modern Company Law* 5th ed 50-51; LAWSA vol 4 part 1 11; Esser 46-47.

³⁰⁵ Cilliers 219-226.

³⁰⁶ C 68.

³⁰⁷ *Gower's Principles of Modern Company Law* 5th ed 51; Esser 46-47; Hannigan *Companies* par 13; LAWSA vol 4 part 1 11.

³⁰⁸ C 22.

their duties.³⁰⁹ The *Companies Act 1981*³¹⁰ gave effect to the Fourth EC Council Directive on financial statements and disclosure.³¹¹

The *Companies Act 1985*³¹² was the first consolidating Act after 1973. The obligation on directors to take the interests of employees into account was retained and became section 309(1) of the consolidated Act which provided as follows:-

“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 members.”

Section 309(2) provided that the duty imposed in section 309 by the directors “is owed to them by the company (and the company alone) and is enforceable in the same way as any other duty owed to a company by its directors.”³¹³ Section 719 of the Act further gave the company specific authority to make payments to employees on the cessation or transfer of the business of the company or part thereof notwithstanding that it is not in the best interests of the company.³¹⁴ Wedderburn points out that this development was partly in consequence of *Parke v Daily News*³¹⁵ which held that *ex gratia* payments of corporate funds by sympathetic directors to redundant employees, without taking account the interest of shareholders, was *ultra virus* and a breach of the directors’ fiduciary duties.³¹⁶

³⁰⁹ *Gower’s Principles of Modern Company Law* 5th ed 51; Esser 47-48; Hannigan *Companies* par 13; LAWSA vol 4 part 1 11. For a discussion of the debates and bills leading to the provision that directors are obliged to take the interests of employees into account, see Wedderburn (2002) *Industrial Law Journal* 99 99-106.

³¹⁰ C 62.

³¹¹ *Gower’s Principles of Modern Company Law* 5th ed 51; Esser 48; Hannigan *Companies* par 13; LAWSA vol 4 part 1 11.

³¹² C 6.

³¹³ See also Delpont (1995) DJ 409 414; Villiers “Section 309 of the Companies Act 1985: Is it time for a reappraisal?” in Collins, Davies & Rideout *Legal Regulation of the Employment Relation* (2000). Section 309 has been described as toothless. See Talbot *Critical Corporate Law* 124.

³¹⁴ In other words, severance pay.

³¹⁵ *Parke v Daily News* [1962] Ch 927.

³¹⁶ Wedderburn (2002) *Industrial Law Journal* 99 105-106.

In the same year the *Companies Securities (Insider Dealing) Act*³¹⁷ and the *Insolvency Act 1985*³¹⁸ was passed. The *Insolvency Act 1986*³¹⁹ consolidated the legislation on insolvency and removed all provisions relating to the winding-up of companies from the *Companies Act 1985*. This was followed by the *Company Directors Disqualification Act 1986*³²⁰ which consolidated all the existing provisions empowering courts to disqualify miscreants from acting as directors or participating in the management of companies. The *Financial Services Act 1986*³²¹ repealed the *Prevention of Fraud (Investments) Act 1958*³²² and replaced it with a detailed system of regulation of those professionally engaged in the investment business. These developments led to a major, and desirable, reclassification of a subject matter in the United Kingdom, distinguishing company law from insolvency law and from securities regulation.³²³

A number of corporate failures and scandals in the United Kingdom led to the establishment of the Cadbury Committee in 1991. The Committee released its recommendations named the *Report of the Committee on the Financial Aspects of Corporate Governance* (the *Cadbury Report*) in 1992.³²⁴ According to Diamond and Price this report is regarded as the historical point at which the concept of corporate governance began to get a life of its own.³²⁵ The report of a study group chaired by Sir Richard Greenbury (the Greenbury Committee) entitled *Directors' Remuneration* (the Greenbury Report) followed in 1995.³²⁶ The Hampel Committee, chaired by Sir Ronald

³¹⁷ C 8.

³¹⁸ C 62. This Act implemented part of the Report of the Cork Committee (Cmnd 8558 of 1982).

³¹⁹ C 45.

³²⁰ C 46.

³²¹ C 60.

³²² C 45.

³²³ *Gower's Principles of Modern Company Law* 5th ed 51-52; LAWSA vol 4 part 1 12.

³²⁴ Mongalo *Corporate Law and Corporate Governance* 195. The Cadbury Report emphasised the importance of independent non-executive directors on the board, the implementation of board committees and the need to separate the role of the chairman and the chief executive officer.

³²⁵ Diamond & Price "The political economy of corporate governance reform in South Africa" (2012) *South African Journal of Business Management* 57 64.

³²⁶ The Greenbury Report made recommendations on directors' remuneration and emphasised the need for strong and independent remuneration committees.

Hampel was set up to review the recommendations of the Cadbury and Greenbury Reports. Its report, *Committee on Corporate Governance: Final Report* (the Hampel Report), was published in 1998.³²⁷ The London Stock Exchange implemented many of the recommendations made by these committees in its listing rules.³²⁸

In 1998 an independent body, the Steering Group, was set up to manage a comprehensive company law review process. The Steering Group published a number of consultation documents between 1999 and 2001, and published a Final Report in 1999.³²⁹ This eventually led to the promulgation of the present *Companies Act 2006*.³³⁰

On the 23rd of June 2016 a referendum was held in which the British citizens voted to leave the European Union (“Brexit”³³¹). It will therefore no longer be necessary for Great Britain to comply with the directives of the European Union. However the effect of Brexit on the company law of the United Kingdom, if any, remains to be seen.

4. THE HISTORY OF CANADIAN COMPANY LAW

4.1 The period until 1800

John Cabot landed in the northern Newfoundland in 1497, claiming the territory for Britain. He was followed by the Portuguese and Spanish. They were soon outnumbered by large French fleets who formed unincorporated associations which were primarily engaged in fishing ventures. Jacques Cartier of France first started exploring the mainland of Canada in 1534 and claimed it for France.³³²

³²⁷ Par 1.3 of the Hampel Report emphasised that good corporate governance ensures that the interests of all relevant stakeholders are taken into account.

³²⁸ Mongalo *Corporate Law and Corporate Governance* 195.

³²⁹ *Modern Company Law for a Competitive Economy: Final Report Volume 1 and 2* URN 01/942 and URN 01/943 released in July 2001 (hereinafter “the Final Report”). For a discussion of the review process, see Esser 82-111 and Hannigan *Companies* par 16.

³³⁰ *C 46*.

³³¹ Brexit is an abbreviation for “British exit”.

Both the British and the French colonized areas of Canada. The French Kings granted trade monopolies under royal charter to French entrepreneurs from the turn of the seventeenth century, who contributed resources and personnel in the form of both fur traders and colonists. The right to incorporate was jealously guarded by the French Kings and charters were granted only to those who performed public functions in addition to their commercial exploits. This prevented the development of any coherent system of private corporate law in the French territories and is the reason why the corporate law in Canada developed from English and American law.³³³

Even English and American corporate activity in Canada was negligible until the second half of the eighteenth century. The monopoly of the Hudson's Bay Company, one of the early English chartered joint stock companies which was incorporated in 1670, covered nearly 40 per cent of the current land mass of Canada.³³⁴ This company is still trading today and is, according to Micklethwait & Wooldridge, the oldest surviving multinational company.³³⁵ It was the explicit policy of England to exploit Canada as a source of raw materials and to prevent competition with England-based enterprises. As a result of this and the questionable status of corporations after the *Bubble Act* there was little Canadian corporate activity during this period.³³⁶

4.2 The period from 1800 to 1970

The nineteenth century saw legislative activity in Canada to incorporate corporations for commercial purposes. The first Act incorporating a Canadian business corporation was passed in 1801.³³⁷ During this period incorporation was effected by statute of the British parliament, the colonial legislatures or under general statutes to facilitate incorporation in certain industries.³³⁸

³³² Welling *Corporate Law in Canada* 47-48.

³³³ Welling *Corporate Law in Canada* 47-48.

³³⁴ Welling *Corporate Law in Canada* 48-49.

³³⁵ Micklethwait & Wooldridge *The Company* 17. The head office of the Hudson's Bay Company is presently located in Toronto and it operates a number of retailers.

³³⁶ Welling *Corporate Law in Canada* 49.

³³⁷ *41 Geo III c 10 (Lower Canada 1801)*. See also Welling *Corporate Law in Canada* 50.

³³⁸ Welling *Corporate Law in Canada* 51.

General incorporation acts had spread through the United States since 1811. Incorporation in the United States was, in contrast to the position in the United Kingdom, fairly easy. Incorporation was obtained by filing a charter with a public official. These charters were, within legislative limits, prepared to the promoters' own specifications. Canada followed this model instead of the complex procedures under the United Kingdom's *Joint Stock Companies Act 1844*. One reason for this is that there were less companies in Canada and that they were not viewed with the same amount of suspicion as in the United Kingdom. Another reason is that the American influence on the Canadian economy was growing rapidly. Canada's first general Act of incorporation was promulgated in 1850.³³⁹ It covered any kind of manufacturing, ship building, mining, mechanical or chemical business.³⁴⁰

The *United Provinces Statute 1864*³⁴¹ followed. This Act was the precursor to the letter of patents form of incorporation that was to dominate Canadian corporate law for more than 100 years. According to Welling, this return to a much less flexible form of incorporation that had prevailed in the seventeenth century is perhaps due to the fact that the Canadian economy at that stage was primarily developmental. The maintaining of closer governmental control is thus understandable. The real mystery is why incorporation by letters of patent did not begin to disappear from Canadian statutes until the 1970s.³⁴²

4.3 The period after 1970

Canada is a federal state. The Canadian federal government as well as the provinces have the power to incorporate. In the late 1960s and early 1970s the federal government and a number of provinces established task forces to examine the law relating to corporations.³⁴³ This led to the most important and widespread reform of Canadian corporate history.³⁴⁴

³³⁹ *13 & 14 Vict c 28 (Can 1850)*.

³⁴⁰ Welling *Corporate Law in Canada* 51-52.

³⁴¹ *27 & 28 Vict c 23 (Can 1864)*.

³⁴² Welling *Corporate Law in Canada* 52-53.

³⁴³ *Interim Report of the Select Committee on Company Law* (1967) (hereinafter "*the Lawrence Report*") for Ontario; Dickerson, Howard, Getz & Bertrand *Proposals for a New Business Corporations Act for Canada* (1971) (hereinafter "*the Dickerson Report*") for the federal government; Sheppard & Smith *Departmental Study Report of the Department of the Attorney General of British Columbia* (1971) for British Columbia; Bird *Report on Company Law*

Ontario, Canada's industrial and commercial heartland, was the first province to completely reform its corporate law by discarding the outmoded letters of patent model and adopting an American model statute with some innovative statutory remedies on the 1st of January 1970.³⁴⁵

This was followed by the federal *Canada Business Corporations Act*³⁴⁶ in 1975. The *Dickerson Report* that preceded this Act recommended the creation of a statutory framework within which promoters could develop corporate constitutions suited to their needs, but which superimposed statutory protections for minority shareholders and creditors.³⁴⁷ The *Canada Business Corporations Act* invokes a statutory division of powers among the participants (the directors, officers, shareholders and to a limited extent creditors) in the internal affairs of a corporation. Persons attaining the status of director, officer, shareholder or creditor are assigned statutory powers and obligations. Directors have an original statutory power to manage the corporation.³⁴⁸ The corporate constitution is not a contract between participating individuals.³⁴⁹

The division of powers model was adopted by Manitoba in 1976,³⁵⁰ by Saskatchewan in 1978,³⁵¹ Alberta³⁵² and New Brunswick in 1981,³⁵³ and by Yukon³⁵⁴ and Newfoundland in 1986.³⁵⁵

(1974) for New Brunswick; Beaudry, Crosbie & Horner *Proposals for a New Business Corporations Law for Saskatchewan* (1975) for Saskatchewan; Institute of Law Research and Reform *Proposals for a New Business Corporations Law for Alberta* (1980) for Alberta. See also Cheffins "The oppression remedy for corporate law: The Canadian experience" (1988) *Journal of International Law* 305 306.

³⁴⁴ Welling *Corporate Law in Canada* 55; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 280-281.

³⁴⁵ *Business Corporations Act 1970 Ont. Rev. Stat. ch. 53*. See also Iacobucci "The Business Corporations Act, 1970: Creation and financing of a corporation" (1971) *The University of Toronto Law Journal* 416 416; Welling *Corporate Law in Canada* 55.

³⁴⁶ *SC 197475 c 33*.

³⁴⁷ *Dickerson Report* vol 1 par 8 quoting from Ballentine *Ballentine on Corporations* (1946). See also Welling *Corporate Law in Canada* 56; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

³⁴⁸ Compare section 66 of the *Companies Act 71 of 2008*.

³⁴⁹ Welling *Corporate Law in Canada* 59-64; Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2010) (hereinafter "Welling et al *Canadian Corporate Law*") 116-118; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 281.

³⁵⁰ *Corporations Act SM 1976 c 40*.

³⁵¹ *Business Corporations Act RSS 1978 c B10*.

³⁵² *Business Corporations Act SA 1981 c B15*.

Quebec partially enacted the division of powers model.³⁵⁶ British Columbia enacted a statute that incorporates most of the remedies contained in the *Canada Business Corporations Act*, but retained the contractarian approach.³⁵⁷ It is therefore a hybrid model. Nova Scotia retained the English model registration statute but enacted statutory remedies modelled on the *Canada Business Corporations Act*.³⁵⁸ Prince Edward Island retained a letters of patent statute.³⁵⁹

5. THE HISTORY OF INDIAN COMPANY LAW

5.1 The period until the emergence of the British Empire in 1600

India has a long tradition of trade and business activities. Along with the family-run businesses and sole proprietorships ancient India had several different forms of business organisations.³⁶⁰ It appears that partnerships were formed for the purpose of engaging in longer distance travel and trade over sea and land.³⁶¹ Other forms that were used to engage in business activity were the *gana* and *samga* (which appear to refer to political and religious entities), the *puga* and *vrata* (entities with members that often had economic motivations, but were also residents of an entire town or village devoted to a profession), the *nigama* and *sreni* (economic organisations of

³⁵³ *Business Corporations Act SNB 1981 c B9.1*.

³⁵⁴ *Business Corporations Act RSY 1986 c B15*.

³⁵⁵ *Corporations Act SN 1986 c 12*.

³⁵⁶ *Companies Act RSQ 1977 c C-38*. It is a letters of patent statute but incorporation after 1979 takes place under a partially division of powers statute.

³⁵⁷ *Business Corporations Act SBC 2002 c 57*. Section 19(3) of this Act provides that the company and its shareholders are bound to the company's articles to the same extent that it had been signed and sealed by the company and by each shareholder.

³⁵⁸ *Companies Act RSNS 1989 c 81*.

³⁵⁹ *Companies Act RSPEI 1989 c C-14*. See also generally Welling *Corporate Law in Canada* 56-57.

³⁶⁰ Khanna "The economic history of the corporate form in India" (2005) (available at http://www.law.yale.edu/documents/pdf/cbl/Khanna_Ancient_India_informal.pdf (accessed 2014-04-02)) (hereinafter "Kanna 'The economic history of the corporate form in ancient India'") 6; Pacala (2011) *Journal of Electric & Electronic Engineering* 77-79.

³⁶¹ Khanna "The economic history of the corporate form in ancient India" 77 79.

merchants, crafts people, artisans and perhaps even para-military entities) and the *pani* (a group of merchants travelling in a caravan to trade their wares).³⁶²

The most important of these organisations was the *sreni* that was being used in India from at least 800 BC until the Islamic invasions around 1000 AD.³⁶³ The *sreni* was a legal entity composed of a collection of people who voluntarily engaged in a similar trade but who did not necessarily belong to the same caste. It shares some similarities with the guilds of medieval Europe. However, the *sreni* was more complex than the guilds and had quite detailed rules of internal organization.³⁶⁴

Noticeably the *sreni* was a separate legal entity with the ability to hold property separately from its owners, to contract and to sue or be sued in its own name.³⁶⁵ The first component of the basic internal structure of the *sreni* was the general assembly of its members. Some *sreni* could have over 1000 members. The second component was its management structure that consisted of two sets of key players namely, the headman of the *sreni* and the executive officers (*karya chintakah*). The *sreni* thus possessed a centralised management structure where the headman and executive officers had considerable power, but were elected by and subject to removal by the general assembly.³⁶⁶ The *sreni* had fairly detailed rules of governance (*srini dharma*) which share similarities with modern corporate governance.³⁶⁷

³⁶² Khanna “The economic history of the corporate form in ancient India” 6-7; Pacala (2011) Journal of Electric & Electronic Engineering 77 79.

³⁶³ Khanna “The economic history of the corporate form in ancient India” 1; Pacala (2011) Journal of Electric & Electronic Engineering 77 79.

³⁶⁴ Khanna “The economic history of the corporate form in ancient India” 8; Pacala (2011) Journal of Electric & Electronic Engineering 77 79.

³⁶⁵ Khanna “The economic history of the corporate form in ancient India” 9; Pacala (2011) Journal of Electric & Electronic Engineering 77 79.

³⁶⁶ Khanna “The economic history of the corporate form in ancient India” 10 -11; Pacala (2011) Journal of Electric & Electronic Engineering 77 79.

³⁶⁷ Khanna “The economic history of the corporate form in ancient India” 12; Pacala (2011) Journal of Electric & Electronic Engineering 77 80.

It appears that the formation of a *sreni* was a fairly straightforward exercise. The members needed to establish a *sreni* with some basic elements of its structure, where after it had to be approved by the monarch. Some sources suggest that the *sreni* needed to register with the state.³⁶⁸

In ancient India the caste system was important. Yet the *sreni* permitted people from different castes to enter and practice the same profession. It also permitted people to leave the *sreni* but they could not make outgoing calls on assets or liabilities of the *sreni*.³⁶⁹

The development of the *sreni* displays remarkable similarities with the modern corporate form.³⁷⁰ Khanna examined the economic history and development of the corporate form in ancient India and came to the conclusion that the *sreni* flourished when the demand for such a corporate form increased, induced by an increase in trade and technological developments, and when conditions allowed the supply and the development of this corporate form. Furthermore the number, size and complexity of the *sreni* increased when there was a growth in trade. It grew fastest where there was a moderate level of centralised state and considerable deference to the *sreni* in managing its internal affairs. He found significant similarities between the *sreni* and the modern Anglo-American corporation.³⁷¹

5.2 The period of the British Empire from 1600 to 1947

The emergence of the British Empire in India is unique in that it was established by a single chartered company. “The Governor and Company of Merchants of London trading into the East Indies” (EIC or also known as the East India Company) was granted a charter giving it a monopoly for fifteen years to trade to the “East Indies” by Queen Elizabeth on the 31st of December 1600.³⁷² At that stage India was not a single country, but rather a collection of states.

³⁶⁸ Khanna “The economic history of the corporate form in ancient India” 14.

³⁶⁹ Khanna “The economic history of the corporate form in ancient India” 16; Pacala (2011) Journal of Electric & Electronic Engineering 77 80.

³⁷⁰ Khanna “The economic history of the corporate form in ancient India” 1; Pacala (2011) Journal of Electric & Electronic Engineering 77 80.

³⁷¹ Khanna “The economic history of the corporate form in ancient India” 51-55.

The greater part of northern and central India was ruled by the Muslim Mughals, descendants of the last Mongol Empire.³⁷³

At first the EIC did not challenge the authority of the Mughals, who granted the EIC (and other European companies) trade monopolies in return for a share in their profits or favourable loans.³⁷⁴ The trading voyages of the EIC proved remarkably profitable and it started offering joint stock from 1613.³⁷⁵

The EIC adopted a two-tier governing structure. The General Court consisted of all its shareholders with voting rights. The day-to-day management of the company was entrusted to a Court of Directors consisting of a governor and 24 directors.³⁷⁶ According to Harris the structure of the EIC provided a solution to the agency problem. It allowed outside passive investors with inferior access to information to monitor the insiders. Team production was not a major issue at the early stages of the EIC (although due to the sheer size of the EIC later on it undoubtedly became a further problem). Creditors were almost absent. Employees did not have much bargaining power and the EIC's Asian constituencies were not taken into account. The Court of Directors essentially had to mediate between the outside passive investors and the inside producing team.³⁷⁷

The powers of the EIC was gradually expanded in subsequent charters and the company evolved from a trading concern to a form of government.³⁷⁸ The company had administrative, legislative and judicial powers. The EIC maintained a huge private army that enabled it to enforce its

³⁷² Micklethwait & Wooldridge *The Company* 21-22; Jain *Outlines of Indian Legal and Constitutional History 7th ed* (2014) (hereinafter "Jain *Outlines of Indian Legal and Constitutional History*") 7; Blair (2013) *University of Illinois Law Review* 785 791; Harris (2015) *Seattle University Law Review* 537 541-542.

³⁷³ Terreblanche *Western Empires* 245.

³⁷⁴ Terreblanche *Western Empires* 246.

³⁷⁵ Micklethwait & Wooldridge *The Company* 23.

³⁷⁶ Micklethwait & Wooldridge *The Company* 23-24; Jain *Outlines of Indian Legal and Constitutional History* 8; Harris (2015) *Seattle University Law Review* 537 542.

³⁷⁷ Harris (2015) *Seattle University Law Review* 537 543.

³⁷⁸ Micklethwait & Wooldridge *The Company* 27; Jain *Outlines of Indian Legal and Constitutional History* 9-10.

monopoly against both local and rival European companies and further allowed Britain to be the dominant power broker in the East for almost 200 years. The company virtually became an empire within the British Empire. In 1757 the EIC's private army defeated the Mughal forces in the Battle of Plassey, where after the company took over the rights to administer and collect taxes from the Mughals³⁷⁹

In the nineteenth century the British government gradually started bringing the EIC under tighter control. In 1813 the EIC's monopoly on trade with India was removed. In 1858, a year after the Indian Mutiny (for which the EIC received the blame), the British government took over all administrative duties in India. The EIC's private army (which at that stage had grown to 350 000 men of whom nearly 90 per cent were Indian mercenary soldiers) passed to the British government and its navy was disbanded. The EIC's charter expired on 1 June 1874.³⁸⁰ In 1858 the British parliament transformed India into a crown colony.³⁸¹ India eventually gained independence and became a constitutional state on the 15th of August 1947.³⁸²

It is not surprising that it was the British who pioneered company legislation in India. As was the case in England, companies were initially established by charter or special act of parliament. The first Companies Act in India was the *Joint Stock Companies Act 1850*, which was based on the English *Joint Stock Companies Act 1844*. This Act recognized companies as distinct legal entities. The concept of limited liability was introduced in the *Joint Stock Companies Act 1857*, which was based on the English *Joint Stock Companies Act 1856*. This was followed by the *Joint Stock Companies Act 1866*, which was based on the English *Joint Stock Companies Act 1862*, and the *Joint Stock Companies Act 1882*.³⁸³

³⁷⁹ Micklethwait & Wooldridge *The Company* 27; Terreblanche *Western Empires* 247-250.

³⁸⁰ Micklethwait & Wooldridge *The Company* 27-28; Terreblanche *Western Empires* 249-250, 327-328.

³⁸¹ Terreblanche *Western Empires* 330-331.

³⁸² It was divided into two nations namely, India and Pakistan. The Indian Constitution specifically declares that it is a socialist state and that India will be organised as a social welfare state (a state which renders social services to the people and promotes their general welfare). See Jain *Outlines of Indian Legal and Constitutional History* 681 & 686-688.

³⁸³ Sharma *Company Law* (2010) 3; Kapoor & Dhamija *Taxmann's Company Law* 17th ed (2014) (hereinafter "Kapoor & Dhamija *Taxmann's Company Law*") 1.

The *Indian Companies Act 1913* was passed with the object of consolidating and amending the law pertaining to trading companies and other associations in what was then known as British India on the pattern of the English *Companies (Consolidation) Act 1908*. The adoption of the English company laws also resulted in the courts in India generally following the decisions of the English courts. The *Indian Companies Act 1913* was amended on several occasions, but remained in force for nearly 50 years.³⁸⁴

5.3 The period after independence in 1947

Following the recommendations of the Company Law Committee in 1952 (the Bhabha Committee) the *Companies Act 1956*³⁸⁵ came into force on 1 April 1956. The Act largely followed the English *Companies Act 1948*. The Act provided for greater measures of governmental control over the formation and management of companies in the public interest and prevented the diversion of company funds for purposes which thwarted national economic policies or approved economic objectives. The objectives of the Act included ensuring that due recognition was given to the legitimate interests of shareholders and creditors, helping the government attain social and economic justice and establishing a socialistic pattern of society. It limited the amount of profit sharing by management. The Act was amended on numerous occasions, but remained in force for nearly 60 years.³⁸⁶

In 2002 the Ministry of Corporate affairs constituted a committee (the Irani Committee) to develop a simplified companies act that will take into account changes on the national and international front, adopt best global practices and offer sufficient flexibility in response to the ever changing business environment. This led to the introduction of company bills in 2008, 2009, 2011 and 2012. Finally the *Companies Act 2013*³⁸⁷ was promulgated on the 30th of August 2013.

³⁸⁴ Sharma *Company Law* 3; Chandrate “Business Corporations (Companies and Corporations)” in Prasad, Mohan & Kumar *Halsbury’s Laws of India* vol 27 (2013) (hereinafter “Chandrate *Business Corporations*”) 15; Kapoor & Dhamija *Taxmann’s Company Law* 1.

³⁸⁵ *Act 1 of 1956*.

³⁸⁶ Sharma *Company Law* 4-5; Chandrate *Business Corporations* 16-17; Ghosh *T.P. Ghosh on Companies Act 2013* 2nd ed (2014) (hereinafter Ghosh *Ghosh on Companies Act*) 3; Kapoor & Dhamija *Taxmann’s Company Law* 1-2

³⁸⁷ *Act 18 of 2013*

The Act introduced ideas like corporate social responsibility, class action suits and a fixed term for independent directors. It requires certain companies to earmark two percent of their average profit of the preceding three years for corporate social responsibility activities and make a disclosure about the policy adopted in the process.³⁸⁸

6. THE HISTORY OF SOUTH AFRICAN COMPANY LAW

6.1 The period until the time of the Union in 1910

The *Vereenigde Landsche Ge-Oktroyeerde Oost-Indische Compagnie* (VOC or also known as the Dutch East India Company), the most influential Dutch chartered company during the period of the Western empires, was established in 1602 when the States-General of the Netherlands granted it a 21 year monopoly to carry out colonial activities in Asia.³⁸⁹ The charter was to last until 1612, after which the company's assets would be distributed to its shareholders. The company had to invest in forts along the African coast to protect its assets. At the end of the ten year period the forts could not be liquidated. With the shareholders demanding returns, the Dutch parliament renewed the company's charter although as a joint stock company. From then the company was to have perpetual existence and its shareholders could exit simply by selling their shares.³⁹⁰ The charter shows that the VOC was semi-public by nature. For instance, it was granted public powers in order to govern the territories in the East.³⁹¹ It further had the power to wage war, imprison and execute convicts, to enter into treaties and alliances in the area of its monopoly and to construct fortresses and strongholds. Like the EIC it was virtually a state within a state.³⁹²

³⁸⁸ Sharma *Company Law* 6-8; Ghosh *Ghosh on Companies Act* 2-4; Kapoor & Dhamija *Taxmann's Company Law* 2-3.

³⁸⁹ Nel Commission Report par 2.12; Kuran (2005) *The American Journal of Comparative Law* 785 808; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1376-1377; Blair (2013) *University of Illinois Law Review* 785 791; Terreblanche *Western Empires* 218-222.

³⁹⁰ Kuran (2005) *The American Journal of Comparative Law* 785 808; Blair (2013) *University of Illinois Law Review* 785 791.

³⁹¹ De Jongh *Between societas and universitas* 557.

³⁹² Terreblanche *Western Empires* 218 with reference to Findlay and O'Rourke *Power and Plenty: Trade, War and the World Economy in the Second Millennium* (2007) 178.

The charter of the VOC specifically provided that its shareholders' liability was limited. Dutch investors were the first to trade their shares at a regular stock exchange that was founded in 1611, just around the corner of the office of the VOC.³⁹³ Control of the VOC vested in so-called "*bewindhebbers*", of whom there were originally 73 and later 60. The shareholders ("*participante*") did not exercise any control, but after a second set of accounts was not drafted as required by the charter, provision was made for public accounting by the *bewindhebbers* to the main shareholders. Nine "*gezworen hoofparticipante*", nominated for three years, further exercised a supervisory function.³⁹⁴

On the 6th of April 1652 Jan van Riebeeck landed in the Cape of Good Hope to establish an outpost for the VOC. The VOC thus became the first company to conduct activities in South Africa.³⁹⁵ The VOC did not tolerate competition and commercial activities of local inhabitants were only encouraged in so far as it was in the interest of the company.³⁹⁶ As a result, there was little corporate activity in South Africa until the nineteenth century.

The Cape was annexed by Britain in 1806. Roman-Dutch law was retained as the common law but English law was imported where required. The reclamation of the diamond and gold fields in the second half of the nineteenth century provided the stimulus for the economic development in South Africa. The commercial laws of the colonies at the time were not able to cope with these developments and the reception of the relatively available and more developed English commercial law was inevitable. English company law was relatively sophisticated whereas

³⁹³ De La Rey (1986) 1 Codicillus 4 7; Micklethwait & Wooldridge *The Company* 20. According to Hansmann, Kraakman and Squire *Law and rise of the firm* 39 the VOC and other Dutch and English joint stock companies also featured strong entity shielding.

³⁹⁴ De La Rey (1986) 1 Codicillus 4 7-8.

³⁹⁵ De La Rey (1986) 1 Codicillus 4 8. The expeditions of Bartholomeüs Diaz (1487-1488) and Vasco de Gama (1497-1499), that preceded Jan van Riebeeck's arrival in the Cape, were exploration expeditions. It does not appear that our indigenous law recognised corporations or similar organisations.

³⁹⁶ De La Rey (1986) 1 Codicillus 4 8. The first legal person established in South African was the Bank van Leening. It was established in 1793 and the capital of the bank was provided by the VOC. See Nel Commission Report par 2.12.

Roman-Dutch law had little to offer.³⁹⁷ The companies that were incorporated in the Cape until 1861 were incorporated either by statute or by contract.³⁹⁸

The first general Companies Act in South Africa was the Joint Stock Companies Limited Liability Act of 1861³⁹⁹ that was promulgated in the Cape in 1861. This Act was based on the then already repealed English *Joint Stock Companies Act 1844* and *Limited Liability Act 1855*. It formed the model for the Company Acts subsequently enacted in Natal, the South African Republic (later Transvaal) and the Republic of the Orange Free State. In addition, the practice of extensive borrowing from English legislation achieved either directly or indirectly was established.⁴⁰⁰ The Act did not make provision for the winding-up of companies and was followed by the Winding-up Act of 1886.⁴⁰¹ In 1892 the Companies Act of 1892⁴⁰² was promulgated which started to look more like a modern companies act, yet the Cape legislation consistently lagged behind its English equivalent.⁴⁰³

³⁹⁷ Although even the English company law was essentially stagnant after the bursting of the South Sea Bubble in 1925. See Naudé *Die Regsposisie van die Maatskappydirekteur met besondere verwysing na die Interne Maatskappyverband* (1970) (hereinafter “Naudé *Die Regsposisie van die Maatskappydirekteur*”) 8; De La Rey (1986) 1 Codicillus 4 9; LAWSA vol 4, part 1 14.

³⁹⁸ De La Rey (1986) 1 Codicillus 4 9. Examples of these early companies are the Cape of Good Hope Savings Bank Society (incorporated by *Ordonansië* 86 of 1831), the South African Association for the Administration and Settlement of Estates (incorporated by Ordinance 6 of 1836, although it was probably already trading at the time), the Board of Executors (incorporated by Ordinance 8 of 1839, and which still exists), the Mercantile Establishment (incorporated by Ordinance 7 of 1836), the South African College (established in 1829 and incorporated as a joint stock company by Ordinance 11 of 1837), the Kowie Harbour Improvement Company (incorporated by Ordinance 4 of 1852), the Simon’s Bay Dock or Patent Slip Company (incorporated by Act 13 of 1859), De Algemene Boedel en Weeskamer (incorporated by Act 31 of 1861), the Union Fire and Marine Insurance and Trust Company (incorporated by Act 32 of 1861), the Cape Town and Green Point Tramway Company (incorporated by Act 33 of 1861), the Sea Point Water-Works Company (incorporated by Act 34 of 1861) and the Wynberg Railway Company (incorporated by Act 35 of 1861). For an interesting discussion of some of these companies, see De La Rey (1986) 1 Codicillus 4 10-12.

³⁹⁹ Act 23 of 1861.

⁴⁰⁰ Naudé *Die Regsposisie van die Maatskappydirekteur* 8-9; De La Rey (1986) 1 Codicillus 13-14; LAWSA vol 4, part 1 14. Companies incorporated under the *Joint Stock Limited Liability Act* include the Midland Agency and Trust Company Limited, Uitenhage Board of Executors and Trust Company and Aegis Assurance and Trust Company of Port Elizabeth. See De La Rey (1986) 1 Codicillus 4 15 for a discussion of these companies.

⁴⁰¹ Act 12 of 1886.

⁴⁰² Act 25 of 1892.

⁴⁰³ De La Rey (1986) 1 Codicillus 4 14; LAWSA vol 4, part 1 15.

The Cape legislation was also applied in Griqualand West⁴⁰⁴ although Griqualand West did adopt its own ordinance for establishing and regulating savings banks.⁴⁰⁵ The first general Companies Act in Natal was the Joint Stock Companies Limited Liability Law of 1864,⁴⁰⁶ but a number of companies were incorporated by statute even before this Act was promulgated in 1864.⁴⁰⁷ This Act remained the most important source of company law in Natal until 1926.⁴⁰⁸

In the South African Republic *De Acte van Maatscappijen met Beperkt Verantwoordelijkheid*⁴⁰⁹ was promulgated in 1874. In 1909 the Companies Act,⁴¹⁰ which was based on the English *Companies (Consolidation) Act 1908* was passed. This was the first South African Act that incorporated current English statutory provisions.⁴¹¹ In the Orange Free State the incorporation of companies was regulated by *De Wet over Beperkte Verantwoordelijkheid van Naamloze Vennootschappen*.⁴¹²

6.2 The period after 1910

At the time of the Union each of the provinces continued to administer its own Companies Act until the first South African Companies Act, the Companies Act of 1926,⁴¹³ was enacted. This Act was based on the Transvaal Companies Act of 1909 and therefore the English *Companies*

⁴⁰⁴ In terms of section 2 of Proclamation 2 of 1871. One of the most well-known companies incorporated in Griqualand West and which still exists today is De Beers Consolidated Mines. See De La Rey (1986) 1 Codicillus 18-19 for a discussion of some of the other companies that were incorporated in Griqualand West.

⁴⁰⁵ De La Rey (1986) "Aspekte van die vroeë maatskappyereg: 'n vergelykende oorsig (slot)" 2 Codicillus 18 18.

⁴⁰⁶ Act 10 of 1864. The Act was subsequently amended by Acts 18 of 1865, 19 of 1883 and 3 of 1896 and supplemented by the Share Pledge Act 33 of 1899.

⁴⁰⁷ De La Rey (1986) 2 Codicillus 18 19 mentions some of these companies.

⁴⁰⁸ De La Rey (1986) 2 Codicillus 18 20. Some of the companies incorporated under the *Joint Stock Companies Limited Liability Law* include Sir JL Hulett & Sons (now the Tongaat-Hulett Group), Thomas Barlow & Sons (South Africa) (now Barlow Rand) and Ready Mixed Concrete Durban Properties (now General Tyre Manufacturers and Distributors). See De La Rey (1986) 2 Codicillus 18 20-21.

⁴⁰⁹ Act 5 of 1874. This Act was amended by Acts 6 of 1874, 1 of 1891 and Ordinance 30 of 1904.

⁴¹⁰ Act 31 of 1909.

⁴¹¹ De La Rey (1986) 2 Codicillus 18 22; LAWSA vol 4, part 1 15.

⁴¹² Ch C of *Wetboek van die Oranjevrijsstaat* of 1981. See also De La Rey (1986) 2 Codicillus 18 21-24.

⁴¹³ 46 of 1926.

(*Consolidation*) Act 1908,⁴¹⁴ yet there were differences. Unlike the English Act the 1926 Act provided for a system of judicial management and included a section⁴¹⁵ regulating pre-incorporation contracts. The Act was amended on numerous occasions. The two more comprehensive amendments in 1939⁴¹⁶ and 1952⁴¹⁷ were preceded by reports of commissions of investigation.⁴¹⁸ It followed earlier major English legislative changes and adopted most of these changes with some exceptions.⁴¹⁹

The Van Wyk de Vries commission was appointed in 1963. The second South African Companies Act, the Companies Act of 1973,⁴²⁰ was based on the report of this commission.⁴²¹ With this Act South African company law started to part with English company law.⁴²² On the recommendation of the Van Wyk de Vries commission, a standing advisory commission on company law was appointed.⁴²³ The work of this standing advisory commission resulted in a number of amendments to the Companies Act of 1973.⁴²⁴

In 1984 the Close Corporations Act⁴²⁵ was enacted which provided for a new form of corporation, the close corporation, which catered for the incorporation of the typically smaller business entities. There is no separation from ownership and control in a close corporation. Unless

⁴¹⁴ De La Rey (1986) 2 Codicillus 18 24; LAWSA vol 4, part 1 15; Henning & Wandrag (1993) DJ 14 25-26.

⁴¹⁵ Section 71.

⁴¹⁶ By Act 23 of 1939.

⁴¹⁷ By Act 46 of 1952.

⁴¹⁸ The Lansdown Commission (UG 45/1936) and the Millin Commission (UG69/1948 and 78/1948).

⁴¹⁹ Naudé *Die Regsposisie van die Maatskappydirekteur* 9; De La Rey (1986) 2 Codicillus 18 24; LAWSA vol 4, part 1 15.

⁴²⁰ Act 69 of 1973

⁴²¹ Main report (RP 45/1970) and supplementary report containing a draft bill (RP 31/1972).

⁴²² De La Rey (1986) 2 Codicillus 18 24; LAWSA vol 4, part 1 15.

⁴²³ Section 18 of the Companies Act 61 of 1973.

⁴²⁴ LAWSA vol 4, part 1 15-16.

⁴²⁵ 69 of 1984

otherwise agreed, every member can participate in the management and representation of the corporation. It introduced a solvency and liquidity test instead of the capital maintenance rule.⁴²⁶

The establishment of corporate governance in South Africa can be traced back to the establishment of the King Committee under the auspices of the Institute of Directors in 1992. The King Committee was not so much established as a result of any significant corporate failure but rather as a result of a desire of South African companies to become part of the international business community again.⁴²⁷ This was the time of the negotiations to establish a constitutional democratic state in South Africa and when corporate governance reforms were taking place around the world. The path that South Africa's corporate governance reform has taken is unique in the sense that it was located within the context of South African experiences and African cultural heritage.⁴²⁸ The *King Report on Corporate Governance* (commonly known as King I) was published in 1994, the same year that the democratic government took office in South Africa.⁴²⁹ In 1996 the final Constitution⁴³⁰ was adopted. The Constitution is the supreme law and all law derives its force from the Constitution and is subject to constitutional control.⁴³¹ The normative values that shape our company laws and the manner in which they are interpreted are now found in the Constitution of the Republic of South Africa, 1996.

A string of corporate failures in the early nineties followed by the collapse of the Masterbond Group led to the appointment of the Nel Commission of Enquiry which completed its report in 2001. The second King Report on corporate governance was published in 2002.⁴³² A process to

⁴²⁶ LAWSA vol 4, part 1 16-17. The close corporation is probably nearer to a limited partnership than a company.

⁴²⁷ Although South Africa had its string of corporate failures in the early nineties. The Nel Commission *The final report of the Commission of Enquiry into the affairs of the Masterbond Group and investor protection in South Africa* (2001) (hereinafter referred to as "the Nel Commission Report") chapter 1 n1, lists examples of such failures.

⁴²⁸ Shandu "Shareholder's interests versus social demands: Incongruous agendas: Note" (2005) *Obiter* 87 88.

⁴²⁹ Institute of Directors in Southern Africa *King Report on Corporate Governance for South Africa 1994* (1994) (hereinafter referred to as "the King I Report"); Mongalo *Corporate Law and Corporate Governance* 195-197; Diamond & Price (2012) *South African Journal of Business Management* 57 60-61; Naidoo *Corporate Governance* 2.

⁴³⁰ Constitution of the Republic of South Africa, 1996.

⁴³¹ *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) par 44.

reform the South African company law was officially launched in July 2003.⁴³³ In 2004 the Department of Trade and Industry published a policy paper entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*⁴³⁴ (the Policy Document). The object of the review was to ensure that the new legislation would be appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy.⁴³⁵ The Companies Act 71 of 2008 (the Companies Act of 2008), the third South African Companies Act, is the product of the reform process. It came into effect on the 1st of May 2011. The King Report on Corporate Governance for South Africa 2009 (the King III Report)⁴³⁶ came into operation in 2010. On the 1st of November 2016 the King Report on Corporate Governance for South Africa 2016 (the King IV Report)⁴³⁷ was published. The King IV report is effective in respect of financial years on or after 1 April 2017.⁴³⁸

In conclusion it is necessary to note that our courts have played an important role in the development of our company law. For example, our courts have contributed to the analysis of the separate legal personality of the company⁴³⁹ developed the director's fiduciary duties⁴⁴⁰ and duty

⁴³² Institute of Directors in Southern Africa *King II Report on Corporate Governance for South Africa 2002* (2002) (hereinafter referred to as "the King II Report"). For a discussion of its provisions, see Mongalo *Corporate Law and Corporate Governance* 199-236; Diamond & Price (2012) *South African Journal of Business Management* 57 61 – 62.

⁴³³ Mongalo "An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008" (2010) AJ xiii xiv.

⁴³⁴ Government Gazette 26493 of 3 June 2004.

⁴³⁵ Par 1.1.

⁴³⁶ Institute of Directors in Southern Africa *King III Report on Corporate Governance for South Africa 2009* (2009) (hereinafter referred to as "the King III Report").

⁴³⁷ Institute of Directors in Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (2016).

⁴³⁸ The King IV Report 38.

⁴³⁹ See *Dadoo v Krugersdorp Municipal Council* 1920 AD 530.

⁴⁴⁰ See *Coronation Syndicate Ltd v Liliensfield and the New Fortuna Co Ltd* 1903 TS 489; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *African Claim and Land Co Ltd v W J Langerman* 1905 TS 494; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Bellairs v Hodnett* 1978 (1) SA 1109 (A); *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T); *Howard v Herrigel* 1991 2 SA 660 (A).

of care and skill⁴⁴¹ within our common law and have brought companies within the framework of our common law personality rights.⁴⁴²

7. CONCLUSION

Social or economic organisations established for a common purpose existed since antiquity. These organisations were developed, refined, tried and tested through an evolutionary process. The successful forms were retained and replicated. These organisations served as solutions for various multi-dimensional problems that entrepreneurs and investors encountered in different historical periods. It is from these organisations that the modern business company evolved. This evolutionary nature of the company means that it changes and adapts with time. The place of the company in our lives depends on our own continuing changing moral, legal, philosophical, political and economic perceptions.

The company developed legal characteristics that distinguishes it from other organisations. The most important attribute of the company is its separate legal personality, which it derived from the medieval corporation or *universitas*. This attribute was initially compelling and attractive as it made it clear that the assets used by these institutions belonged to the institutions, though a perpetual succession of individuals may administer them. It also provided for a continuity in contractual relations between the institutions and other parties. It ensured that the assets that were earmarked to support the work of these institutions could not be used by the members or administrators for their private purposes. In other words it locked in the capital of these institutions. It also facilitated self-governance by requiring some sort of governance arrangement by which individuals would be chosen to make decisions for the institution. The governance structure prescribed by company law since the early nineteenth century is a managerial hierarchy topped by a board of directors. The characteristics of perpetual succession and asset partitioning

⁴⁴¹ See *Fisheries Development Corp of SA Ltd v Jorgenson; Fisheries Development Corp of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (3) SA 156 (W); *Ex parte Lebowa Development Corporation Ltd* 1989 (1) SA 71 (T); *Howard & Herrigel* supra.

⁴⁴² See *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A); *Financial Mail v Sage Holdings Ltd* 1993 (2) SA 451 (A).

(including limited liability) are consequences of the company's separate legal personality.⁴⁴³ Limited liability was not initially the feature that caused business people to seek out and adopt the company as an organizational form. Company statutes did not always provide for limited liability, especially early in the nineteenth century.⁴⁴⁴ The positive effect of asset partitioning, specifically limited liability, is that it stimulates growth and investment. It attracts capital from investors who surrender control of their capital to those who manage the company. Another important line of development was the adoption of the partnership (*societas*) principle of trading on joint account. Through this development the legal concept of *universitas* was paired with the financial tool of equity investment. Consequently a further important characteristic of the modern company is that its shares are transferrable. Not all these attributes were present in the earlier forms of social and economic organisations. These characteristics were developed to deal with the multi-disciplinary problems that the company faced, such as the agency, asset partitioning and team production challenges.⁴⁴⁵

These attributes or legal characteristics made the company prodigiously successful. It is arguably the dominant social institution of the modern world.⁴⁴⁶ The company is integral to society, particularly as a creator of wealth and employment. In the world today, companies have the greatest pools of human and monetary capital.⁴⁴⁷

⁴⁴³ Blair (2013) *University of Illinois Law Review* 785 787-788 and 795-796; Harris (2015) *Seattle University Law Review* 537 550. Cassim HIC "Introduction to the new Companies Act: General overview of the Act" in Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2nd ed (2012) (hereinafter "*Contemporary Company Law*") 35-41 states that limited liability, perpetual succession, the fact that the assets, profits, debts and liabilities belong to the company, the fact that a shareholder has no right to manage the company's business or transact on its behalf, that a company may sue and be sued in its own name and that a company may contract with its shareholders are all consequences of the company's separate legal personality. See also Welling et al *Canadian Corporate Law* 128. Berle and Means *The Modern Corporation* 120 explain:

"The real privilege which the state grants is that of corporate entity - the right to maintain business in its own name, to sue and be sued on its own behalf irrespective of the individuals; to have perpetual succession - i.e. to continue this entity although the individuals in it changed. From all this necessarily flowed a limited liability of the associates."

⁴⁴⁴ Blair (2013) *University of Illinois Law Review* 785 795.

⁴⁴⁵ Harris (2015) *Seattle University Law Review* 537 549.

⁴⁴⁶ Berle & Means *The Modern Corporation* 313.

⁴⁴⁷ See King III Code reproduced in Delpont *Henochsberg* Vol 2 8. See also Mongalo *Corporate Law and Corporate Governance* 179-180 who notes that companies dominate economic life in South Africa and other developed and developing nations.

The company played a pivotal role in the establishment of the Western Empires. The fact that the East lost its economic lead to the West after the fall of the Roman Empire was partially due to its relative failure to develop corporations or companies.⁴⁴⁸ The company is also presently at the forefront of the resurgence of the economies of Eastern countries such as China and India.

There has however been some spectacular corporate failures and some form of regulation appears necessary to protect the stakeholders of the company, including its shareholders, creditors and employees.⁴⁴⁹ Corporate governance plays an important role in this regard.

A historical analysis reveals that the concept of the company and the consequences that the law ascribes to incorporation is a function of the underlying economic, political and social environment in which it operates.⁴⁵⁰ The underlying normative value system in which the company operates determines its *raison d'être* and also if, to what extent and how the interests of creditors and employees of the company should be protected.

The history of the company shows that the law more often responds to the evolution of the company rather than shapes it.⁴⁵¹ Company laws essentially perform two functions. The first is a facilitative function. It provides the legal norms which promote the accumulation of equity capital. One of the major advantages of the company is its ability to attract capital to fund large scale economic ventures. The second is a regulatory function. It imposes controls to protect certain persons or interests.⁴⁵² As is evident from this historical analysis, the nature and extent of the regulation of the company is also a function of the prevailing economic, political and social environment in which it operates. Corporate failures, recessions and the adoption of certain

⁴⁴⁸ Micklethwait & Wooldridge *The Company* 5-7; Hansmann, Kraakman & Squire (2006) *Harvard Law Review* 1333 1387. There were, of course, many other reasons. For a comprehensive study from a political and economic perspective, see Terreblanche *Western Empires*.

⁴⁴⁹ Employees surrender the direction of their labour to those in control of the company.

⁴⁵⁰ Katzew (2011) *SALJ* 686 688.

⁴⁵¹ *Cooke Corporation, Trust and Company* 189-190; McBride (2011) *Law and contemporary problems* 1 4-5.

⁴⁵² Mongalo *Corporate Law and Corporate Governance* 151, Armour, Hansmann & Kraakman "Agency problems and legal strategies" in *The Anatomy of Corporate Law* 35, De Jongh *Between societas and universitas* 567.

political and economic policies (for example imperialism, democratic socialism and welfare state capitalism) have often resulted in stricter regulation. On the other hand, rapid economic growth or industrialisation and the adoption of political and economic policies such as *laissez-faire* capitalism, liberalism, neoliberalism and globalism tended to lead to deregulation.⁴⁵³

Through most of its evolution until at least the nineteenth century the company and its predecessors served a public purpose.⁴⁵⁴ The expansion of this purpose to include private interests occurred with the arrival of the general incorporation laws in the nineteenth century.⁴⁵⁵ With the appearance of general incorporation laws the corporate mechanism had evolved from an arrangement in which an association of owners controlled their property under close state supervision to an arrangement in which they surrendered control of their capital to those in control of the corporation.⁴⁵⁶ Historically though, the corporation was a public institution with public purposes. From a historical perspective shareholder primacy is a recent event.⁴⁵⁷

The foundations of corporate governance can be traced back to the English *Joint Stock Companies Act, 1844*. However it was the seminal work of Berle and Means⁴⁵⁸ during the Great Depression of 1923 to 1933, in which they identified the separation of ownership and control of the company, which really stimulated the debate about the purpose and governance of the company. Since then the focus of corporate governance has primarily been directed on how to strengthen managerial accountability and, in certain instances, protect minorities. The company was increasingly expected to behave in a socially responsible manner, consider the interests of other stakeholders such as its creditors and employees and there was a rise in the so-called stakeholder statutes. The

⁴⁵³ See also Talbot *Critical Company Law* 111-112.

⁴⁵⁴ Compare for example the Indian *sreni*, the Roman *societas publicanorum*, the medieval corporation or *universitas*, the guilds, the chartered joint stock companies of the Western maritime empires as well as the chartered and statutory companies that were incorporated during the eighteenth and nineteenth centuries (and even today). Some early corporations were created as quasi-governmental bodies with broad political, taxation and coercive powers.

⁴⁵⁵ See Micklethwait & Wooldridge *The Company* 181; Bakan *The Corporation* 153; Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 101 n 1; McBride (2011) *Law and contemporary problems* 1 5; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁴⁵⁶ Berle & Means *The Modern Corporation* 120-128.

⁴⁵⁷ Greenfield *The Failure of Corporate Law Fundamental Flaws & Progressive Possibilities* (2006) 126.

⁴⁵⁸ Berle & Means *The Modern Corporation*.

1980s saw a shift towards neoliberalism and globalism and the rise of the law and economics movement that played a dominant role in company law until the Global Financial Crisis of 2007 to 2008. During this period shareholder primacy trumped the interests of the other stakeholders of the company. A number of corporate scandals during the 1990s followed by the bursting of America's stock market bubble in 2000 to 2002 led to the increased regulation of the company. The Global Financial Crisis of 2007 to 2008 again put corporate governance under the spotlight. The 21st century may well become the century of governance with an increasing focus on the social responsibility of the company. Even faithful contractarians acknowledge that as a normative matter the overall objective of company law is to serve the interests of society as a whole.⁴⁵⁹

The United States was never bothered with the difference between the corporate and incorporate form and moved rapidly towards corporations on the one hand, and partnerships on the other. The absence of liability of a shareholder for corporate debts is an inalienable corporate attribute. In contrast to this the development in England was towards an intermediate form namely, a company acting under a deed or a contractarian approach. This historical development resulted in the unlimited company becoming the basic company form in England. In England limited liability was a secondary consideration until the nineteenth century. Limitation of liability came with the *Limitation of Liability Act 1855* subject to certain safeguards. The *Joint Stock Companies Act 1856* abolished virtually all of these safeguards. From 1856 there was a movement away from the almost complete freedom of the 1856 Act towards progressively stricter controls and increased provision for publicity. The *Companies Acts* of 1980 and 1985 also specifically obliged directors to take the interests of employees into account.

Corporate law in Canada developed from English and American law. The letter of patents form of incorporation dominated Canadian corporate law for a long period. After 1970 however the federal government and the majority of provinces in Canada adopted the American model which invokes a statutory division of powers amongst the internal stakeholders of the company. This statutory framework incorporates protections for minority shareholders and creditors.

⁴⁵⁹ Armour, Hansmann & Kraakman "What is Corporate Law?" in Kraakman et al *The Anatomy of Corporate Law* 28.

India and South Africa initially adopted the English model. The Indian Constitution now specifically declares that it is a socialist state and that India will be organised as a welfare state. The *Companies Act 1956* provided for a greater measure of governmental control over the formation and management of companies in the public interest and to prevent the diversion of company funds for purposes which thwarted national economic policies or approved economic objectives. The objectives of the Act included ensuring that due recognition was given to the legitimate interests of shareholders and creditors, helping the government attaining social and economic justice and establishing a socialistic pattern of society.

South African company law started to part with English company law since 1973 and the gap between the two systems has since widened substantially. The present Companies Act of 2008 invokes a statutory division of powers among the participants (the directors, officers, shareholders, employees and to a limited extent creditors) in the internal affairs of a corporation. A person attaining the status of director, officer, shareholder, employee or creditor is assigned statutory powers and obligations. Directors have an original statutory power to manage the corporation. The Act however retained elements of the contractarian approach. It is therefore a hybrid model statute.

The company had a marked impact on the historical, economical, technological, social and even political development of the world. This trend is set to continue, especially as the company has also demonstrated a remarkable resilience and ability to adapt. The challenge is to ensure that this impact will be a positive one. The important lessons that we learned from the past should not be forgotten.

CHAPTER 3

THE NATURE OF THE COMPANY

- 1 INTRODUCTION**
 - 2 DEFINITION AND ATTRIBUTES OF THE COMPANY**
 - 3 TYPES OF COMPANIES**
 - 4 CONTRACTARIAN THEORIES**
 - 5 COMMUNITARIAN OR PROGRESSIVE THEORIES**
 - 6 THE CONCESSION THEORY**
 - 7 ORGANISATIONAL THEORIES**
 - 8 BERLE AND MEANS**
 - 9 CONTRACTARIAN AND DIVISION OF POWER COMPANIES**
 - 10 APPLICATION OF THE THEORIES IN THE UNITED KINGDOM, CANADA AND INDIA**
 - 11 APPLICATION OF THE THEORIES IN SOUTH AFRICA**
 - 12 CONCLUSION**
-

1 INTRODUCTION

Wetlauffer identifies three distinct horizontal levels in the structure of legal discourse.¹ The uppermost of these three levels contains our discussions and disagreements about rules, doctrine and particular legal outcomes - the practical application of the law. The middle level is comprised of the various and conflicting theories of law. The theory that we adopt on this level depends on our system of belief. Each system of belief corresponds to a distinct community, each is governed by

¹ Wetlauffer "Systems of belief in modern American law: A view from century's end" (1999) American University Law Journal 1 3-8.

its own set of rules and each is, in important ways inconsistent and incompatible with the others.² Wetlaufer compares these systems of belief with ships passing in the night. On any given ship, there might be conversations in which issues are joined and problems are solved, but as between those ships there is barely any communication worthy of name. The differences in these systems of belief account for most of the dysfunctionality of the arguments and explanations that go on at the upper-most level of rules, doctrine and policy. The systems of belief in this middle level rests in turn upon a distinctive set of underlying assumptions and beliefs, prime values and projects, centres of attention, intellectual affiliations, and styles of interpretation and arguments that comprise the third and most basic level of legal discourse.³ Wetlaufer argues that “one cannot work or teach at the level of rules, doctrine, and policies in a way that is free from the kinds of assumptions, beliefs, and commitments that [he] described as comprising the second and third levels of legal discourse.”⁴

From a moral philosophical point of view Sandel identifies three approaches to justice.⁵ The first connects justice to the idea of maximizing welfare. The doctrine of utilitarianism is the most influential within this approach.⁶ The second is the range of theories that connects justice to freedom. Most of these theories emphasize respect for individual rights. Sandel identifies two rival camps within this group namely, the *laissez-faire* camp led by the free-market libertarians

² Wetlaufer identifies six systems of belief in modern American law namely, turn-of-the-century formalism; legal realism (that flowered in the 1920s and 1930s) and is associated with a revolt against formalist jurisprudence; the legal process school (that arose in the early 1950s) as a reaction against certain of the more sceptical aspects of legal realism; the law and economics school (that first came into prominence in the 1960s); the legal positivist or analytical tradition; and contemporary critical theory. All these systems of belief share a commitment to classical liberalism (what he terms “the master paradigm”).

³ Wetlaufer (1999) American University Law Journal 1 1-7. Wetlaufer uses ten “dimensions of difference” to describe the differing assumptions, beliefs and commitments (the third level of legal discourse) to distinguish the different belief systems namely, the fairness and legitimacy of the existing order; prime values and projects; focus and centre of attention; human nature and social existence; the nature and consequences of language; the nature of knowledge and possibilities of reason and objectivity; the relationship between law and other disciplines; interpretive strategies and forms of argument; the possibilities of the rule of law; and the consequences of speaking against the possibilities of reason, objectivity or the rule of law. See Wetlaufer (1999) American University Law Journal 1 59-77.

⁴ Wetlaufer (1999) American University Law Journal 1 7.

⁵ Sandel *Justice What's the Right Thing to Do?* (2009) (hereinafter “Sandel *Justice*”) 6 and 19-20.

⁶ Sandel *Justice* 19 and chapter 3. In market societies it offers a natural starting point. The doctrine of utilitarianism was founded by Jeremy Bentham and later refined by John Stuart Mill.

and the fairness camp consisting of theorists with a more egalitarian approach.⁷ The case for free markets is typically rooted in a libertarian as well as a utilitarian approach.⁸ The last approach sees justice as bound up with virtue and the good life.⁹ The system of belief, resultant theory of law and approach to justice that we adopt will thus determine how we conceptualise the company. Our differences on these levels also account for our various and sometimes inconsistent and incompatible conceptualizations of the company.

We tend to focus on the more practical aspect of the functioning of companies (the upper-most level identified by Wetlaufer) with the result that we tend to regard company law as conclusive and static.¹⁰ As is evident from the historical analyses nothing could be further from the truth. The concept of the company is constantly changing and adapting with time. It is an evolutionary concept. Carter pointed out that:

“It needs no demonstration, however, to the men of his profession to establish the fact that all law is in a constant process of modification by legislation and judicial interpretation. And no other branch of the law is more in flux than the law of corporations.”¹¹

Carter expressed this view in relation to the law of corporations in the United States of America in 1919 but it is equally true for company law in South Africa today. The Companies Act 71 of 2008 (The Companies Act of 2008), which came into effect on the 1st of May 2011, is the product of a complete reform of our company law. The normative value system that underpins our modern company law has changed markedly since classic liberalism and *laissez-faire* reigned supreme.

⁷ Sandel *Justice* 19 and chapters 3-6. Its proponents include Milton Friedman, Robert Nozick, Immanuel Kant and John Rawls.

⁸ Sandel *Justice* 75. According to the libertarian argument laws that interfere with the free market violate individual liberty. According to the utilitarian argument free markets promote general welfare. When two people make a deal, both gain. As long as they do not hurt anyone else, it must increase overall utility.

⁹ Sandel *Justice* 20 and chapters 8-10. Its proponents include Aristotle and also Sandel himself.

¹⁰ Carter *The Nature of the Corporation as a Legal Entity with especial reference to the Law of Maryland* Doctor of Philosophy dissertation (1919) John Hopkins University 1.

¹¹ Carter 3.

Where must the courts then find its interpretation of company law, taking into account its evolutionary nature? Carter's response to this question is as follows:-

“[The court] must do justice as the circumstances of a case require, in the light of both precedent and sound reason. But why should sound reason so often seem to demand the modification of precedents? The answer is at hand: legal concepts have grown up that have become crystallized into a static system of law, while the expansion of commerce and industry has carried society beyond the social, economic and political conditions which gave birth to ancient theories. To be sure, the law has kept pace in great measure with this development. New fictions have been introduced to enable the courts to administer that substantial justice to which they have ever been committed. Yet, even more than law, political society is itself dynamic and the very fictions which the beginning of a century called forth as steps in advance, have been discarded to suit a later period of economic and social development.¹²

Judicial decisions should, and do for the most part, rest upon concepts determined by constant application of the principles of jurisprudence and philosophy of law.¹³ Jurisprudence, it may be said, is an analytical science and deals with the various relations which are regulated by legal rules rather than the rules that regulate those relations.¹⁴ At its heart is legal theory, an investigation of the nature of law. Legal philosophy deals more with the value implications of law.¹⁵ The legal status of a company is a product of philosophies about its nature. Theories of the company accordingly influence its position in law.¹⁶ An attempt to arrive at the sources, origin and nature of the company is furthermore a pre-requisite to an adequate analytical discussion of court decisions upon the subject.¹⁷ According to Bottomley:-

¹² Carter 3.

¹³ Carter 2.

¹⁴ Carter 3. Harris *Legal Philosophies* (1980) 2 states that: “Jurisprudence has to do, not with the lawyer's role as a technician, but with any need he may feel to give good account of his life's work - either to fellow citizens, or to himself, or to any gods there be.”

¹⁵ Harris *Legal Philosophies* (1980) 2-3.

¹⁶ Carter 1.

¹⁷ Carter 2.

“The broad and basic purpose of examining corporate theory is to develop a framework within which we can assess the values and assumptions that either unite or divide the plethora of cases, reform proposals, legislative amendments and practices that constitute modern corporate law. This law has not sprung up overnight. We need some way of disentangling the different philosophical and political perspectives from which it had been constructed.”¹⁸

Millon explains that legal theories differ from legal rules because legal theories set forth a positive or descriptive assertion about the world - an assertion about what companies are. Normative implications are then said to follow from the positive assertion.¹⁹ Theories of the company therefore provide a standard for evaluating actual or proposed legal rules. In other words, theories can be used to legitimate or criticise corporate doctrine.²⁰ However, theories are not developed in a vacuum. One of the most important formative elements of company theory is legal doctrine itself.²¹ Millon thus argues:-

“The gradual acceptance of a new legal theory of the corporation (together with other social and political phenomena) encouraged receptivity toward new legal rules, while the new rules (again, together with other factors) themselves encouraged people to think about the corporation in a new way. All this was happening at the same time: The new theory legitimated the new doctrine as doctrine was legitimating theory. Our ideas about what corporations are provide us with critical perspective toward corporate doctrine. At the same time, particular instances of corporate doctrine are interpreted to imply that one

¹⁸ Bottomley “Taking corporations seriously: Some considerations for corporate regulation” (1990) *Federal Law Review* 203 204 as quoted by Dine *The Governance of Corporate Groups* (2000) (hereinafter “Dine *Corporate Groups*”) 1.

¹⁹ Millon “Theories of the corporation” (1990) *Duke Law Journal* 201 241. For example, because the company is a concession of the state, the state must ensure that corporate governance structures are fair and democratic. Or because the company is a nexus of contracts between private individuals, the state should not interfere in these private relations.

²⁰ Millon (1990) *Duke Law Journal* 201 241.

²¹ Millon (1990) *Duke Law Journal* 201 242. For example, extensive regulation through a chartering process suggested that companies were artificial entities, whereas easily available general incorporation laws support claims about the “natural” character of the company.

theory, rather than another, more appropriately captures what is essential or characteristic about corporations.”²²

The same sort of interdependence characterises the relationship between company theory and social practice. Millon states:

“Theories about the corporation depend in a large part on perceptions of what corporations look like. Law embodies beliefs about what is legitimate, and these beliefs influence the way people behave. Legal theory shapes social practice and practice informs theory - at the same time.”²³

Legal theories, like legal rules, exist in concrete social and historical contexts.²⁴ As the company changed over time, so did its conceptualisation. This changing concept of the company, in turn, impacted on the ways in which it was regulated. Theory and law adapted to conform to the factual realities of the corporate enterprise.²⁵ An important task of legal theory is then to uncover the specific historical context of legal conceptions and to “decode” their true concrete meanings in this context.²⁶ The normative implications of theories are not always static. Millon explains this as follows:-

“The historian can describe the ways in which particular legal ideas were interpreted in the past and, in that sense, ended up having a ‘determinate’ meaning. But, for us, living in the present, we must keep in mind that we - the interpretive community - determine the meaning of legal theories and legal rules. Legal concepts determine nothing but that which we allow them to determine.”²⁷

²² Millon (1990) *Duke Law Journal* 201 242-243. See also Harris “The history of the team production theory” (2015) *Seattle University Law Review* 537 550.

²³ Millon (1990) *Duke Law Journal* 201 243. For example, the natural entity theory of the company served to legitimize big business and vice versa.

²⁴ Millon (1990) *Duke Law Journal* 201 244.

²⁵ Colombo “The corporation as a Toquevillian enterprise” (2012) *Temple Law Review* 1 5 and 22.

²⁶ Horwitz “*Santa Clara* revisited: The development of corporate theory” (1985) *West Virginia Law Review* 173 224.

²⁷ Millon (1990) *Duke Law Journal* 201 247.

But even the context is not as narrowly constraining as the inevitability of the context might seem to imply for two reasons. First, at any point in time any legal concept may be interpreted in different ways, capable of sustaining strongly subversive normative arguments. Legal theories are not always determinative in the sense of possessing only a single normative implication.²⁸ Secondly, interpretive context does not provide *a priori* answers to its own questions. Any legal argument involves different views about the implications of a legal concept. It is not a mere observation of a concept's meaning but involves interpretation and evaluation. Interpretive convention, while shaping our responses to new problems, is itself constantly and inevitably being refashioned. Legal theories do not determine their own meanings.²⁹ As Millon states: "Decisions about the normative implications of legal theories, and indeed choices among the theories themselves, take place against the background of interpretive conventions that are constantly shifting."³⁰ This indeterminate nature of theories "invites lawyers, judges, and scholars, as members of an interpretive community, to use their critical and creative faculties and their persuasive abilities to take full advantage of the transformative potential within existing context."³¹

Company theory generally deals with one of three issues. From approximately the late 1920s it most often deals with the issues of corporate governance and corporate behaviour. Less often, it deals with the more abstract issue of the purpose or the *raison d'être* of a company, for example should the purpose of the company be to pursue not only the holy grail of profit but also more general social goods. Rarely, especially during the period roughly between the late 1920s and the 1970s, did it deal with the most abstract issue of all - what is a company? Instead of considering the company from this abstract perspective, company theorists have concerned themselves with organization theory and economic analyses of company behaviour. However in recent times the

²⁸ Millon (1990) Duke Law Journal 201 248-249.

²⁹ Millon (1990) Duke Law Journal 201 249-251.

³⁰ Millon (1990) Duke Law Journal 201 250.

³¹ Millon (1990) Duke Law Journal 201 251.

debate about the nature of the company has again been revived. People have begun speaking about companies in ways that indicate that the meaning of the word is unsettled.³²

The purpose of this chapter is to consider the more prominent theories of the nature of the company and their normative features. Consideration is specifically given to the question whether these theories provide a normative basis for the protection of creditors and employees. The theories of the company influence the model of company that we adopt. It thus shapes the relationship that companies have with all the participants in their social and economic activities (including its creditors and employees) and with its regulators.³³ It strongly influences important legal questions. To what extent should companies be given constitutional and statutory rights? Should companies have social responsibilities? Should shareholders be personally liable for the debts of the company? Should companies incur delictual and criminal liability?³⁴ The debate about the nature of the company is sensitive. It deals with the question of how we distribute things we prize. As Talbot states:

“The debate over ‘what is the company’ is highly political. It is a debate about who should be the winners and losers in society, what we produce as a society and for whose benefit we produce. It is a debate about the shape of global development. It impacts on the environment, on social cohesion and on human rights. All these issues come back to the same debates: what is the company and what is its purpose? They are debates about the meaning of life from a non-spiritual perspective and they do not have simple answers.”³⁵

³² Coates “State takeover statutes and corporate theory: The revival of an old debate” (1989) *New York University Law Review* 806 806-808; Colombo (2012) *Temple Law Review* 1 10; Petrin “Reconceptualizing the theory of the firm - from nature to function” (2013) *Penn State Law Review* 1 14; Blair “Corporate personhood and corporate persona” (2013) *University of Illinois Law Review* 785 807-808.

³³ Dine *Corporate Groups* 1; Esser *Recognition of Various Stakeholder Interests in Company Management* LLD thesis (2008) University of South Africa 25; Keay *Company Directors’ Responsibilities to Creditors* (2007) 291. Moore *Corporate Governance in the Shadow of the State* (2013) 3 (hereinafter referred to as “*Moore Corporate Governance*”) states that the objective of an academic characterisation is to emphasise and draw on the key distinguishing features of a subject rather than to document that phenomenon in all its complexity, much like an artistic caricature. The process of academically characterising a subject involves an empirical (what is a phenomenon) and normative (what form or qualities should a phenomenon embody) dimension.

³⁴ Petrin (2013) *Penn State Law Review* 1 2-3.

³⁵ Talbot *Palgrave Great Debates in Company Law* (hereinafter referred to as “*Talbot Great Debates in Company Law*”) vii. These debates can become very sensitive. See for example Talbot *Great Debates in Company Law* 47-48.

There are many divergent theories about the nature of the company.³⁶ Some theories, also referred to as foundational theories, study the origins of the company. Others, also referred to as operational theories, study the way in which companies operate.³⁷ Still other theories, also referred to as personhood theories, focus on the ‘entity-ness’ or ‘entityless-ness’ of the company. Is the company an entity or enterprise that is distinct from its members or is it only an aggregate of individuals and merely a fiction or abstraction on the other?³⁸ Is company law based on *societas* (partnership) or *universitas* (corporation)? The corporate personhood of the company, arguably its most fundamental attribute, is considered separately in chapter 4. Some theories deal with more than one of the above aspects. The labels attached to these theories are not sacrosanct. Not only do the theories of the company vary considerably, but there are also many nuances and variations on the different theories.³⁹ In broad terms these theories seek to answer the questions of what the company is and why it exists.⁴⁰ These questions have occupied the attention of not only legal academics, but also of academics in several other disciplines such as finance, economics, business ethics and occupational behaviour.⁴¹ Bottomley warns that it is not possible to devise a grand theory for all corporations in all contexts.⁴²

This chapter commences with a discussion of the attributes of the modern company. What are the key distinguishing features of a company? Is it possible to define the concept “company”?

³⁶ Keay *Company Directors’ Responsibilities to Creditors* 291; Dine *Corporate Groups* 2. Wolff “On the Nature of Legal Persons” (1938) *Law Quarterly Review* 494 496 asserts that there are sixteen theories pertaining to the legal nature of the juristic person.

³⁷ Dine *Corporate Groups* 1.

³⁸ Wolff (1938) *Law Quarterly Review* 494; Keay *The Corporate Objective* (2011) 25; Talbot *Great Debates in Company Law* 1. As indicated in the conclusion of the historical analysis, the most important attribute of the modern company is its separate legal personality. 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” (2011) *SALJ* 686 688; Berle & Means *The Modern Corporation & Private Property* (hereinafter “Berle & Means *The Modern Corporation*”) 120, Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2010) (hereinafter “Welling et al *Canadian Corporate Law*”) 128; Cassim R “The Legal Concept of a Company” in Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2nd ed (2012) (hereinafter “*Contemporary Company Law*”) 35-41.

³⁹ Esser & Du Plessis “The Stakeholder debate and directors’ fiduciary duties” (2007) *SA Merc LJ* 346 355 and 362.

⁴⁰ Keay *The Corporate Objective* 24; Talbot *Great Debates in Company Law* 1.

⁴¹ Keay *The Corporate Objective* 24.

⁴² Bottomley *The Constitutional Corporation* (2007) 17 as referred to in Keay *The Corporate Objective* 38.

Thereafter the different types of companies are considered briefly. Then follows an evaluation of some of the more prominent theories about the nature of the company. It is impossible to deal with all the divergent theories in this study. The theories about the nature of the company which are discussed in this chapter are the contractarian theories (which can in turn be divided into legal contractarianism and economic contractarianism), the communitarian or progressive theories, the concession theory and the organisational theories.

Thereafter consideration is given to how Berle and Means conceptualised the company in their seminal work, *The Modern Corporation & Private Property*,⁴³ which was first published in 1932. As indicated in the previous chapter this work had a profound effect on company law. It led to a reconsideration of the role of companies in society. Any discussion on the nature of the company would be incomplete without a consideration of this work.

It appears that some Canadian commentators⁴⁴ prefer to distinguish between models of company constitutions. A distinction is made between charter corporations, special act corporations, letters of patent corporations, contractarian companies,⁴⁵ and division of power corporations. The important distinction, from a South African perspective, is between contractarian companies and division of power corporations. This distinction is discussed next. Whilst this distinction is positivist in nature⁴⁶ it does remove some conceptual difficulties. It is also important to bear in mind in considering and placing foreign case law in its proper perspective, especially case law from Canada.

⁴³ Berle & Means *The Modern Corporation*.

⁴⁴ See, for example, Welling *Corporate Law in Canada The Governing Principles* 3rd ed (2006) (hereinafter “Welling *Corporate Law in Canada*”); Welling et al *Canadian Corporate Law* 110-118; Abbey *An Insightful Study of the Oppression Remedy under South African and Canadian Corporate Law* Master of Laws thesis (2012) University of Western Ontario, Canada 11-16.

⁴⁵ The Canadian commentators specifically refer to these entities as “companies” as opposed to “corporations”.

⁴⁶ Compare also the ‘technique of governance’ approach proposed by Wishart “A reconfiguration of company and/or corporate law theory” (2010) *Journal of Corporate Law Studies* 151.

Next follows a brief discussion of the application of the theories on the nature of the company in the comparative jurisdictions and in South Africa. Finally certain conclusions are drawn about the nature of the company.

2 DEFINITION AND ATTRIBUTES OF THE COMPANY

As indicated in chapter 2, the word “corporation” or “company” refers to an association of persons bound together in a *corpus*, a body sharing a common purpose in a common name.⁴⁷ But this broader definition of a corporation or company includes associations other than corporations or companies as we understand these concepts in company law. What then is the technical or legal meaning of the word “company” in company law?

The statutory definitions of the corporation or company in the foreign jurisdictions under consideration in this study are of little assistance in providing an answer to this question. The United Kingdom’s *Companies Act 2006*⁴⁸ (the *Companies Act 2006*) defines a company as a company so formed and registered in terms of the Act, a company formed and registered under the *Companies Act 1985*⁴⁹ or the *Companies (Northern Ireland) Order*,⁵⁰ or a company that was an existing company under the last mentioned Act or Order.⁵¹ The *Canada Business Corporations Act*⁵² (the *Canada Business Corporations Act*) defines a corporation as “a body corporate

⁴⁷ The noun “corporation” and the verb “to incorporate” are both derived from the Latin verb *corporare*, which means to form into or furnish with a body or to infuse it with substance. See McGuinness “Business Corporations” in Brecher *Halsbury’s Laws of Canada* 1st ed (2013) (hereinafter “McGuinness *Business Corporations*”) 206. At 214 n1 the author points out that although the terms “company” and “corporation” are often used interchangeably, they are not strictly speaking synonymous. A company is an association of two or more persons formed to conduct a business or some other activity in the name of that association. A corporation is one type of such association and differs from the others in that it is incorporated. See also Hannigan “Companies” in MacKay *Halsbury’s Laws of England* 5th ed (2009) Vol 14 (hereinafter “Hannigan *Companies*”) paras 1 and 2; Bone “Legal perspectives on corporate responsibility: Contractarian or communitarian thought?” (2011) *Canadian Journal of Law and Jurisprudence* 277 279; Blair (2013) *University of Illinois Law Review* 785 788-789.

⁴⁸ C 46.

⁴⁹ C 6.

⁵⁰ *S.I. 1986/1032 (N.I. 6)*.

⁵¹ Section 1(1) of the *Companies Act 2006*.

⁵² *R.S.C., 1985, c. C-44*.

incorporated or continued under this Act and not discontinued under this Act.”⁵³ The Indian *Companies Act 2013*⁵⁴ (the *Companies Act 2013*) defines a company as “a company incorporated under the Act or under any previous company law.”⁵⁵

The South African Companies Act of 2008 similarly does not provide any clarity in establishing the technical and legal meaning of the word ‘company’. It defines a company as meaning:-

“[A] juristic person⁵⁶ incorporated in terms of this Act, a domesticated company,⁵⁷ or a juristic person that, immediately before the effective date-

- (a) was registered in terms of the –
 - (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act;⁵⁸ or
 - (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
- (b) was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act No. 61 of 1973);⁵⁹ or
- (c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act.⁶⁰”

⁵³ Section 2(1).

⁵⁴ *Act 18 of 2013*.

⁵⁵ Section 2(20).

⁵⁶ A “juristic person” is defined in section 1 of the Act as including a foreign company and a trust, irrespective of whether it was established within or outside South Africa. Note that in South African common law a trust is not juristic person, but for purposes of the Companies Act of 2008 it is regarded as being a juristic person. See Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 29.

⁵⁷ A “domesticated company” is a foreign company whose registration has been transferred to South Africa in terms of section 13(5)-(11).

⁵⁸ An “external company” is defined in section 1 of the Companies Act 61 of 1973 (the Companies Act of 1973) as “a company or other association of persons, incorporated outside the Republic, the Memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property.”

⁵⁹ An “existing company” is defined in section 1 of the Companies Act of 1973 as meaning anybody which immediately prior to the commencement of the Companies Act of 1973 was a company in terms of any law repealed by the Companies Act of 1973.

These statutory definitions do not tell us much about the nature of the company. They essentially define the company as a company incorporated under or recognized by the enabling Act. The statutory definitions provide one clue about the nature of the company namely, that it depends on the law for its incorporation or recognition. The *Canada Business Corporations Act* and the South African Companies Act of 2008 provide a further clue - that the company is a person (“body corporate” in the case of the *Canada Business Corporations Act* and “juristic person” in the case of the South African Companies Act of 2008).

Although the word ‘company’ is very familiar, it is an elusive concept to define since “the word company has no strictly legal meaning.”⁶¹ Outside of statutory definition the word ‘company’ has no precise legal content. As is evident from the statutory definitions referred to herein before, the company is more often defined in practical terms as an entity created or recognised under a specific Companies Act.⁶² Some commentators attempt to define the company with reference to its attributes. As indicated in the previous chapter, the company developed legal characteristics or attributes through the years that distinguishes it from other social and economic organisations and that makes it prodigiously successful. These characteristics or attributes are the following: The first and most important attribute of the company is its separate legal personality, which it derived from the medieval corporation or *universitas*. The characteristics of perpetual succession and asset partitioning (including limited liability⁶³) are consequences of the company’s separate legal personality.⁶⁴ The positive effect of asset partitioning, and specifically limited liability is that it

⁶⁰ Deregistration in terms of the Companies Act of 1973 meant the cancellation by the Registrar of companies of the memorandum of association and articles of association of the company (see section 1 of the Companies Act of 1973).

⁶¹ Per Buckley J in *Re Stanley, Tenant v Stanley* [1906] 1 Ch. 131 at 134.

⁶² Carter 11-14; Blackman “Companies” in Joubert (ed) LAWSA vol 4 part 1 (1995) (hereinafter “LAWSA vol 4 part 1”) par 1; Davies & Worthington *Gower & Davies Principles of Modern Company Law* 9th ed (2012) (hereinafter “*Gower & Davies Principles of Modern Company Law* 9th ed) 3; Singh *Company Law* 16th ed (2015) 1-2.

⁶³ Limited liability was not initially the feature that caused business people to seek out and adopt the company as an organizational form. Company statutes did not always provide for limited liability, especially early in the nineteenth century. See Blair (2013) *University of Illinois Law Review* 785 795.

⁶⁴ *Gower & Davies Principles of Modern Company Law* 9th ed 12; Blair (2013) *University of Illinois Law Review* 785 787-788 and 795-796; Harris (2015) *Seattle University Law Review* 537 550. Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 35-41 states that limited liability, perpetual succession, the fact that the assets, profits, debts and liabilities belong to the company, the fact that a shareholder has no right to manage the company’s business or transact on its behalf, that a company may sue and be sued in its own name and that a company may contract with its shareholders are all consequences of the company’s separate legal personality. See also Welling et al *Canadian Corporate Law* 128. Berle & Means *The Modern Corporation* 120 explain:

makes it possible to isolate business risks within the corporate venture and facilitates the raising of capital from investors. It thus stimulates growth and investment. The second characteristic of the modern company is that it is managed under a centralised (board) structure. The governance structure prescribed by company law since the early nineteenth century is a managerial hierarchy topped by a board of directors. This permits a large and fluctuating body of investors to entrust their investments to a small, dedicated and specialized group of persons to manage. The third characteristic of the company is that its equity interests (usually in the form of shares) are transferrable. These characteristics were developed through an evolutionary process to deal with the multi-disciplinary problems that the company faced, such as the agency, asset partitioning and team production challenges.⁶⁵

For Carter the company and the state are similar group organisations which differ principally in size and the presence in the state of the sovereign quality of the group will.⁶⁶ The most usual distinguishing characteristics of the company for Carter are limited liability, its continued existence and centralised control.⁶⁷ However he warns that when a criterion is sought to distinguish between an incorporated and an unincorporated body, no one of these attributes can be taken as an absolute certain guide.⁶⁸

According to Cook: “The corporation is a protection in that the liability is limited; it is capable in that it renders possible the collection of great capital; it is efficient because the directors and they alone govern its policy and its contracts; and it is convenient because it is easy to sell or buy or pledge or bequeath one’s interests in the concern.”⁶⁹

“The real privilege which the state grants is that of corporate entity - the right to maintain business in its own name, to sue and be sued on its own behalf irrespective of the individuals; to have perpetual succession - i.e. to continue this entity although the individuals in it changed. From all this necessarily flowed a limited liability of the associates.”

⁶⁵ Harris (2015) *Seattle University Law Review* 537 549.

⁶⁶ Carter 18.

⁶⁷ Carter 6 and 9.

⁶⁸ Carter 6 – 8.

⁶⁹ Cook *Treatise on the Law of Corporations having a Capital Stock* vol 1 (1913) 31 sec 6 n3.

The Nel Commission⁷⁰ concluded that the features of a modern public company include its artificial legal personality, perpetual succession, assets and profits that accrue to itself and not its members, limited liability, transferable interests, management by directors appointed by shareholders and, in many jurisdictions, the compulsory preparation and publication of audited financial statements.

According to Armour, Hansmann and Kraakman⁷¹ business corporations in Europe, America and Japan all have the same legal characteristics. These characteristics are legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership.

For Greenfield the attributes of the company that makes it such a success are the liquidity and transferability of its shares, the protection of shareholders from personal liability for the debts of the company, its perpetual and separate existence and centralised management.⁷²

In *Trustees of Dartmouth College v Woodward*⁷³ Chief Justice Marshall stated that the most important attributes of the company are its separate existence (“individuality”) and its immortality.⁷⁴

In *Vitamax (Pty) Ltd v Executive Catering Equipment CC*⁷⁵ the court said that the essential characteristics of a company are its existence as an entity distinct from its members, its capacity to

⁷⁰ Nel Commission *The Final Report of the Commission of Enquiry into the affairs of the Masterbond Group and Investor Protection in South Africa* (2001) (hereinafter “Nel Commission Report”) par 2.3.

⁷¹ Armour et al “What is Corporate Law” in in Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda & Rock *The Anatomy of Corporate Law A Comparative and Functional Approach* (2009) (hereinafter “*The Anatomy of Corporate Law*”) 1-16.

⁷² Greenfield *The Failure of Corporate Law Fundamental Flaws & Progressive Possibilities* (2006) (hereinafter “*Greenfield The Failure of Corporate Law*”) 130-134; Greenfield “Proposition: Saving the world with corporate law?” (2008) *Emory Law Journal* 947 954-955.

⁷³ *17 U.S. (4 Wheat.) 518 (1819)*.

⁷⁴ At 636-637.

⁷⁵ 1993 (2) SA 556 (W) 558.

own property apart from its members and perpetual succession. The most important of these characteristics is the concept of a company as a separate legal person.⁷⁶

The modern company as we understand it in company law can thus be defined as a separate legal person (which encompasses the characteristics of perpetual succession and asset partitioning) managed under a centralised (board) structure and having a liquid and transferable equity (or interest) structure. One can add that the company depends on the law for its existence or recognition.

3 TYPES OF COMPANIES

What we call “companies” or “corporations” encompass a wide range of entities that differ dramatically from one another, both historically and in our present time. They differ in a number of respects, including size, structure, organisation, profitability, culture and goal.⁷⁷ These salient distinctions must be acknowledged in determining how companies should be conceptualised and regulated. Companies can for example be classified according to their number of members as sole companies⁷⁸ or aggregate companies.⁷⁹ A single member or small family owned and operated company differs materially from a large public company with dispersed shareholders. Companies can also be categorised according to the nature of their members. A state owned company differs from a privately owned company.⁸⁰ With relation to the right of members to freely alienate their

⁷⁶ Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 35-41 states that limited liability, perpetual succession, the fact that the assets, profits, debts and liabilities belong to the company, the fact that a shareholder has no right to manage the company’s business or transact on its behalf, that a company may sue and be sued in its own name and that a company may contract with its shareholders are all consequences of the company’s separate legal personality. See also Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2006) (hereinafter “Welling et al *Canadian Corporate Law*”) 128; Petrin (2013) *Penn State Law Review* 1 20. Berle & Means *The Modern Corporation* 120 explain:

“The real privilege which the state grants is that of corporate entity – the right to maintain business in its own name, to sue and be sued on its own behalf irrespective of the individuals; to have perpetual succession – i.e. to continue this entity although the individuals in it changed. From all this necessarily flowed a limited liability of the associates.”

⁷⁷ Colombo (2012) *Temple Law Review* 1 4-5.

⁷⁸ A company having only one member at a time (also known as a one-man company).

⁷⁹ A company having more than one member at a time.

⁸⁰ Carter 14; Colombo (2012) *Temple Law Review* 1 16-17.

shares companies can be divided into public (“open”)⁸¹ or private (“closed”)⁸² companies. Companies can further be divided according to their function. One of the most significant legally recognized distinctions is that between profit (or for-profit) and non-profit (or not-for-profit) companies.⁸³ Insofar as profit companies are concerned, some are formed to enable a single or a small group of traders to carry on a business. Others are formed to allow the investing public to invest in the enterprise without participating in the management.⁸⁴ It is therefore not surprising that the law itself does not treat all companies equally.⁸⁵

The *Companies Act 2006* of the United Kingdom distinguishes between public and private companies.⁸⁶ In essence a public company is permitted to offer its shares to the public whilst a private company is not so permitted.⁸⁷ A public company whose shares are traded on a public market (a listed, publicly traded or quoted company) is subject to more stringent regulation by the *Financial Services and Markets Act 2000*⁸⁸ and the rules made under it by the Financial Conduct Authority.⁸⁹ A company can further be a limited or an unlimited company.⁹⁰ In an unlimited

⁸¹ The shareholders of public companies have the right to freely alienate their shares.

⁸² The right of shareholders to alienate their shares in private companies are restricted. See Carter 15.

⁸³ Colombo (2012) Temple Law Review 1 20-21.

⁸⁴ *Gower & Davies Principles of Modern Company Law* 9th ed 12-13.

⁸⁵ Colombo (2012) Temple Law Review 1 16-20. Colombo argues that a small family owned and operated company seem to be well described and understood under the aggregate theory. A pension fund may be more accurately envisioned in managerialist terms. A holding company appear to be the epitome of an artificial person. A large manufacturing company may be best conceptualised by the team production theory.

⁸⁶ Section 4 of the *Companies Act 2006*. See also Hannigan “Companies” in MacKay *Halsbury’s Laws of England* 5th ed (2009) Vol 14 (hereinafter “Hannigan *Companies*”) paras 72 and 73; *Gower & Davies Principles of Modern Company Law* 9th ed 14-16.

⁸⁷ As indicated in chapter 2, the private company was introduced in the United Kingdom by the *Companies (Consolidation) Act 1908* (8 Edw. 7 c.69). Now the default rule in the United Kingdom is that a company is a private company. In other words unless the company states that it is to be registered as a public company, it will be a private one. See *Gower & Davies Principles of Modern Company Law* 9th ed 16.

⁸⁸ C 8.

⁸⁹ Sections 146 and 361. See also *Gower & Davies Principles of Modern Company Law* 9th ed 16-19.

⁹⁰ Section 3. See also Hannigan *Companies* paras 81 and 102; *Gower & Davies Principles of Modern Company Law* 9th ed 19.

company there is no limit on the members' liability.⁹¹ The *Companies Act 2006* also distinguishes between companies limited by guarantee and companies having a share capital.⁹² Companies limited by guarantee are suitable for carrying on non-profit ventures. A company formed to promote the interests of the community or a section of it can also opt to form a community interest company in terms of the *Companies (Audit, Investigations and Community Enterprise) Act 2004*.⁹³ The *Companies Act 2006* also recognizes the different needs of different sizes of company.⁹⁴ Statutory and chartered companies can still be incorporated in the United Kingdom.⁹⁵

In Canada corporations can be incorporated by the federal Parliament and each provincial legislature.⁹⁶ Corporations incorporated in terms of the federal *Canada Business Corporations Act* are all business corporations. In Canadian law the traditional division between private and public companies has no technical meaning. No such distinction is made in the *Canada Business Corporations Act*. Securities regulation distinguishes between corporations that offer securities to the public and those who do not.⁹⁷ Non-profit corporations are incorporated under the *Canada Not-for-profit Corporations Act*.⁹⁸

The two common types of company that may be incorporated under the Indian *Companies Act 2013* are private companies⁹⁹ and public companies.¹⁰⁰ Private companies include one person

⁹¹ Not surprisingly, very few unlimited companies are incorporated. See *Gower & Davies Principles of Modern Company Law* 9th ed 19.

⁹² Section 5. See also Hannigan *Companies* paras 78, 79 and 102.

⁹³ C 27. See also section 6 of the *Companies Act 2006*; Hannigan *Companies* par 82; *Gower & Davies Principles of Modern Company Law* 9th ed 11 and 20-22.

⁹⁴ See for example sections 123, 381-384 and 455. See also *Gower & Davies Principles of Modern Company Law* 9th ed 19-20.

⁹⁵ *Gower & Davies Principles of Modern Company Law* 9th ed 22-24.

⁹⁶ *Welling Corporate Law in Canada* 1-12. Provinces are limited to conferring rights to corporations to operate within the incorporating province.

⁹⁷ *Welling Corporate Law in Canada* 301 n11.

⁹⁸ *SC 2009, c23*.

companies¹⁰¹ and small companies.¹⁰² Public companies may be listed¹⁰³ or unlisted. Private and public companies may be incorporated as either limited liability companies or unlimited liability companies.¹⁰⁴ Limited liability companies may be companies limited by shares,¹⁰⁵ companies limited by guarantee¹⁰⁶ or companies limited by guarantee as well as shares.¹⁰⁷ Companies may also be classified as statutory companies,¹⁰⁸ registered companies,¹⁰⁹ associations not for profit,¹¹⁰ government companies,¹¹¹ foreign companies,¹¹² holding companies,¹¹³ subsidiary companies¹¹⁴ and associate companies.¹¹⁵

⁹⁹ Sections 2(68) and 3(1)(b) of the *Companies Act 2013*. The members of a private company is limited to 200. Its articles must restrict the transfer of its shares and prohibit the invitation to the public to subscribe for any securities of the company. It must have a prescribed minimum paid-up capital.

¹⁰⁰ Section 2(71). A public company is defined as a company which is not a private company with a prescribed minimum paid-up capital.

¹⁰¹ Sections 2(62) and 3(1)(c). The *Companies Act 2013* has for the first time allowed the incorporation of a limited liability company consisting of just one member.

¹⁰² Section 2(85). The paid-up capital and turnover of a small company may not exceed a prescribed amount.

¹⁰³ Section 2(52). A listed company means a company which has any of its securities listed on any recognized stock exchange.

¹⁰⁴ Section 2(92). Section 3(2) allows a company to be registered as an unlimited company.

¹⁰⁵ Sections 2(22) and 4(1)(d)(i).

¹⁰⁶ Sections 2(21) and 4(1)(d)(ii).

¹⁰⁷ Section 285.

¹⁰⁸ Section 1(4). Each statutory company is governed by the provisions of its own special Act. However the provisions of the *Companies Act 2013* apply to these companies insofar as it is not inconsistent with the special Act.

¹⁰⁹ A company registered under the *Companies Act 2013* is a registered company.

¹¹⁰ Section 8.

¹¹¹ Section 2(45). At least 51 percent of a government company's shares must be held by the central and/or state government(s). A government company can be a private or public company.

¹¹² Section 2(42).

¹¹³ Section 2(46).

¹¹⁴ Section 2(87).

¹¹⁵ Section 2(6). For a discussion of the various types of companies provided for by the Indian *Companies Act 2013* see Ghosh *T.P. Ghosh on Companies Act 2013* 2nd ed (2014) (hereinafter *Ghosh Ghosh on Companies Act*) 66-97; Kapoor & Dhamija *Taxmann's Company Law* 17th ed (2014) (hereinafter "*Kapoor & Dhamija Taxmann's Company Law*") 28-60; Singh *Company Law* 16th ed (2015) (hereinafter "*Singh Company Law*") 553-574.

In South Africa the Department of Trade and Industry's policy paper entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*¹¹⁶ (the Policy Document), that was published in 2004, stated that the company law regime in existence at the time recognized three business (or for-profit) vehicles namely, a public company, a private company and a close corporation. Relatively little distinction was made between a private and public company in terms of structuring and reporting requirements, while the gap between these two business vehicles and a close corporation was large. The Policy Document recognised the need to review the business forms available with the view to providing the best form of incorporation, especially for persons forming a business for the first time.¹¹⁷ The Policy Document specifically proposed that the review of our company law be extended to non-profit organisations and co-operatives to ensure that these kind of companies are not faced with the same requirements regarding share capital, but still comply with principles of sound governance, accountability and the protection of creditors.¹¹⁸ The Policy Document concluded that the division between close corporations, private companies and public companies offered limited opportunities for progression from one form of company to another. This resulted in distrust by financiers of close corporations. It was therefore necessary to move away from the largely artificial separation between the different business forms, to recognise only one formal business vehicle and to provide for a simple, easy company formation process. The Policy Document stressed that it is necessary to recognize that companies will vary in size, turnover and in the number of shareholders. The number of shareholders do not provide an adequate basis for differentiation. The Policy document stated that the most important distinction was perhaps between listed and unlisted companies. Additional rules may be imposed on listed companies to meet the requirements of the stock exchange and to protect the investment of small and larger shareholders who have very limited input into the running of these companies. In addition a further distinction may be necessary for unlisted companies on the basis of turnover, as the ability

¹¹⁶ Government Gazette 26493 of 3 June 2004.

¹¹⁷ Par 2.2.3.

¹¹⁸ Paras 1.3 and 2.2.4. According to the Policy Document it was estimated that there were approximately 11 000 section 21 companies registered in South Africa at the time.

to contract and the relationship with other stakeholders becomes more complex as the size and turnover of these companies increases.¹¹⁹

The South African Companies Act of 2008 serves as a single statute that regulates diverse types of companies. The Act allows flexibility in the design and organization of companies.¹²⁰ Existing close corporations remain in existence. However no new close corporations may be formed, nor may companies be converted into close corporations.¹²¹ Section 8(1) of the Act provides for the formation of two broad types of company namely, profit companies and non-profit companies. A profit company is defined as a company formed for the purpose of financial gain for its shareholders.¹²² Section 8(3) provides that no association founded after 31 December 1939 for purposes of carrying on business that has for its object the acquisition of gain by the association or its individual members, is or may be a company or other form of body corporate unless it is registered as a company under the Act, is formed pursuant to another law or was formed pursuant to letters of patent or royal charter before 31 May 1962. Profit companies are categorised into private companies, public companies, personal liability companies and state-owned companies. A private company is a profit company whose memorandum of association prohibits the offering of its shares to the public and restricts the transferability of its shares.¹²³ A public company is any profit company that is not a state-owned enterprise, a private company or a personal liability

¹¹⁹ Par 4.2.

¹²⁰ Cassim MFC “Types of Companies” in *Contemporary Company Law* 67-68. This is in line with the stated purposes of the Act, which includes to promote the development of the South African economy by creating flexibility and simplicity in the formation and maintenance of companies (section 7(b)), to reaffirm the concept of the company as a means of achieving economic and social benefits (section 7(d)), to continue to provide for the creation and use of companies in a manner that enhances economic welfare (section 7(e)) and to provide for the development of companies within all sectors of the economy (section 7(f)). According to *Gower & Davies Principles of Modern Company Law* 9th ed 15 a single act approach functions well if the act in question allows for such flexibility.

¹²¹ Schedule 3 item 2(1) of the Companies Act of 2008. See also Cassim MFC “Types of Companies” in *Contemporary Company Law* 100-103; Davis (ed) *Companies and Other Business Structures in South Africa* 3rd ed (2013) (hereinafter “Davis *Companies and Other Business Structures*”) 38.

¹²² Section 1. See also Cassim MFC “Types of Companies” in *Contemporary Company Law* 69-72; Davis *Companies and Other Business Structures* 34. The authors of Davis *Companies and Other Business Structures* 34 n 29 remark that the definition of a profit company appears to contradict the enlightened shareholder approach which was adopted in the Act.

¹²³ Section 1. See Cassim MFC “Types of Companies” in *Contemporary Company Law* 73-78; Davis *Companies and Other Business Structures* 36-37 for a discussion of the private company. In contrast with the provisions of the Companies Act of 1973 there is no restriction on the number of shareholders of a private company in the Companies Act of 2008.

company. A public company can be listed (on a stock exchange) or unlisted.¹²⁴ A personal liability company is a private company whose memorandum of incorporation provides that it is a personal liability company.¹²⁵ A state-owned company is a profit company that is either listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act,¹²⁶ or is owned by a municipality. They are thus directly or indirectly controlled by the state.¹²⁷ The Act also provides for external and domesticated companies.¹²⁸ The Companies Act of 2008 further differentiates between companies based on their economic and social significance as indicated by for example their annual turnover, the size of its workforce, or the nature and extent of its activities and regulates them differently.¹²⁹ The Act does not make provision for the incorporation of companies limited by guarantee.¹³⁰

One of the purposes of the Companies Act of 2008 is to provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions.¹³¹ The Act provides for the regulation of non-profit companies in Schedule 1.¹³² A non-profit company must be incorporated for a public

¹²⁴ Section 1. See Cassim MFC “Types of Companies” in *Contemporary Company Law* 78-81; Davis *Companies and Other Business Structures* 36-37 for a discussion of the public company. A public company is subject to the enhanced accountability and transparency requirements of chapter 3 of the Act.

¹²⁵ Section 1. See Cassim MFC “Types of Companies” in *Contemporary Company Law* 81-84; Davis *Companies and Other Business Structures* 35-36 for a discussion of the personal liability company. The directors of a personal liability company is usually jointly and severally liable for the contractual debts and liabilities of the company. It is used mainly by professional associations such as attorneys, stockbrokers, public accountants, auditors and quantity surveyors whose professional rules require personal liability.

¹²⁶ Act 1 of 1999.

¹²⁷ Section 1. See Cassim MFC “Types of Companies” in *Contemporary Company Law* 84-86; Davis *Companies and Other Business Structures* 35 for a discussion of state-owned companies.

¹²⁸ Section 1. See Cassim MFC “Types of Companies” in *Contemporary Company Law* 94-100; Davis *Companies and Other Business Structures* 39-40 for a discussion of external and domesticated companies.

¹²⁹ See for example section 30(2)(b) (auditing of financial statements) and section 72(4) (appointment of a social and ethics committee).

¹³⁰ A pre-existing company limited by guarantee could have elected to become a profit company under the Companies Act of 2008, failing which it is deemed to be a non-profit company. See Schedule 5 item 4(1)(d). See also Cassim MFC “Types of Companies” in *Contemporary Company Law* 70.

¹³¹ Section 7(h).

benefit or an object relating to one or more cultural or social activities, or communal or group interest. The income and property of a non-profit company may not be distributable to its incorporators, members, directors, officers or persons related to them, subject to certain exceptions.¹³³

This study focusses primarily on companies engaged in commerce and more particularly the large public companies. The more prominent theories about the nature of the company namely, the contractarian theories (which can in turn be divided into legal contractarianism and economic contractarianism), the communitarian or progressive theories, the concession theories and the organisational theories, are considered next. Each theory is placed within its historical context. The underlying philosophy, assumptions, beliefs and approach to justice that underpins each theory are identified. The approach of each theory to the creation of the company, the nature of the company, whether it is a private or a public institution, its “entity-ness” or “entityless-ness”, the purpose of the company and the purpose of company law is discussed. Attention is also given to how each theory regards the shareholders, directors (and officers), creditors and employees of the company. Lastly some of the main criticisms of each theory are considered.

4 CONTRACTARIAN THEORIES

Contractarian theories emphasise the freedom of the individual, liberty, competition and the limitation of interference in the free-market. It can be said that it is the product of the philosophy of liberal individualism that arguably dominated political and academic discourse since World War II. During the 1980s, libertarian ideas found prominent expression in the pro-market, anti-government rhetoric of Ronald Reagan and Margaret Thatcher. Contractarians believe people ought to be free to make their own choices about how to live their lives as long as they do not harm others. They object to legal rules that redistribute wealth, mandate particular behaviour or prevent people from making bargains that they would otherwise choose to make.¹³⁴ Sandel

¹³² See Cassim MFC “Types of Companies” in *Contemporary Company Law* 86-94; Davis *Companies and Other Business Structures* 37-38 for a discussion of non-profit companies.

¹³³ Section 1 read with item 1(1) of Schedule 1.

explains that the standard case for unfettered markets (and hence also contractarianism) revolves around two ideas namely, maximising welfare (utilitarianism) and respecting freedom (libertarianism). The first claim of those arguing for unfettered markets is that markets promote the welfare of society as a whole. They equate welfare with economic prosperity, though welfare is a broader concept that can include non-economic aspects of social well-being. The second claim is that markets respect individual freedom. Rather than imposing values on persons, markets let people choose for themselves what value to place on things they exchange. This presupposes that all things can be valued in monetary terms.¹³⁵ Contractarians find the virtue argument for justice discomfoting as it seems more judgemental than arguments that appeal to welfare and freedom.¹³⁶ The contractarian theories are based on the philosophies of amongst others Jeremy Bentham (who founded utilitarianism),¹³⁷ John Stuart Mill,¹³⁸ Frederick Hayek,¹³⁹ Milton Friedman,¹⁴⁰ and Robert Nozick.¹⁴¹

The contractarian theories can be divided into economic and legal contractarianism. Economic contractarian theories are concerned with the allocation of control rights and residual claims,

¹³⁴ Millon “New directions in corporate law: Communitarians, contractarians and the crises in corporate law” (1993) Washington and Lee Law Review 1373 1382; Sandel *Justice* 61; Bone (2011) Canadian Journal of Law and Jurisprudence 277 278; Colombo (2012) Temple Law Review 1 8.

¹³⁵ Sandel *Justice* 6, 20, 41-48, 49, 60-64 and 75-102.

¹³⁶ Sandel *Justice* 8. Sandel points out that one of the great questions of political philosophy is whether a just society should seek to promote the virtue of its citizens or whether the law should be neutral toward competing conceptions of virtue, so that citizens can be free to choose for themselves the best way to live. Philosophers such as Immanuel Kant (although he rejects utilitarianism and connects justice and morality to freedom), John Rawls (although he rejects utilitarianism and purely *laissez-faire* utilitarian principles), Jeremy Bentham, John Stuart Mill and Robert Nozick argue that principles of justice that define our rights should not rest on any particular concept of virtue, or of the best way to live. This view is also supported by, for example, Milton Friedman. For philosophers such as Aristotle, Elizabeth Anderson, Alasdair MacIntyre and Sandel the law cannot be neutral on questions of virtue. This view is supported by, for example, Jean-Jacques Rousseau, Martin Luther King Jnr, John F. Kennedy, Barack Obama, and even abolitionists and the Taliban, who all draw their visions of justice from moral and religious ideas. See Sandel *Justice* 9, 12, 20, 34-48, 61, 87, 97-98, 104-109, 140-142, 151-166, 184-207, 218-243, 244-251 and 260-269.

¹³⁷ Bentham *An Introduction to the Principles of Morals and Legislation* (2007). See Sandel *Justice* 34-48.

¹³⁸ Mill *On Liberty* 4th ed (1869). See Sandel *Justice* 48-56.

¹³⁹ Hayek *The Constitution of Liberty* (1960). See Sandel *Justice* 61.

¹⁴⁰ Friedman *Capitalism and Freedom* (2002). See Sandel *Justice* 61-62.

¹⁴¹ Nozick *Anarchy, State and Utopia* (2013). See Sandel *Justice* 62-64.

while legal contractarian theories concentrate on the legal significance of boundaries of firms, such as diminishing agency problems.¹⁴²

4.1 Economic contractarianism or economic (market) theories

The economic contractarian theory was devised by economists such as Coase,¹⁴³ Alchian, Demsetz,¹⁴⁴ Jensen, Meckling¹⁴⁵ and Fama.¹⁴⁶ The concept was subsequently embraced by the law and economics school lawyers such as Easterbrook, Fischel,¹⁴⁷ and Bainbridge.¹⁴⁸ As

¹⁴² Keay *The Corporate Objective* 30.

¹⁴³ Coase “The nature of the firm” (1937) *Economica* 386. Coase saw the firm as an organisational alternative to the market. He theorised that the firm exists because it became more efficient to engage in the exchange of information and services within an organisation than it would be to contract for those services in the free market. This is because of the high transaction costs in the free market. The organisational structure of the firm allows it to allocate resources, enable sufficient outputs and thus lower transaction costs. Within the firm market transactions are eliminated and replaced by a centralised command structure. The command structure within the firm is achieved by the intrinsic structural features of the common law employment relation and in particular the concept of employee subordination to the reasonable orders of the employer. However unlike the institutional economists Coase did not see the firm as displacing market transacting, but rather as a way to engage in market activity with reduced transaction costs. See also Williamson “The vertical integration of market production: Market failure considerations” (1971) *American Economic Review* 112; Williamson “Markets and hierarchies: Some elementary considerations” (1973) *American Economic Review* 316; Keay *The Corporate Objective* 31; Talbot *Great Debates in Company Law* 2-3; Petrin (2013) *Penn State Law Review* 1 33; Chopra & Arora *Company Law Piercing the Corporate Veil* (2013) (hereinafter referred to as “Chopra & Arora *Company Law*”) 20-21. See further O’Kelley “Coase, Knight, and the nexus-of-contract theory of the firm: A reflection on reification, reality, and the corporation as entrepreneur surrogate” (2012) *Seattle University Law Review* 1247 for a different understanding of Coase’s theory of the firm and its implications for legal research into the nature of the modern corporation. According to O’Kelley, Oliver Williamson developed Coase’s theory further and theorised that the firm can be used to coordinate the trading process more efficiently than the market. The large company, and especially conglomerates, acts as little capital markets whereby executives relocate resources from under-performing areas to growth areas that are outperforming the market.

¹⁴⁴ Alchian & Demsetz “Production, information costs and economic organizations” (1972) *American Economic Review* 777. Alchian and Demsetz theorised the company as a team of producers who establish monitors to ensure a fair allocation of tasks. Whereas in Coase’s firm the structure is hierarchical, in the model of Alchian and Demsetz the structure is flat, almost like a partnership. See also Colombo (2012) *Temple Law Review* 1 7; Talbot *Great Debates in Company Law* 4-5.

¹⁴⁵ Jensen & Meckling “The theory of the firm, managerial behaviour, agency costs and ownership structure” (1976) *Journal of Financial Economics* 305. Jensen and Meckling see the firm as a legal fiction which describes a nexus of contracts. Shareholders are residual risk takers who agree with managers that the latter would protect the shareholders’ interest. But the agreement is not an actual agreement, as this would be insufficient. The key governance issue is agency costs. See also Colombo (2012) *Temple Law Review* 1 7; Talbot *Great Debates in Company Law* 5-6.

¹⁴⁶ Fama “Agency problems and the theory of the firm” (1980) *Journal of Political Economy* 288; Fama & Jensen “Separation of ownership and control” (1983) *Journal of Law and Economics* 301.

¹⁴⁷ Easterbrook & Fischel “The corporate contract” (1989) *Columbia Law Review* 1416; Easterbrook & Fischel *The Economic Structure of Corporate Law* (1996). The last mentioned is probably the classic work on the economic

indicated in the previous chapter, the law and economics movement¹⁴⁹ gained prominence from approximately 1979 with the ideological shift from Keynesian social democracy towards neoliberalism and globalism. The last decade has seen a decline in the law and economics movement. In academy this decline was authored by behavioural economics, which questions the rational actor assumption of neoclassical economics.¹⁵⁰

Because economic contractarianism and other economics-based company law models are more concerned with what companies do, rather than what they are, they are termed “functional” theories.¹⁵¹

According to the economic contractarian theory the company is a voluntary association of individuals rather than a creation of the state.¹⁵² The company (or “firm” as proponents of this theory prefer to refer to all business forms) is nothing more than a web of consensual transactions or contract based relations, either express or implied, between rational economic actors, including shareholders, managers, creditors, employees and customers.¹⁵³ The firm is thus fundamentally a

contractarian theory. See also Keay *The Corporate Objective* 26-27; Blair (2013) *University of Illinois Law Review* 785 815; Talbot *Great Debates in Company Law* 5-6.

¹⁴⁸ Bainbridge *The New Corporate Governance in Theory and Practice* (2008). See also Talbot *Great Debates in Company Law* vii.

¹⁴⁹ The law and economics movement originated in the Chicago School of Economics. See Talbot *Critical Company Law* (2007) 125. Keay *The Corporate Objective* 24 identifies four primary theories that were adopted by the law and economics school namely, the contractarian theory (which can in turn be divided into economic contractarianism and legal contractarianism), the agency theory, the transaction costs theory and the property rights theory.

¹⁵⁰ Millon (1993) *Washington and Lee Law Review* 1373 1373-1377; Greenfield “The third way: Beyond shareholder or board primacy” (2014) *Seattle University Law Review* 749 756-757. According to Greenfield the Global Financial Crisis of 2007 to 2008 has “finally marked the end of the glory days of *homo economicus*.” See Greenfield (2014) *Seattle University Law Review* 749 757. However it is still often asserted that the economic contractarian theory is the dominant view of the company. See Talbot *Critical Company Law* 129; Ripken “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle” (2009) *Fordham Journal of Corporate & Financial Law* 97 164-165; Moore *Corporate Governance* 71-72; Keay *The Corporate Objective* 27; Colombo (2012) *Temple Law Review* 1 7; Blair (2013) *University of Illinois Law Review* 785 819.

¹⁵¹ Petrin (2013) *Penn State Law Review* 1 33. The use of the term “functional” originates from Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 3-4.

¹⁵² Fischel “The corporate governance movement” (1982) *Vanderbilt Law Review* 1259 1273-1274; Greenfield *The Failure of Corporate Law* 30; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 161.

¹⁵³ Dine *Corporate Groups* 9-10; Greenfield “The place of workers in corporate law” (2001) *Boston College Law Review* 283 311; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 158-159; Keay *The Corporate Objective* 28; Petrin (2013) *Penn State Law Review* 1 34.

nexus of contracts.¹⁵⁴ The theory rests on notions of rationality, efficiency and information. However the measurement of efficiency and the explanation of what is rational varies widely.¹⁵⁵

The law and economics school holds the view that the company is a private initiative and not a public institution. The school has embraced economic theories of the company and legal theory has generally been eschewed. For them the free market will ensure that the company is properly governed and the function of the law is to ensure that the market operates effectively. They have either given little attention or rejected the role of legal principles in defining the company or firm, and they have separated the legal fiction from the economic concept.¹⁵⁶ These theorists see contracts in the economic sense as any voluntary social arrangement involving mutual expectations between parties rather than in a legal sense.¹⁵⁷

Economic contractarianism ignores or denies the separate legal personality of the company. The incorporated firm is regarded as a mere structural convenience that serves the collective, contractually communicated interests of its various human participants at any given time. It is not an independent, real corporate entity. The idea of a separate corporate person is only a convenient

¹⁵⁴ Dine *Corporate Groups* 8; Lombard *Directors' Duties to Creditors* LLD thesis (2006) University of Pretoria 17; Esser 26-27; Talbot *Critical Company Law* 125; Lichner "Should shareholders' interests be the mainstay of corporate governance?" (2009) *European Business Law Review* 889-895; Greenfield "Corporate law and the rhetoric of choice" (2009) *Law & Economics: Towards Social Justice (Research in Law and Economics, Volume 24)* 61-69-72; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97-158; Keay *The Corporate Objective* 26-27; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277-285; Colombo (2012) *Temple Law Review* 1-6; Moore *Corporate Governance* 72-74; Chopra & Arora *Company Law* 29-34; Greenfield (2014) *Seattle University Law Review* 749-753-756. The term "nexus of contracts" was first coined by Jensen & Meckling (1976) *Journal of Financial Economics* 305.

¹⁵⁵ Dine *Corporate Groups* 9; Gevurtz "Using comparative and transnational corporate law to teach corporate social responsibility" (2011) *Pacific McGeorge Global and Development Law Journal* 39-39-40.

¹⁵⁶ Branson "Corporate governance 'reform' and the new corporate social responsibility" (2001) *University of Pittsburgh Law Review* 605-618-620; Talbot *Critical Company Law* 119-129; Lichner (2009) *European Business Law Review* 889-895; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97-158-159; Keay *The Corporate Objective* 26; Colombo (2012) *Temple Law Review* 1-6; Moore *Corporate Governance* 67; Talbot *Great Debates in Company Law* 23.

¹⁵⁷ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97-158; Keay *The Corporate Objective* 28; Blair (2013) *University of Illinois Law Review* 785-814-817.

fiction.¹⁵⁸ In this sense the economic contractarian theory is analogous to the fiction theory that is discussed in the next chapter.¹⁵⁹

The function of company law is to provide a set of off-the-rack legal rules that mimic what investors and their agents would do to reduce transaction costs. The parties can opt out or deviate from these legal rules by mutual agreement. Many contractarians believe that the fundamental concern of company law is agency costs and specifically how shareholders can reduce the costs of delegating control over their financial capital to corporate managers.¹⁶⁰ Company law is facilitative or enabling (private) law and not regulatory or prescriptive (public) law. The only function of regulation is to address imperfections in the market. This theory is premised on a free and perfect market that produces optimum wealth.¹⁶¹ Governments should not concern themselves with the inherent goals of the corporation. Any adverse social outcomes should be addressed by non-corporate regulatory laws that are universal to all.¹⁶²

Contractarians sidestep the issue of the separation of ownership from control by asserting that there are no real owners of a corporation and nothing real that may be owned. Since the company consists of an association of individual actors who negotiate an equilibrium position among themselves, no one class of participants, not even the shareholders, can regard itself as owners of

¹⁵⁸ Cheffins *Company Law: Theory, Structure and Operation* (1977) 31-41; Dine *Corporate Groups* 8-10; Talbot *Critical Company Law* 125; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 159; Keay *The Corporate Objective* 27-29; Petrin (2013) *Penn State Law Review* 1 34; Moore *Corporate Governance* 62 and 72-74; Chopra & Arora *Company Law* 17-20. The notion that a company is a fiction is commonly traced to a comment of Sir Edward Coke in *The Case of Sutton's Hospital (1612)*, 10 *Ca. Rep.* at 32b: “[a] corporation ... is invisible, immortal and exists only in intendment and consideration of law.” Welling argues that this statement is a tautology. The corporation is a legal creation, a “legal personality, not [a] social, psychological, or erotic personality.” Within the realm of legal analysis corporate legal personality is unquestionable whilst outside the realm of legal analysis it is doubtful whether the corporate legal personality is of any interest at all. See Welling *Corporate Law in Canada* 112-113.

¹⁵⁹ Petrin (2013) *Penn State Law Review* 1 34.

¹⁶⁰ Dine *Corporate Groups* 8 and 10; Greenfield (2001) *Boston College Law Review* 283 295-299; Lombard 17; Esser 28; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 162-163; Colombo (2012) *Temple Law Review* 1 7; Petrin (2013) *Penn State Law Review* 1 34.

¹⁶¹ Dine *Corporate Groups* 10-11; Greenfield (2001) *Boston College Law Review* 283 312; Talbot *Critical Company Law* 125; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 162-163; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Petrin (2013) *Penn State Law Review* 1 34; Moore *Corporate Governance* 1-2 and 63-67; Greenfield (2014) *Seattle University Law Review* 749 754.

¹⁶² Talbot *Critical Company Law* 129.

the company. The shareholders are just one of the various suppliers of inputs whose rights are determined by the interrelated contracts that make up the company.¹⁶³ But the interests of shareholders are elevated above the other economic actors because they are deemed to be the residual risk bearers who exchange money and relative vulnerability for managers' loyalty by means of a non-negotiated standard form of contract.¹⁶⁴ The directors will therefore ensure that the contracts entered into with the other economic actors, for example with creditors and employees, are based upon terms and obligations that minimise costs, particularly agency costs, for if they fail to do so shareholders will withdraw their investment from the company.¹⁶⁵ Directors and officers of the company are treated as contractual agents of the shareholders.¹⁶⁶

Company law imposes fiduciary duties as part of this off-the-rack contract between managers and shareholders. Shareholders are the exclusive beneficiaries of the managers' fiduciary duties because they "face more daunting contracting problems than other constituencies."¹⁶⁷ Creditors and employees do not need fiduciary duties in their contracts because their contracts can be specific enough to make the imposition of fiduciary duties inefficient.¹⁶⁸ They must bargain with shareholders (through their agents) for whatever protections they are willing to pay for.¹⁶⁹ Macey argues that employees can also depend on collective bargaining to protect their interests insofar as their contracts do not protect them.¹⁷⁰ The resultant norm is one of shareholder wealth, which

¹⁶³ Talbot *Critical Company Law* 129; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 159-160; Colombo (2012) *Temple Law Review* 1 9-10. Colombo states that whereas the dominant characteristic of the pre-contractarian firm was the separation from ownership from control, it was arguably replaced by a separation from ownership from ownership as a result of the ascendancy of institutional investing.

¹⁶⁴ Talbot *Critical Company Law* 128; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 160.

¹⁶⁵ Jensen and Meckling (1976) *Journal of Financial Economics* 305 311; Davis & Le Roux "Changing the role of the corporation: A journey away from adversarialism" (2012) *AJ* 306 307; Petrin (2013) *Penn State Law Review* 1 34-35.

¹⁶⁶ Petrin (2013) *Penn State Law Review* 1 34-35; Blair (2013) *University of Illinois Law Review* 785 814-815.

¹⁶⁷ Millon (1993) *Washington and Lee Law Review* 1373 1378; Macey "An economic analysis of the various rationales for making shareholders the exclusive beneficiaries of corporate fiduciary duties" (1991) *Stetson Law Review* 23 36; Greenfield (2001) *Boston College Law Review* 283 312.

¹⁶⁸ Easterbrook & Fischel *The Economic Structure of Corporate Law* 90; Macey (1991) *Stetson Law Review* 23 36; Greenfield (2001) *Boston College Law Review* 283 312.

¹⁶⁹ Millon (1993) *Washington and Lee Law Review* 1373 1378.

holds that the company is to be governed in the best interests of its shareholders, within the extraneous law.¹⁷¹

4.2 Legal Contractarianism

According to the legal contractarian theory two or more parties conclude an agreement to carry on commercial activity and it is from this agreement that the company is born. The company is thus a private contractual creation and is regarded as an association or aggregation of individuals.¹⁷² Armour, Hansmann and Kraakman describe the company as a “nexus for contracts” (as opposed to the description as a “nexus of contracts” by the economic contractarians) in the sense that the company serves, fundamentally, as the common counterparty in numerous contracts with, amongst others, suppliers, customers and employees. For them a core element of the firm as a nexus for contracts is its separate legal personality in the eyes of the law.¹⁷³

As a normative matter Armour, Hansmann and Kraakman acknowledge that the overall objective of company law (as is the case with any branch of law) is to serve the interests of society as a whole. The narrower view that the purpose of company law is to maximise shareholder wealth can be understood as saying that the pursuit of shareholder value is generally an effective means of advancing overall social welfare.¹⁷⁴

¹⁷⁰ Macey “Externalities, firm-specific capital investments, and the legal treatment of fundamental corporate changes” (1989) *Duke Law Review* 173 192; Greenfield (2001) *Boston College Law Review* 283 314.

¹⁷¹ Colombo (2012) *Temple Law Review* 1 10; Moore *Corporate Governance* 66 with reference to Parkinson *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1993) 42-43 and 94-96.

¹⁷² Dine *Corporate Groups* 3; Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6 and 19-27; Chopra & Arora *Company Law* 34-36.

¹⁷³ Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6-9. This attribute of the separate legal personality of the corporation requires three types of rules namely, entity shielding (shielding the assets of the corporation from the creditors of its owners), rules governing the allocation of authority (who can bind the corporation) and procedures to bring lawsuits that require dedicated legal doctrines that cannot feasibly be replicated by contract.

¹⁷⁴ Armour, Hansmann and Kraakman argue that this is so because shareholders are the better monitors (creditors, employees and customers on the other hand will consent to deal with the corporation only if they are better off as a result) and the residual claimants (in the sense that they are entitled to appropriate the net assets and earnings of the corporation after all other contractual claimants such as creditors, employees, suppliers and customers have been paid in full) of the corporation. See Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 28-29.

Two important consequences of the legal contractarian theory are first, that it creates a private law entity that is isolated from regulatory interference by the state and secondly, the deemed agreement or contract is concluded between the company and its members (shareholders) to the exclusion of all other interested parties, including creditors and employees.¹⁷⁵ According to this model the relationship between the company on the one hand, and creditors and employees on the other is purely contractual. Whilst the economic contractarian theory also views the company as a private entity, it differs from the legal contractarian theory in that it deems the web of consensual transactions or contract based relations to be between all the rational economic actors, including creditors and employees.

Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda and Rock, who are all well-known advocates of the legal contractarian theory, describe the approach that they take in their comprehensive analysis of the company and company law in *The Anatomy of Corporate Law A Comparative and Functional Approach* as “functional” in the sense that they focus on the ways in which company law responds to the practical problems facing companies.¹⁷⁶ For legal contractarians the principal function of company law is facilitative namely, to provide business enterprises with a legal form that possesses five core attributes, namely, legal personality, limited liability, transferable shares, delegated management under a board structure and investor ownership.¹⁷⁷ Within this legal form stakeholders can structure their particular relationships as they deem fit.¹⁷⁸ A second, but equally important function of company law is to facilitate coordination between participants in the corporate enterprise by minimising agency or principal-agent problems. Agency problems is a term that describes three principal sources of opportunism namely, conflicts between managers and shareholders, conflicts among shareholders, and conflicts

¹⁷⁵ Millon (1993) Washington and Lee Law Review 1373 1378; Dine *Corporate Groups* 3-4 and 9; Lombard 27-28; Moore *Corporate Governance* 2-3 and 63-67.

¹⁷⁶ Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 2-5.

¹⁷⁷ Branson (2001) University of Pittsburgh Law Review 605 620-622; Hansmann & Kraakman “The end of history for corporate law” (2001) Georgetown Law Journal 439 439-440; Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 1-2; Armour, Hansmann & Kraakman “Agency Problems and Legal Strategies” in *The Anatomy of Corporate Law* 35; Petrin (2013) Penn State Law Review 1 37-38.

¹⁷⁸ Millon (1993) Washington and Lee Law Review 1373 1378; Esser 27; Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6 and 19-27.

between shareholders and the company's other constituencies, including creditors and employees.¹⁷⁹

According to the agency theory, which became influential by the early 1900s, directors are regarded as agents of the shareholders, who do not have the time or ability to run the company's business. The managers (or executive directors) are appointed by the board of directors to manage the business of the company for the shareholders. The shareholders of the company are best suited to monitor the managers and in so doing they incur costs, known as "agency costs". One of the primary emphases of the agency theory is to monitor agency costs.¹⁸⁰

Armour, Hansmann and Kraakman use the term "ownership" in the sense of describing the right to control the company¹⁸¹ and the right to receive the company's net assets. According to them the company is principally designed to facilitate the organization of investor-owned firms. In other words the persons who invest capital in the company are the "owners" in the sense described before. They concede that the law sometimes deviates from this assumption and permits persons other than investors of capital, for example creditors and employees,¹⁸² to participate in some degree in either the control or net earnings or both.¹⁸³ Whilst the corporate governance system principally supports the interests of shareholders as a class, it can (and to some degree must) also

¹⁷⁹ Armour, Hansmann & Kraakman "What is Corporate Law" in *The Anatomy of Corporate Law* 2-3. Armour, Hansmann & Kraakman "Agency Problems and Legal Strategies" in *The Anatomy of Corporate Law* chapter 2 describe the legal strategies that are used to reduce agency costs. Greenfield *The Failure of Corporate Law* 47-53 argues that the agency costs argument provides a basis for the protection of employees as well. He is supported by Glynn "Communities and their corporations: Towards a stakeholder conception of the production of corporate law" (2008) *Case Western Reserve Law Review* 1067 1072-1073.

¹⁸⁰ Armour, Hansmann and Kraakman "Agency Problems and Legal Strategies" in *The Anatomy of Corporate Law* 35-37; Talbot *Critical Company Law* 125-126; Keay *The Corporate Objective* 30-31; Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) (hereinafter "Keay *The Enlightened Shareholder Value Principle*") 20-21; Chopra & Arora *Company Law* 21-23; De Jongh *Between societas and universitas. The listed company in historical perspective (Tussen societas en universitas. De beursvennootskap en haar aandeelhouders in historisch perspectief)* (2013) Supreme Court of Netherlands - Research Department (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368748 (accessed 2014-04-09)) (hereinafter "De Jongh *Between societas and universitas*") 562.

¹⁸¹ Which generally involves voting in the election of directors and voting to approve major transactions.

¹⁸² Worker co-determination and the rules pertaining to insolvency are typical examples.

¹⁸³ Armour, Hansmann & Kraakman "What is Corporate Law" in *The Anatomy of Corporate Law* 14-15.

address the agency conflicts jeopardising the interests of minority shareholders and non-shareholder constituencies.¹⁸⁴

Company law largely refrains from regulating transactions with creditors. However, in two instances the benefits of company law responding to shareholder-creditor agency problems outweigh their costs namely, in relation to companies that are financially distressed and creditors who are unable to adjust the terms of their exposure to the risk that they bear (for example victims of delicts).¹⁸⁵ Rock argues that the shareholder-creditor agency cost problem also becomes a central concern for company law if the system is shareholder-centric rather than manager-centric.¹⁸⁶ The reason for this is that shareholders have an incentive to externalize risk unto creditors and other fixed claimants.¹⁸⁷

According to Enriques, Hansmann and Kraakman, employees are the principal non-shareholder constituency to enjoy governance protection as a matter of right in some jurisdictions.¹⁸⁸ The first governance protections afforded to employees are appointment and decision rights. They point out that the company laws of many West European countries mandate employee-appointed directors in at least some large companies.¹⁸⁹ In contrast with appointment rights, company law almost never confers direct decision-making rights on employees. Works councils, even though they cannot influence major corporate decisions, provide employees with information and consultation rights and arguably creates as much trust between companies and employees as

¹⁸⁴ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 89.

¹⁸⁵ Armour, Hertig & Kanda “Transactions with Creditors” in *The Anatomy of Corporate Law* 118-121.

¹⁸⁶ Rock “Adapting to the new shareholder-centric reality” (2013) *University of Pennsylvania Law Review* 1907 1910. In his view the United States corporate law system had shifted from a manager-centric system to a shareholder-centric system since the early 1980s as managers started to largely think like shareholders as a result of changes in managerial compensation, shareholder concentration and activism and board composition, outlook and ideology.

¹⁸⁷ Rock (2013) *University of Pennsylvania Law Review* 1907 1927.

¹⁸⁸ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 89.

¹⁸⁹ German law, for example, provides that half of the members of supervisory boards of companies with over 2000 (German based) employees be appointed by employees. See Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 100.

mandatory representation on the board, especially since representatives on works councils are typically employees of the company rather than outside union representatives.¹⁹⁰ The second governance protections are incentive strategies. Non-shareholder constituencies do not enjoy the protection of the equal sharing norm. Employees receive the bulk of their compensation as fixed payments rather than volatile claims on the net income of the company as a whole. The company law of many jurisdictions provides that directors owe their fiduciary duties to the company rather than any of its constituencies. In theory this might (or might not) require a division of company surplus between all the constituents (including employees). In practice, however, courts lack the information to determine which policies maximize aggregate welfare, which renders this duty unenforceable. According to Enriques, Hansmann and Kraakman this duty of directors is thus less a species of equal sharing than, at best, a vague counsel of virtue, and, at worst, a smokescreen for board discretion. The appointment of independent directors and constituency statutes¹⁹¹ may function as weak trustees on behalf of employees. Employee stock ownership might also seem to be a weak variant of the equal sharing device. But share ownership does not have the same consequences for employees that it has for outside investors with diversified portfolios. Consequently incentive devices are less important in protecting employees.¹⁹² Lastly the constraints strategy for protecting employees is largely embodied in separate legislation such as labour law. For Enriques, Hansmann and Kraakman company law constraints for protecting employees are either toothless or narrowly targeted.¹⁹³

4.3 Criticism of the contractarian theories

As indicated hereinbefore, the normative or philosophical foundation of the contractarian theories revolve around two ideas namely, maximising welfare (utilitarianism) and respecting freedom (libertarianism). Sandel identifies two defects in the utilitarian approach: First, it makes justice a

¹⁹⁰ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 102-104. See Havenga “Directors’ fiduciary duties under our future company law regime” (1997) SA Merc LJ 310 322-323 for a discussion of works councils in South Africa.

¹⁹¹ Constituency statutes permit, but do not require, directors to consider the interests of employees and other non-shareholder constituencies.

¹⁹² Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 102-104.

¹⁹³ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 104-105.

matter of calculation, not principle. Secondly, it attempts to translate all human goods into a single uniform measure of value (more particularly into monetary terms) and ignores the qualitative differences between them.¹⁹⁴ The libertarian approach solves the first defect but not the second. Except for singling out certain rights worthy of respect, they accept people's preferences as they are and ignore their moral value.¹⁹⁵ The moral basis of libertarianism is self-ownership.¹⁹⁶ The notion of self-ownership is appealing, especially to those who seek a strong foundation for individual rights. But it has implications that are not easy to embrace, like an unfettered market without a safety net for those who fall behind; a minimal state that rules out most measures to ease inequality and promote the common good; and a celebration of consent so complete that it permits self-inflicted affronts to human dignity such as cannibalism or selling oneself into slavery.¹⁹⁷ The liberal conception of freedom does not explain a range of moral and political obligations that we commonly recognise, or even prize. These include obligations of solidarity and loyalty, historic memory and religion.¹⁹⁸ The normative or philosophical basis of the contractarian theories is therefore questionable.

A further fundamental criticism of the contractual theories is that the notions of rationality, efficiency, information and a free and perfect market that produces optimum wealth on which it is premised are illusions. The contractual theories are based on the assumption that when two persons conclude a contract, the terms of that contract must be fair. But as Sandel points out,

¹⁹⁴ Sandel *Justice* 260. Sandel demonstrates with reference to poignant examples (placing a value on loss of life, pain or virtue and paying persons to wage war and bear children) that it is not possible to capture all values in monetary terms and that certain goods are corrupted or degraded if bought or sold for money. See Sandel *Justice* 41-48 and 75-102.

¹⁹⁵ Sandel *Justice* 260-261. According to the libertarian approach obligations can arise in only two ways: First, natural duties that are universal and do not require consent. Secondly, voluntary obligations that are particular and require consent. Sandel identifies a third source of obligation (based on a narrative conception of persons) namely, obligations of solidarity that are particular and do not require consent. They involve moral responsibilities we owe to those with whom we share a certain history. Only this third category of obligations can explain public apologies and reparations; collective responsibility for collective injustice; the special responsibilities of family members, and fellow citizens, for one another; solidarity with comrades; allegiance to one's town or city, community or country; patriotism; pride and shame in one's nation or people; fraternal and filial loyalties. See Sandel *Justice* 224-240.

¹⁹⁶ The idea that I own my body, my life and my person and should be free to do whatever I want to do with them, as long as I do not hurt others. See Sandel *Justice* 70.

¹⁹⁷ Sandel *Justice* 65, 69-74 and 103-105.

¹⁹⁸ Sandel *Justice* 220-221.

contracts are not self-sufficient moral instruments. Contracts carry moral weight only insofar as they realise two ideals: First, they must be autonomous in the sense that must be truly free. A contracting party can exercise free choice only if he or she is not unduly pressured and reasonably well informed. Secondly, they must be reciprocal. The obligation to fulfil them must arise from the obligation to repay the other party for the benefits provided by that party. In practice these ideals are imperfectly realised. Persons are situated differently in real life. The bargaining power and knowledge of the contracting parties often differ. As long as this is true the existence of the agreement does not, by itself, guarantee the fairness of the agreement.¹⁹⁹ The reality of the matter is further that the market on which the contractual theories are premised is neither truly fair nor perfect.²⁰⁰ Yet one of the most striking tendencies of our time is the expansion of markets and market-orientated reasoning into spheres of life traditionally governed by non-market norms. Markets are useful instruments for organizing productive activity. But Sandel warns that “unless we want to let the market rewrite the norms that govern social institutions, we need a public debate about the moral limits of markets.”²⁰¹

According to Dine, the economic contractarian theory is criticized both at the level of the conception of companies and company law, as well as the perceived political results of the theory. At the conceptual level the utility and accuracy of the theory is questioned. The explanation of what is rational and the measurement of efficiency, two of the core notions of this theory, varies widely. The third notion on which it is based namely, that the rational actor has full and perfect information at his or her command is a myth.²⁰² Its most obvious shortcoming is the assumption

¹⁹⁹ Sandel *Justice* 95 and 142-151.

²⁰⁰ Sandel *Justice* 7, 75 and 95-96. This is now generally accepted. See for example the work of Jean Tirole, the 2014 Nobel Prize winner for economic sciences, including Tirole “Overcoming adverse selection: How public intervention can restore market functioning” (2012) *American Economic Review* 102. Even Milton Friedman, the 20th century’s most prominent advocate for free markets and winner of the 1976 Nobel Prize in economic sciences, accepted this. See Friedman M & Friedman R *Free to Choose* (1980) 136-137. Hence also the need for legislation that attempts to address the unfairness and imperfections of the market, including the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Competition Act 89 of 1998, the Promotion of Access to Information Act 2 of 2000, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.

²⁰¹ Sandel *Justice* 265.

²⁰² Dine *Corporate Groups* 12-13; Greenfield *The Failure of Corporate Law* 11-12; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 165; Gevurtz (2011) *Pacific McGeorge Global and Development Law Journal* 39 39-40; Petrin (2013) *Penn State Law Review* 1 39.

of perfectly efficient markets on which it is based. The frank reality is that markets are neither free nor perfect. Market failures are a reality.²⁰³ At the level of the perceived political results of the theory, the economic view of the company may encourage a short term view of the company's best course of action. It tends to emphasise wealth maximisation of the shareholders at the expense of public interest goals. This can lead to corporate failures and catastrophes.²⁰⁴

Davis and Le Roux reason that a company cannot be reduced to the sum of a series of contracts. It is a far more complex institution with distinctive attributes and is of considerable importance to a wide range of stakeholders in modern economic life.²⁰⁵ The economic contractarian theory specifically offers too narrow a focus and too simplistic a response to the question, what is a company? It does not give any significance to the social, moral and political aspects of the company.²⁰⁶ For Welling the concept of a nexus of contracts may conceivably be right in economic theory but it makes no sense about the legal theory of corporations.²⁰⁷

O'Kelley argues that the economic contractarian theory does not provide a theoretical paradigm that accurately predicts or describes company law. He identifies two flaws in the theory. The first is the equation of the company and the firm. The second flaw is the exclusion of the entrepreneur.²⁰⁸ He argues that the economic contractarians' conceptualisation of the company is based on a misapplication of Coase's theory of the firm.²⁰⁹ Coase's theory of the firm must in turn must be understood as an extension of Knight's theory of the entrepreneur.²¹⁰ Prior to the seminal contributions of Knight and Coase in the early 20th century, Adam Smith's perfect

²⁰³ Sandel *Justice* 19 Bone (2011) Canadian Journal of Law and Jurisprudence 277 290.

²⁰⁴ Dine *Corporate Groups* 14; Greenfield *The Failure of Corporate Law* 17-18 and 30-35; Ripken (2009) Fordham Journal of Corporate and Financial Law 97 165-166; Bone (2011) Canadian Journal of Law and Jurisprudence 277 290.

²⁰⁵ Davis & Le Roux (2012) AJ 306 307.

²⁰⁶ Ripken (2009) Fordham Journal of Corporate & Financial Law 97 166.

²⁰⁷ Welling *Corporate Law in Canada* 110-112.

²⁰⁸ O'Kelley (2012) Seattle University Law Review 1247 1250.

²⁰⁹ In Coase (1937) *Economica* 386.

²¹⁰ In Knight *Risk, Uncertainty, and Profit* (1921). See O'Kelley (2012) Seattle University Law Review 1247 1248.

competition model was the dominant economic model. According to this model perfect competition makes central planning largely unnecessary. Price signals would result in the best allocation of economic resources.²¹¹ Knight and Coase on the other hand looked inside the firm and identified the entrepreneur as the central economic actor who allocated resources by command.²¹² Knight sought to go beyond the perfect competition theory and explain how the free enterprise system actually works. Knight's central argument was that uncertainty is the most critical factor to abstract from reality in order to produce perfect competition. The presence of uncertainty in the real world explains the existence of the entrepreneur and the firm.²¹³ Knight and Coase saw the firm as having an "inside" and an "outside". The firm also has a distinct central actor, the entrepreneur. On this view the company (comprised of the relations between officers, directors and shareholders) is the "inside" of the firm acting as entrepreneur. The primary function of company law is to regulate this relationship between officers, directors and shareholders. The relationships between the company (acting as entrepreneur-owner) and the other constituents of the firm, including creditors, employees and customers, encompasses the "outside" of the firm. The "company" is therefore not the same thing as the "firm".²¹⁴

Gevurtz reasons that the law has a legitimate concern not only with the total wealth produced by companies, but also in helping to ensure that the distribution of this wealth reflects societal values - whether this value is equality or, less ambitious, that distributions reflect fully informed contracts rather than opportunistic exploitation.²¹⁵

Creditors are often not able to protect themselves adequately. Limited liability confers very significant benefits, especially on owners of closely held companies and provides opportunities

²¹¹ O'Kelley (2012) Seattle University Law Review 1247 1251-1252.

²¹² O'Kelley (2012) Seattle University Law Review 1247 1250.

²¹³ O'Kelley (2012) Seattle University Law Review 1247 1252-1254.

²¹⁴ O'Kelley (2012) Seattle University Law Review 1247 1250 and 1259-1267.

²¹⁵ Gevurtz (2011) Pacific McGeorge Global and Development Law Journal 39 39. See also Greenfield (2001) Boston College Law Review 283 322 and 325-326. Sandel identifies four rival theories of distributive justice namely, the feudal or caste system (a fixed hierarchy based on birth), the libertarian system (free market with formal equality of opportunity), the meritocratic system (free market with fair equality of opportunity) and the egalitarian system (Rawls's difference principle of encouraging the gifted to exercise their talents, but with the understanding that the rewards these talents reap in the market belong to the community as a whole). See Sandel *Justice* 157.

for abuse of the corporate entity. Information about the company's finances is often seriously deficient and open to manipulation. Furthermore the company's financial situation can change very quickly, as many creditors have learnt at their cost.²¹⁶

Greenfield questions the assumption about the power of employees to protect themselves through contract, collective bargaining and market forces.²¹⁷ Employees face daunting contracting problems. It is as difficult for them to anticipate the various contingencies that may affect their claims as stakeholders in the company. If the presence of fiduciary duties are necessary in the shareholding-management context to serve as gap-filling and contract enforcing devices, they could certainly serve an analogous purpose in the employment relation.²¹⁸ He further reasons that fiduciary duties are primarily about relationships. In his view, the interaction between employees and the company is far more relational than between shareholders and the company.²¹⁹ Whilst individual shareholders may not have access to negotiations with the company, they are ably represented by venture capitalists, investment bankers, large institutional shareholders and the like. The subject matter of collective bargaining of employees is also often limited.²²⁰ Greenfield argues further that the inefficiencies in the labour market provide significant reason to be concerned that the shareholder-management contract actually externalises costs of that agreement unto employees.²²¹

Greenfield further points out that employees also have monitoring or agency costs associated with making sure the directors or managers are keeping their interests at heart. Employees, like shareholders, give up control of something of worth that they invest in the company. In the case of shareholders it is capital. In the case of employees it is skill, time and effort. In both cases the

²¹⁶ Ziegel "Creditors as corporate stakeholders: The quiet revolution - an Anglo-Canadian perspective" (1993) *Toronto Law Journal* 511 530; Rajak "Director and officer liability in the zone of insolvency: A comparative analyses" (2008) *PER* 1 3 and 8-9.

²¹⁷ Greenfield (2001) *Boston College Law Review* 283 314.

²¹⁸ Greenfield (2001) *Boston College Law Review* 283 315-317.

²¹⁹ Greenfield (2001) *Boston College Law Review* 283 317.

²²⁰ Greenfield (2001) *Boston College Law Review* 283 318-319.

²²¹ Greenfield (2001) *Boston College Law Review* 283 323-325.

contributors' willingness to part with their resource depends on the assessment that they will receive more by contributing it than withholding it. Both groups depend on the care, skill and good faith of the management. It is therefore not clear then why company law should step in to reduce agency costs between managers and shareholders yet not between managers and employees.²²²

Dine is of the view that both legal and economic contractarianism struggle to move from the foundational theory into the operational sphere. Neither accepts the legitimacy of state regulation of power.²²³ They ignore that corporate statutes do in fact contain provisions that reflect the public interest which is not found in the private law of contracts.²²⁴ In a similar vein Roe emphasises the important role that politics play in company law in his comparative analysis of corporate governance under the European social democracies with that of corporate governance in the more capitalistic democracies in England and the United States.²²⁵ According to Greenfield the free market cannot be trusted to produce and deliver many things that people truly desire, such as safety and security. In addition, companies depend mightily on government assistance to survive and make money - in fact the very infrastructure of the market is to a large extent a creation of government.²²⁶ It is further evident from the historical analysis in the previous chapter that the concept of the company and the consequences that the law ascribes to incorporation is a function of not only the underlying economic environment in which it operates but also the underlying political and social environment.²²⁷

Insofar as legal contractarianism is concerned, the notion of a statutory contract may have been fitting in the deed of settlement companies of the eighteenth and nineteenth centuries. A deed of

²²² Greenfield (2001) *Boston College Law Review* 283 299-303.

²²³ Dine *Corporate Groups* 14-16.

²²⁴ Allen "Our schizophrenic conception of the business corporation" (1992) *Cardoza Law Review* 261; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 165; Welling et al *Canadian Corporate Law* 95.

²²⁵ Roe "Political preconditions separating ownership from control" (2000) *Stanford Law Review* 539.

²²⁶ Greenfield *The Failure of Corporate Law* 19-21.

²²⁷ See also Katzew (2011) *SALJ* 686 688.

settlement company was not a true corporation but a contractually created cross between a partnership and trust that mimicked the company. The modern company is a far cry from the deed of settlement company. Dine states that “[t]rading with limited liability removes our modern companies a momentous distance from unincorporated joint stock companies.”²²⁸ The two major strands to the difference are the advent of general incorporation acts and the grant of limited liability. The state clearly plays a significant role in the modern company. Limited liability can never be achieved in a satisfactory manner by private law devices and it was this intervention that finally established companies as the major instrument in economic development.²²⁹

Dine also points out that legal contractarian notions are “strained” in explaining the effects of this contract. She refers, for example, to the manner in which the courts have sought to designate who may enforce a right under the articles of association²³⁰ and the application of the rule in *Foss v Harbottle*,²³¹ which accepts that in most cases the majority decision of the contractors, taken according to the contractual rights of the shareholders, represents the will of the corporation.²³² According to Dine this gives powerful force to the argument that the company has a constitution rather than a contract at the heart of its organisational structure.²³³ Welling echoes these views and argues that the courts “have made a complicated mess of the simple notion of the statutory contract.”²³⁴

²²⁸ Dine *Corporate Groups* 5.

²²⁹ Dine *Corporate Groups* 5-6.

²³⁰ Dine *Corporate Groups* 4-7. For example, the “contract” is unenforceable if the plaintiff sues in a capacity other than a shareholder. See also for example, *Eley v Positive Government Life Assurance* (1876) 1 ExD 88 (Court of Appeal).

²³¹ (1843), 67 ER 189.

²³² Dine *Corporate Groups* 7.

²³³ Dine *Corporate Groups* 6.

²³⁴ Welling *Corporate Law in Canada* 68-80. Welling also refers to the fact that this statutory created contract can ostensibly be amended by a majority without the consent of the outvoted minority. In addition the courts have held that an informality or irregularity which can be ratified by the majority will preclude the minority to sue on this statutory contract if the act when done regularly would be within the powers of the company and the intention of the majority shareholders is clear. This is the so called “procedural irregularity defence”. See also Abbey 23-86 who states that it leads to a lack of clarity in understanding the separate legal personality of a company, the piercing of the corporate veil and majority rule. See also *Gower & Davies Principles of Modern Company Law* 9th ed 68-78.

The notion of a statutory contract is also not appropriate in those jurisdictions, for example the United States, Germany, Canada and arguably now also South Africa where the division of powers of the various stakeholders are regulated through legislation rather than the company's constitution.²³⁵

The notion that directors are agents of the shareholders is also open to criticism. There is no express contract between the shareholders and the directors, and arguably, no implied contract. From a legal point of view the directors are agents of the company, not of the shareholders. There are however several points that deny the existence of any agency between shareholders and managers. Managers have no express contract with shareholders, and arguably, no implied contract. Managers are not in law the agents of shareholders. They are employed by the company and not the shareholders. Shareholders can also not direct what the board of directors must do.²³⁶

5 COMMUNITARIAN OR PROGRESSIVE THEORIES

5.1 The theories

The normative view of communitarians (also known as progressives) to society contrasts sharply with that of the contractarians. Whereas the contractarian approach to justice revolves around the ideas of maximising welfare (utilitarianism) and respecting freedom (libertarianism), the communitarian (also known as progressive) approach to justice emphasises the importance of virtue or the common good.²³⁷ Communitarians' vision of liberty is one that includes a positive component. For them liberty is empty without taking into account those primary needs upon which adequate conceptions of human dignity and human flourishing depend. The market alone cannot adequately fulfil basic human needs for everyone because many people lack the resources to participate effectively in the market. They argue that opportunities in life should not depend entirely on accidents of birth and bargaining power. People are entitled to more in life than they can pay for.²³⁸

²³⁵ Compare Welling *Corporate Law in Canada* 110-112; *Gower & Davies Principles of Modern Company Law* 9th ed 64-66.

²³⁶ Key *The Enlightened Shareholder Value Principle* 21-22.

²³⁷ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292.

For communitarians the contractarian approach creates a moral void.²³⁹ The liberal political theory that underpins the contractarian approach was born as an attempt to spare politics and law from becoming embroiled in moral and religious controversies.²⁴⁰ Communitarians believe this approach is flawed for two reasons: First, it is not always possible to decide questions of justice and rights without resolving substantive moral questions. Secondly, even where it is possible it may not be desirable.²⁴¹ Sandel explains:

“A just society can’t be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.”²⁴²

Communitarians emphasise the social arena in which individual activity occurs. By virtue of membership of a shared community, individuals are interdependent and owe obligations to each other that exist independently from contract.²⁴³ According to the libertarian approach, obligations can arise in only two ways: First, natural duties that are universal and do not require consent. Secondly, voluntary obligations that are particular and require consent. Communitarians identify a third source of obligation (based on a narrative conception of persons) namely, obligations of solidarity that are particular and do not require consent. These obligations involve moral responsibilities we owe to those with whom we share a certain history. Only this third category of obligations can explain public apologies and reparations (like affirmative action); collective responsibility for collective injustice; the special responsibilities of family members, and fellow citizens, for one another; solidarity with comrades; allegiance to one’s town or city, community or country; patriotism; pride and shame in one’s nation or people; fraternal and filial loyalties.²⁴⁴

²³⁸ Millon (1993) *Washington and Lee Law Review* 1373 1382-1383.

²³⁹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

²⁴⁰ Sandel *Justice* 243.

²⁴¹ Sandel *Justice* 251-260 refers to the debates about abortion, embryonic stem cell research and same-sex marriages which cannot be resolved without taking a stand on the underlying moral and religious controversy.

²⁴² Sandel *Justice* 261.

²⁴³ Millon (1993) *Washington and Lee Law Review* 1373 1382; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

The communitarian company law theories thus focus on the sociological and moral phenomenon of the company as a community, in contrast to the individualistic and self-reliant group of economic actors who are the only significant players in the Milton Friedman view of the company.²⁴⁵ The communitarian approach finds support in the philosophy of *ubuntu*: A person is only a person because of other people. Applied to the company it means that a company cannot be separated from other persons in the community. *Ubuntu* is one of our constitutional values.²⁴⁶

While the law and economics scholars have turned to finance theory and neoclassical economics, the communitarians embrace the view of humanities and social sciences. They attack the focus on profit and consider a wider array of social and political values, such as respect for human dignity, ethical behaviour, cooperation, justice, fairness, stability, sustainability, civic responsibility and the overall welfare of society.²⁴⁷ Instead of looking at company law from the perspective of common law principles and notions of contract, they focus on the purposes of the law and our vision for society.²⁴⁸ Sandel points out that debates about justice and rights are often, unavoidably, debates about the purpose of social institutions, the goods they allocate and the virtues they honour and reward. Despite our best attempts, the law cannot be neutral about virtue and the good life.²⁴⁹

The communitarian notion of a corporation as an instrument to serve the public interest can be traced back to the early history of the company. The historical analyses in chapter 2 reveals that the company and its predecessors served a public purpose for most of its evolution until at least

²⁴⁴ MacIntyre *After Virtue* (1981) 201; Sandel *Justice* 224-240.

²⁴⁵ Branson (2001) *University of Pittsburgh Law Review* 605 639; Key *The Corporate Objective* 37.

²⁴⁶ Boon *The African Way The Power of Interactive Leadership* (2001) 31. See also Keevy “The Constitutional Court and ubuntu’s ‘inseparable trinity’” (2009) *JJS* 61; Mokgoro “Ubuntu, the Constitution and the Rights of Non-Citizens” (2010) *Stell LR* 221; Church J “Sustainable development and the culture of uBuntu” (2012) *DJ* 511; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 365; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 86; *South Africa Broadcasting Corporation v Mpofu* [2009] 4 All SA 169 (GSJ) paras 62-66; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) par 23.

²⁴⁷ Esser 31; Greenfield “Defending stakeholder governance” (2008) *Case Western Law Reserve Review* 1043 1055; Key *The Corporate Objective* 36-37; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

²⁴⁸ Millon (1993) *Washington and Lee Law Review* 1373 1379; Greenfield *The Failure of Corporate Law* 36-39. This finds resonance in the approach of Davis & Le Roux (2012) *AJ* 306.

²⁴⁹ Sandel *Justice* 207.

the nineteenth century. The expansion of this purpose to include private interests only occurred with the arrival of general incorporation laws in the nineteenth century.²⁵⁰ Sandel traces the roots of the communitarian approach back to the philosophies of Aristotle and to a lesser degree that of Hegel, Saint Augustine and Saint Thomas Aquinas.²⁵¹ Aristotle believed that citizenship is the right to participate in the public life of the state, which is more in line with a duty and a responsibility to look after the interests of the community. This is indicative of a communitarian conception of citizenship.²⁵² During the 1980s a number of critics, including Sandel and later Etzioni,²⁵³ began to challenge the ideal of the freely choosing unencumbered self. They became known as the “communitarian” critics of contemporary liberalism.²⁵⁴ It was only in recent years that a group of scholars, largely located in the United States, have applied communitarian principles to company law.²⁵⁵ However even Dodd’s views in his seminal debates with Berle

²⁵⁰ William Blackstone, the legendary English jurist, said in his 1765 treatise:

“But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impractical; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politics, bodies corporate (*corpora corporate*), or corporations; of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce: in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct.”

See Tucker (ed) Blackstone *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 2nd ed (1803) 467 referred to in Bone (2011) Canadian Journal of Law and Jurisprudence 277 280 n17.

²⁵¹ Sandel “Introduction” in Sandel ed *Liberalism and its Critics* (1984) 50; Bone (2011) Canadian Journal of Law and Jurisprudence 277 292.

²⁵² Bone (2011) Canadian Journal of Law and Jurisprudence 277 300; Sandel *Justice* 195-200. Bone states that the concept of corporate citizenship grew out of the social responsibility theories based on the ethical and moral principles advanced by the pre-Christian thinkers such as the philosopher, Cicero, and the Indian statesman and philosopher, Kautilya.

²⁵³ Etzioni *The Spirit of the Community: The Reinvention of American Society* (1993) referred to in Bone (2011) Canadian Journal of Law and Jurisprudence 277 292 n95; Etzioni *The New Golden Rule: Community and Morality in a Democratic Society* (1996), referred to in Keay *The Corporate Objective* 34.

²⁵⁴ Sandel *Justice* 220-221. It is interesting to note that liberal freedom developed as an antidote to political theories that consigned people to destinies fixed by caste or class, station or rank, custom, tradition, or inherited status (in other words the feudal or caste system of distribution justice). As indicated before the other rival theories of distribution justice identified by Sandel are the libertarian system (free market with formal equality of opportunity), the meritocratic system (free market with fair equality of opportunity) and the egalitarian system (Rawls’s difference principle of encouraging the gifted to exercise their talents, but with the understanding that the rewards these talents reap in the market belong to the community as a whole). See Sandel *Justice* 157.

(that are discussed in chapter 5) encompassed the communitarian tradition. According to Dodd the company “has a social service as well as a profit-making function.”²⁵⁶ Dodd conceptualised the company as a corporate citizen rather than as an engine for shareholder wealth.²⁵⁷ Berle and Means similarly conceptualised the company from a communitarian perspective.²⁵⁸

Bone identifies a number of particular variants of the communitarian theory namely, the single constituency theory, Catholic Social Thought (CST) and corporate citizenship.²⁵⁹ Rather than arguing for the recognition of various corporate constituents, the single constituency theory is concerned with the creation of a philosophy of redistribution in the company, whereby the rights and profits rightfully earned by one constituency may be transferred to the benefit of another as a result of the underlying foundation of the corporate relationship between the constituents.²⁶⁰ CTS is founded largely on ecclesiastical doctrines and embraces absolute moral values such as human dignity and freedom.²⁶¹ The corporate citizenship variant conceptualises the company as a corporate citizen rather than simply as an engine for shareholder wealth. Corporate citizenship is fundamentally about making the company a better corporate citizen through its corporate governance practices, and in doing so, companies must take into account its social, environmental and financial footprint and embrace the principles of sustainable development.²⁶²

²⁵⁵ Key *The Corporate Objective* 34 n 174 indicates that some of the foremost communitarians have been Douglas Branson, William Bratton, Lyman Johnson, David Millon and Lawrence Mitchell. Dodd was an earlier prominent communitarian. Greenfield and Bakan are other contemporary prominent communitarians. Greenfield “Reclaiming corporate law in a new gilded age” (2008) *Harvard Law Review & Policy* 1 1 notes that the last generation or so of progressives have focused on constitutional law and other areas of public law, and have left corporate law to adherents of neoclassical law and economics .

²⁵⁶ Dodd “For whom are corporate managers trustees?” (1932) *Harvard Law Review* 1145 1148.

²⁵⁷ Key *The Corporate Objective* 35; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 295-297; Moore *Corporate Governance* 67-70.

²⁵⁸ Berle & Means *The Modern Corporation* 303-308 and 310.

²⁵⁹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

²⁶⁰ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 294 with reference to Millon “The single constituency argument in the economic analyses of business law” (2009) *Research in Law and Economics: A Journal of Policy* 43. According to Bone the single constituency theory is closely related to the team production model of Blair and Stout that will be discussed hereinafter although the single constituency theory promotes a range of social and political values beyond wealth maximization. However he classifies the team production model as a variant of the contractarian theories. See Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284.

²⁶¹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 294-295.

Communitarians see companies as separate legal entities with the rights and corresponding responsibilities of a natural person.²⁶³ As such, legal constraints are necessary to ensure that corporations are accountable to the society in which they operate.²⁶⁴ This philosophy forms the basis of the discipline of corporate social responsibility.²⁶⁵ Corporate social responsibility implies an ethical relationship of responsibility between the company and the society in which it operates. As a responsible corporate citizen, a company should protect, enhance and invest in the well-being of the economy, society and natural environment.²⁶⁶ Communitarians require corporations to be good corporate citizens.²⁶⁷

In contrast to contractarians, communitarians believe that large companies are public institutions. Communitarians theorise that the grant of company status is not only a concession by the state but also an instrument of the state to utilise. The company is deemed to be a political tool of the state to achieve its goals. In this theory the company loses its commercial focus.²⁶⁸ Communitarians believe that companies have political, social and economic dimensions. Companies are required to act in the public interest. This is the message at the heart of the communitarian theory.²⁶⁹

²⁶² Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 295-297 and 301-302. This is also the view that Dodd takes in his seminal debate with Berle. See Dodd (1932) *Harvard Law Review* 1145.

²⁶³ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284, 292 n95, 296; Dodd (1932) *Harvard Law Review* 1145 1161.

²⁶⁴ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292 n 95 and 293.

²⁶⁵ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292-294.

²⁶⁶ The King III Code 50. The King III Code is replicated in Delpont *Henochsberg on the Companies Act 71 of 2008* vol 2 (2011) (Loose-leaf, update October 2014) (hereinafter “Delpont *Henochsberg vol 2*”). Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292. Corporate citizenship has been called “capitalism with a social conscience.” See Naidoo *Corporate Governance An Essential Guide for South African Companies* 2nd ed (2009) (hereinafter “Naidoo *Corporate Governance*”) 241.

²⁶⁷ Greenfield “Corporate citizenship: Goal or fear?” (2014) *University of St. Thomas Law Journal* 960 963. The term “corporate citizenship” can be used as a synonym for “corporate responsibility.”

²⁶⁸ Dine *Corporate Groups* 17; Esser 30-31.

²⁶⁹ Millon (1993) *Washington and Lee Law Review* 1373 1379-1380; Esser 31; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 293-294.

For communitarians company law is, like every other area of common and statutory law, predicated upon our collective political decisions about what we want our society to look like.²⁷⁰ They emphasise the regulatory aspect of company law. Regulation should be used to channel corporate power toward socially beneficial ends even though it may involve restrictions on freedom.²⁷¹

Greenfield points out that the company has been an immensely successful business form. He believes that this is as a result of the company's specific attributes, including the liquidity and transferability of its shares, limited liability, its separate legal existence, its perpetuity and its hierarchical management structure under a group decision maker (the board of directors).²⁷² However, the company has its pathologies. As an artificial entity it has no conscience of its own and is unable (absent regulation) to take into account values other than (and far more important than) financial wealth. The company has every incentive to externalise costs unto those whose interests are not included in its financial calculus.²⁷³ Greenfield believes the success of the corporation can be taken advantage of to achieve important gains in social welfare. He proposes two changes. First, to change the definition of wealth within corporate law to mean the wealth of all the stakeholders rather than just the shareholders. Secondly, improving the corporation's structure by diversifying the board to include representatives of stakeholders other than shareholders.²⁷⁴

According to Bakan “[a] key premise of the corporation is that it is an institution - a unique structure and set of imperatives that direct the actions of people within it.”²⁷⁵ It is a creation of the

²⁷⁰ Greenfield *The Failure of Corporate Law* 29-40. The employment relationship is similarly not a purely private law relationship. It is also a social relationship in which the public has an interest. See Klare “The public/private distinction in labor law” (1982) *University of Pennsylvania Law Review* 1358; Rycroft & Jordaan *A Guide to South African Labour Law* (1990) 11-13.

²⁷¹ Millon (1993) *Washington and Lee Law Review* 1373 1379-1380 and 1382; Greenfield “Reclaiming corporate law in a new gilded age” (2008) *Harvard Law & Policy Review* 1 21-23; Glynn (2008) *Case Western Reserve Law Review* 1067 1072.

²⁷² Greenfield (2008) *Emory Law Journal* 948 953-958.

²⁷³ Greenfield (2008) *Emory Law Journal* 948 958-959.

²⁷⁴ Greenfield (2008) *Emory Law Journal* 948 974-983.

state. Without the state the corporation is nothing.²⁷⁶ It was originally conceived as a public institution whose purpose was to serve national interests and advance the public good.²⁷⁷ However “[b]y the end of the nineteenth century, through a bizarre legal alchemy, courts had fully transformed the corporation into a ‘person’, with its own identity, separate from the flesh-and-blood people who were its owners and managers” The concession theory was abandoned and corporations were viewed as real and natural entities.²⁷⁸

In addition, the corporation’s legally defined mandate became to pursue, relentlessly and without exception, its own self-interest, regardless of the harmful consequences that it might cause to others. Bakan argues that as a result, the corporation “is a pathological institution, a dangerous possessor of the great power it wields over people and societies.”²⁷⁹ As a psychopathic creature, the corporation can neither recognise nor act upon moral reasons to refrain from hurting others. Its legal makeup forces it to pursue its own selfish ends and cause harm when the benefits of doing so outweigh the costs. It is an “externalizing machine”.²⁸⁰ The corporation has been very successful at pursuing its mandate. It has infiltrated and commercialised virtually all spheres of our society and now even targets the public sphere such as water and power utilities, police, fire and emergency services, day care centres, universities, schools, airports, broadcasting, public parks and highways.²⁸¹ It is even targeting the political system to the extent that companies are sometimes referred to as partners of government. Bakan argues: “If corporations and

²⁷⁵ Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2005) (hereinafter “Bakan *The Corporation*”) 1.

²⁷⁶ Bakan *The Corporation* 153-154, 156 and 158.

²⁷⁷ Bakan *The Corporation* 153. See also Greenfield “New principles for corporate law” (2005) *Hastings Business Law Journal* 87 88.

²⁷⁸ Bakan *The Corporation* 16. In other words the natural entity or organic theory was accepted and the fiction theory discarded.

²⁷⁹ Bakan *The Corporation* 16.

²⁸⁰ Bakan *The Corporation* 60-84. See also Greenfield *The Failure of Corporate Law* 30; Greenfield (2008) *Emory Law Journal* 948 959; Greenfield “The puzzle of short-termism” (2011) *Wake Forest Law Review* 627 627-628.

²⁸¹ Bakan *The Corporation* 111-138.

governments are indeed partners, we should be worried about the state of our democracy, for it means that government has effectively abdicated its sovereignty over the corporation”.²⁸²

Bakan believes that the corporation as a state-created tool for advancing social and economic policy, should only have one institutional purpose namely, to serve the public.²⁸³ As a result, corporations would have to be reconstituted to serve, promote, and be accountable to broader domains of society than just themselves and their shareholders.²⁸⁴ Corporations are our creations. They have no lives, no powers and no capacities beyond what we, through our governments, give them.²⁸⁵ According to Bakan the corporation’s current tenants poorly reflect us. Whilst individualistic self-interest and consumer desires are core parts of who we are, they are not all who we are. Corporate rule must be challenged to revive the values and practices that it contradicts: democracy, social justice, equality and compassion.²⁸⁶

Progressive corporate law scholars differ if company law or other regulatory measures should be used to force corporations to consider the interests of other stakeholders but still allow them to generate wealth. Greenfield believes that company law is a powerful regulatory tool and often more effective than other regulatory measures.²⁸⁷ He believes that a company’s wealth should be shared fairly among those who contribute to its creation.²⁸⁸ He also believes that participatory democratic corporate governance is the best way to ensure the sustainable creation and equitable distribution of corporate wealth.²⁸⁹

²⁸² Bakan *The Corporation* 108.

²⁸³ Bakan *The Corporation* 156-158; Greenfield *The Failure of Corporate Law* 172-130.

²⁸⁴ Bakan *The Corporation* 106.

²⁸⁵ Bakan *The Corporation* 164.

²⁸⁶ Bakan *The Corporation* 166-167; Greenfield *The Failure of Corporate Law* 1-5.

²⁸⁷ Greenfield *The Failure of Corporate Law* 140-142.

²⁸⁸ Greenfield *The Failure of Corporate Law* 142-146.

²⁸⁹ Greenfield *The Failure of Corporate Law* 146-152; Greenfield (2008) *Harvard Law & Policy Review* 1 2-5.

Communitarians conceive the company as a community of constituencies with directors owing duties to all stakeholders. This includes shareholders, creditors, employees, suppliers, customers, the public and the environment as corporate constituents.²⁹⁰ They reject the contractarian idea that parties are able to protect themselves. They argue for mandatory rules to provide protection for stakeholders who are vulnerable to abuse. They promote the interests of other stakeholders such as creditors and employees. Rather than being concerned about the reduction of transaction costs, they are concerned about the social effects of corporate activity.²⁹¹ They are sceptical about the practical efficacy of contract as a mechanism by which non-shareholder stakeholders can protect themselves *ex ante* from harmful effects.²⁹² The communitarian view of the company thus supports an argument for the protection of creditors and employees.²⁹³

5.2 Criticism of the communitarian theories

Arguably the major criticism of the communitarian theory is that it is not as methodically articulated as the contractarian theories. It lacks the clarity and vigour of the contractarian theories. The foundational principles of the theory are imprecise and difficult to interpret. The real challenge for the communitarian theory is to develop a framework of the company that indicates how the directors and managers must identify and weigh up the convergent interests of the various stakeholders of the company.²⁹⁴

Contractarians also criticise the communitarian theory on a normative basis. For them, company law is a species of private law. Any infringement of the state in companies interferes with the individual's freedom to contract. On this basis it is argued that the communitarian vision of the company is inconsistent with these private law principles.²⁹⁵ This criticism is only valid if the underlying system of belief and philosophy underpinning the contractual theories are accepted.

²⁹⁰ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 293.

²⁹¹ Henderson "Corporate social responsibility - the case for unsecured creditors" (2007) *Oxford University Commonwealth Law Journal* 93 100; Esser 31; Key *The Corporate Objective* 34-36.

²⁹² Millon (1993) *Washington and Lee Law Review* 1373 1379.

²⁹³ Henderson (2007) *Oxford University Commonwealth Law Journal* 93 99.

²⁹⁴ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 290-291 and 303-304.

²⁹⁵ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 303.

The communitarian theory is also criticized on the basis that it loses sight of the commercial goal of the company or that it will not serve the interests of shareholders, and consequently the society as a whole.²⁹⁶ This criticism is not entirely valid. Greenfield, for example, emphasises the important role that the company has played as one of society's most powerful engines of wealth creation. His concern is that without regulatory constraints the company can be overly single-minded in the pursuit of profit.²⁹⁷ He furthermore does not believe that the core purpose of the company should be the maximisation of shareholder wealth.²⁹⁸ A company is created in the interest of society as a whole and the social value of a company is not measurable by looking at shareholder return alone.²⁹⁹ He believes that company law should channel the power of companies to make them a progressive force in society, using them not only to create wealth but also to spread it more equally.³⁰⁰

It is further important to bear in mind that, like the company, the state is also a social structure. The state can suffer from the same pathologies as a company. State intervention requires a functional and effective government. If that is not the case one dysfunctional system is simply replaced by another. It is also not the primary function of the state to participate in economic activity but rather to provide the infrastructure for its subjects to do so.

6 THE CONCESSION THEORY

6.1 The theory

The concession theory focuses on the company's dependence on the state. According to this theory the existence and operation of the company is a concession, grant or privilege bestowed by the state, thereby justifying government interference. The concession consists of a bundle of

²⁹⁶ Dine *Corporate Groups* 20; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 303.

²⁹⁷ Greenfield (2008) *Harvard Law & Policy Review* 1 6-7; Greenfield (2008) *Emory Law Journal* 948 948,949 and 975.

²⁹⁸ Greenfield (2008) *Harvard Law & Policy Review* 1 8-10.

²⁹⁹ Greenfield (2008) *Harvard Law & Policy Review* 1 18.

³⁰⁰ Greenfield (2005) *Hastings Business Law Journal* 87 93-97; Greenfield (2008) *Emory Law Journal* 948 949.

rights including immortality, free transferability of interests and limited liability.³⁰¹ Of these rights, limited liability is perhaps the most important.³⁰² The granting of limited liability is seen as a privilege which is subject to specific terms and conditions.³⁰³ The company is a public body, or at the very least bestraddle the public and private sectors by combining private investment with state-granted privileges.³⁰⁴

Medieval companies or corporations, and practically all companies or corporations up and until the mid-nineteenth century, concerned themselves with undertakings such as religion; education; colonization and foreign trade; the construction of utilities like railways and canals and other public-orientated activities. These companies or corporations were incorporated on an individual basis through charter or legislation.³⁰⁵ The chartered companies of the Maritime empires were typically companies that clearly owed their powers and privileges to a delegation from the state. The attributes granted to these companies, particularly perpetual succession and the ability to sue and be sued flowed from state-delegated powers.³⁰⁶

As a result of this dependence component, the concession theory is often equated with the fiction theory that is discussed in chapter 4.³⁰⁷ Some conceive the concession theory to be rooted in or

³⁰¹ Dine *Corporate Groups* 21; Lombard 20; Henderson (2007) *Oxford University Commonwealth Law Journal* 93 100; Esser 29; Chopra & Arora *Company Law* 23-24; Padfield “Rehabilitating concession theory” (2013) *Oklahoma Law Review* 327 332.

³⁰² Padfield (2013) *Oklahoma Law Review* 327 332-333.

³⁰³ Dine *Corporate Groups* 22 states that this notion is expressed well in *Re Rolus Properties Limited (1988) 4 BCC 446* :

“The privilege of limited liability is a valuable incentive to encourage entrepreneurs to take on risky ventures without inevitable personal and total financial disaster. It is, however, a privilege that must be accorded upon terms.”

³⁰⁴ Micklethwait & Wooldridge *The Company A Short History of a Revolutionary Idea* (2003) 17-21; Kuran “The absence of the corporation in Islamic Law: Origins and persistence” (2005) *The American Journal of Comparative Law* 785 806-808; Hansmann, Kraakman & Squire “Law and the rise of the firm” (2006) *Harvard Law Review* 1333 1376.

³⁰⁵ Pollman “Reconceiving corporate personhood” (2011) *Utah Law Review* 1629 1635; Colombo (2012) *Temple Law Review* 1 15.

³⁰⁶ Dine *Corporate Groups* 21-22; Colombo (2012) *Temple Law Review* 1 15.

³⁰⁷ Ghadas “Real or artificial? Jurisprudential theories on corporate personality” (2007) *US-China Law Review* 6 9; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107; Pollman (2011) *Utah Law Review* 1629 1633-

closely linked to the fiction theory.³⁰⁸ Others argue that a fictionist must believe in the need for concession, but to insist on concession does not imply a belief in fictionism.³⁰⁹ The concession theory may be indifferent as to the question of the reality of a corporate body.³¹⁰ Still, others deny that there is any relation between the concession and fiction theories.³¹¹ Padfield regards the concession theory as a company law, and the fiction theory as a constitutional law theory of the company.³¹² Dewey, on the other hand believes that there is essentially nothing in common between the fiction theory and the concession theory, although they both seek to limit the power of companies. For him the fiction theory is ultimately a philosophical theory that derives from canon law and holds that the corporate body is but a name, a thing of the intellect.³¹³ The concession theory is a product of the rise of the national state. The concession theory may be indifferent as to the question of the reality of the corporate body but insists that the legal power of all corporations is derived from the state. However, in spite of their historical and logical divergence, the two theories flowed together.³¹⁴ This is for Dewey an example of the indeterminate nature of company theory.

In contrast to the communitarian theories, the concession theory does not adhere to the proposition that the company should realign its aim to reflect the social aspirations of the state. The

1639; Colombo (2012) *Temple Law Review* 1 15-16; Padfield (2013) *Oklahoma Law Review* 327 331; Padfield “Corporate social responsibility & concession theory” (2015) *William & Mary Business Law Review* 1 20-21.

³⁰⁸ Naudé *Die Regsposisie van die Maatskappydirekteur met besondere verwysing na die Interne Maatskappyverband* (1970) (hereinafter “Naudé *Die Regsposisie van die Maatskappydirekteur*”) 17 n6; Dine *Corporate Groups* 22; Ghadas (2007) *US-China Law Review* 6 9. Maitland “Introduction” in Maitland (ed) Von Gierke *Political Theories of the Middle Age* (1900) xxx states “[i]nto [the corporation’s] nostrils the State must breathe the breath of fictitious life, for otherwise it would be no animated body but individualistic dust.”

³⁰⁹ Duff *Personality in Roman Private Law* (1983) 235, referred to in Naudé *Die Regsposisie van die Maatskappydirekteur* 17 n6.

³¹⁰ Dewey “The historic background of corporate legal personality” (1926) *Yale Law Journal* 655 666-667.

³¹¹ Wolff (1938) *Law Quarterly Review* 494 509; Naudé *Die Regsposisie van die Maatskappydirekteur* 17 n6; Ghadas (2007) *US-China Law Review* 6 9.

³¹² Padfield (2013) *Oklahoma Law Review* 327 330.

³¹³ Dewey (1926) *Yale Law Journal* 655 665-666 and 667.

³¹⁴ Dewey (1926) *Yale Law Journal* 655 668.

concession theorists accept only that the state has a role to play to ensure that corporate governance structures are fair and democratic.³¹⁵

Bottomley calls for a “reconceptualization of the corporate legal structure in political terms.”³¹⁶ He argues for the importation of values and ideas in public political life in corporate governance. According to him corporate constitutionalism (that may be seen as flowing from the acceptance that the state has a legitimate role to play in corporate governance) has “three key features: the idea of dual decision-making, which recognises the different roles of the board of directors and the general meeting of shareholders in corporate life; the idea of deliberative decision-making, which seeks to ensure that corporate decisions are made on the basis of an open and genuine consideration of all relevant issues and the idea of a separation of powers, which aims to make corporate decision-making power diffuse and accountable.”³¹⁷ This approach finds resonance in the approach of the division of power statutes that expressly divides powers within the corporate constitution between shareholders and management.

Carter similarly argues that the company is one of the most important constituent elements of the state. An adequate study of the nature of the corporation must take into consideration studies of the state itself. Such an analysis will touch on both the domain of constitutional law and that of political science in its broader aspects. He illustrates the striking similarity between the two enquiries by substituting the word “State” with the word “corporation” in Willoughby’s postulate as to the scope of a study of the nature of the state.³¹⁸ It would read as follows:-

“The conception of the [corporation], which we have to obtain, if it is to be satisfactory, must be one that will disclose its ultimate nature, including therein a sufficient reason for its existence, and adequate justification of the right by which it exercises its authority. It must contain a statement of the attributes with which a [corporation] is necessarily endowed, and by

³¹⁵ Dine *Corporate Groups* 21; Lombard 20; Padfield (2013) *Oklahoma Law Review* 327 333-334.

³¹⁶ Bottomley “From contractualism to constitutionalism: A framework for corporate governance” (1997) *Sydney Law Review* 277 278 referred to in Dine *Corporate Groups* 23.

³¹⁷ Bottomley (1997) *Sydney Law Review* 277 278-279.

³¹⁸ Carter 5.

the possession of which it may be distinguished from other [associations]. It will thus afford us a general type, rather than an empirical illustration. The origin of political authority [that is “corporate autonomy”], so far as it can be rationally determined, must receive satisfactory treatment, and the location of sovereignty [that is, “group will”], be considered. Furthermore, the conception must be one upon which we can base a true philosophy of law, and in accordance with which may be satisfactorily interpreted the nature of the relations between different [states] [that is, “members of the state”], and between particular [corporations] and the individuals comprising them.”³¹⁹

It is easy to argue for the social responsibility of companies and the protection of the interests of creditors and employees on the basis of the concession theory. The company is a creation of state and as a public body it owes duties to all stakeholders.³²⁰

6.2 Criticism of the concession theory

The concession theory does not tell us much about the nature of the company except to emphasise its dependence on the state. It is not based on any particular philosophy or system of belief.

It is argued that the concession theory was undermined by changes in the structure of company law, including the end of the special charter era of incorporation and the erosion of doctrines (for example the *ultra vires* doctrine) that allowed the state to keep a tight grip on companies.³²¹ The counter argument is the fact that government permission is required to incorporate companies supports the legitimacy of state regulation, regardless how freely such permission is granted.³²² Companies cannot be created solely by private contracting. Limited liability and the separate legal personality of a company cannot be practically achieved through private contracting.³²³

³¹⁹ Willoughby *An Examination of the Nature of the State A Study in Political Philosophy* 6-7, with alterations and additions by Carter.

³²⁰ Dine *Corporate Groups* 23-24; Henderson (2007) *Oxford University Commonwealth Law Journal* 93 100.

³²¹ Pollman (2011) *Utah Law Review* 1629 1661; Padfield (2013) *Oklahoma Law Review* 327 335 and 346-347.

³²² Padfield (2013) *Oklahoma Law Review* 327 347.

³²³ Hansmann & Kraakman “The essential role of organizational law” (2000) *Yale Law Journal* 387 390; Pollman (2011) *Utah Law Review* 1629 1661; Padfield (2013) *Oklahoma Law Review* 327 347.

A criticism of the concession theory and the fiction theory (discussed in chapter 4) is that it leads to difficulties in explaining how the company functions once it becomes operational.³²⁴ To overcome this problem Dine formulated the dual concession theory. According to this theory the company is seen as an instrument created by the contractors that have a real identity separate from them and distinct from the original contracting parties. The company “floats free” from its founders and becomes a separate person with its own interests.³²⁵ Its powers are not only a concession of the original “contractors” but from a wide group involved in attaining its corporate goals. This has the consequence that the directors can not only consider the interests of the original “contractors” but that they must consider a wider variety of interests when they manage the company.³²⁶ The dual concession theory has in turn been criticised as not indicating how the different interests of this wider variety of stakeholders should be balanced.³²⁷

7 ORGANISATIONAL THEORIES

“One of the central divisions in the debate over ‘what is a company’ is between those who say that the company is a hierarchical organisation headed by a managerial team (the board of directors) and those who argue that it is an alternative expression of a market of investors.”³²⁸

The latter group include the economic contractarians discussed before, who construct various economic or market models of the company (or firm as they prefer to call it). They do not view the company as a separate legal entity and retain the notion of the contracting and bargaining individual.³²⁹ The first group are often legal scholars or organisational theorists. The legal

³²⁴ Dine *Corporate Groups* 24.

³²⁵ Dine *Corporate Groups* 26; Lombard 21-22; Esser 30.

³²⁶ Dine *Corporate Groups* 27.

³²⁷ Lombard 21-22; Esser 30.

³²⁸ Talbot *Great Debates in Company Law* 1.

³²⁹ Talbot *Great Debates in Company Law* 1-6. The economic models include the models of Coase (who conceptualises the company as an organisational alternative to the market which lowers the costs of market transactions); Alchian and Demsetz (who conceptualise the company as a team of producers who establish

scholars, including the legal contractarians discussed before, conceptualise the company within a legal model where its rights and powers are set out in the law. The legal framework creates a hierarchical organisation in which the central managing body *inter alia* ensures that the various claims against and within the company are met.³³⁰ The organisational theorists conceptualise the company within an organisational model, which may be presented as either a positive model for successful production and profit maximisation³³¹ or alternatively as a political model which sees exploitation of human and natural resources as the primary *raison d'être* of the company.³³² The

mechanisms *inter se* to ensure fair allocation of tasks); as well as Jensen and Meckling (who conceptualise the company as a legal fiction that describes a nexus of contracts). See Coase (1937) *Economica* 386; Alchian & Demsetz (1972) *American Economic Review* 777; Jensen & Meckling (1976) *Journal of Financial Economics* 305.

³³⁰ Talbot *Great Debates in Company Law* 1-2 and 11-14. The legal models include the models of Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda and Rock (who conceptualise the company as a “nexus for contracts” (as opposed to the description as a “nexus of contracts” by the economic contractarians) in the sense that the company serves, fundamentally, as the common counterparty in numerous contracts with, amongst others, suppliers, customers and employees); Bainbridge (discussed further in chapter 5, who conceptualises the company as an organisation whose effectiveness is derived from the superior decision making powers of the board of directors) and Key (discussed further in chapter 5, who conceptualises the company as an entity whose purpose it is to self-protect and maximise its value as an entity). See *The Anatomy of Corporate Law*; Bainbridge “Why a board? Group decision-making in corporate governance” (2002) *Vanderbilt Law Review* 1; Bainbridge “Director primacy: The means and ends of corporate governance” (2003) *Northwestern University Law Review* 547; Key *The Corporate Objective*.

³³¹ See for example Berle and Means (discussed hereafter, who conceptualise the company as an organisational form whose size enables it to dictate the shape of the market and renders it a quasi-public institution despite its legal conception as a private institution); Williamson (who conceptualises the company as an organisational mechanism designed to transcend the problems of market behaviour such as bounded rationality and opportunism); Chandler (who conceptualises the company as a rational organisation which enables management to steer production and development to optimum efficiency); Blair and Stout (discussed hereafter, who conceptualise the company as a team production); Commons (who conceptualises the company as an institution in which transactions are undertaken by participants in accordance with its organisational framework which defines inequalities but limits exploitation); as well as Greenfield (who conceptualises the company as a team-like collective enterprise making use of a multitude of inputs from various kinds of investors). See Berle & Means *The Modern Corporation*; Williamson *The Economic Institutions of Capitalism* (1985); Chandler *Scale and Scope The Dynamics of Industrial Capitalism* (1990); Blair & Stout “A team production theory of corporate law” (1999) *Virginia Law Review* 247; Commons *Institutional Economics Its Place in Political Economy* (2009); Greenfield (2008) *Case Western Reserve Law Review* 1043 1043-1044; Greenfield (2014) *Seattle University Law Review* 749 761. See also Talbot *Great Debates in Company Law* 6-11 and 13-15 for a general discussion of these positive models of the organisational theories.

³³² See for example Karl Marx (who conceptualises the company as an organisation designed to enable capital to extract value from labour); Braverman (who conceptualises the company as an organisation which enables management to control through deskilling labour); as well as Lazonick (who conceptualises the company as a historically developing organisation which usurps the market in its ability to coordinate production, discipline labour and enhance value). See Engels (ed) Karl Marx *Capital* (1906); Braverman *Labor and Monopoly Capital The Degradation of Work in the Twentieth Century* (1998); Lazonick *Business Organization and the Myth of the Market Economy* (1994). See Talbot *Great Debates in Company Law* 15-18 for a general discussion of these political models of the organisational theories.

legal scholars or organisational theorists emphasise the hierarchy and separateness of the company.³³³

This discussion will focus on one particular (and arguably the most prominent) organisational theory namely, the team production theory of Blair and Stout.³³⁴ The team production theory can be classified as either a legal theory (because it identifies the nature of the company so closely with the legal rules that apply to it) or an organisational theory (because it conceives the company to be a hierarchical organisation for production and profit maximisation). It is also closely related to the single constituency theory (a variant of the communitarian theories) in the sense that it is similarly concerned with the creation of a philosophy of redistribution in the company, whereby the rights and profits rightfully earned by one constituency may be transferred for the benefit of another as a result of the underlying foundation of the corporate relationship between the constituents. However where the team production theory promotes wealth maximization, the single constituency theory promotes a range of social and political values beyond wealth maximization.³³⁵

7.1 The team production theory of Blair and Stout

The doctrinal and structural histories do not point to any well-defined period when all the doctrinal pieces necessary for the team production theory matured. The separate legal personality of the company was recognized since the middle ages but did not give rise to team production. The structural independence of the board developed only in the first half of the 20th century. The business judgement rule experienced ups and downs until the 1980s and beyond.³³⁶ Alchian and Demsetz,³³⁷ pioneers of the economic contractarian theory, were the first economists to seriously examine the problem of joint production.³³⁸ Holmstrom,³³⁹ Rajan and Zingales³⁴⁰ developed the

³³³ Talbot *Great Debates in Company Law* 1.

³³⁴ Blair & Stout (1999) *Virginia Law Review* 247.

³³⁵ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284; Talbot *Great Debates in Company Law* 13-15.

³³⁶ Harris (2015) *Seattle University Law Review* 537 559.

³³⁷ Alchian & Demsetz (1972) *American Economic Review* 777.

³³⁸ Blair & Stout (1999) *Virginia Law Review* 247 265-268; Keay *The Corporate Objective* 37.

team production theory further before Blair and Stout published their article “A team production theory of corporate law”³⁴¹ in 1999.

Blair and Stout argue that from a positivist basis, the team production theory is consistent with the way company law actually works. The nature of the company and its social purpose can be discovered through an analyses of the legal rules relating to companies. So for example, the company laws in the United States tend to give extensive powers to the board of directors (in particular the chief executive officer) and limited powers to the shareholders. This indicates an intention that the board is empowered to protect the interest of the company as a whole and not just the shareholders.³⁴² From a normative basis they suggest that the team production theory demonstrates how company law ought to work. They believe that by preserving directors’ independence, and imposing on them fiduciary duties that they owe to the company (and not to any particular “team member” of the company), company law reinforces and supports an essential economic role by hierarchy in general, and by boards of directors in particular.³⁴³ They caution against attempts to reform company law by either contractarians who want to increase shareholder power over directors or communitarians who want to give other stakeholders greater control rights.³⁴⁴ Blair and Stout believe their approach is consistent with economic contractarianism.³⁴⁵ As is the case with economic contractarianism, the team production theory also revolves around the idea of maximising welfare (utilitarianism). Yet, Blair and Stout also emphasise the importance of virtue or the common good to a certain extent. They argue that the directors’ duties “are imbued with moral weight”, that they must act “fairly and impartially” and that “trust is one

³³⁹ Holmstrom “Moral hazards in teams” (1982) *The Bell Journal of Economics* 324. See Blair & Stout (1999) *Virginia Law Review* 247 268-269; Keay *The Corporate Objective* 37.

³⁴⁰ Rajan & Zingales “Power in a theory of the firm” (1998) *The Quarterly Journal of Economics* 387. See Blair & Stout (1999) *Virginia Law Review* 247 271-274.

³⁴¹ Blair & Stout (1999) *Virginia Law Review* 247.

³⁴² Talbot *Great Debates in Company Law* 13-14.

³⁴³ Blair & Stout (1999) *Virginia Law Review* 247 289.

³⁴⁴ Blair & Stout (1999) *Virginia Law Review* 247 327.

³⁴⁵ Blair & Stout (1999) *Virginia Law Review* 247 254.

of the most fundamental concepts in law.”³⁴⁶ They believe that hierarchs are only likely to be trusted if they have reputations for integrity, independence and service, together with the desire to protect and enhance these reputations. Moreover, they believe these reputations should be reinforced by “powerful social norms.”³⁴⁷

The team production theory applies primarily to public companies with dispersed shareholders where the directors are free from the direct control of the team members, including shareholders, executives and employees. According to Blair and Stout closely held firms, on the other hand, are more closely aligned to the principal-agent model.³⁴⁸

The company is created when a number of individuals get together to undertake a team production project.³⁴⁹ Blair and Stout conceptualize the modern public company as an internal governance structure they call a “mediating hierarchy” that serves to coordinate the activities of the “team members”, allocates the resulting production and mediates disputes among team members.³⁵⁰ They observe that shareholders are not the only group that provide firm-specific inputs into company production. The members of the team include shareholders, executives, employees, or even creditors or the local community that make essential contributions and have an interest in the company’s success.³⁵¹ The board of directors sits at the peak of the hierarchy. The board’s authority over company assets are virtually absolute and their independence of individual team members is protected by the law.³⁵² The team members cede authority to the directors to ensure fairness in productive contributions.³⁵³ The team members give up important rights, including

³⁴⁶ Blair & Stout (1999) *Virginia Law Review* 247 316.

³⁴⁷ Blair & Stout (1999) *Virginia Law Review* 247 317-318.

³⁴⁸ Blair & Stout (1999) *Virginia Law Review* 247 281-282.

³⁴⁹ Blair & Stout (1999) *Virginia Law Review* 247 275-276.

³⁵⁰ Blair & Stout (1999) *Virginia Law Review* 247 250-251 and 278.

³⁵¹ Blair & Stout (1999) *Virginia Law Review* 247 250 and 278.

³⁵² Blair & Stout (1999) *Virginia Law Review* 247 251.

³⁵³ Lichner (2009) *European Business Law Review* 889 900; Keay *The Corporate Objective* 37; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 288-289; Petrin (2013) *Penn State Law Review* 1 35-36; Talbot *Great Debates in Company Law* 13.

property rights over the team inputs (such as financial capital and firm-specific human capital) and the team's joint output to the company itself.³⁵⁴ The public company is not so much a “nexus of contracts” as a “nexus of firm-specific investments.”³⁵⁵ The mediating hierarchy of a company can be viewed as a substitute for explicit contracting that is specifically useful in situations where team production requires several team members to make various kinds of firm-specific investments in projects that are complex, ongoing and unpredictable.³⁵⁶ The essence of team production is that the whole can be made bigger than the sum of the parts.³⁵⁷

It appears that Blair and Stout see the company as a private rather than a public body. The company is seen as a separate fictional legal entity that owns the firm's assets and serves as the “repository” for all its residual returns until they are paid out to the shareholders or other stakeholders.³⁵⁸

According to Blair and Stout the literature on the question of why a company exists has developed along three main paths, each which focuses on a different aspect of organising productive activities. The first path explores problems that arise if one party hires another to act on his or her behalf (the principal agent problem). The second path focuses on the role of property rights for closing contractual gaps (the property rights approach). The law and economics approach focuses on these first two tracks. The third path considers the role hierarchy may play in avoiding shirking³⁵⁹ and rent-seeking³⁶⁰ problems (the team production approach).³⁶¹ Blair and Stout believe the public company offers the “second-best solution”³⁶² to team production problems such

³⁵⁴ Blair & Stout (1999) *Virginia Law Review* 247 250-251, 277 and 320.

³⁵⁵ Blair & Stout (1999) *Virginia Law Review* 247 275 and 285.

³⁵⁶ Blair & Stout (1999) *Virginia Law Review* 247 278.

³⁵⁷ Blair & Stout (1999) *Virginia Law Review* 247 269.

³⁵⁸ Blair & Stout (1999) *Virginia Law Review* 247 269, 277 and 292.

³⁵⁹ “Shirking” occurs when individuals do not bring their part to ensure a joint project's success and instead free-ride on others' efforts. See Blair & Stout (1999) *Virginia Law Review* 247 249 n3.

³⁶⁰ “Rent-seeking” occurs where individuals expend time, money and other resources to squabble with each other over the size of their individual pieces of a fixed group pie. See Blair & Stout (1999) *Virginia Law Review* 247 249 n4.

³⁶¹ Blair & Stout (1999) *Virginia Law Review* 247 257-258.

as shirking and rent-seeking where it is impossible to regulate it contractually. It allows individuals who hope to profit from team production to overcome these problems by relinquishing control over both the team's assets and output to a mediating hierarchy whose primary function is to exercise control in a fashion that maximises the joint welfare of the team as a whole.³⁶³ A further function of the company is to encourage firm-specific investments in team production by mediating disputes among team members about the allocation of duties and rewards.³⁶⁴

Blair believes that business companies are more than just bundles of assets that belong to shareholders. While shareholders provide the financial capital, without which many businesses cannot get out of the starting blocks, it is the efforts of the entrepreneurs, managers and key employees, as well as business practices that cultivate innovation and collaboration in teams that add value to the financial capital.³⁶⁵ In certain limited circumstances shareholders enjoy special rights that are not granted to other stakeholders such as the right to institute derivative actions and the right to vote. These rights are merely instrumental. Shareholders do not enjoy these rights because they have some unique claims, but because they are often in the best position to represent the coalition that comprises the firm.³⁶⁶

The board of directors must protect the firm-specific investments of the whole corporate team including shareholders, managers, employees, and possibly other groups, such as creditors.³⁶⁷ This appears to be a communitarian approach. However, whereas the communitarians argue that company law should be reformed to make directors more accountable to stakeholders, Blair and Stout argue that directors should not be under direct control of either shareholders or other stakeholders.³⁶⁸ Blair and Stout believe that their mediating hierarchy approach, which views the

³⁶² "Second-best" solutions in economics represent the best outcome that can be achieved, given that some of the conditions of the first best solution are violated. See Blair & Stout (1999) *Virginia Law Review* 247 250 n6.

³⁶³ Blair & Stout (1999) *Virginia Law Review* 247 250, 271, 283-284 and 319; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 289.

³⁶⁴ Blair & Stout (1999) *Virginia Law Review* 247 278; Talbot *Great Debates in Company Law* 13.

³⁶⁵ Blair (2013) *Illinois Law Review* 785 814.

³⁶⁶ Blair & Stout (1999) *Virginia Law Review* 247 288-289.

³⁶⁷ Blair & Stout (1999) *Virginia Law Review* 247 253 and 288-289.

public company as a mechanism for filling in the gaps where team members have found explicit contracting difficult or impossible, is consistent with the economic contractarian approach although it is more consistent with the way a company actually works.³⁶⁹ The board of directors serve as the final arbitrators in disputes that cannot be resolved at the lower level.³⁷⁰ The true objective of corporate governance is to find a sufficient solution to the team production problem, whereby managers have to adequately address the claims of all corporate constituents that form part of the team production model.³⁷¹ The board of directors do not act as agents who ruthlessly pursue shareholders' interests at the expense of creditors, employees and other team members. Rather, the directors are trustees (rather than agents) for, and owe fiduciary duties to, the company itself.³⁷²

The directors protect the enterprise-specific investment of all the members of the team and not just the shareholders. As a result, directors owe their fiduciary duties to the company rather than to its shareholders. They can therefore properly take actions that benefit other stakeholders. This theory therefore supports an argument for the protection of creditors and employees.³⁷³

Blair and Stout recognise that the intellectual capital that employees provide is one of the key assets that a company uses in production.³⁷⁴ When employees are engaged by the company, they enter into contracts that cannot fully encompass the relationship and therefore the contract can be said to be incomplete.³⁷⁵ Accordingly the directors are obliged to take the interests of employees

³⁶⁸ Blair & Stout (1999) *Virginia Law Review* 247 253-254.

³⁶⁹ Blair & Stout (1999) *Virginia Law Review* 247 254-255.

³⁷⁰ Blair & Stout (1999) *Virginia Law Review* 247 279.

³⁷¹ Lichner (2009) *European Business Law Review* 889 900; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 289.

³⁷² Blair & Stout (1999) *Virginia Law Review* 247 280-281, 291 and 294.

³⁷³ Blair & Stout (1999) *Virginia Law Review* 247 249; Henderson (2007) *Oxford University Commonwealth Law Journal* 93 100; Lichner (2009) *European Business Law Review* 889 900; Keay *The Corporate Objective* 37-38; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Petrin (2013) *Penn State Law Review* 1 35-36; Chopra & Arora *Company Law* 16-17; Talbot *Great Debates in Company Law* 13.

³⁷⁴ Blair & Stout (1999) *Virginia Law Review* 247 261.

³⁷⁵ As indicated herein before, the economic contractarians also argue for fiduciary duties as a result of incomplete contracts. However according to the economic contractarians these incomplete contracts are only concluded with the

into account.³⁷⁶ In addition Blair and Stout argue that the investment of employees in a company become very firm specific as they develop their skills and knowledge during the course of their employment. They thus bear a significant risk that their investment will decrease in value if they lose their employment as they cannot easily reinvest in another firm. As a result, the interests of employees deserve protection as much as the interests of shareholders.³⁷⁷ The provision of human capital is as important as the provision of financial capital. As a result, employees have a claim to corporate governance as near equal to those of shareholders.³⁷⁸

7.2 Criticism of the team production theory

The team production theory adopts a positivist approach and primarily seeks to discover the nature of the company from legal doctrine. It is a functional theory that seeks to explain how the modern public company operates, rather than how it ought to operate. Drawing on economic theory, it focusses on the maximization of the welfare of the team members in monetary terms.³⁷⁹ As is the case with economic contractarianism it makes justice a matter of calculation rather than principle. The team production theory tends to emphasise wealth maximisation of the team members at the expense of public interest goals. It gives little attention to the social, moral and political aspects of the company. The normative or philosophical basis of the team production theory is therefore weak.

Millon argues that the most fundamental criticism against the team production theory is that in practice directors do not act as the team production theory says they should. Directors are not acting as a neutral mediating hierarch but tilt decidedly in the direction of shareholders. Typically boards have a strong preference for short-term share maximization because this is what

shareholders of the company. Creditors and employees do not need fiduciary duties in their contracts because their contracts can be specific enough to make the imposition of fiduciary duties inefficient.

³⁷⁶ Talbot *Great Debates in Company Law* 14.

³⁷⁷ Talbot *Great Debates in Company Law* 14.

³⁷⁸ Talbot *Great Debates in Company Law* 14.

³⁷⁹ Millon "Team production theory: A critical appreciation" (2014) *University of California Law Review Discourse* 79 79.

institutional shareholders demand.³⁸⁰ The reality is also that the board of directors often do not adequately protect creditors and employees.³⁸¹

The team production theory rests on the assumption that the board of directors will act impartially, independently, with integrity and to the benefit of the company. It assumes that the board will be able to successfully mediate disputes among team members about the allocation of duties and rewards. The Great Depression of 1929-1933, the bursting of America's stock-market bubble in 2000 to 2002, the Global Financial Crisis of 2007 to 2008 and a number of corporate scandals have shown that this assumption is inaccurate. Many prominent scholars do not believe that the board of directors can be trusted to fulfil this role. One of the fundamental debates in company law ever since Berle and Means identified the problem of the separation of ownership and control in the public company in 1932 has been how to hold otherwise unaccountable directors and managers accountable.

Because the team production theory is a variant of the contractarian theories, a number of the criticisms against the economic contractarian theory also applies to the team production theory. The team production theory also does not accept the legitimacy of state regulation of power nor the fact that corporate statutes do in fact contain provisions that reflect the public interest.

A criticism that the team production theory shares with the communitarian theories is that it similarly does not indicate how the directors must resolve the conflicting interests between the various team members. Blair and Stout believe it is a matter of the company's internal politics. This however means that extra-legal pressures and not legal rules will shape the board's decision-making.³⁸²

³⁸⁰ Millon (2014) University of California Law Review Discourse 79 80-81.

³⁸¹ Millon points out that corporate stock has returned over 650 percent during the past quarter century while real wages have stagnated. This is a clear indication that shareholders are winning the internal politics. See Millon (2014) University of California Law Review Discourse 79 80.

³⁸² Keay *The Corporate Objective* 38; Bone (2011) Canadian Journal of Law and Jurisprudence 277 278; Millon (2014) University of California Law Review Discourse 79 80.

Talbot argues that though the team production theory promotes a labour orientation of the company, it is problematic in that it only encompasses labour as part of the team when labour is skilled.³⁸³

8 BERLE AND MEANS

The United States of America had become a highly industrialised economy in the second half of the nineteenth century. The 1920s (the Roaring Twenties) was a period of unprecedented wealth creation and growth. The modern company dominated the market. This boom period was followed by the Great Depression (1929-1933), which had a devastating impact on the world economy and led to high levels of unemployment. It was during this period of economic distress that Berle and Means published their seminal work *The Modern Corporation and Private Property*,³⁸⁴ in which they drew attention to the growing separation of power between the executive management of major public companies and their increasingly diverse and remote shareholders.³⁸⁵

Berle and Means alluded to the fact that American law inherited the company from English law as it stood at the end of the eighteenth century. At that stage the very existence of the company was conditioned upon a concession from the state.³⁸⁶ The document of grant (or charter) that embodied the arrangement amongst the associates was the product of a threefold negotiation involving the state, the combined associates and the associates acting for themselves. It was recognised as a “contract”. Prior to 1811, substantially every charter was separately legislated into the law of the state and most charters continued to be separately legislated until well into the nineteenth century. Berle & Means described this arrangement as a “state controlled” agreement where the various states specifically protected three groups namely, the general public, the

³⁸³ Talbot *Great Debates in Company Law* 14-15.

³⁸⁴ Berle & Means *The Modern Corporation*.

³⁸⁵ Berle & Means *The Modern Corporation* book one, chapters III-VI. See also Pollman (2011) *Utah Law Review* 1629 1650-1652; Chopra & Arora *Company Law* 39-41.

³⁸⁶ Berle & Means *The Modern Corporation* 120. The authors state that at that time a corporation was considered as “franchise” (Norman-French “privilege”) granted by the state.

corporate creditors and (to a lesser extent) the shareholders.³⁸⁷ The management of the company was perceived to be a set of agents of and strictly accountable to the shareholders.³⁸⁸ Companies were quasi-public institutions and were obliged to conform to prevailing political objectives.³⁸⁹ This is representative of the concession theorists' conceptualisation of the company.

The situation changed with the appearance of large scale production, the adoption of general incorporation laws and the growth in the number of shareholders.³⁹⁰ With the appearance of general incorporation laws, the examination of the charter by the state with the view to protecting all the interest groups began to disappear, allowing the incorporators to write their contract in the broadest of terms.³⁹¹ Companies were able to separate themselves from state control and became private institutions.³⁹² This led to the result that management had as complete latitude and as little liability as possible. In addition, through various statutory changes, the position of shareholders, once a controlling factor in the running of the company, declined from extreme strength to practical impotence.³⁹³ As a result, a large measure of separation of ownership and control had taken place which created a new form of ownership. Berle and Means explained:

³⁸⁷ Berle & Means *The Modern Corporation* 120-122. The typical protections that were applied were that the enterprise was required to be defined and was carefully limited in scope that the contributions of capital were rigidly supervised and that rigid capital structures were set up. The common law added additional safeguards which included that residual control vested in the shareholders who contractually delegated the management of the corporation to the directors, that the shareholders had the sole right to invest new monies in the enterprise and that dividends could only be paid out of surplus profits. See Berle & Means *The Modern Corporation* 122-124. At 126

³⁸⁸ Berle & Means *The Modern Corporation* 125-126. The authors compared the position of the managers at that stage with that of the captain and officers of a ship at sea. Their authority in navigation might be supreme, but the direction of the voyage, the alteration of the vessel, the character of the cargo, and the distribution of the profits and losses were settled ahead of time and could be altered only by the persons having the underlying property interest.

³⁸⁹ Talbot *Great Debates in Company Law* 9.

³⁹⁰ Berle & Means *The Modern Corporation* 126. In the United States this process started in 1811 when New York passed a general incorporation law in respect of manufacturing enterprises (*Laws of 1811*, chapter 67). In 1837 the first really modern type of statute made its appearance in Connecticut. The first general incorporation Act in the United Kingdom was the *Joint Stock Companies Act, 1844*. The *Joint Stock Companies Act, 1856* was the first of the modern company acts in the United Kingdom that provided for incorporation to be obtained without being subjected to onerous requirements. Canada's first general incorporation Act was promulgated in 1850.

³⁹¹ Berle & Means *The Modern Corporation* 128.

³⁹² Talbot *Great Debates in Company Law* 10.

³⁹³ Berle & Means *The Modern Corporation* 126-128. According to Berle & Means these statutory changes probably merely recognised an underlying economic fact and lay as much in the shareholders' inability to manage as in the willingness of the managers to take over control of the task. See Berle & Means *The Modern Corporation* 128-131. See also Keynes "The end of *laissez-faire*" in Keynes *Essays in Persuasion* (1931) 312 and 314-315; Gailbraith

“As ownership of corporate wealth has become more widely dispersed, ownership of that wealth and control of it have come to lie less and less in the same hands. Under the corporate system, control over industrial wealth can be and is being exercised with a minimum of ownership interest. Conceivably it can be exercised without any such interest. Ownership of wealth without appreciable control and control of wealth without appreciable ownership appear to be the logical outcome of the corporate development. This separation of function forces us to recognise ‘control’ as something apart from ownership on the one hand and from management on the other. Control divorced from ownership is not, however, a familiar concept. It is a characteristic product of the corporate system.”³⁹⁴

This growing separation of power between the executive management of major public companies and their increasingly diverse and remote shareholders left a void as many of the checks which formally operated to limit the use of power had disappeared.³⁹⁵ This phenomenon destroyed the very foundation of the system of private enterprise namely, that the self-interest of the property owner (held in check only by competition and the principle of supply and demand) was the best guarantee of economic efficiency.³⁹⁶ The property owner no longer had control over his property. Berle and Means warned:

“It requires little analysis to make plain the fact that private property, as understood in the capitalist system, is rapidly losing its original characteristics. Unless the law stops the wide open gap which the corporate mechanism has introduced, the entire system has to be revalued.”³⁹⁷

Economics and the Public Purpose (1973) chapter 9; De Jongh *Between societas and universitas* 561. De Jongh states that this led to the institutional doctrine of the company in terms of which it is no longer seen as a contract but as an institution. A company has its own interests separate from its shareholders.

³⁹⁴ Berle & Means *The Modern Corporation* 66. Berle and Means calls this new form of ownership passive ownership (as opposed to the traditional active ownership where the owner also has control over his property).

³⁹⁵ Berle & Means *The Modern Corporation* 5-10 and 66-111.

³⁹⁶ Berle & Means *The Modern Corporation* 8-9.

³⁹⁷ Berle & Means *The Modern Corporation* 219.

Berle and Means concluded that the corporate mechanism had evolved from an arrangement in which an association of owners controlled their property under close state supervision to an arrangement in which they surrendered control of their capital to those in control of the company.³⁹⁸ Berle and Means stated:

“In its new aspect the corporation is a means whereby the wealth of innumerable individuals have been concentrated into huge aggregates and whereby control over this wealth has been surrendered to a unified direction. The power attendant upon such concentration has brought forth princes of industry, whose position in the community is yet to be defined. The surrender of control over their wealth by investors has effectively broken the old property relationships and has raised the problem of defining these relationships anew. The direction of industry by persons other than those who have ventured their wealth has raised the question of the motive force back of such direction and the effective distribution of the returns from business enterprise.”³⁹⁹

They compared the situation of the shareholders with that of employees, who surrender the direction of their labour to their employer.⁴⁰⁰ This relinquishing of control is also an important element of the team production theory of Blair and Stout as discussed hereinbefore. However in contrast with Blair and Stout, Berle and Means did not believe that directors should be left unaccountable.

From the perspective of Berle and Means there was now a disjuncture between companies’ legal conceptualisation as private and their practical function as holders of public money, employers of the public and creators of products for the public on a grand scale. The company had become an organisational form whose size enables it to dictate the shape of the market and renders it a quasi-public institution despite its legal conception as a private institution.⁴⁰¹ Companies had evolved a

³⁹⁸ Whilst shareholders are not the owners of the assets of the company (they cannot be because of the principle of separate legal personality), they were nevertheless regarded as the owners of the capital of the company. See Mongalo *Corporate Law and Corporate Governance A Global Picture of Business Undertakings in South Africa* (2003) (hereinafter referred to as “Mongalo *Corporate Law and Corporate Governance*”) 191.

³⁹⁹ Berle & Means *The Modern Corporation* 4.

⁴⁰⁰ Berle & Means *The Modern Corporation* 5.

⁴⁰¹ Berle & Means *The Modern Corporation* 5 and 7; Talbot *Great Debates in Company Law* 9-10.

“corporate system” (as there was once a feudal system) and became both a method of property tenure and a means of organising economic life.⁴⁰²

Berle and Means conceptualised the company as a social organisation which, on the one hand, involves a concentration of power comparable to the concentration of religious power in the medieval church or of political power in the national state. On the other hand, it involves the interrelation of a wide diversity of economic interests - those of the “owners” (shareholders) who supply capital, those of the employees who “create,” those of the consumers who give value to the products of the enterprise, and above all those of the control who wield power.⁴⁰³ They viewed the company as a separate legal entity.⁴⁰⁴

They promoted the idea of a company, now freed from shareholder and market demands, as being a public institution whose purpose was to operate in the interests of the community.⁴⁰⁵ Their conception of the purpose of the company is discussed further in Chapter 5.

Berle and Means distinguished between three functions in discussing the problems facing the company concept. The first is that of having an interest (or “ownership”) in the company. The position of the “owners” has been reduced to that of having a set of legal and factual interests in the company. For purposes of distinguishing between ownership and control, Berle and Means treated the shareholders (those who have major interests and hold legal title before the law) of the company as its owners in their study, although they indicated that bondholders are also often included as part owners. They also pointed out that the economist does not hesitate to class an employee as a part owner for certain purposes. The second function is that of having power over the company. For practical purposes Berle and Means limited this group to those who hold major elements of power over the company namely, the board of directors and the senior officers. The third function is that of acting in respect to the company. This would include the creditors and employees of the company and also the community. Berle and Means did not deal with the

⁴⁰² Berle & Means *The Modern Corporation* 3.

⁴⁰³ Berle & Means *The Modern Corporation* 309-310.

⁴⁰⁴ Berle & Means *The Modern Corporation* 120-121, 197.

⁴⁰⁵ Talbot *Great Debates in Company Law* 10.

position of creditors and employees in any detail.⁴⁰⁶ They pointed out that a single individual may fulfil, to varying degrees, one or more of these functions.⁴⁰⁷ Berle and Means concluded that the interests of ownership and control are in a large measure opposed if the interests of the latter grow primarily out of the desire for personal monetary gain.⁴⁰⁸ They believed that the legally enforceable duties (including their fiduciary duties and duties of reasonable care) of management are the only effective safeguards of the shareholders by which management can be held accountable.

Corporate management, composed of directors and officers of the corporation, is an institution created by the law itself. The problem is that the evolution of the company has developed a situation in which the dominant controlling forces of the company are no longer the directors or officers but individuals or controlling groups who have no formal place in the corporate scheme. These forces have confiscated part of the profit stream and even of the underlying assets “by means of purely private processes, without any test of public welfare or necessity.” Nevertheless their powers are nominally uncontrolled.⁴⁰⁹

The solution that Berle and Means proposed to manage the problem of the separation of ownership from control was the thesis that “all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable for the ratable benefit of all the shareholders as their interests appear.”⁴¹⁰ Any corporate action must be tested twice: first, by the technical rules dealing with the existence and proper exercise of the power; and second, by the equitable rules somewhat analogous to those which apply in favour of a *cestui que* trust to the trustee’s exercise of wide powers granted to him in the instrument making him a fiduciary.

⁴⁰⁶ Berle & Means *The Modern Corporation* 293 n3.

⁴⁰⁷ Berle & Means *The Modern Corporation* 112-113.

⁴⁰⁸ Berle & Means *The Modern Corporation* 115.

⁴⁰⁹ Berle & Means *The Modern Corporation* 207 and 219.

⁴¹⁰ Berle & Means *The Modern Corporation* 220.

Directors and managers are thus similar to trustees, although the business situation demands greater flexibility than the trust situation.⁴¹¹ They are not agents of the shareholders.⁴¹²

It is important to note that the concern of Berle and Means was how managers could be held accountable. Their point was that the accountability of directors and managers will be eroded if they also have a duty towards other interest groups.⁴¹³

Berle and Means conceptualised the company from a communitarian perspective. They believed that the modern company had brought about such changes as to make the free market theory of Adam Smith inapplicable.⁴¹⁴ In their view the powers of the company must be used for the public benefit.⁴¹⁵ They stated it is conceivable, and indeed seems almost essential if the corporate system is to survive, that the control of the company “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.”⁴¹⁶

In 1967 Berle wrote that company law had developed to reflect the evolving social concept of what American civilization should look like.⁴¹⁷ The company “like the slave of Aladdin’s lamp...must increasingly follow the mandate of the American state, embodied in social attitudes

⁴¹¹ Berle & Means *The Modern Corporation* 220 and 241-243.

⁴¹² Berle “Property, Production and Revolution A preface in the Revised Edition” in Berle & Means *The Modern Corporation* (hereinafter “Berle ‘Property, Production and Revolution’ in Berle & Means *The Modern Corporation*”) xxi.

⁴¹³ Berle & Means *The Modern Corporation* 244.

⁴¹⁴ Berle & Means *The Modern Corporation* 303-308.

⁴¹⁵ Berle & Means *The Modern Corporation* 310. In its most extreme form, exhibited in the communist movement, all of the powers and privileges of property shall be used only in the common interest. In less extreme forms of socialist dogma, transfer of economic powers to the state for public service is demanded. According to the capitalist dogma, and particularly in times of depression, there are demands that those controlling the great economic institutions accept responsibility for the well-being of those affected by the institution, whether investors, creditors, employees or consumers.

⁴¹⁶ Berle & Means *The Modern Corporation* 312-313.

⁴¹⁷ Berle ‘Property, Production and Revolution’ in Berle & Means *The Modern Corporation* xxviii-xxix.

and in case, statute and constitutional law.”⁴¹⁸ Berle believed that few American enterprises, and no large companies, can take the view that their plants, tools and organizations are their own, and that they can do what they please with their own. Companies are essentially political constructs. According to Berle:

“Philosophical preoccupation would become more important than economic. What is this personal life, this individuality, this search for personal development and fulfilment intended to achieve? Mere wallowing for consumption would leave great numbers of people unsatisfied; their demand will be for participation. ... It may well mean that the state would be expected to create jobs wherever a social need is recognized, irrespective of the classical requirements of a commercial base. ... Not impossibly, the teacher, the artist, the poet and the philosopher will set the pace for the new era.”⁴¹⁹

Berle clearly also saw justice as bound up with virtue.

Through no small influence of the work of Berle and Means, there was a fundamental rethinking of the role of business companies, the nature of their ownership and of their obligations to broader society.⁴²⁰ In the United States, companies were no longer perceived as economic institutions but as historically peculiar quasi-public institutions who had to conform with public service expectations as part of their core operational activities, and as an essential pre-condition of maintaining their implicit license to hold and exercise quasi-public power outside of the formal democratic state framework. This led to regulation to solidify and enforce these public service expectations and to ensure socially acceptable conduct and the protection of other stakeholders.⁴²¹

⁴¹⁸ Berle ‘Property, Production and Revolution’ in Berle & Means *The Modern Corporation* xxxvii.

⁴¹⁹ Berle ‘Property, Production and Revolution’ in Berle & Means *The Modern Corporation* xxxix.

⁴²⁰ Greenfield (2014) *Seattle University Law Review* 749 752.

⁴²¹ Berle *Power Without Property: A New Development in American Political Economy* (1959) 91-92; Berle & Means *The Modern Corporation* 310-313; Moore *Corporate Governance* 69-70; Greenfield (2014) *Seattle University Law Review* 749 752-753. These statutory measures included the *Securities Act of 1933*, the *Securities Exchange Act of 1934*, the labour protections in the *National Labor Relations Act of 1935* (protecting the right to bargain collectively), and *Fair Labor Standards Act of 1938* (creating a federal minimum wage). Prior to this the federal courts in the United States protected business from regulatory mandates and limits by use of a broad due process clause and a narrow commerce clause. See *Lochner v New York*, 198 U.S. 45 (1905); *Carter v Carter Coal Co.*, 298 U.S. 238 (1936); Greenfield (2014) *Seattle University Law Review* 749 752 752. In *Dodge v Ford Motor Co.*, 170 N.W. 668, 684 (Mich 1919) the court held that “[a] business corporation is organised and carried on primarily for the profit of the stockholders.”

In fact since Berle and Means identified the separation of ownership and control in the company, there have been endless debates and theories on how to resolve this problem. Managing this separation is one of the key functions of company law and corporate governance.⁴²²

9 CONTRACTARIAN AND DIVISION OF POWER COMPANIES

As indicated before, companies can be classified into different types of companies in terms of a number of criteria, including their size, structure, organisation, profitability, culture and goal. Some commentators, especially some Canadian commentators, prefer to classify companies according to their models or types of company constitutions. On this basis they distinguish between:

- a) charter corporations;⁴²³
- b) special act corporations;⁴²⁴

⁴²² See Branson (2001) *University of Pittsburgh Law Review* 605 605; Mongalo *Corporate Law and Corporate Governance* 190-193; Talbot *Critical Company Law* 111; Naidoo *Corporate Governance* 4-5. Branson “Proposals for corporate governance reform: Six decades of ineptitude and counting” (2013) *Wake Forest Law Review* 673 676 states that:

“The ensuing years have engaged in seemingly endless debate upon what is the solution to the Berle and Means problem, with one lengthy hiatus (the economic analyses of law era) in which scholars questioned whether the separation of ownership from control was a problem at all. For the most part, though, corporate governance reform efforts have opined as to what would render unaccountable managers, no longer answerable to rank-and-file shareholders, accountable. Would nationalization, installation of public interest directors, mandatory social accounting and disclosure, federal chartering of larger public corporations, market forces (including the market for corporate control), activism by institutional investors, the forces of globalization, or reinforced powers for gatekeepers, to name a few, align managers’ interests with those of owners and other constituencies?”

⁴²³ A charter corporation is created by the exercise of executive power by the state. The basic constitutional document of a charter corporation is its charter (also referred to as “letters of patent”). Sometimes the charter might provide only a skeleton of a constitution in which case the details will be fleshed out in by-laws. The by-laws is in the nature of subordinate legislation and must be consistent with the charter. The source of the powers of the constituents of a charter corporation is the charter. The common law will determine whether a person has standing to enforce compliance with the charter. The regulated companies that were founded from approximately the fourteenth to the sixteenth centuries, and the chartered companies of the sixteenth and seventeenth centuries were typical charter corporations. There are very few of these charter corporations still in existence. See Welling *Corporate Law in Canada* 46-47; Welling et al *Canadian Corporate Law* 111-112; Abbey 12.

⁴²⁴ A special act corporation is created by a particular act of the legislature. The basic constitutional document of a special act corporation is the relevant act. The relevant act would generally contain more details than a charter of a charter corporation. It is also likely to provide explicitly for the enactment of by-laws. The source of the powers of its constituents are contained in the relevant act. Grievance procedures may be provided explicitly in the relevant act. If not, the aggrieved party must rely on the general principles governing the situation where someone acts inconsistently with an act, including the law of standing. Both charter corporations and special act corporations are created by a considered exercise of constitutional power. The difference between the two types is that charter corporations are created by the executive and special act corporations by the legislature. Special act corporations are

- c) letters of patent corporations;⁴²⁵
- d) contractarian companies;⁴²⁶ and
- e) division of power corporations.⁴²⁷

Whilst this distinction is positivist in nature, it reflects fundamentally different approaches and removes some conceptual difficulties.⁴²⁸ It is important to bear this in mind in considering and placing foreign case law in its proper perspective. For example, the judicial approach to resolving disputes in those jurisdictions which adopted a division of power model (including Canada, the United States of America and Germany) will differ fundamentally from those that adopted the contractarian (English) model. It is also important to establish what model or type of constitution our own new Companies Act of 2008 adopted and if it differs from the model that was implicit in its predecessors. If there is a fundamental difference, it will need to be borne in mind not only in interpreting the Companies Act of 2008, but also in considering and placing South African case law before the Act came into effect on the 1st of May 2011 in its proper perspective.

The important distinction, from a South African perspective, is between contractarian companies and division of power corporations.

traditionally restricted to public and semi-public institutions, for example universities and utility companies. See *Welling Corporate Law in Canada* 50-51; *Welling et al Canadian Corporate Law* 112; *Abbey* 12-14.

⁴²⁵ A letters of patent corporation is incorporated under an incorporation act that adopts the charter corporation as its model. The difference between this corporation and a corporation incorporated under a general incorporation act is that in the case of a letters of patent corporation the executive retains a discretion whether or not to incorporate the corporation, whilst in the case of a corporation incorporated under a general incorporation act the corporation must be established. The basic constitutional documents of a letter of patents corporation are its letters of patent and the relevant statute under which they were granted. The relevant statute will also provide for the making of by-laws, which will be subordinate to the act and the letters of patent. The division of constitutional powers is set out in the relevant act. The usual technique is to grant managerial power to the board of directors. The shareholders are given the power to elect the directors, and also particular powers in special circumstances, such as the approval of changes to the letters of patent. Letters of patent acts do not provide for grievance procedures to correct or restrain violations of the corporate constitution. In principle the aggrieved party must rely on the general principles governing the situation where someone acts inconsistently with an act, including the law of standing. Letters of patent corporations are now almost obsolete. See *Welling Corporate Law in Canada* 52-53; *Welling et al Canadian Corporate Law* 112-113; *Abbey* 14-15.

⁴²⁶ The Canadian commentators specifically refer to these entities as “companies” as opposed to “corporations.”

⁴²⁷ See, for example, *Welling Corporate Law in Canada* 44-56; *Welling et al Canadian Corporate Law* 110-118; *Abbey* 11-16.

⁴²⁸ *Welling Corporate Law in Canada* 44. See also Gower “Some contrasts between British and American corporate law” (1956) *Harvard Law Review* 1369 1376-1377. Compare further the ‘technique of governance’ approach proposed by Wishart (2010) *Journal of Corporate Law Studies* 151.

9.1 Contractarian (or English model) companies

The contractarian companies (also referred to as ‘English model companies’ or ‘memorandum and article companies’) are based on a statutory contract and are rights orientated rather than status and remedy orientated.⁴²⁹ They are based on *societas* (partnership) rather than *universitas* (corporation).

These companies have their roots in the unincorporated or deed of settlement companies that were developed in England in the aftermath of the *Bubble Act*.⁴³⁰ As indicated in the historical analyses, these unincorporated or deed of settlement companies, which proliferated in the period from the end of the eighteenth until the early nineteenth century, were a cross between the partnership and the trust concepts. The company was normally formed by a ‘deed of settlement’ in which the subscribers would agree to be associated in an enterprise with a prescribed joint stock divided into a specified number of shares. The deed could normally be amended with the consent of a specified majority of the members. The management was delegated to a committee of directors and the company’s property would be vested in a separate body of trustees.⁴³¹ These companies were in essence partnerships.⁴³² They were regularised by legislation beginning with the *Joint Stock Companies Act 1844*,⁴³³ primarily by requiring registration.⁴³⁴ Limited liability was introduced by the *Limited Liability Act 1855*.⁴³⁵ These companies were not fully appreciated

⁴²⁹ Welling *Corporate Law in Canada* 59.

⁴³⁰ 6 *Geo 1 c 18*.

⁴³¹ Formoy *The Historical Foundations of Modern Company Law* (1923) 40-41; Cooke *Corporation, Trust and Company: An Essay in Legal History* (1950) (hereinafter “Cooke *Corporation, Trust and Company*”) 85-87; Cilliers *A Critical Enquiry into the Origin, Development and Meaning of the Concept ‘Limited Liability’ in Company Law* LLD thesis (1963) University of South Africa 60; Welling *Corporate Law in Canada* 66-67; Welling et al *Canadian Corporate Law* 114; Delpont “The Division of Powers in a Company” in Visser, Pretorius & Koekemoer (ed) *Essays in Honour of Frans Malan, former Judge of the Supreme Court of Appeal* (2014) (hereinafter “*Essays in Honour of Frans Malan*”) 82-83.

⁴³² Formoy *The Historical Foundations of Modern Company Law* 41; Cilliers 60; Welling et al *Canadian Corporate Law* 114; Abbey 16-18; Gower *Gower’s Principles of Modern Company Law* 5th ed (1992) (hereinafter “*Gower’s Principles of Modern Company Law* 5th ed”) 32; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 81-92.

⁴³³ 7 & 8 *Vict. , c. 110*.

⁴³⁴ See 3.4 in chapter 2 for a discussion of the relevant legislation.

⁴³⁵ 18 & 19 *Vict, c. 133*.

as having legal personalities of their own until 1897, when the House of Lords held in the seminal case of *Salomon v Salomon & Co*⁴³⁶ that a joint stock company registered under the *Companies Act 1862*⁴³⁷ is a juristic person separate from its shareholders and that the members were not liable for the company's debts.⁴³⁸ With this decision, states Cooke, the older theory of corporations was applied to the joint stock fund.⁴³⁹

The basic constitutional documents of a contractarian company (in addition to the governing statute) are its 'memorandum of association' and 'articles of association.' The memorandum, which corresponds to the charter of a charter corporation, is normally a short document containing for example the name of the company, its objects, share capital and perhaps some other details. The articles, which corresponds with the by-laws of a charter corporation, was normally the longer document.⁴⁴⁰

The governing statute of a contractarian company invariably provides that the memorandum and articles constitute a contract between the shareholders of the company; and between the shareholders and the company. In other words the English model statute makes the company constitution a contract among the shareholders; and between each shareholder and the company.⁴⁴¹ True to the partnership roots of the contractarian company, the shareholders are the

⁴³⁶ *1897 AC 22 (HL); 1895-99 All ER Rep 33 (HL).*

⁴³⁷ *25 & 26 Vict. , c. 89.*

⁴³⁸ For a general discussion of this case, see Welling *Corporate Law in Canada* 96-97; Rajak (2008) PER 1 6-10; Talbot *Critical Company Law* 24-29; Abbey 62-66. Welling makes the interesting point that the House of Lords came to the conclusion that a joint stock company was a person separate from its shareholders and that the shareholders were not liable for the company's debts because that is what the *Companies Act 1862* provided. However, the Act did not state this particularly clearly. Section 7 provided that the liability of members "may" be limited to the amount of unpaid shares held by the shareholders. Section 18 provided that upon registration of the memorandum of incorporation "the Subscribers" shall be a body corporate capable of exercising all the functions of an incorporated company, but with such liability on the member as provided for in the Act. The common law view is that the corporation itself (not its members) is a body corporate. Section 38 further provided that, in the event of the liquidation of the company, the members shall be liable to contribute an amount sufficient for payment of the debts and liabilities of the company with the qualification that the contribution shall not exceed the amount of the members' unpaid shares.

⁴³⁹ *Cooke Corporation, Trust and Company* 176. In common law a corporation is an entity separate from its members.

⁴⁴⁰ Welling et al *Canadian Corporate Law* 115.

theoretical source of all power within the company. Directors are normally not given any managerial powers by the statute, but derive their powers from a delegation by the shareholders in the articles of association. The residual power thus vests in the shareholders.⁴⁴²

There are a number of difficulties in the application of this statutory contract which have seriously eroded the contractual rights of shareholders in a contractarian model company. This led Welling to conclude that “[j]udges have made a complicated mess of the simple notion of a statutory contract.”⁴⁴³ One difficulty that has plagued contractarian companies is the question of redress to secure compliance with the company constitution. Under a contractarian model one would assume that any breach of the company constitution can be redressed by an action for breach of contract.⁴⁴⁴ However the contract is a statutory contract and the parties are bound only to the extent that the statute says they are bound. The statute normally provides that the shareholders and the company are bound to the contract. The directors and officers are normally not bound thereto. The problem is that an individual may act in several different capacities. This has been a source of difficulty and considerable debate. Some suggest that a shareholder that brings an action for breach of the statutory contract must show that the breach affected him or her ‘as a shareholder’.⁴⁴⁵ Professor Lord Wedderburn warned that the cases in this area are a mess.⁴⁴⁶ In his view “a member can compel the company not to depart from the contract with him under

⁴⁴¹ Welling *Corporate Law in Canada* 65; Welling et al *Canadian Corporate Law* 115.

⁴⁴² Welling *Corporate Law in Canada* 68-70; Welling et al *Canadian Corporate Law* 115; Abbey 18.

⁴⁴³ Welling *Corporate Law in Canada* 59. See also the comprehensive discussion in Abbey 50-92.

⁴⁴⁴ Welling *Corporate Law in Canada* 65-66; Welling et al *Canadian Corporate Law* 116. See also n 234.

⁴⁴⁵ Welling *Corporate Law in Canada* 68; Welling et al *Canadian Corporate Law* 116. Welling points out that proponents of this view often rely on the case of *Beattie v E & F Beattie Ltd [1938] Ch 708 (Eng CA)*. However the case does not stand for this principle. It was decided on the technicalities of civil procedure, not abstract theorising about the nature of the corporate constitution. See Welling *Corporate Law in Canada* 68-70 for a discussion of this case.

⁴⁴⁶ Wedderburn “Shareholders’ rights and the rule in *Foss v Harbottle*” (1957) *The Cambridge Law Journal* 19. See also Chumir “Challenging directors and the rule in *Foss v Harbottle*” (1965) *Alberta Law Review* 96; Goldberg “The enforcement of outsider rights under section 20(1) of the *Companies Act 1948*” (1972) *The Modern Law Review* 362; Prentice “The enforcement of ‘outsider’ rights” (1980) *The Company Lawyer* 179; Gregory “The section 20 contract” (1981) *The Modern Law Review* 526; Goldberg “The controversy of the section 20 contract revisited” (1985) *The Modern Law Review* 158; Drury “The relative nature of a shareholder’s right to enforce the company contract” (1986) *The Cambridge Law Journal* 219.

the articles, even if that means indirectly the enforcement of ‘outsider’ rights vested either in third parties or himself, so long as ... he sues *qua* member and not *qua* outsider.”⁴⁴⁷

A second problem involves the alteration of the statutory contract. Virtually all the contractarian statutes contain a provision that the memorandum and articles of a company can be amended by a prescribed majority. The effect is that, contrary to established contractual principles, the statutory contract can be amended without the consent of the outvoted minority. In other words, a contractual right or obligation can vanish instantaneously upon a constitutional amendment of the statutory contract by the prescribed majority.⁴⁴⁸ Furthermore the courts have concluded that a shareholder’s action for breach of the statutory contract may be precluded retroactively (even before a formal amendment of the statutory contract) through ratification by a simple majority. This is the so-called ‘procedural irregularity’ defence.⁴⁴⁹ The statutory contract in a contractarian model company is therefore not as straightforward in practice as it appears to be in theory.⁴⁵⁰

9.2 Division of power corporations

Division of power companies derives from the United States model and were created to try to rationalise corporate law and remove some of the difficulties that had developed in interpreting the contractarian model. They are called division of power corporations because the legislation expressly divides powers within the corporate constitution amongst the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. This model is status and remedy orientated. Every person attaining a specific status (for example director, officer, shareholder, creditor or employee), is assigned statutory powers, obligations and remedies. The corporate constitution is not a contract among the participants.⁴⁵¹ As opposed to contractarian companies division of power corporations are based on *universitas* (corporation) rather than *societas* (partnership).

⁴⁴⁷ Wedderburn (1957) *The Cambridge Law Journal* 194 212-213.

⁴⁴⁸ Welling *Corporate Law in Canada* 71-72.

⁴⁴⁹ Welling *Corporate Law in Canada* 72-79.

⁴⁵⁰ Welling *Corporate Law in Canada* 79-80.

⁴⁵¹ Welling *Corporate Law in Canada* 59-60; Welling et al *Canadian Corporate Law* 116; Abbey 20; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 89-91. *The Model Business Corporations*

The basic constitutional document of a division of power corporation (in addition to the governing statute) is the articles (or memorandum) of incorporation which corresponds to the memorandum of association in a contractarian company or the charter in a chartered company. It is normally a basic document that must set out the name, capital structure and a few other basic features. It may also set out other things (basically anything that can be regulated in by-laws). The articles (or memorandum) of incorporation is difficult to change and normally requires a special majority.⁴⁵² As is the case with the letters of patent model, the division of power model also makes provision for the making of by-laws. The directors can make, amend or repeal by-laws subject to the approval of the shareholders. The division of power model also contemplates that some agreements among shareholders (called “unanimous shareholder agreements”) can become constitutional documents. Whilst agreements among shareholders are common, especially in smaller corporations, it is only with the division of power model that some agreements between shareholders may become constitutional documents.⁴⁵³

The basic division of powers corresponds with that of a letters of patent model company. The governing statute grants the directors the power to manage the business and affairs of the corporation. This is an original grant of power, not a delegated grant of power as is the case with the contractarian model. Any other person can only intervene in the management of the affairs of the corporation by reference to one of three powers. The first is a constitutionally permitted delegation from the board of directors by either a delegation of some of the board’s powers to employees, or by intra-corporate regulations called ‘by-laws’. The result is similar to that of the executive branch of government. The daily running of the corporation, like the daily governmental participation in the life of a nation, is not done collectively by the board of directors, nor individually by any one of them, but is left in the hands of corporate officers who,

Act of the American Bar Association for example provides in section 8.01 (b): “All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under section 7.23.” Compare also section 198A of the *Australian Corporations Act 50 of 2001 (Cth)* which provides as follows:

- “(1) The business of a company is to be managed by or under the direction of the directors.
- (2) The directors may exercise all the powers of the company except any powers that this Act or the company’s constitution (if any) require the company to exercise in general meeting.”

⁴⁵² Welling et al *Canadian Corporate Law* 116-117.

⁴⁵³ Welling et al *Canadian Corporate Law* 117.

like civil servants, are delegated specific tasks and are controlled by internal regulations. The second is where the governing statute or corporate constitution grant persons specific powers to intervene in certain circumstances. The third is through a unanimous shareholder agreement. The shareholders are given the power to elect the directors. Their position can be compared with that of the electorate in a state. They also have particular powers in particular circumstances, for example to approve amendments to the constitution and certain fundamental transactions, or to temporarily or permanently deprive the directors of their power by a unanimous shareholder agreement and run the corporation themselves. This describes the basic political hierarchy of a corporation under a division of power statute. It operates on the fundamental principles of majority rule within each of the spheres of influence of the board of directors and shareholders; and managerial power, delegated to individual corporate officers.⁴⁵⁴

Superimposed on this political hierarchy is a legal structure designed to achieve two purposes. First the governing statute creates and circumscribes the principle of corporate personality, which is directed primarily at regulating relationships involving outsiders, including contractors, creditors, employees⁴⁵⁵ and the general public. Secondly, the governing statute creates extensive remedies for shareholders and certain other ‘complainants’ primarily in pursuit of the principle of minority protection. These remedies are about standing and not about substantive rights. The governing statute provides certain statutory procedural remedies (as opposed to contractual remedies) to persons on attaining a specific status (for example director, officer, shareholder, creditor or employee), which remedies are designed for specific purposes. The division of power model is usually more thorough in providing remedies than the contractarian model.⁴⁵⁶

The managerial obligations and duties of directors and officers are public in nature. That is not to say that they owe it to the public. To the contrary, they owe these obligations and duties to the corporation as a separate legal entity. But the managerial obligations and duties of directors and officers are public in the sense that they have a statutory origin. It is no different in kind to the

⁴⁵⁴ Welling *Corporate Law in Canada* 60-62; Welling et al *Canadian Corporate Law* 117.

⁴⁵⁵ Although creditors and employees can also be participants in the corporation to whom statutory powers, obligations and remedies are assigned.

⁴⁵⁶ Welling *Corporate Law in Canada* 62-64; Welling et al *Canadian Corporate Law* 117-118.

duty of a motorist to drive a vehicle with due care and diligence. The governing statute typically contains a provision compelling directors and officers to comply with the provisions of that statute, the articles (or memorandum) of incorporation and by-laws under threat of criminal sanction. This provision of remedies designed for specific purposes to specific persons; and the technique of curbing managerial power are the most distinguishing features between division of power corporations and contractarian (or English model) companies.⁴⁵⁷

10 APPLICATION OF THE THEORIES IN THE UNITED KINGDOM, CANADA AND INDIA

Next the application of the theories in the United Kingdom, Canada, India and South Africa are briefly considered with specific reference to the approach of each jurisdiction to corporate social responsibility (indicative of the communitarian theory), the legal status of the company, whether the particular Act contains a statutory contract clause (indicative of the legal contractarian theory), and whether that particular jurisdiction adopts a contractarian (or English) model or type of company constitution or a division of power model.

10.1 United Kingdom

There are some indications of a communitarian approach to be found in the *Companies Act 2006* of the United Kingdom. Section 172(1) for example provides as follows:

“A director of a company must act in a 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

⁴⁵⁷ Welling *Corporate Law in Canada* 62-63.

(f) the need to act fairly as between members of the company.”⁴⁵⁸

Section 172(3) provides that the duty imposed under section 172 “has effect subject to any enactment... requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.”⁴⁵⁹ The aforesaid duty of the directors is owed to the company and not to the individual stakeholders.⁴⁶⁰ Section 247 provides that the powers of the directors include, “if they would not otherwise do so”, to make provision for employees or former employees of the company or any of the subsidiaries in connection with the cessation or transfer of the undertaking of the company or its subsidiary.⁴⁶¹ Directors must accordingly have regard to more than just the interests of shareholders. Section 414C(1) of the *Companies Act 2006* further provides that the directors’ report should include a strategic report containing information about corporate social responsibility matters.⁴⁶² Bone is of the view that section 172(1) reflects either an enlightened contractarian model (enlightened shareholder value model of corporate governance that is discussed in chapter 5) or a communitarian approach. For him there is nothing in the *Companies Act 2006* that is particularly definitive of which theory is more congruent with its guiding philosophy.⁴⁶³

⁴⁵⁸ This section will be discussed further in chapter 5. Deva describes the approach followed in this section as a “duty approach” to introduce elements of corporate social responsibility into the governance structure or decision making process of companies (or to “humanize” company law). In other words a duty is imposed on directors to also consider the interests of non-shareholders and the community when making decisions. See Deva “Socially responsible business in India: Has the elephant finally woken up to the tunes of international trends?” (2012) *Common Law Review* 299 303-304.

⁴⁵⁹ See *Gower & Davies Principles of Modern Company Law* 9th ed 540-558 for a discussion of section 172.

⁴⁶⁰ Section 170(1) of the *Companies Act 2006*.

⁴⁶¹ Section 719 of the *Companies Act 1985 C 6*, the predecessor of the *Companies Act 2006*, also authorised the directors to make payments to employees on the cessation or transfer of the business of the company or part thereof notwithstanding that it is not in the best interests of the company. Wedderburn points out that this development was partly in consequence of *Parke v Daily News* [1962] Ch 927, which held that *ex gratia* payments of corporate funds by sympathetic directors to redundant employees, without taking account the interest of shareholders, was *ultra virus* and a breach of the directors’ fiduciary duties. See Wedderburn “Employees, Partnership and Company Law” (2002) *Industrial Law Journal* 99 105-106. See also *Gower & Davies Principles of Modern Company Law* 9th ed 189-190 and 552-553 for a discussion of section 247.

⁴⁶² Deva describes this as a “disclosing” or “reporting” approach to introduce elements of corporate social responsibility into the governance structure or decision making process of companies. See Deva (2012) *Common Law Review* 299 306.

⁴⁶³ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 298.

The UK Corporate Governance Code (CGC)⁴⁶⁴ applies formally only to companies with a premium listing of equity shares on the London Stock Exchange.⁴⁶⁵ The purpose of the CGC is to facilitate effective, entrepreneurial and prudent management that can deliver the long-term success of the company.⁴⁶⁶ The main principles encapsulated in the CGC deal with leadership, effectiveness, accountability, remuneration and relations with shareholders. The CGC does not specifically deal with corporate social responsibility. The CGC works on the principle of ‘comply or explain’. Companies must disclose in their annual report the extent to which they complied with the CGC and give reasons for areas of non-compliance (if any). The sanctions that can be applied to both companies and directors for non-compliance are extensive.⁴⁶⁷

Section 16 of the *Companies Act 2006* provides that registration of a company has the effect that “[t]he subscribers to the memorandum, together with such other persons as may from time to time become members of the company, are a body corporate by the name stated in the certificate of incorporation.”⁴⁶⁸ The body corporate is capable of exercising all the functions “of an incorporated company.”⁴⁶⁹ What is noticeable is that the “subscribers” or “members” are deemed to be the body corporate. This is indicative of the aggregate theory that is discussed in chapter 4.

Section 33 of the *Companies Act 2006* provides that the “provisions of a company’s constitution bind the company and its members to the same extent as if there were covenants on the part of the company and each member to observe its provisions.”⁴⁷⁰ This statutory contract clause (indicative of a contractarian model or type of company constitution) is a legacy of the unincorporated deed of settlement companies that became prevalent after the promulgation of the *Bubble Act*⁴⁷¹ in

⁴⁶⁴ Financial Reporting Council *UK Corporate Governance Code*, September 2014.

⁴⁶⁵ UK CGC 1 par 4. See also *Gower & Davies Principles of Modern Company Law* 9th ed 384 and 430.

⁴⁶⁶ UK CGC 1 par 1.

⁴⁶⁷ UK CGC 4. See also *Gower & Davies Principles of Modern Company Law* 9th ed 430-432.

⁴⁶⁸ Section 16(2) of the *Companies Act 2006*.

⁴⁶⁹ Section 16(3).

⁴⁷⁰ See also Moore *Corporate Governance* 139-141.

⁴⁷¹ *Supra*.

1820. These deed of settlement companies were, as indicated hereinbefore, a cross between the partnership and trust concepts. They were not true corporations but were in fact creatures of contract.⁴⁷² The deed of settlement of these companies was essentially a partnership agreement that mimicked the provisions found in charters of incorporation. When the *Joint Stock Companies Act 1844*⁴⁷³ made it possible to incorporate companies simply through registration, the deed of settlement was retained as the constitutive document of the company.⁴⁷⁴ The *Joint Stock Companies Act 1856*⁴⁷⁵ substituted the memorandum and articles for the deed of settlement. The Act specifically provided that the memorandum and articles were contractually binding.⁴⁷⁶ It is interesting to note that the *Joint Stock Companies Act 1856*⁴⁷⁷ did not specifically state that the company was also bound thereto as if it too had signed and sealed it, as these companies were not yet fully appreciated as being a separate legal person until the decision of *Salomon v Salomon & Co Ltd*.⁴⁷⁸ This omission was only rectified in the *Companies Act 2006*.

Although the articles of association have a contractual status, they are more than a private contract between the company and its members. The articles of association becomes a public document on registration.⁴⁷⁹ From this situation the courts have concluded that standard contract law should apply to the contract only with certain qualifications.⁴⁸⁰

⁴⁷² Welling *Corporate Law in Canada* 66-67 points out that the deed of settlement was of course contractually binding as it was under seal. The *Joint Stock Companies Act 1856* specifically provided that the memorandum and articles were contractually binding (sections 7 and 10). The Act did not specifically state that the company was also bound thereto as if it too had signed and sealed it, as these companies were not yet fully appreciated as having legal personality on its own until the decision of *Salomon v Salomon & Co Ltd* supra. See also *Gower & Davies Principles of Modern Company Law* 9th ed 68-9; Abbey 15-18.

⁴⁷³ Supra.

⁴⁷⁴ Cilliers & Benade *Korporatiewe Reg* (1987) par 5.35

⁴⁷⁵ 19 & 20 Vict. c. 47.

⁴⁷⁶ Sections 7 and 10 of the *Joint Stock Companies Act 1856*.

⁴⁷⁷ Supra.

⁴⁷⁸ Supra.

⁴⁷⁹ Sections 9(5)(b) and 14 of the *Companies Act 2006*.

⁴⁸⁰ See also *Gower & Davies Principles of Modern Company Law* 9th ed 69-78.

Moore argues that the United Kingdom company law is comparatively unique in providing express quasi-contractual status and effect to a company's constitution. The basic contractarian notion of private ordering lies at the very heart of company law in the United Kingdom.⁴⁸¹ Irrespective of the formal separate legal personality of a company from the perspective of other stakeholders such as creditors and employees, when distilled down internally the company, in effect, ultimately is its collective body of members (shareholders) and owes its existence to their common endeavours. Moore states:

“Thus from the initial phase of its development British company law had, largely by virtue of its own doctrinal path dependence, developed a somewhat curious ideological perspective on corporate entities whereby shareholders are positioned ‘inside’ the company from a governance perspective, and, correspondingly, non-shareholder constituents such as creditors and employees deal *with* the company-member contractual nexus ‘from the outside’ only.”⁴⁸²

Company law in the United Kingdom is rooted in the legal contractarian theory.⁴⁸³ It is important to note however that this statutory contract has been questioned in the United Kingdom itself, where it originated. Before the promulgation of the *Companies Act 2006*, the Company Law Review considered whether it was appropriate any longer to regard the articles of association as a contract but in the end decided that the issue did not call for immediate resolution.⁴⁸⁴

A further remarkable feature of company law in the United Kingdom is the extent to which it leaves regulation of the internal affairs of a company, such as the division of powers between the organs of the company (the general meeting of the shareholders and the board of directors), to the company itself in its constitution. In the United Kingdom the shareholders constitute the ultimate

⁴⁸¹ Moore *Corporate Governance* 137.

⁴⁸² Moore *Corporate Governance* 141.

⁴⁸³ Dine *Corporate Groups* 4.

⁴⁸⁴ Company Law Review *Completing the Structure* URN 00/1335, November 2000; Gower & Davies *Principles of Modern Company Law* 9th ed 69.

source of managerial authority within the company. The directors obtain their powers by a process of delegation from the shareholders through the constitution.⁴⁸⁵

The *Companies Clauses Consolidation Act 1845*⁴⁸⁶ was the first to address the division of powers in the company.⁴⁸⁷ The Act basically provided that the directors shall have the management and superintendence of the affairs of the company, except as to such matters as are directed by the Act or the special Act (under which it was incorporated) to be transacted by the general meeting. Furthermore the directors shall exercise their powers subject to the provisions of the Act or special Act; and in the exercise of such powers they shall be subject to the control and regulation of any general meeting specially convened for the purpose.⁴⁸⁸ Certain powers were specifically reserved for the general meeting.⁴⁸⁹ What is significant is that the division of powers was regulated in the Act itself. These provisions served as a model for subsequent division of powers in the United Kingdom with the important difference that the division of powers since then has been regulated in the proposed articles, and not in the subsequent Acts.⁴⁹⁰ The contractarian model or type of company constitution originated in the United Kingdom. Company law in the United Kingdom is based more on *societas* (partnership) than *universitas* (corporation).

10.2 Canada

Initially Canadian corporations (both public and private) did not have legal duties towards communities.⁴⁹¹ However corporate citizenship has recently been revived under Canadian law,

⁴⁸⁵ *Gower & Davies Principles of Modern Company Law* 9th ed 64-65 and 384. The constitution of the company includes, but is not limited to the articles of association. It also includes special resolutions of shareholders. It no longer includes the memorandum of incorporation. Section 17 of the *Companies Act 2006*. See also *Gower & Davies Principles of Modern Company Law* 9th ed 67-68.

⁴⁸⁶ *C 16 Regnal. 8 & 9 Vict.*

⁴⁸⁷ See Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 83.

⁴⁸⁸ Section 90 of the *Companies Clauses Consolidation Act 1845*.

⁴⁸⁹ Section 91.

⁴⁹⁰ Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 83-84.

⁴⁹¹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 299-230.

which now contemplates a communitarian corporation.⁴⁹² Section 122(1) of the *Canada Business Corporations Act* provides as follows:

“Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”⁴⁹³

Two ground-breaking judgements of the Supreme Court of Canada (that dealt with the aforesaid fiduciary duty of directors) encapsulate the approach of Canadian corporation law. In *Peoples Department Stores Inc v Wise*⁴⁹⁴ the Court observed:

“Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the ‘best interests of the corporation’ should be read not simply as the ‘best interests of the shareholders.’...[I]n determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the Board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.”⁴⁹⁵

In *BCE Inc v 1976 Debentureholders*,⁴⁹⁶ the Court emphasized that the fiduciary duty of the directors is owed to the corporation and not to any particular stakeholder. In considering what is in the best interests of the corporation the directors may look at the interests of, *inter alia*, the shareholders, employees, creditors, consumers, governments and the environment.⁴⁹⁷ The Court held that, when directors are weighing up conflicting corporate interests “it falls to the directors of

⁴⁹² Bone (2011) Canadian Journal of Law and Jurisprudence 277 279, 298 and 304.

⁴⁹³ Deva is of the view that, as opposed to the obligatory model of the United Kingdom (where directors are required by section 172(1) to consider the interests of specified non-shareholders), Canada follows a permissive model, under which company law permits directors to take into account the interests of non-shareholders. See Deva (2012) Common Law Review 299 304.

⁴⁹⁴ [2004] S.C.J. No 64, [2004] 3 S.C.R. 461.

⁴⁹⁵ [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 Par 42.

⁴⁹⁶ [2008] S.C.J. No 37, [2008] 3 S.C.R. 560.

⁴⁹⁷ Par 80.

the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”⁴⁹⁸ The Supreme Court of Canada thus adopted a communitarian approach.⁴⁹⁹ These cases illustrate that Canadian corporation law regards the fundamental issues of the purpose of the corporation and the duties and obligations of the directors and management of the corporation differently than what may be observed in the company law of the United Kingdom, where the emphasis is on the interests of the shareholders of the company.⁵⁰⁰

Section 15(1) of the *Canada Business Corporations Act* provides that “[a] corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” A comparison of this section with that of section 16(2) of the United Kingdom *Companies Act 2006* (which provides that the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, are a body corporate) reveal the fundamentally different approaches of the two jurisdictions. In Canadian law the corporation is viewed as an entity distinct from its shareholders, whilst the company is conceptualised as an aggregation of its members in the law of the United Kingdom.⁵⁰¹ Canadian corporation law is firmly based on *universitas* (corporation) whilst company law in the United Kingdom is based more on *societas* (partnership).

The reforms in Canada in the 1970s and 1980s rejected the legal contractarian model in virtually every Canadian jurisdiction.⁵⁰² With the exception of British Columbia and Nova Scotia, the

⁴⁹⁸ Par 81.

⁴⁹⁹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277-298.

⁵⁰⁰ See Welling et al *Canadian Corporate Law* vi and 219-226. Corporate governance practices in Canada are shaped by legal rules and best practices promoted by institutional shareholder groups, the media and professional director associations such as the Institute of Corporate Directors. Regulation of Canada’s national stock exchange is divided between the Province of Ontario for the senior exchange, the Provinces of British Columbia and Alberta for the venture exchange and the Province of Quebec for the derivative exchange. The Ontario Securities Commission issued the *Canadian Securities Administrators National Instrument 58-101* (the Rule), the *Disclosure of Corporate Governance Practices and National Policy 58-201* and the *Corporate Governance Guidelines* which came into effect on 30 June 2005. They deal with issues such as corporate governance and relationships with stakeholders. See MacDougall, Yalden & Walker “Canada” in Calkoen *The Corporate Governance Review* 2nd ed (2012) (hereinafter “*The Corporate Governance Review*”) 34-44; McGuinness *Business Corporations* 598-605.

⁵⁰¹ Welling *Corporate Law in Canada* 81-157; Welling et al *Canadian Corporate Law* 127-226.

corporation law statutes of the other Canadian provinces and the federal *Canada Business Corporations Act* do not contain a statutory contract provision (similar to section 33 of the United Kingdom *Companies Act 2006*).⁵⁰³ Welling rejects the economic contractarian theory as a red herring. He states:

“It may be harmless for a lawyer to agree that a ‘firm’ (not a legally recognized concept) is a nexus of contracts. The same lawyer can’t agree that ‘a CBCA corporation is a nexus of contracts’. A CBCA corporation (like a grandmother) is a legal person, it has a special place in our legal system, quite different from a badger and nothing at all like a ‘nexus of contracts’ or any set of relationships. Nothing of *legal* consequence about a corporation can be explained by that kind of terminology.”⁵⁰⁴

The division of power model or type of company constitution is the dominant model in Canada.⁵⁰⁵ Section 102(1) of the *Canada Business Corporations Act* provides: “Subject to any unanimous shareholders agreement, the directors shall manage, or supervise the management of, the business and affairs of the corporation.” This is an original grant of power to the directors to manage the business and affairs of the corporation. It can only be interfered with where there is a constitutional delegation from the board;⁵⁰⁶ where a specific power to intervene in certain circumstances is granted by the Act⁵⁰⁷ or the corporate constitution; or through a unanimous shareholder agreement.⁵⁰⁸ The managerial power of the directors is public in nature.⁵⁰⁹

⁵⁰² Welling *Corporate Law in Canada* 80.

⁵⁰³ Welling *Corporate Law in Canada* 65-67.

⁵⁰⁴ Welling *Corporate Law in Canada* 111.

⁵⁰⁵ Welling *Corporate Law in Canada* 59-64; Welling et al *Canadian Corporate Law* 110-118.

⁵⁰⁶ By the directors delegating some of their powers to employees (for example managers), or intra-corporate regulations (called “by-laws”). See section 103 of the *Canada Business Corporations Act*.

⁵⁰⁷ For example to amend or reject by-laws (section 103(2)) or to amend the corporate constitution (section 173(1)).

⁵⁰⁸ Section 146 of the *Canada Business Corporations Act*. See Welling *Corporate Law in Canada* 60-62.

⁵⁰⁹ This is evident from the provisions of section 122(2) (which requires every director and officer of the company to comply with the Act, the regulations, the by-laws and any unanimous shareholders agreement) and section 251 (which provides that every person who, without reasonable cause, contravenes a provision of the Act or the regulations for which no punishment is provided is guilty of an offence). See Welling *Corporate Law in Canada* 62-63.

The *Canada Business Corporations Act* creates extensive remedies for shareholders and other complainants.⁵¹⁰ The remedies are about standing, not about substantive rights.⁵¹¹ Corporate law in Canada is now built on four major principles namely, corporate personality (the principle that a corporation's behaviour is to be legally analysed by analogy to the behaviour of human beings), managerial power (the principle that the daily operation of a corporate business is to be done by a relatively independent managerial group), majority rule (the principle that the internal decisions are to be made by a democratic process among those constitutionally franchised on any particular issue), and minority protection (the principle that certain corporate, managerial or majority shareholder inclinations ought to be restrained from injuring the minority members of any group created by the corporate constitution). There are other lesser principles as well, such as the integrity of public issues and the trading of shares and employee participation in the corporation. Some of these principles are contained in legislation other than corporate law. The function of corporate law is to create a system of rules for analysing and balancing which principle prevails when two or more of these principles come into conflict.⁵¹²

10.3 India

India has a rich tradition in corporate social responsibility.⁵¹³ The Supreme Court of India has recognised the social character of a company even before the *Companies Act 2013* came into force. In *Charanjit Lal Chowdhury v Union of India*⁵¹⁴ the Court observed: "A corporation which is engaged in the production of a commodity vitally essential to the community, has a

⁵¹⁰ See part XX of the *Canada Business Corporations Act*. These remedies include a derivative action (sections 239-240), an oppression remedy (section 241), an application to rectify the records of the company (section 243) and a right to apply for a restraining or compliance order (section 247).

⁵¹¹ Welling *Corporate Law in Canada* 62-64.

⁵¹² Welling *Corporate Law in Canada* 58-59.

⁵¹³ See Sharma "Corporate social responsibility in India: An overview" (2009) *The International Lawyer* 1515; Gowda "The evolution of corporate social responsibility (CSR) in India" (2013) *Indian Streams Journal* 1 for a discussion of the history of corporate social responsibility in India. Sharma argues that the corporate philanthropy (involving charitable donations made by business houses) first practiced by Indian businesses was initially rooted in religious belief and culture. With time there has been a significant shift in the approach which resulted in the emergence of four different models - the trusteeship model propounded by Mahatma Gandhi, the statist model put forward by Nehru, the liberal model proposed by Friedman, and the stakeholder model proposed by Edward. See Sharma (2009) *The International Lawyer* 1515 1516-1517.

⁵¹⁴ *AIR 1951 SC 41, 59; 1950 SCR 869; (1951) 21 Comp Cas 33.*

social character of its own and it must not be regarded as the concern primarily or only of those who invest money in it.”⁵¹⁵ In *National Textile Workers’ Union v PR Ramakrishnan*⁵¹⁶ the Supreme Court remarked:

“The traditional view that the company is the property of the shareholders is now an exploded myth. ... Today social scientists and thinkers regard a company as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contribute to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive domain over the concern, as if the concern belongs to it? A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions.”⁵¹⁷

The *Companies Act 2013* introduced mandatory corporate social responsibility.⁵¹⁸ Every company having a net worth or turnover more than a prescribed amount during any of three preceding financial years must establish a corporate and social responsibility committee consisting of three or more directors of whom at least one must be an independent director. The committee must formulate and recommend a corporate social responsibility policy which shall indicate the activities to be undertaken by the company as specified in schedule VII of the Act, recommend the amount of expenditure that needs to be incurred on these activities and monitor the corporate

⁵¹⁵ Quoted in Singh *Company Law* 245.

⁵¹⁶ *AIR 1983 SC 75; (1983) 53 Comp Cas 184 (SC); (1983) 1 SCC 228.*

⁵¹⁷ *1983 SCR (1) 922 942-944.*

⁵¹⁸ See Ghosh *Ghosh on Companies Act* 685-718 for a more detailed discussion of corporate social responsibility in India.

social responsibility policy of the company from time to time.⁵¹⁹ The board must ensure that the activities listed in the corporate social responsibility policy are undertaken by the company.⁵²⁰ The activities specified in schedule VII include activities relating to eradicating extreme hunger and poverty; promotion of education; promoting gender equality and empowering women; reducing child mortality and improving maternal wealth; combating human immunodeficiency virus, acquired immunodeficiency syndrome, malaria and other diseases; ensuring environmental sustainability; employment enhancing vocational skills; social business projects; contribution to the Prime Minister's National Relief Fund or certain other specified funds; and such other matters as may be prescribed.⁵²¹ The board of directors of these companies must ensure that during each financial year the company spends at least two percent of the average net profits during the immediately preceding three years in pursuance of its social responsibility policy.⁵²² There is no specific penalty if a company fails to spend these amounts except that the board must disclose in its report why the company failed to do so.⁵²³ Every company which consists of more than 1000 shareholders, debenture holders, deposit holders and any other security holders at any time during a financial year must also establish a stakeholder relationship committee. The function of this committee is to consider and resolve the grievances of security holders of the company.⁵²⁴

At least one-third of the board of directors of every listed company must be independent directors. The central government may prescribe the minimum number of independent directors in a class or classes of public companies.⁵²⁵ These independent directors must be selected from a central data

⁵¹⁹ Section 135(1) - (3) of the *Companies Act 2013*.

⁵²⁰ Section 135(4).

⁵²¹ Schedule VII.

⁵²² Section 135(5). See Ghosh *Ghosh on Companies Act* 688-718; Singh *Company Law* 416-417 for a discussion of section 135 (corporate social responsibility).

⁵²³ Second proviso to section 135. See Ghosh *Ghosh on Companies Act* 688-691; Talbot *Great Debates in Company Law* 160. According to Deva this is a disclosing or reporting approach to introduce elements of corporate social responsibility into the governance structure or decision making process of companies. See Deva (2012) *Common Law Review* 299 306.

⁵²⁴ Section 178(5) and (6). See Ghosh *Ghosh on Companies Act* 451. Deva calls the establishment of institutionalised mechanisms to protect the interests of stakeholders a composition approach to introduce elements of corporate social responsibility into the governance structure or decision making process of companies. See Deva (2012) *Common Law Review* 299 305-306.

bank.⁵²⁶ Every listed company and certain prescribed public companies must appoint at least one woman director on the board.⁵²⁷ A listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed.⁵²⁸ The Act regulates and controls managerial remuneration. For example, the total amount of remuneration payable by a public company to its directors, including managing director, fulltime director, and its manager in respect of every financial year shall not exceed eleven percent of the net profits of the company.⁵²⁹ Singh argues that regulation and control over directors' remuneration is necessary for several reasons, prominent among them being prevention of diversion of corporate funds for personal use and the impact which an unduly high executive remuneration has upon the rest of society.⁵³⁰ The report of the board of directors shall include the details about the policy developed and implemented by the company on corporate social responsibility during the year.⁵³¹

Section 166(2) of the *Companies Act 2013* provides that a director of a company “shall act in good faith in order to promote the objects of the company⁵³² for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.” This provision is seemingly inspired by section 172(1) of the United Kingdom *Companies Act 2006*.⁵³³

⁵²⁵ Section 149(4). See also Kapoor & Dhamija *Taxmann's Company Law* 305-309; Ghosh *Ghosh on Companies Act* 408-427; Singh *Company Law* 259-261.

⁵²⁶ Section 150. See also Ghosh *Ghosh on Companies Act* 412; Singh *Company Law* 261.

⁵²⁷ Section 149(1) read with Rule 3 of *Companies (Appointment and Qualification of Directors) Rules, 2014*. See also Kapoor & Dhamija *Taxmann's Company Law* 312-313.

⁵²⁸ Section 151. See also Ghosh *Ghosh on Companies Act* 387.

⁵²⁹ Section 197. See also Kapoor & Dhamija *Taxmann's Company Law* 338-345; Ghosh *Ghosh on Companies Act* 483-492; Singh *Company Law* 335-340.

⁵³⁰ See also Singh *Company Law* 335.

⁵³¹ Section 134(3)(o) of the *Companies Act 2013*. This is similar to sections 414C, 414CA and 414CB of the United Kingdom *Companies Act 2006*.

⁵³² Which must be stated in its memorandum. See section 4(c) of the *Companies Act 2013*.

⁵³³ Deva (2012) *Common Law Review* 299 312-313.

The Indian government issued a number of guidelines on corporate social responsibility, including the *Corporate Social Responsibility Voluntary Guidelines, 2009*; the *National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011*; and the *Guidelines on Social Responsibility for Central Public Sector Enterprises, revised 2013*. The guidelines are rooted in the triple bottom line approach.⁵³⁴ It also published the *Companies (Corporate Social Responsibility Policy) Rules, 2014*.⁵³⁵ There is a strong emphasis on corporate social responsibility in Indian law. The Indian approach has a very definite communitarian bias in this respect.

The question may be asked why there is such a strong emphasis on corporate social responsibility in Indian law. Van Zile argues that the mandatory approach of the new Indian *Companies Act 2013* towards corporate social responsibility can be seen as an attempt to deal with India's huge social problems and inequalities without resorting to high corporate tax. The Indian legislature sought to protect India's burgeoning economy and its on-going attractiveness to investors and adopt a more 'market' type regulation.⁵³⁶ According to Ghosh, participation of small investors in the capital market and foreign direct investments largely depend upon good corporate governance and adequate investor protection. On the other hand, corporate activities being an important vehicle of economic growth need to be facilitated through managerial freedom and minimal governmental control. Whilst the *Companies Act 2013* balances these two considerations, the emphasis is on the first. The Act integrates the contemporary principles of corporate governance and corporate citizenship. It ensures that profitable companies are part and parcel of the process of social development in India. Various aspects of the strict *Sarbanes-Oxley Act*,⁵³⁷ that was

⁵³⁴ The triple bottom line approach entails that a company should have due regard to economic, social and environmental concerns. Deva (2012) *Common Law Review* 299 299-300 and 308-312; Ghosh *Ghosh on Companies Act* 685 and 687-688

⁵³⁵ *GSR 129(E)*, dated 27 February 2014. The rules are reproduced in Ghosh *Ghosh on Companies Act* 1499-1502.

⁵³⁶ Talbot *Great Debates in Company Law* 159-160, with reference to Van Zile "India's mandatory corporate social responsibility proposal: Creative capitalism meets creative regulation in the global market" (2012) *Asian-Pacific Law & Policy Law Journal* 274. Talbot remarks that following independence in 1947, India pursued a socialist agenda. The new 'liberal' economic programme that India embarked upon since 1991 was premised on fulfilling those social goals and improving economic equality. Instead the new economic programme has increased wealth inequalities. The massive increase in gross domestic product has benefitted a minority in India, creating a super-rich and failing to better the super-poor.

⁵³⁷ *Pub.L. No 107-204, 116 Stat. 745 (2002)*.

promulgated in the United States following a number of corporate scandals in the 1990s and the bursting of America's stock-market bubble in 2000 to 2002, were incorporated in the *Companies Act 2013*. The Act is further based upon the proposition that improving shareholders' participation in the decision making process is the best way to improve and enlarge corporate investors' base.⁵³⁸ Ghosh observes:

“The corporate social responsibility in India, as has been conceptualized and aspired, would go a long way in cementing the company as a responsible member of the society and not simply as a profit making vehicle. It will bring social harmony and the Act's local area focus would facilitate the company to justify its presence as a member of the area wherein it operates. This sense of belongingness is [as] critical for growth and prosperity of an artificial juridical person as it is for any individual.”⁵³⁹

Despite this strong communitarian approach, the Indian *Companies Act 2013* is an anomaly in that it still remains strongly rooted in the legal contractarian approach that it inherited from the United Kingdom. Section 9 of the Act provides that from the date of incorporation of a company “such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate...” This is similar to the aggregate approach adopted in section 16(2) of the United Kingdom *Companies Act 2006*.

India further inherited the statutory contract provision from the United Kingdom. Section 10 of the Indian *Companies Act 2013* provides: “Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its part to observe all the provisions of the memorandum and of the articles.”⁵⁴⁰

⁵³⁸ Ghosh *Ghosh on Companies Act* I-5 to I-6.

⁵³⁹ Ghosh *Ghosh on Companies Act* I-5.

⁵⁴⁰ See Kapoor & Dhamija *Taxmann's Company Law* 110-113; Ghosh *Ghosh on Companies Act* 109-110; Singh *Company Law* 80-83 for a discussion of the statutory contract in Indian law.

The memorandum of association is still required to stipulate the objects for which the company is incorporated.⁵⁴¹ The articles of association may prescribe such regulations for the company as the subscribers deem expedient. The Act gives the subscribers a free hand. Any stipulations as to the relation between the company and its members, and between the members *inter se*, may be inserted in the articles, as long as it does not conflict with the Act or any other law. The articles regulates the internal management of the company.⁵⁴²

Section 179 of the Indian *Companies Act 2013* deals with the powers of the board. Section 179(1) provides as follows:

“The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.”

Whilst these powers are now original and not delegated from the shareholders through the articles of association, they are subject to material limitations. The ultimate power in the company still vests with the shareholders and not the board of directors.⁵⁴³ The corporate governance system

⁵⁴¹ Section 4 of the *Companies Act 2013*. Note that the United Kingdom *Companies Act 2006* does not require the objects to be stated in the memorandum. The objects, if at all, have only to be stated in the articles. If there is no such statement, the company will have unrestricted objects. For a discussion of the objects clause in the memorandum and the *ultra vires* doctrine in the context of the Indian law, see Kapoor & Dhamija *Taxmann's Company Law* 86-90; Ghosh *Ghosh on Companies Act* 111-112; Singh *Company Law* 58-73.

⁵⁴² Section 6. See also Kapoor & Dhamija *Taxmann's Company Law* 102-106; Ghosh *Ghosh on Companies Act* 439-443; Singh *Company Law* 78; *Madras Stock Exchange Ltd v SSR Rajakumar (2003) 116 Comp Cas (2003) 2 LW 90*.

⁵⁴³ Singh *Company Law* 278-284. That the ultimate power in the company vests in the shareholders is buttressed by section 245(1)(f) of the *Companies Act 2013* which provides that certain members, depositors, or class of them may seek an order restraining the company from taking any action contrary to any resolution passed by the members.

that is adopted in the *Companies Act 2013* is still strongly rooted in United Kingdom model.⁵⁴⁴ The Act adopted the contractarian (English) model of constitution.

11 APPLICATION OF THE THEORIES IN SOUTH AFRICA

11.1 The traditional approach

Traditionally South African company law was firmly rooted in the contractarian (or English model) company. The memorandum and articles of association constituted a contract between the company and its shareholders, and between the shareholders *inter se*.⁵⁴⁵ Section 65(2) of the Companies Act of 1973 provided: “The memorandum and articles shall bind the company and the members thereof to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.” This legal contractarian approach had its historical roots in the unincorporated deed of settlement companies that were widespread in the United Kingdom by the beginning the nineteenth century. The division of powers in the company was regulated in the articles, which means that it was delegated and could be revoked or changed by the shareholders in general meeting. It was also generally accepted that the shareholders, in general meeting, was the supreme organ of the company.⁵⁴⁶ Our company law was based on *societas* (partnership) rather than *universitas* (corporation).⁵⁴⁷

⁵⁴⁴ See Ghosh *Ghosh on Companies Act* 719-782.

⁵⁴⁵ See section 65(2) of the Companies Act 61 of 1973 and *De Villiers v Jacobsdal Saltworks (Pty) Ltd* 1959 (3) SA 873 (O) 874; *Gohlke & Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) 692; *Mpofu v South African Broadcasting Corporation Ltd* (2008/18368) [2008] ZAGPHC 413 (16 September 2008) par 29; Cilliers & Benade *Korporatiewe Reg* paras 5.36-5.39; Kunst, Delpont & Vorster *Henochsberg on the Companies Act* 5th ed (1994) (Loose-leaf, update June 2011) (hereinafter “Kunst et al *Henochsberg on 1973 Act*”) 123 – 124; Delpont *Henochsberg on the Companies Act 71 of 2008* vol 1 (2011) (Loose-leaf, update October 2014) (hereinafter “Delpont *Henochsberg vol 1*”) 74

⁵⁴⁶ See discussions in Vermaas “The Company in General Meeting” in Pretorius, Delpont, Havenga & Vermaas *Hahlo’s South African Company Law through the Cases* 5th ed (1991) (hereinafter referred to as “*Hahlo’s South African Company Law*”) 285-289; Havenga “The Directors in Action” in *Hahlo’s South African Company Law* 446-453; Cilliers & Benade *Korporatiewe Reg* paras 14.04-14.08; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 85-89. The position under the Companies Act of 1973 was summarized as follows in *LSA UK Ltd (formerly Curtainz Ltd) v Impala Platinum Holdings Ltd* [2000] JOL 6308 (A) at 21-22:

“Our law recognizes what has been called ‘the doctrine of ‘supremacy of the articles of association’... What it amounts to is that the founding members, and also a later body of members by special resolution, may order the internal affairs of their company in the way that suits them best, subject to such prohibitions as may exist in the Act or any other law, statutory or common... The board of directors and the general meeting are

11.2 The approach of the Policy Document

A process to reform the South African company law was officially launched in July 2003.⁵⁴⁸ In 2004 the Department of Trade and Industry published the Policy Document. The object of the review was to ensure that the new legislation would be appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy.⁵⁴⁹

The Policy Document recognises that our company law was essentially built on foundations that were put in place by the British in the middle of the nineteenth century and that reform was necessary to reflect the current market practices and societal needs.⁵⁵⁰ The Policy Document signifies a clear shift away from the traditional contractarian approach. It recognises that the environment in 2004 was fundamentally different from the situation that prevailed in England in the nineteenth century. Consequently there was a need for a comprehensive company law review.

The Policy Document states:

“We now live in a world of greater globalisation, increased electronic communication, greater sensitivity to social and ethical concerns, fast growing markets, greater competition for capital, goods and services. ... There is a growing recognition by companies and governments that there is a need for higher standards of corporate governance and ethics and greater interdependence between enterprises and societies in which they operate. ...

...

Socio-political and economic change in South Africa has underscored the need for social responsiveness, transparency and accountability of enterprises. The mobility of

both organs of the company, each having its own original powers. The directors do not receive their powers as agents for the company, so that in the absence of a contrary provision in the memorandum and articles, even a unanimous general meeting may not supersede the directors' powers.”

⁵⁴⁷ Compare De Jongh *Between societas and universitas*.

⁵⁴⁸ Mongalo “An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008” (2010) AJ xiii xiv.

⁵⁴⁹ Par 1.1 of Policy Document.

⁵⁵⁰ Paras 2.1 and 2.2.1.

international capital has highlighted the need for domestic laws to be investor friendly and competitive with international trends.”⁵⁵¹

The Policy Document proposed that while company law should be comprehensive, it should not burden companies with unnecessary rules. Company law must be facilitative, enabling and flexible. Although company law will inevitably impose restraints on companies and those who control and manage them, its primary aim should be to make it possible for companies to structure themselves and carry on their business in the manner they consider most appropriate for the conduct of their business and the administration of their affairs. Company law should therefore contain a minimum of mandatory rules and clear and enforceable prohibitions, limited to those aspects of corporate structure, governance, administration and management which must be complied with by all companies so as to ensure transparency, disclosure, the protection of legitimate interests and the prevention of fraud and oppressive conduct. While company law should provide for the means of co-operation among various stakeholders, it should not attempt to prescribe what the co-operation should be. Best practice codes can also guide companies in their interaction with stakeholders.⁵⁵²

The Policy Document took the position that a unitary board structure be retained, but that stakeholder representation on the board should be optional. It concluded that while a two-tier board provides for the opportunity for stakeholder representation, the European experience has shown that this structure is often inefficient, may deter investment and is not necessarily desirable for shareholders. It may also be costly to impose a two-tier structure. It proposed that directors could be allowed to have regard to the interests of stakeholders other than shareholders in appropriate circumstances.⁵⁵³

Investor protection was identified as one of the key functions of company law. The Policy Document describes investors in companies broadly as equity investors, employees and creditors. It concludes that employee rights are generally protected in labour law whilst large creditors rely

⁵⁵¹ Par 2.2.1. See also par 4.7.4.

⁵⁵² Par 3.3.

⁵⁵³ Par 4.4.2.

increasingly on contract to protect their investment. Equity investors are accordingly generally at the greatest risk. Thus a primary goal of company law should be to ensure that shareholders, as the investors of equity, are granted explicit rights and that they have effective recourse if these rights are violated.⁵⁵⁴

The Policy Document proposed that company law must ensure maximum possible transparency in regard to the administration of companies and the maximum disclosure of their affairs. While it is primarily shareholders that have a right to information, other stakeholders such as creditors and employees must receive proper notice of all policies and decisions that will affect their interests.⁵⁵⁵ Stakeholders, including creditors and potential investors should be able to access relevant information with ease.⁵⁵⁶

The theoretical approach that the Policy Document adopted is not entirely clear or consistent. It probably leans the strongest in the direction of the dual concession theory or even the communitarian theory. The Policy Document clearly recognises the economic and social role that companies play in the competitiveness and development of South Africa. It also emphasises the interdependence between companies and the societies in which they operate. Directors can have regard to the interests of stakeholders other than shareholders in appropriate circumstances. The company is conceptualised as a quasi-public institution. On the other hand the Policy Document envisages that company law should be facilitative, enabling and flexible rather than regulatory. It promotes a predictable and effective regulatory environment and flexibility in the formation and the management of companies. The purpose is to encourage investment and entrepreneurship. As is the case with the Indian *Companies Act 2013*, the Policy Document attempts to balance these two considerations.

⁵⁵⁴ Par 4.4.1. The Policy Document identified four basic rights of shareholders namely, a right to capital, a right to income, a right to a vote and a right to information. Of these only the latter two rights are absolute.

⁵⁵⁵ Paras 3.4 and 4.4.3.

⁵⁵⁶ Par 4.7.1.2.

11.3 The approach of the Companies Act of 2008

There are a number of provisions in the Companies Act of 2008 that are indicative of a communitarian approach. Section 5(1) of the Companies Act of 2008 provides that the Act must be interpreted and applied in a manner that gives effect to its purposes. The purposes of the Act are set out in section 7. Section 7(b) recognises the significant role of enterprises (companies) within the social and economic life of a nation. Section 7(d) reaffirms the concept of the company as a means of achieving economic and social benefits. A further goal of the Act, contained in section 7(e), is to continue to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy.⁵⁵⁷ Section 72(4) of the Act empowers the Minister to prescribe by regulation that certain companies must have a social and ethics committee if it is desirable and in the public interest, having regard to the annual turnover, workforce size or nature or extent of the activities of such companies.⁵⁵⁸ The function of this committee amongst other things, is to monitor the company's contribution to the development of the community in which it conducts most of its activities, including the company's environment, health, public safety and employment relationships.⁵⁵⁹

The corporate social responsibility of the company is buttressed by the King IV Report on Corporate Governance for South Africa 2016 (the King IV Report).⁵⁶⁰ The King IV Report revolves around ethical leadership, the company (or other organisation) in society, corporate

⁵⁵⁷ Deva calls the approach to explicitly stipulate that it is the duty of a company to perform certain social responsibilities a duty approach to introduce elements of corporate social responsibility into the governance structure or decision making process of companies. See Deva (2012) *Common Law Review* 299 304-305.

⁵⁵⁸ Regulation 43 of the Companies Regulations, 2011 GN R.351, GG34239 dated 26 April 2011 (Companies Regulations) requires all listed companies, state-owned companies and private companies with a public interest score of more than 500 to appoint a social and ethics committee.

⁵⁵⁹ Regulation 43(5) of the Companies Regulations. See further Esser "Corporate social responsibility: A company law perspective" (2011) SA Merc LJ 317 325-326; Cassim R "Governance and the Board of Directors" in *Contemporary Company Law* 459-462; Cassim FHI "The Duties and Liabilities of Directors" in *Contemporary Company Law* 522-523; Kloppers "Driving corporate social responsibility (CSR) through the Companies Act: An overview of the social and ethics committee" (2013) PER 165 165-169; Havenga "The social and ethics committee in South African company law" (2015) THRHR 258; Esser & Delpont "Shareholder protection philosophy in terms of the Companies Act 71 of 2008" (2016) THRHR 1 16-19; Botha "Evaluating the social and ethics committee: Is labour the missing link? (1)" (2016) THRHR 580; Botha "Evaluating the social and ethics committee: Is labour the missing link? (2)" (2017) THRHR 1.

⁵⁶⁰ Institute of Directors in Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (2016) (hereinafter referred to as "the King IV Report").

citizenship, sustainable development, stakeholder inclusivity, integrated thinking and integrated reporting.⁵⁶¹ The report recognises that companies (and other organisations) operate in a societal context which they affect and by which they are affected. The report states: “This idea of interdependency between organisations and society is supported by the African concept of *Ubuntu* or *Botho*, captured by the expressions *uMuntu ngumuntu ngabantu* or *Motho ke motho ka batho* – I am because you are; you are because we are.”⁵⁶² Corporate citizenship is the recognition that the company is an integral part of the broader society in which it operates, affording it standing as a juristic person in that society with rights, but also responsibilities and obligations.⁵⁶³ Our Courts have used the King Reports to measure the conduct of directors and companies.⁵⁶⁴ The question is whether the principles of good corporate governance contained in the King IV Report is a substantive normative value in itself. Esser and Delpont conclude that these principles are not always mere recommendations but that directors will have to adhere to them to comply with their legal duties.⁵⁶⁵ According to King,⁵⁶⁶ the language in the King III Report, the predecessor of the King IV report, was carefully chosen. The word ‘must’ was used with regards to a governance principle that was in line with the Companies Act of 2008, because directors had to comply therewith. The word ‘should’ was used when it was a recommendation of good governance which was not contained in the Act. The legal status of the King IV Report is the same as that of its predecessors – it is a set of voluntary principles and leading practices. But some of the practices have been legislated parallel with the voluntary King codes of governance, in which case they are compulsory. South Africa thus adopted a hybrid system of corporate governance.⁵⁶⁷ The King IV

⁵⁶¹ King IV Report 4.

⁵⁶² King IV Report 24.

⁵⁶³ King IV Report 11 and 25. Corporate citizenship has been called “capitalism with a social conscience.” See Naidoo *Corporate Governance* 241.

⁵⁶⁴ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) 352; *Momentum Group Ltd v Chairperson, Competition Tribunal* [2006] JOL 18120 (CAC); *South African Broadcasting Corporation v Mpofu* [2009] 4 All SA 169 (GSJ). The importance of adhering to the principles of sound corporate governance was also emphasized in *De Villiers v BOE Bank Ltd* [2004] 2 All SA 457 (SCA) par 52.

⁵⁶⁵ Esser & Delpont “The duty of care skill and diligence: The King Report and the 2008 Companies Act” (2011) THRHR 449 455. See also King IV Report 35.

⁵⁶⁶ King (2012) AJ 446 447.

⁵⁶⁷ King IV Report 35.

Report differs from the King III Report in that it adopted a “apply and explain” rather than a “apply or explain” approach.⁵⁶⁸ The King IV Report reflects a communitarian conceptualisation of the company.

Section 13 of the Companies Act of 2008 recognises the right of any person to incorporate a company. In this sense the state does not play the role of a concessionary as reflected in the communitarian and concession theories.⁵⁶⁹ The counter argument is that even this right is derived from the state. Companies cannot be created solely by private contracting. Limited liability and the separate legal personality of a company cannot be practically achieved through private contracting. Naudé argues that the concession theory is not persuasive in South African Law. Associations that comply with the common law requirements for the recognition of juristic personality, such as churches, political parties and trade unions, are recognized as legal persons without any concession of the state. In addition thereto, general incorporation laws eroded the basis of this theory.⁵⁷⁰ On the other hand the concession theory finds resonance in section 20(9) of the Companies Act of 2008 which empowers the court to disregard the separate personality of the company if the incorporation or use of the company constitutes an unconscionable abuse of the juristic personality of a company as a separate entity.⁵⁷¹

Section 19(1) provides that a company is a juristic person from the date of its incorporation and that it has all of the legal powers and capacity of an individual, except to the extent that a juristic

⁵⁶⁸ King III Report 6; King IV Report 37. The “apply or explain” approach shows appreciation of the fact that it is often not a case whether to comply or not, but rather to consider how the principles and recommendations may be applied. The “apply and explain” approach requires that an explanation be provided in the form of a narrative account, with reference to the practices that demonstrate application of the principle. The explanation should address which recommended or other practices have been implemented, and how these achieve or give effect to the principle.

⁵⁶⁹ See also Esser 31; Katzew (2011) SALJ 686 690-691.

⁵⁷⁰ Naudé *Die Regsposisie van die Maatskappydirekteur* 17. See also *Morrison v Standard Building Society* 1932 AD 229; Cilliers 201-203; Cronjé “Persons” in Joubert (ed) *LAWSA* vol 20 part 1 2nd ed (2010) (hereinafter “*LAWSA* vol 20 part 1”) 431.

⁵⁷¹ For a discussion of section 20(9) see Davis *Companies and Other Business Structures* 30-33; Cassim FHI “Introduction to the New Companies Act: General overview of the Act” in *Contemporary Company Law* 57-63; Delport *Henochoberg* 99-100; Cassim “Hiding behind the Veil” (2013) DR 35. See also *Bellini v Paulsen* [2013] 2 All SA 26 (WCC); *Ex parte Gore* 2013 (3) SA 382 (WCC); [2013] 2 All SA 437 (WCC); *Van Zyl v Kaye* 2014 (4) SA 452 (WCC).

person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise. This provision is similar to section 15(1) of the *Canada Business Corporations Act*.

Section 66(1) of the Companies Act of 2008 provides: “The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.” The significance of this section is the following: First, the powers of the directors are now original and not delegated from the shareholders through the memorandum of incorporation as it was in the Companies Act of 1973 (through the articles of association). The powers and duties of the directors thus have a constitutional (or statutory) and not a contractual base. Secondly, the ultimate power in the company now vests with the board of directors and not the shareholders. Unless the qualifications of section 66(1) applies, the board of directors is the ultimate organ of the company. The only control that the shareholders have over the directors, other than the power to appoint⁵⁷² or remove⁵⁷³ them, is if the shareholders act unanimously.⁵⁷⁴ Thirdly, it confirms that a company is an institution rather than a contractual arrangement (a *universitas* rather than a *societas*).⁵⁷⁵ Fourthly, this provision signifies a fundamental shift in the underlying philosophy and approach to the company constitution away from a contractarian (or English model) company to a division of power corporation.⁵⁷⁶

⁵⁷² Section 66(4) of the Companies Act 2008.

⁵⁷³ Section 71.

⁵⁷⁴ *Pretorius v PB Meat (Pty) Ltd* (1057/2013) [2013] ZAWCHC 89 (14 June 2013); *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] JOL 32101 (WCC) par 31; Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 123-124; Delpont *Henochsberg vol 1* 250(3); Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 90-92; Esser & Delpont (2016) THRHR 1 8-10.

⁵⁷⁵ Compare De Jongh *Between societas and universitas* 561-562. Cassim R “Governance and the Board of Directors” in *Contemporary Company Law* 412 states that even the analogy of a director as an agent of the company (as opposed to the shareholders) is not as strong as in the Companies Act of 1973.

⁵⁷⁶ Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 123-124.

This fundamental shift is further buttressed by the fact that the Companies Act of 2008 provides specific remedies to specific persons.⁵⁷⁷ These remedies are about standing and not about substantive rights. The Act is thus status and remedy orientated. It makes provision for the board of directors to make, amend and repeal rules (by-laws) subject to the approval of the shareholders.⁵⁷⁸ The Act recognises a shareholder agreement as a constitutional document.⁵⁷⁹ The managerial obligations and duties are public in nature.⁵⁸⁰

Yet, the Companies Act of 2008 retained a statutory contract provision. Section 15(6) provides:

“A company’s Memorandum of Incorporation, and any rules of the company, are binding -

- (a) between the company and each shareholder;
- (b) between or among shareholders and the company; and
- (c) between the company and –
 - (i) each director or prescribed officer of the company: or
 - (ii) any other person serving the company as a member of a committee of the board,

in the exercise of their respective functions within the company.”

It is interesting to note that the phrase “as if they had been signed by each member”, which was contained in section 65(2) of the Companies Act of 1973 and which implied a contractual relationship, does not appear in section 15(6) of the Companies Act of 2008. Section 15(6) of the Companies Act of 2008 fails to specify the legal status of the various relationships created by this section, but it is arguably still based on a statutory contract.⁵⁸¹ Contrary to its predecessors, clause 15(6) provides that the memorandum of incorporation and rules are also binding between the company and each director, prescribed officer and member of a board committee.

⁵⁷⁷ Compare for example the specific remedies provided for in sections 160-164. See also Davis *Companies and Other Business Structures* 292-307 for a general discussion of these remedies.

⁵⁷⁸ Section 15(3)-(5A) of the Companies Act 2008.

⁵⁷⁹ Section 15(7).

⁵⁸⁰ Section 15(6)(c) provides for example that the memorandum is binding on directors, prescribed officers and each person serving the company as a member of a committee of the board. Section 77 provides for the personal liability of directors and prescribed officers under a number of circumstances. Section 218(2) also provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

⁵⁸¹ Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 142.

Thus certain elements of the contractarian model company were retained in the Companies Act of 2008. As is the case with the Policy Document, the theoretical approach that the Companies Act of 2008 adopted is therefore not entirely clear or consistent.

12 CONCLUSION

“Presently, we are experiencing a churning in the intellectual history of corporate law theory and doctrine. There is now more openness to revisiting the core questions about what corporations are, to whom they owe obligations, and how to best conceptualize them and their regulation than any time in a generation”.⁵⁸²

Our conceptualisation of the company and its position in law is determined by the philosophical approach to justice and the resultant theory of law that we adopt. Three broad philosophical approaches to justice are identified in this chapter. The first connects justice to the idea of maximizing welfare. The doctrine of utilitarianism is the most influential within this approach. The second approach connects justice to freedom. It emphasizes respect for individual rights. There are two rival camps within this group namely, the *laissez-faire* camp led by the free-market libertarians and the fairness camp consisting of theorists with a more egalitarian approach. The case for free markets is typically rooted in a libertarian as well as a utilitarian approach. The last approach sees justice as bound up with virtue and the good life.⁵⁸³

We cannot detach arguments about justice and rights from arguments about the good life and virtue.⁵⁸⁴ After analysing the three philosophical approaches to justice Sandel concluded as follows:

⁵⁸² Greenfield (2014) University of St Thomas Law Journal 960 961-962. This springs from a number of corporate failures, the global financial crisis of 2008 and also the debate that was sparked by the United States Supreme Court in *Citizens United v Federal Election Commission* 588 U.S. 310 (2010) which validated the constitutional rights of corporations to engage in political discourse and to spend money from general treasuring funds to influence electoral outcomes.

⁵⁸³ Sandel *Justice* 6 and 19-20.

⁵⁸⁴ Sandel *Justice*, specifically at 244-269.

“A just society can’t be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.

It is tempting to seek a principle or procedure that could justify, once and for all, whatever distribution of income or power or opportunity resulted from it. Such a principle, if we could find it, would enable us to avoid the tumult and contention that arguments about the good life inevitably arouse.

But these arguments are impossible to avoid. Justice is inescapably judgemental. Whether we are arguing about financial bailouts [of companies during a financial crisis] or Purple Hearts [medals awarded by the United States military that honours sacrifice], surrogate motherhood or same-sex marriage, affirmative action or military service, CEO pay or the right to use a golf cart [in competitions], questions of justice are bound up with competing notions of honour and virtue, pride and recognition. Justice is not only about the right way to distribute things. It is also about the right way to value things.”⁵⁸⁵

Sandel makes some suggestions what the politics of a common good may look like. First, a just society requires a strong sense of community. It must cultivate in citizens a concern for the whole and a dedication to the common good and civic virtue as opposed to purely privatised notions of the good life. Secondly, we must understand the moral limits of markets. One of the most striking tendencies of our time is the aggressive expansion of markets and market-orientated reasoning into spheres of life traditionally governed by non-market norms. Key social practices like military service, child-bearing, teaching and learning, criminal punishment, the admission of new citizens and so on can be corrupted or degraded if market norms are applied to them. We need to debate what non-market norms we want to protect from market intrusion. Thirdly, we need to address the increasing gap between rich and poor. The growing inequality undermines the solidarity that democratic citizenship requires. As the inequality deepens, rich and poor live increasingly separate lives. The affluent start to use private medical care, education and security,

⁵⁸⁵ Sandel *Justice* 261.

leaving the public institutions to those who cannot afford it. This has two negative effects. Public services start to deteriorate, as those who no longer use those services become less willing to support them financially (through their taxes) and otherwise. In addition public institutions cease to be places where citizens of different walks of life encounter one another. This makes it difficult to cultivate the solidarity and sense of community on which democratic citizenship depends. Economic scarcity, perceived inequalities and the deep resentment that accompany these challenges leave the foundations of a democratic system fragile. If pushed too far it can lead to industrial and social protest action. We must thus focus on the civic consequences of inequality and find ways of reversing them. Fourthly, we need a more robust public engagement with our moral disagreements. Politics of moral engagement is not only a more promising ideal than politics of avoidance, it is also a more promising basis for a just society.⁵⁸⁶

Theories of the company provide a standard for evaluating actual or proposed legal rules. In other words, theories can be used to legitimise or criticise corporate doctrine. However, theories are not developed in a vacuum. There is an interdependence and cross-pollination between the theories that we develop and adopt; legal doctrine itself; and social practice.⁵⁸⁷ Furthermore decisions about the normative implications of legal theories, and indeed choices among the theories themselves, take place against the background of interpretive conventions that are constantly shifting. The normative implications of theories are not always static.⁵⁸⁸

The statutory definitions of the company (or corporation) in the jurisdictions of the United Kingdom, Canada, India and South Africa provide some clues about the nature of the company. The first is that the company depends on the law for its incorporation or recognition. The *Canada Business Corporations Act* and the South African Companies Act of 2008 provide one further clue namely, that the company is a juristic person. Outside of statutory definition the word ‘company’ has no precise legal content. However the modern company as we understand it in company law can be defined with reference to its attributes as a separate legal person (which encompasses the

⁵⁸⁶ Sandel *Justice* 263-269; Anstey “Marikana – and the push for a new South Africa pact” (2013) SAJLR 133 141.

⁵⁸⁷ Millon (1990) Duke Law Journal 201 241-243.

⁵⁸⁸ Millon (1990) Duke Law Journal 201 247-251.

characteristics of perpetual succession and asset partitioning) managed under a centralised (board) structure and having a liquid and transferable equity (or interest) structure.

The more prominent theories of the nature of the company and their normative features are considered hereinbefore. The normative or philosophical foundation of the contractarian theories (which can in turn be divided into legal contractarianism and economic contractarianism) revolve around two ideas namely, maximising welfare (utilitarianism) and respecting freedom (libertarianism). The liberal political theory that underpins the contractarian approach was born as an attempt to spare politics and law from becoming embroiled in moral and religious controversies.⁵⁸⁹ The contractarian theories are functional theories in that they are more concerned about what companies do, rather than what they are. The economic contractarian theories conceptualise the company (or “firm” as proponents of these theories prefer to refer to all business forms) as a nexus of contracts between rational economic actors, including shareholders, managers, creditors, employees and customers.⁵⁹⁰ The interests of shareholders are elevated above the other economic actors because they are deemed to be the residual risk bearers. Creditors and employees must protect themselves contractually. The resultant norm is one of shareholder wealth, which holds that the company is to be governed in the best interests of its shareholders, within the extraneous law.⁵⁹¹

Legal contractarians on the other hand conceptualise the company as a nexus for contracts. The company is a private contractual creation and is regarded as an association or aggregation of individuals.⁵⁹² For them a core element of the firm as a nexus for contracts is its separate legal personality in the eyes of the law.⁵⁹³ As a normative matter they acknowledge that the overall

⁵⁸⁹ Sandel *Justice* 243.

⁵⁹⁰ Dine *Corporate Groups* 9-10; Greenfield (2001) *Boston College Law Review* 283 311; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 158-159; Keay *The Corporate Objective* 28; Petrin (2013) *Penn State Law Review* 1 34.

⁵⁹¹ Colombo (2012) *Temple Law Review* 1 10; Moore *Corporate Governance* 66.

⁵⁹² Dine *Corporate Groups* 3; Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6 and 19-27; Chopra & Arora *Company Law* 34-36.

⁵⁹³ Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6-9.

objective of company law is to serve the interests of society as a whole.⁵⁹⁴ Whilst Company law largely refrains from regulating transactions with creditors, it does so in two instances namely, in relation to companies that are financially distressed and creditors who are unable to adjust the terms of their exposure to the risk that they bear (for example victims of delicts).⁵⁹⁵ The shareholder-creditor agency cost problem also becomes a central concern for company law if the system is shareholder-centric rather than manager-centric.⁵⁹⁶ The reason for this is that shareholders have an incentive to externalize risk unto creditors and other fixed claimants.⁵⁹⁷ Employees are the principal non-shareholder constituency to enjoy governance protection as a matter of right in some jurisdictions.⁵⁹⁸

The normative view of communitarians to society contrasts sharply with that of the contractarians. Whereas the contractarian approach to justice revolves around the ideas of maximising welfare (utilitarianism) and respecting freedom (libertarianism), the communitarian (also known as progressive) approach to justice emphasises the importance of virtue or the common good.⁵⁹⁹ Communitarians see companies as separate legal entities with the rights and corresponding responsibilities of a natural person.⁶⁰⁰ As such, legal constraints are necessary to ensure that corporations are accountable to the society in which they operate.⁶⁰¹ This philosophy forms the basis of the discipline of corporate social responsibility.⁶⁰² Corporate social responsibility implies an ethical relationship of responsibility between the company and the society in which it operates. As a responsible corporate citizen, a company should protect, enhance and invest in the well-

⁵⁹⁴ Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 28-29.

⁵⁹⁵ Armour, Hertig & Kanda “Transactions with Creditors” in *The Anatomy of Corporate Law* 118-121.

⁵⁹⁶ Rock (2013) *University of Pennsylvania Law Review* 1907 1910.

⁵⁹⁷ Rock (2013) *University of Pennsylvania Law Review* 1907 1927.

⁵⁹⁸ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in *The Anatomy of Corporate Law* 89.

⁵⁹⁹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292.

⁶⁰⁰ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284, 292 n95, 296; Dodd (1932) *Harvard Law Review* 1145 1161.

⁶⁰¹ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292 n 95 and 293.

⁶⁰² Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292-294.

being of the economy, society and natural environment.⁶⁰³ Communitarians require corporations to be good corporate citizens.⁶⁰⁴ The communitarian approach finds support in the philosophy of *ubuntu*. In contrast to contractarians, communitarians believe that large companies are public rather than private institutions. Communitarians theorise that the grant of company status is not only a concession by the state, it is also an instrument of the state to utilise. The communitarian view of the company thus supports an argument for the protection of creditors and employees.⁶⁰⁵

The concession theory focuses on the company's dependence on the state. According to this theory the existence and operation of the company is a concession, grant or privilege bestowed by the state, thereby justifying government interference. In contrast to the communitarian theories, the concession theory does not adhere to the proposition that the company should realign its aim to reflect the social aspirations of the state. The concession theorists accept only that the state has a role to play to ensure that corporate governance structures are fair and democratic.⁶⁰⁶ It is easy to argue for the social responsibility of companies and the protection of the interests of creditors and employees on the basis of the concession theory. The company is a creation of state and as a public body it owes duties to all stakeholders.⁶⁰⁷

Blair and Stout believe that their team production theory is consistent with economic contractarianism.⁶⁰⁸ The team production theory also revolves around the idea of maximising welfare (utilitarianism). But Blair and Stout also emphasise the importance of virtue or the common good to a certain extent. The team production theory applies primarily to public companies with dispersed shareholders where the directors are free from the direct control of the team members. Blair and Stout conceptualize the modern public company as an internal governance structure they call a "mediating hierarchy" that serves to coordinate the activities of

⁶⁰³ The King III Code 50.

⁶⁰⁴ Greenfield (2014) University of St. Thomas Law Journal 960 963.

⁶⁰⁵ Henderson (2007) Oxford University Commonwealth Law Journal 93 99.

⁶⁰⁶ Dine *Corporate Groups* 21; Lombard 20; Padfield (2013) Oklahoma Law Review 327 333-334.

⁶⁰⁷ Dine *Corporate Groups* 23-24; Henderson (2007) Oxford University Commonwealth Law Journal 93 100.

⁶⁰⁸ Blair & Stout (1999) Virginia Law Review 247 254.

the “team members”, allocates the resulting production and mediates disputes among team members.⁶⁰⁹ The board of directors must protect the firm-specific investments of the whole corporate team including shareholders, managers, employees, and possibly other groups, such as creditors.⁶¹⁰ As a result directors owe their fiduciary duties to the company rather than to its shareholders. They can therefore properly take actions that benefit other stakeholders. The team production theory therefore supports an argument for the protection of creditors and employees.⁶¹¹ This appears to be a communitarian approach. However where the communitarians argue that company law should be reformed to make directors more accountable to stakeholders, Blair and Stout argue that directors should not be under direct control of either shareholders or other stakeholders.⁶¹²

Berle and Means drew attention to the growing separation of power between the executive management of major public companies and their increasingly diverse and remote shareholders. They conceptualised the company as a social organisation whose size enables it to dictate the shape of the market and renders it a quasi-public institution despite its legal conception as a private institution.⁶¹³ Berle and Means conceptualised the company from a communitarian perspective. In their view the powers of the company must be used for the public benefit.⁶¹⁴ They argued it is conceivable, and indeed seems almost essential if the corporate system is to survive, that the control of the company “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.”⁶¹⁵

⁶⁰⁹ Blair & Stout (1999) *Virginia Law Review* 247 250-251 and 278.

⁶¹⁰ Blair & Stout (1999) *Virginia Law Review* 247 253 and 288-289.

⁶¹¹ Blair & Stout (1999) *Virginia Law Review* 247 249; Henderson (2007) *Oxford University Commonwealth Law Journal* 93 100; Lichner (2009) *European Business Law Review* 889 900; Keay *The Corporate Objective* 37-38; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Petrin (2013) *Penn State Law Review* 1 35-36; Chopra & Arora *Company Law* 16-17; Talbot *Great Debates in Company Law* 13.

⁶¹² Blair & Stout (1999) *Virginia Law Review* 247 253-254.

⁶¹³ Berle & Means *The Modern Corporation* 5 and 7; Talbot *Great Debates in Company Law* 9-10.

⁶¹⁴ Berle & Means *The Modern Corporation* 310.

⁶¹⁵ Berle & Means *The Modern Corporation* 312-313.

It is not possible to devise a grand theory for all corporations in all contexts.⁶¹⁶ Each theory seeks to explain the nature of the company from a different perspective. Each theory can be criticised on a number of grounds. But from a normative perspective the communitarian theory and arguably also the concession theory (more particularly the dual concession theory of Dine) are the most acceptable theories about the nature of the company. A company, especially a large public company, is a public or quasi-public entity and a corporate citizen. It cannot be conceptualised as a private contractual arrangement. Even the conceptualisation of a small or closely held company as a private contractual arrangement is problematic.⁶¹⁷ Deva argues that the introduction of corporate social responsibility into company laws has become indispensable for two reasons: First, companies initially played a limited role and influence in society. The state provided the basic services, offering social services and protecting human rights. The corporate focus on profit maximization did not adversely affect society too much. However, this allocation of responsibilities between the private sector and the state, as well as the leverage of the state over companies has changed significantly over the years. This change in the role and place of companies in society requires a corresponding change in company law that sets the rules for corporate behaviour. Secondly, from a regulatory point of view it is much more difficult to influence the behaviour of artificial entities, such as companies. Most of the traditional regulatory regimes (for example consumer protection law and labour law) try to influence corporate behaviour from the outside. Whilst this is a useful approach, it has proved inadequate in moulding corporate behaviour along the desired lines. What we additionally need is an approach that could influence corporate behaviour from the inside and impact the decision making process of companies.⁶¹⁸

⁶¹⁶ Bottomley *The Constitutional Corporation* (2007) 17 as referred to in Keay *The Corporate Objective* 38.

⁶¹⁷ Keay argues that in some ways a closely held company may be seen as an aggregate of individuals carrying on business together as the shareholders have far more involvement than do shareholders in public companies. But even so the individual shareholders or a group cannot, save through or for the company, do certain things, such as concluding contracts or holding property. The membership of these companies may well also not remain the same, yet the company continues to exist. See Keay *The Corporate Objective* 190. See also Pollman (2011) *Utah Law Review* 1629 1662. Members can further contract with the company. It is also the company that takes and defends legal proceedings. Thus even closely held companies are separate legal persons. Wolff also uses the example of a number of corporations that have the same five shareholders. Each of these companies has its own property and creditors of one of them has no claim against the property of a second. See Wolff (1938) *Law Quarterly Review* 494 497.

⁶¹⁸ Deva (2012) *Common Law Review* 299 302- 303. Moore argues that at its core corporate governance essentially comprises three core elements namely, power, accountability and legitimacy. Effective managerial account-giving

Companies can also be classified according to their models or types of company constitutions. The important distinction, from a South African perspective, is between contractarian companies and division of power corporations. The contractarian companies (also referred to as ‘English model companies’ or ‘memorandum and article companies’) are based on a statutory contract and are rights orientated rather than status and remedy orientated.⁶¹⁹ They are based on *societas* (partnership) rather than *universitas* (corporation). There are a number of difficulties in the application of this statutory contract.

Division of power corporations derives from the United States model and were created to try to rationalise corporate law and remove some of the difficulties that had developed in interpreting the contractarian model. They are called division of power corporations because the legislation expressly divides powers within the corporate constitution among the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. This model is status and remedy orientated. Every person attaining a specific status (for example director, officer, shareholder, creditor or employee), is assigned

processes are a necessary institutional precondition to securing the legitimacy and sustainability of management’s continuing possession and exercise of power. Employees, like shareholders, put their capital (human capital) at the disposal of the management of a company. The power imbalance that exists in the capital employee relationship in the Anglo American systems is due to the particular nature of the common law employment relationship based on the old master and servant relationship coupled with the innate structural imbalances of labour markets in favour of employers (as generally scarce) purchasers of generally non-scarce human capital. However, the institutional response to corporate-managerial power as it exists in the employment relationship has been collective adversarialism rather than accountability. Moore *Corporate Governance* 44-61, who also refers to amongst others Fox *Beyond Contract: Work, Power and Trust Relations* (1974), Kahn-Freund “Industrial democracy” (1977) *Industrial Law Journal* 65; Davies and Lord Wedderburn of Charlton “The land of industrial democracy” (1977) *Industrial Law Journal* 197; Wheeler “Works councils: Towards stakeholding?” (1997) *Journal of Law and Society* 44. At the root the employer employee relation is not dissimilar to that of the corporate equity relation. The employee sacrifices his human capital to his employer just as the shareholder sacrifices his equity capital to the control of those who manage the company. Where these two relations differ is that our labour law accepts that there are no institutional countermeasures to managerial power. The purpose of labour law is to create the legal framework or rules which will enable the respective social economic powers of the parties to determine the outcome of the conflict between them. Davis & Le Roux (2012) *AJ* 306 309; Moore *Corporate Governance* 49-50. Our labour law accepts that employers and employees have different interests. Employers seek to obtain the maximum productivity for the remuneration that they pay, whilst employees seek better remuneration and terms and conditions of employment. They have a common interest though, and that is the continued existence of the undertaking and the regulation of the unavoidable and necessary conflicts that will arise. See Davis & Freedland *Kahn-Freund’s Labour and the Law* (1983) 27. This is the simple explanation. The situation is, however, more complex. At least three theoretical perspectives on the nature and purpose of industrial relations can be identified namely, the unitary perspective, the class conflict perspective and the pluralist perspective. See Rycroft & Jordaan *A Guide to South African Labour Law* 90-99. The question also arises whether the employment relationship is a contractual or a status relationship. See Rycroft & Jordaan *A Guide to South African Labour Law* 18-22; Oosthuizen *Vergoedingsbevele in die Suid-Afrikaanse Nywerheidshof* (1993) LLM thesis University of Port Elizabeth 22-27.

⁶¹⁹ Welling *Corporate Law in Canada* 59.

statutory powers, obligations and remedies. The corporate constitution is not a contract among the participants.⁶²⁰ As opposed to contractarian companies, division of power corporations are based on *universitas* (corporation).

The United Kingdom company law is comparatively unique in providing express quasi-contractual status and effect to a company's constitution.⁶²¹ The basic contractarian notion of private ordering lies at the very heart of company law in the United Kingdom. The subscribers or members are deemed to be the body corporate.⁶²² Shareholders are positioned 'inside' the company from a governance perspective, and, correspondingly, non-shareholder constituents such as creditors and employees deal *with* the company-member contractual nexus 'from the outside' only. A further remarkable feature of company law in the United Kingdom is the extent to which it leaves regulation of the internal affairs of a company, such as the division of powers between the organs of the company (the general meeting of the shareholders and the board of directors), to the company itself in its constitution. In the United Kingdom the shareholders constitute the ultimate source of managerial authority within the company. The directors obtain their powers by a process of delegation from the shareholders through the constitution.⁶²³ The contractarian model or type of company constitution originated in the United Kingdom. Company law in the United Kingdom is based on *societas* (partnership) rather than *universitas* (corporation).

The law in Canada adopts a fundamentally different approach. Canadian law follows a communitarian approach. In Canadian law the corporation is viewed as an entity distinct from its shareholders. The corporate constitution is not a contract among the participants.⁶²⁴ Canadian corporation law is firmly based on *universitas* (corporation). The corporation has the rights,

⁶²⁰ Welling *Corporate Law in Canada* 59-60; Welling et al *Canadian Corporate Law* 116; Abbey 20; Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 89-91.

⁶²¹ Section 33 of the *Companies Act 2006*.

⁶²² Section 16(2) of the *Companies Act 2006*.

⁶²³ *Gower & Davies Principles of Modern Company Law* 9th ed 64-65 and 384.

⁶²⁴ Welling *Corporate Law in Canada* 59-60; Welling et al *Canadian Corporate Law* 116; Abbey 20; Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 89-91.

powers and privileges of a natural person.⁶²⁵ The division of power model or type of company constitution is the dominant model in Canada.⁶²⁶ The *Canada Business Corporations Act* invokes a statutory division of powers amongst the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. The directors are granted the power to manage, or supervise the management of, the business and affairs of the corporation.⁶²⁷ The Act is status and remedy orientated. The Act creates extensive remedies for shareholders and other complainants. The remedies are about standing, not about substantive rights.⁶²⁸

A feature of the Indian *Companies Act 2013* is its strong emphasis on corporate social responsibility. Corporate social responsibility is mandatory in India. The Indian approach has a very definite communitarian bias in this respect. The Indian approach of making corporate social responsibility mandatory is worth examining, particularly as it illustrates the problem of making corporations moral when market imperatives are strong, even when political will and pressure to address corporate morality is itself also strong.⁶²⁹ It is further worth noting the similarities in the socio-economic and political circumstances in India and South Africa. Both countries have colonial pasts. Inequalities remain deeply ingrained in both societies. The governments of both countries have to respond to demands for social justice and economic equality, whilst simultaneously attempting to stimulate investment and economic growth.⁶³⁰ India and South Africa are both developing nations and members of the BRICS⁶³¹ association of emerging national economies. Both countries are constitutional states and adopted bills of rights. Talbot endorses the Indian approach and argues: “If companies are not free to make moral choices because of the market, if there is no real market argument for corporate social responsibility and if the

⁶²⁵Section 15(1) of the *Canada Business Corporations Act*; Welling *Corporate Law in Canada* 81-157; Welling et al *Canadian Corporate Law* 127-226.

⁶²⁶ Welling *Corporate Law in Canada* 59-64; Welling et al *Canadian Corporate Law* 110-118.

⁶²⁷ Section 102(1) of the *Canada Business Corporations Act*.

⁶²⁸ Welling *Corporate Law in Canada* 62-64.

⁶²⁹ Talbot *Great Debates in Company Law* 159-160.

⁶³⁰ Talbot *Great Debates in Company Law* 159.

⁶³¹ Brazil, Russia, India, China and South Africa.

international restraints to enhance corporate morality are ineffective, mandating corporate social responsibility may be a way of ensuring corporate social responsibility.”⁶³² She states further:

“Ultimately, it may only be the law that can create those clear moral guidelines that enable companies and companies’ management to be *fit to be free*, as it did in the ‘progressive’ periods. Mandatory corporate social responsibility may help in providing some of that encouragement and guidance.”⁶³³

Despite this strong communitarian approach, the Indian *Companies Act 2013* is an anomaly in that it still remains rooted in the legal contractarian approach that it inherited from the United Kingdom. India inherited the statutory contract provision from the United Kingdom.⁶³⁴ The subscribers and members of the company are deemed to be the body corporate.⁶³⁵ In India the powers of the board are derived directly from the *Companies Act 2013*.⁶³⁶ This can be contrasted with the position in the United Kingdom, where the directors obtain their powers by a process of delegation from the shareholders through the constitution. But whilst the powers of the directors in Indian company law are now original and not delegated from the shareholders through the articles of association, they are subject to material limitations. The ultimate power in the company still vests with the shareholders and not the board of directors.⁶³⁷ The corporate governance system that is adopted in the *Companies Act 2013* is still strongly rooted in the United Kingdom model.⁶³⁸

There are a number of provisions in the South African Companies Act of 2008 that are indicative of a communitarian approach. The corporate social responsibility of the company is further buttressed by the King IV Report. The King IV Report reflects a definite communitarian

⁶³² Talbot *Great Debates in Company Law* 159.

⁶³³ Talbot *Great Debates in Company Law* 161. See also Deva (2012) *Common Law Review* 299 301- 303.

⁶³⁴ Section 10 of the Indian *Companies Act 2013*.

⁶³⁵ Section 10.

⁶³⁶ Section 179(1).

⁶³⁷ Singh *Company Law* 278-284.

⁶³⁸ See Ghosh *Ghosh on Companies Act* 719-782.

conceptualisation of the company. As is the case with the *Canada Business Corporations Act*, the Companies Act of 2008 provides that the company is a separate juristic person which has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise.⁶³⁹ The powers of the directors to manage the business and affairs of the company are original and not delegated from the shareholders through the memorandum of incorporation as it was in the Companies Act of 1973 (through the articles of association).⁶⁴⁰ The powers and duties of the directors thus have a constitutional (or statutory) and not a contractual base. The ultimate power in the company now vests with the board of directors and not the shareholders. Unless the qualifications of section 66(1) applies, the board of directors is the ultimate organ of the company. The Act is status and remedy orientated. This signifies a fundamental shift in the underlying philosophy and approach to the company constitution away from a contractarian (or English model) company to a division of power corporation.⁶⁴¹ The company is an institution rather than a contractual arrangement (a *universitas* rather than a *societas*).

Yet the Companies Act of 2008 retained a statutory contract provision. Thus certain elements of the contractarian model company were retained.⁶⁴² It is difficult to perceive why the legislature deemed it necessary to retain the statutory contract in the Companies Act of 2008, despite the fact that the statutory contract has been questioned in the country where it originated and is also strained in its application. It would have been better and in line with a division of power model to rather have made provision for a restraining or compliance remedy similar to section 247 of the *Canada Business Corporations Act*. Such a remedy could have allowed prescribed persons (for example a shareholder, or a person entitled to be registered as a shareholder; a director or a prescribed officer; any member of a committee of the board; a registered trade union that represents the employees or another representative of the employees of the company; or any person who in the discretion of the court is a proper person to do so) to apply to court for an order

⁶³⁹ Section 19(1) of the Companies Act 2008.

⁶⁴⁰ Section 66(1).

⁶⁴¹ Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 123-124.

⁶⁴² Section 15(6).

directing other shareholders, directors, prescribed officers or members of board committees to comply with the memorandum of incorporation or any rules of the company, if they failed to do so. The Companies Act of 2008 already makes provision for certain restraining or compliance remedies, although they arguably do not go far enough.⁶⁴³ In this respect the theoretical approach that the Companies Act of 2008 adopted is unfortunately not entirely clear or consistent.

⁶⁴³ Section 20(4) read with section 20(5) provides that a shareholder, director or prescribed officer may institute proceedings to restrain a company from performing any action that is in breach of the Act or a specified limitation under the memorandum of incorporation. Section 161 also allows the holder of issued securities to apply to the court for a declaratory order regarding the rights that the person may have in terms of the Act, the memorandum of incorporation, any rules of the company or any applicable debt instrument. These remedies can be compared with section 247 (restraining or compliance order) of the *Canada Business Corporations Act* that allows for shareholders to remedy breaches of the Act, the regulations, articles, by-laws or unanimous shareholder agreement with leave of the court.

CHAPTER 4

THE CORPORATE PERSONHOOD OF THE COMPANY

- 1 INTRODUCTION
 - 2 THE FICTION OR ARTIFICIAL ENTITY THEORY
 - 3 THE AGGREGATE THEORY
 - 4 THE REAL ENTITY THEORY
 - 5 THE JURIDICAL REALITY THEORY
 - 6 APPLICATION OF THE CORPORATE PERSONHOOD THEORIES IN THE UNITED KINGDOM, CANADA AND INDIA
 - 7 APPLICATION OF THE CORPORATE PERSONHOOD THEORIES IN SOUTH AFRICA
 - 8 CONCLUSION
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1 INTRODUCTION

The most important attribute of the modern company is its separate corporate personhood or legal personality.¹ Any study of the nature of the company will be incomplete without an analyses of

¹ As indicated in the historical analyses, the company derived this attribute from the medieval corporation or *universitas*. The characteristics of perpetual succession and asset partitioning (including limited liability) are consequences of the company's separate legal personality. See Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2010) (hereinafter "Welling et al *Canadian Corporate Law*") 128; 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" (2011) SALJ 686 688; Cassim R "The Legal Concept of a Company" in Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2nd ed (2012) (hereinafter "*Contemporary Company Law*") 35-41; Blair "Corporate personhood and corporate persona" (2013) University of Illinois Law Review 785 787-788 and 795-796; Harris "The history of team production theory" (2015) Seattle University Law Review 537 550. Berle and Means explain in Berle and Means *The Modern Corporation & Private Property* (hereinafter "Berle and Means *The Modern Corporation*") 120:

"The real privilege which the state grants is that of corporate entity - the right to maintain business in its own name, to sue and be sued on its own behalf irrespective of the individuals; to have perpetual succession - i.e. to continue this entity although the individuals in it changed. From all this necessarily flowed a limited liability of the associates."

its corporate personhood and the normative consequences thereof. The question whether or not the company should be viewed as a separate legal person is a question that received the attention of legal theorists for years.² The answer to this question provides us with a normative framework for how we should view companies - more particularly what their rights, duties, capacities and obligations are, how we expect them to behave and how they should be treated.³

Legal personality (or legal subjectivity) refers to a person's standing in law, the aggregate of that person's various rights, duties and capacities. The most important capacities are legal capacity (the competence to have rights, duties and capacities), capacity to act (the capacity to perform valid juristic acts),⁴ capacity to litigate and capacity to be held liable for crimes and delicts. Although all legal subjects have legal capacity, their legal capacity does not extend equally far. For example, an infant or minor does not have the same legal capacity as a major person. However, no legal subject can be entirely without legal capacity. The importance of being a person in the eyes of the law is that only a person can have rights, duties and capacities and therefore participate in legal intercourse.⁵ A thing that can never have rights, duties and capacities is not a legal subject but may be a legal object.⁶

² See for example Freund *The Legal Nature of Corporations* (1897); Machen "Corporate personality" (1911) *Harvard Law Review* 253; Canfield "The scope and limits of the corporate entity theory" (1917) *Columbia Law* 128; Vinogradoff "Juridical persons" (1924) *Columbia Law Review* 594; Hallis *Corporate Personality: A Study in Jurisprudence* (1930); Cohen "Transcendental nonsense and the functional approach" (1935) *Columbia Law Review* 809; Wolff "On the nature of legal persons" (1938) *Law Quarterly Review* 494; Nekam *The Personality Conception of the Legal Entity* (1938); Hart "Definition and theory in jurisprudence" (1954) *Law Quarterly Review* 37; Kribbe *Corporate Personality: A Political Theory of Associations* PhD Thesis (2003) London School of Economics and Political Science 9-10; Welling *Corporate Law in Canada The Governing Principles* 3rd ed (2006) (hereinafter "Welling *Corporate Law in Canada*") 88; Ripken "Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle" (2009) *Fordham Journal of Corporate & Financial Law* 97 99.

³ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 100; Padfield "Corporate social responsibility & concession theory" (2015) *William & Mary Business Law Review* 1 19.

⁴ Legal capacity is also referred to as "passive legal capacity" and capacity to act as "active legal capacity." See Van Heerden, Cockrell & Keightley (eds) *Boberg's Law of Persons and the Family* 2nd ed (1999) 74.

⁵ Cronje "Persons" in Joubert (ed) *LAWSA* vol 20 part 1 (2010) (hereinafter "LAWSA vol 20 part 1") par 438.

⁶ Heaton *The South African Law of Persons* 3rd ed (2008) 38; *LAWSA* vol 20 part 1 par 449; Pollman "Reconceiving corporate personhood" (2011) *Utah Law Review* 1629 1638-1639. Welling *Corporate Law in Canada* 82 explains the difference between a legal subject and a legal object as follows:

"At one end we find such beings as newts, badgers and trees. Despite their perceptible manifestations of individual character, they are never accorded legal personality. At the other end of the spectrum we find the 25 year old male celibate, *genus homo sapiens*. However comatose he may appear, this creature is, in all circumstances, accorded legal personality until he is moribund."

Modern law distinguishes between two classes of persons namely, natural persons and juristic persons.⁷ Natural persons are recognised as legal subjects in all modern civilized legal systems.⁸ They are deemed to be legal persons or legal subjects by nature.⁹ This was not always the case. For example, slaves were not regarded as legal subjects in legal systems which recognised slavery.¹⁰ They were legal objects without any rights, duties and capacities.¹¹

The legal personality of groups, associations or entities is not self-evident. It is for each legal system to decide whether, and to what extent, to endow these bodies with legal personality or not.¹² Originally legal personality was accorded to ecclesiastical bodies.¹³ This later spread to towns, universities as well as guilds of merchants and tradesmen. This separate legal personality developed as a key characteristic of the medieval corporation or *universitas*.¹⁴ In South African law legal personality is granted to churches, political parties and trade unions but not to trusts and

⁷ LAWSA vol 20 part 1 par 439.

⁸ Wolff (1938) Law Quarterly Review 494 506; Kribbe 12.

⁹ Naudé *Die Regsposisie van die Maatskappydirekteur met besondere verwysing na die Interne Maatskappyverband* (1970) (hereinafter “Naudé *Die Regsposisie van die Maatskappydirekteur*”) 13 argues that this proposition is questionable. Legal capacity is not an inborn quality but a capacity bestowed by the positive law. Slaves and women, for example, did not always have legal capacity.

¹⁰ This was for example the case in Roman law. In Roman and Roman-Dutch law children born *monstra* were also not regarded as legal subjects. In *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 (A) 865 the court held that “the birth of a *monstrum* is a physical impossibility” so that today all human beings, irrespective of how deformed or defective they may be, are regarded as legal subjects. See LAWSA vol 20 part 1 par 439 n2.

¹¹ LAWSA vol 20 part 1 par 439. Machen argues that the essence of legal personality does not lie in the possession of rights but in the subjection to liabilities. Slaves did not have rights, but were nevertheless subject to legal duties. When the law declared that a slave was not a person, it meant merely that he or she was treated for some purposes if he or she was not a person. See Machen (1911) Harvard Law Review 253 262-263.

¹² Wolff (1938) Law Quarterly Review 494 506-507; Kribbe 12. For example, English and South African Law does not accord legal personality to a partnership whilst the Scottish and French law does. A trust is also not a separate legal person in South African law. South African law recognizes the following entities as juristic persons: First, associations incorporated in terms of general enabling acts, such as companies, banks and co-operatives. Secondly, associations or institutions created and recognized as juristic persons in specific legislation, such as universities and the South African Broadcasting Association. Thirdly, associations that are in common law recognized as legal subjects, such as churches, political parties and trade unions. See LAWSA vol 20 part 1 par 439.

¹³ Welling *Corporate Law in Canada* 88; Ghadas “Real or artificial? Jurisprudential theories on corporate personality” (2007) US-China Law Review 6 8.

¹⁴ Blair (2013) University of Illinois Law Review 785 789 and 796; Harris (2015) Seattle University Law Review 537 550. See also chapter 2, section 2.1.

partnerships. The corporate personhood of companies refers to the fact that modern law conceives companies to be legal persons with certain rights, duties and capacities.¹⁵

The purpose of this chapter is to examine the corporate personhood or legal personality of the company and its normative consequences. The more prominent corporate personhood theories and their normative features are considered first.¹⁶ The emphasis is on the historical context of each theory, its principle propagandists, how it conceptualises the company, the legal position of the directors, whether the company has the capacity to be held liable for crimes and delicts, the ‘entity-ness’ or ‘entityless-ness’ of the company, how it compares with the other theories, and its normative consequences and effects on company law. The corporate personhood theories deal with important questions: Is the company an entity or enterprise that is distinct from its members or is it only an aggregate of individuals?¹⁷ Should company law be based on *societas* (partnership) or *universitas* (corporation)? How should the corporate personhood or legal personality of the company be conceptualised? The corporate personhood theories discussed in this chapter are the fiction (or artificial entity) theory, the aggregate (contractual or associational) theory, the real entity (natural entity or organic) theory and the juridical reality theory.¹⁸ Each of

¹⁵ Colombo ‘The corporation as a Tocquevillian association’ (2012) *Temple Law Review* 1 22.

¹⁶ Millon identifies three dimensions of company theories. The first dimension is the distinction between the company as a separate legal entity, separate from its shareholders and other stakeholders; and the company as the mere aggregation of natural persons without a separate existence. The second dimension is the distinction between the company as an artificial creation of the state or the law and the company as a natural product of private initiative. The third dimension is the distinction between a public law regulatory conception of company law on the one hand, and a private law, internal perspective on the other. See Millon ‘Theories of the corporation’ (1990) *Duke Law Journal* 201 201-202.

¹⁷ See for example Wolff (1938) *Law Quarterly Review* 494; Keay *The Corporate Objective* (2011) 25; Talbot *Palgrave Great Debates in Company Law* (hereinafter referred to as ‘Talbot *Great Debates in Company Law*’) 1.

¹⁸ There are also other corporate personhood theories, for example the purpose theory and the symbolist theory. According to the purpose theory corporate property is not the property of a person but of a purpose (“*Zweckvermögen*”). The so-called juristic person is no person at all, but is in effect subject-less property destined for a particular purpose. The property of the juristic person does not belong to anybody but is dedicated to and legally bound by certain objects. The purpose theory is based on the assumption that only humans can have rights. As is the case with the fiction theory (that is discussed hereafter), the legal personality of corporations are regarded as fictitious. The purpose theory was primarily intended to explain the ownership of property by charitable foundations. It also explains the separate corporate personality of churches, political parties and organizations such as trade unions. The purpose theory was developed in Germany by Brinz about the same time as the fiction theory. Other advocates of the purpose theory include Bekker and Demelius. See Machen (1911) *Harvard Law Review* 253 256; Wolff (1938) *Law Quarterly Review* 494 496; Naudé *Die Regsposisie van die Maatskappydirekteur* 17-18; Ghadas (2007) *US-China Law Review* 6 9-10. According to the symbolist (or ‘bracket’) theory, in principle only human beings have legal capacity. The conception of corporate personality is an economic device which simplifies the task of co-

these theories have their own normative features.¹⁹ They all provide their own unique insights into the corporate personhood or legal personality of companies. Although they appear to contradict each other at times, each theory plays a complimentary role in describing a certain aspect of the company. These theories have been invoked by the courts to support their decisions. Sometimes multiple theories have been resorted to in a single case.²⁰

Thereafter consideration is given to the application of the corporate personhood theories in the United Kingdom, Canada, India and South Africa. A comprehensive discussion of this topic falls outside the scope of this thesis. The focus is on the particular jurisdiction's treatment of the corporate personhood of the company (in other words the 'entity-ness' or 'entityless-ness' of the company), the capacity of the company and the legal position of the directors in relation to the company. Finally certain conclusions are drawn.

2 THE FICTION OR ARTIFICIAL ENTITY THEORY

2.1 The theory

The fiction or artificial entity theory was inspired by Roman law. Pope Innocentius IV²¹ is often credited as the founder of the idea that corporate bodies are fictional entities. He postulated that these entities do not have a body or a will. They exist only in the abstract. As a result they cannot be excommunicated or commit a delict.²² The fiction theory was the dominant theory until the first half of the nineteenth century. Until then companies were mostly incorporated by charter or

ordinating legal relations. The symbolist theory was developed by Jhering. See Ghadas (2007) *US-China Law Review* 6 10.

¹⁹ Coates "State takeover statutes and corporate theory: The revival of an old debate" (1989) *New York University Law Review* 806 809-810; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101.

²⁰ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 118.

²¹ Pope Innocentius IV was the pope from 1243 to 1254.

²² Carter *The Nature of the Corporation as a Legal Entity with especial reference to the Law of Maryland* Doctor of Philosophy dissertation (1919) John Hopkins University 38; Dewey "The historical background of corporate legal responsibility" (1926) *Yale Law Journal* 655 665-666; Naudé *Die Regsposisie van die Maatskappydirekteur* 12; Ghadas (2007) *US-China Law Review* 6 8; Petrin "Reconceptualizing the theory of the firm – from nature to function" (2013) *Penn State Law Review* 1 5; Singh *Company Law* 16th ed (2015) (hereinafter "Singh *Company Law*") 5-6.

special act on a case by case basis.²³ The state played a decisive role in the incorporation and operation of companies (including the protection of other stakeholders).²⁴ Incorporation was reserved mainly for ecclesiastical associations, associations that served a public purpose and associations that met specific social needs.²⁵ However, with the appearance of general incorporation laws from the beginning of the nineteenth century, the idea that the company existed only because of a concession of the state became less persuasive and the dominance of the fiction theory started to deteriorate.²⁶ After the 1880s, three corporate personhood theories competed for dominance namely, the fiction theory (that saw the company as an artificial entity created by positive law), the aggregate theory (that saw the company as a contractually created private entity that was in effect no different from a partnership) and the real entity theory (that saw the company as a real entity in the extra-judicial sense).²⁷

The German jurist, Friederich Carl von Savigny, is probably the most prominent of the fiction theorists.²⁸ Savigny observed that in law, property belongs to a corporation and not to any individual. He theorised who or what the real owner of this property is. He postulated that ownership involves the possession of a will by the owner and concluded that inasmuch as a corporation does not really possess a will, the property must belong to a fictitious being and not to

²³ Coates (1989) *New York University Law Review* 806 814; Millon (1990) *Duke Law Journal* 201 205-207 and 211; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107-108; Colombo (2012) *Temple Law Review* 1 15; Petrin (2013) *Penn State Law Review* 1 5 and 9.

²⁴ Millon (1990) *Duke Law Journal* 201 207-211; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 108.

²⁵ Coates (1989) *New York University Law Review* 806 814; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 108; Pollman (2011) *Utah Law Review* 1629 1630; Colombo (2012) *Temple Law Review* 1 15; Blair (2013) *University of Illinois Law Review* 785 800.

²⁶ Horwitz “*Santa Clara revisited: The development of corporate theory*” (1985) *West Virginia Law Review* 173 181; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 109. Some argue that the grant of corporate status can still be viewed as a concession from the state because asset partitioning, specifically limited liability, can only be achieved through legislation and not by agreement. See Pollman (2011) *Utah Law Review* 1629 1640-1641; Padfield (2015) *William & Mary Business Law Review* 1 23-24.

²⁷ Horwitz (1985) *West Virginia Law Review* 173 184-185.

²⁸ Carter 38; Dewey (1926) *Yale Law Journal* 655 665-666; Naudé *Die Regsposisie van die Maatskappydirekteur* 12; Ghadas (2007) *US-China Law Review* 6 8; Petrin (2013) *Penn State Law Review* 1 5. Other prominent supporters of the fiction theory include Coke, Blackstone, Salmond and Machen. See Ghadas (2007) *US-China Law Review* 6 8; Blair (2013) *University of Illinois Law Review* 785 799.

any real person or entity.²⁹ Savigny concluded: “Besides men and ‘natural persons’ the law knows as ‘subjects’ of proprietary rights certain fictitious, artificial or juristic persons, and as one species of this class it knows the corporation.”³⁰

The fiction theory contains a fictional and a dependence component.³¹ Its fictional component emphasises that the company is through legal fiction endowed with legal personality (or legal subjectivity) as if it is a human being.³² The fiction theorists postulate that in principle only human beings have legal capacity. Human beings are by nature legal persons or legal subjects.³³ Wolff argued that it has, since the abolition of slavery, been a truism from a religious and moral point of view that human beings (or natural persons) have, apart from all law, a natural dignity or personality, and are therefore in law capable of having rights.³⁴ The fiction theory “starts from a natural, extra-juristic conception of personality, as founded in ethics and religion and then adds that certain groups and institutions determined by law, though lacking in supreme, that is human dignity, are nevertheless treated by law as if they were human persons.”³⁵

No one can deny that companies exist and are as real as for example human beings, animals, the sea, ideas or rules.³⁶ Fiction theorists conceptualise a company as an entity distinct from the

²⁹ Machen (1911) *Harvard Law Review* 253 255.

³⁰ Ghadas (2007) *US-China Law Review* 6 7 quoting Maitland “Introduction” in Maitland (ed) Von Gierke *Political Theories of the Middle Age* (1900) xx.

³¹ Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 106.

³² Carter 40; Wolff (1938) *Law Quarterly Review* 494 494-496 and 505-521; Millon (1990) *Duke Law Journal* 201 205-206; Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 106; Keay *The Corporate Objective* 33 and 812. According to Wolff one might also say that the law endows with capacity first human beings, and secondly, certain bodies not being human beings. See Wolff (1938) *Law Quarterly Review* 494 506.

³³ Wolff (1938) *Law Quarterly Review* 494 494-496 and 505-521; Kribbe 12; Keay *The Corporate Objective* 33 and 812. Naudé argues that the proposition that humans have a natural dignity or personality, and is therefore in law capable of having rights is questionable. Legal capacity is not an inborn quality but a capacity bestowed by the positive law. Slaves and women, for example, did not always have legal capacity. See Naudé *Die Regsposisie van die Maatskappydirekteur* 13

³⁴ Wolff (1938) *Law Quarterly Review* 494 506; Kribbe 13.

³⁵ Wolff (1938) *Law Quarterly Review* 494 507.

³⁶ Machen (1911) *Harvard Law Review* 253 258-262; Wolff (1938) *Law Quarterly Review* 494 505; Chopra & Arora *Company Law Piercing the Corporate Veil* (2013) (hereinafter referred to as “Chopra & Arora *Company Law*”) 6.

aggregate of its members, just as a school is an entity distinct and separate from its pupils and teachers. Any group of individuals, at any rate any group whose membership is constantly changing, is necessarily an entity separate and distinct from the constituent individuals.³⁷ All that the law can do is to recognize, or refuse to recognize, the existence of the entity. The commonly used statement associated with the fiction theory, that a company only exists in the contemplation or intendment of law, is therefore not correct. To the contrary, fiction theorists believe a company is real.³⁸ According to Machen:

“A corporation is an entity - not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the Church.”³⁹

However, the fact that a company exists does not mean that it is endowed with legal personality.⁴⁰ According to the fiction theory the company is referred to as a person as a matter of convenience. It is an abbreviation to endow the company with legal personality as if it is a human being.⁴¹ By conferring legal personality upon the company through legal fiction, commerce is facilitated in that the company then has the capacity to, for example, enter into contracts; hold property; sue and be sued; and ultimately carry on business in its own name.⁴² It is in this sense the company is not a real but a fictional person. In sum the fiction theory treats a company as if it is a legal

Although, as Machen states, we cannot well determine whether the corporate entity is real unless we first decide what reality is. This can raise deep philosophical questions. See Machen (1911) *Harvard Law Review* 253 258.

³⁷ Machen (1911) *Harvard Law Review* 253 259.

³⁸ Machen (1911) *Harvard Law Review* 253 260-261; Coates (1989) *New York University Law Review* 806 810.

³⁹ Machen (1911) *Harvard Law Review* 253 262.

⁴⁰ The unincorporated deed of settlement companies that became so prolific after the *Bubble Act* was passed in 1720 is an example.

⁴¹ Machen (1911) *Harvard Law Review* 253 263 and 266; Carter 42-43 and 52-53; Wolff (1938) *Law Quarterly Review* 494 506; Millon (1990) *Duke Law Journal* 201 205-206; Kribbe 12-14; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 106-107.

⁴² Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 106; Pollman (2011) *Utah Law Review* 1629 1638-1639. A similar fiction is employed in our law to regard a foetus as having been born at the time of conception, although the legal subjectivity of a natural person only begins at birth, whenever it is to its advantage (*nasciturus pro iam nato habetur quotiens de commodis eius agitur*). See *Road Accident Fund v Mati* 2005 (6) SA 215 (SCA); LAWSA vol 20 part 1 par 442.

person by legal fiction. Whereas human beings are by nature legal persons capable of having rights, companies are endowed with this capacity by law when the company is incorporated.⁴³

Wolff postulated that the fiction theory is not a theory at all. It is a legal concept or formula that says nothing but this: “Whatever may be the nature of corporations, foundations and so on, all that interests us is that they are endowed by law with legal capacity as if they were human beings.”⁴⁴ Legal personality can be given to just about any object if it is deemed to serve the ends of justice.⁴⁵

According to the fiction theory a company has the capacity to be holder of proprietary rights, but because it is not a being capable of reasoning or forming a will, it does not have the capacity to act. Just like a person who lacks legal capacity (for example a person who is mentally ill or an infant), the company can only act through an authorised representative.⁴⁶ As a result, directors and managers are conceptualised as representatives of the company.⁴⁷

According to the fiction theory, a company cannot commit a crime or delict as it is incapable of forming a will. Its representatives or agents, who actually commit the crime or delict, can however be held liable.⁴⁸

⁴³ Wolff (1938) *Law Quarterly Review* 494 494-496 and 505-521; Kribbe 12-13; Keay *The Corporate Objective* 33 and 812.

⁴⁴ Wolff (1938) *Law Quarterly Review* 494 505-506.

⁴⁵ A good example is the decision of the Judicial Committee of the Privy Council in the case of *Pramatha Nath Mullick v Pradyumna Kamar Mullick* (1925) *LR 52 Ind App 245 (Hindu Law JPCP)*, in which it was held that an Indian idol by the name Sri Sri Radha Shamsunderji has legal personality. See Duff “The personality of an idol” (1977) *Cambridge Law Review* 42 and Welling *Corporate Law in Canada* 122-124 for a discussion of this judgement and its relevance to company law. Purely inanimate objects such as the estate of a deceased person, a jury or a community may also for example be personified. See Machen (1911) *Harvard Law Review* 347 350; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107.

⁴⁶ Naudé *Die Regsposisie van die Maatskappydirekteur* 13-14 with reference to Von Savigny *System des heutigen Römischen Rechts* Band II (1840) 282-283; Petrin (2013) *Penn State Law Review* 1 5-6.

⁴⁷ Naudé *Die Regsposisie van die Maatskappydirekteur* 12.

⁴⁸ Naudé *Die Regsposisie van die Maatskappydirekteur* 13-14; Petrin (2013) *Penn State Law Review* 1 6 and 29. According to Dibandj the criminal liability of companies generally emerged through statutes and not the common law. Nothing precludes the legislature to impose criminal liability on companies. He questions whether the imposition of criminal liability on companies is even a good idea. Sanctions are limited to fines and often have very little deterrent effect. See Dibandj “(Mis)conceptions of the corporation” (2013) *Georgia State University Review* 731 766-772.

The dependence component of the fiction theory emphasises the company's dependence on the law to endow it with legal personality. The company owes its legal personality to the law rather than the initiative of its individual incorporators. The legal personality of the company is artificial, fictional and conditional because it cannot come into being unless and until the law sanctions it.⁴⁹ According to the fiction theory, the rights, duties and capacities of a company totally depend on how much the law imputes to it by fiction.⁵⁰ As a result of this dependence component, the fiction theory is often equated with the concession theory that is discussed in the previous chapter.⁵¹

The fiction theory has several consequences for company law. Since the company's existence as a legal person is dependent on the exercise of the state's discretion, there is little basis to recognize company "rights". The doctrine of *ultra vires* serves as a powerful check on company activity.⁵² Critical to the fiction theory is the idea that what the state has the exclusive power to create, it also has the power to destroy.⁵³ The state is thus justified to withdraw or take away the benefit of incorporation if a company fails to achieve its public purpose or the public policy

⁴⁹ Carter 40; Coates (1989) *New York University Law Review* 806 811-812; Millon (1990) *Duke Law Journal* 201 206; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107; Blair (2013) *University of Illinois Law Review* 785 799; Dibadj (2013) *Georgia State University Review* 731 754-758.

⁵⁰ Ghadas (2007) *US-China Law Review* 6 9; Blair (2013) *University of Illinois Law Review* 785 800; Dibadj (2013) *Georgia State University Review* 731 733 and 735.

⁵¹ Ghadas (2007) *US-China Law Review* 6 9; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107; Pollman (2011) *Utah Law Review* 1629 1633-1639; Colombo (2012) *Temple Law Review* 1 15-16; Padfield "Rehabilitating concession theory" (2013) *Oklahoma Law Review* 327 330-331; Chopra & Arora *Company Law* 23-24; Padfield (2015) *William & Mary Business Law Review* 1 20-21. Padfield conceives the fiction theory as a constitutional law and the concession theory as a company law theory of the company. See Padfield (2013) *Oklahoma Law Review* 327 330. Dewey, on the other hand, states that there is nothing essentially in common between the fiction theory and the concession theory, although they both seek to limit the power of corporations. For him the fiction theory is ultimately a philosophical theory that derives from canon law and holds that the corporate body is but a name, a thing of the intellect. The concession theory, on the other hand, is a product of the rise of the national state. It emphasises that all minor organizations, including corporations, derive their powers from a supreme power namely, the state. The concession theory may be indifferent as to the question of the reality of a corporate body. However, in spite of their historical and logical divergence, the two theories flowed together. See Dewey (1926) *Yale Law Journal* 655 666-668.

⁵² Pollman (2011) *Utah Law Review* 1629 1635; Colombo (2012) *Temple Law Review* 1 16.

⁵³ Coates (1989) *New York University Law Review* 806 812. Coates points out notes that after the case of *Trustees of Dartmouth College v Woodward* 17 U.S. (4 Wheat.) 518 (1819), every state in the United States of America incorporated a reserved power clause reserving the right to, at its pleasure, alter, amend, suspend or repeal in whole or in part any certificate of incorporation that it had issued.

objectives of the state.⁵⁴ The fiction theory is therefore often cited as the theoretical basis for veil piercing.⁵⁵ It also provides a normative basis for mandatory corporate social responsibility. The company, as a fictional person, is incapable of being a social and moral being. Social and moral obligations must thus be enforced on the company by law.⁵⁶ According to the fiction theory the state agrees to grant legal personality (and the privileges that go with it) to companies in exchange for a *quid pro quo*. At a minimum, the state expects companies to comply with its legal regulation of companies, for example through labour and environmental statutes. A more expansive view is that it justifies increased state regulation of companies.⁵⁷

The fiction theory is normatively supportive of a public orientated view of companies and company law. As a creation of the state, the company serves a public purpose and also serves as a vehicle to pursue public policy objectives.⁵⁸ The fiction theory also provides a theoretical basis for the statutory regulation of the relationship between the company and its stakeholders, including its creditors and employees.⁵⁹

2.2 Arguments for and against the fiction theory

One criticism of the fiction theory is that it is incompatible with the conception of subjective rights. Subjective rights can only belong to beings capable of having a will, in other words to

⁵⁴ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 108.

⁵⁵ Petrin (2013) *Penn State Law Review* 1 20-22. Petrin asserts that the reliance by the courts on the corporate imagery of a real or fictional being (what he terms metaphorical and equity driven explanations) in deciding veil piercing cases have resulted in confusion and weakened the validity of and trust in the concept of veil piercing as a whole. He argues for a scholarly analyses of the concepts of limited liability and veil piercing based on the functions and effects of the firm rather than its nature.

⁵⁶ Petrin (2013) *Penn State Law Review* 1 25; Padfield (2015) *William & Mary Business Law Review* 1 24-25.

⁵⁷ Coates (1989) *New York University Law Review* 806 812-814; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 108; Padfield (2013) *Oklahoma Law Review* 327 333; Blair (2013) *University of Illinois Law Review* 785 800-801; Dibadj (2013) *Georgia State University Review* 731 759; Padfield (2015) *William & Mary Business Law Review* 1 21. Millon refers to examples where the fiction theory served as the theoretical basis for the regulation of the company. For example in response to concerns about equal opportunity, general incorporation laws were promulgated to allow all persons access to the market. See Millon (1990) *Duke Law Journal* 201 207-211.

⁵⁸ Millon (1990) *Duke Law Journal* 201 207; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101 and 108-109; Blair (2013) *University of Illinois Law Review* 785 800-801.

⁵⁹ Millon (1990) *Duke Law Journal* 201 210-211.

natural persons. The counter argument is that a person can exercise his or her will in the interest of another person. A parent can for example exercise his or her will in the interest of an infant. A person can also exercise his or her will in the interest of a defined or undefined future group of persons or to purely protect objective interests, for example a trustee of a trust. In all these examples the subjective rights in question do not pertain to the person exercising those rights.⁶⁰ Welling states that the term “will”, when used in reference to individuals, involves the capacity to choose one’s own course of action. The term however takes a modified meaning when used in reference to a corporation. The “will” of a corporation “is confined by the dictates of law, which prescribes certain conditions before such expressions of interest become applicable to the corporation.”⁶¹ Wishart argues that we should move away from the sole focus of the law being human beings and abandon the legal subject as an intellectual construct. For him, the law should rather be seen as a technique of governance.⁶²

It is also argued that the fiction theory and the concession theory are incompatible with an important basic human right namely, the right to associate. The fiction theory furthermore does not explain how the state, the very entity that confers the legal personality, becomes a corporate person itself. Wolff believed that this argument confuses the conceptions of the state and the law. The fiction theory postulates that it is for the law to decide whether and under what conditions an entity that is not a natural person (including the state) has legal personality. Even the recognition of an entity as a sovereign state is a function of international law, and not the state.⁶³

A further criticism is that the fiction theory can be used to achieve dangerous political results. For example, in the French revolution the theory was used to justify the state’s confiscation of church property. Wolff’s response to this criticism was that these conclusions do not follow from the theory itself but from the positive law.⁶⁴

⁶⁰ Wolff (1938) *Law Quarterly Review* 494 507-508.

⁶¹ Welling *Corporate Law in Canada* 113.

⁶² Wishart “A reconfiguration of company and/or corporate law theory” (2010) *Journal of Corporate Law Studies* 151 153, 162 and 176.

⁶³ Wolff (1938) *Law Quarterly Review* 494 509; Kribbe 14.

⁶⁴ Wolff (1938) *Law Quarterly Review* 494 508.

According to Wolff the one real criticism of the fiction theory is that it only treats the company as having legal personality, whereas the real entity theory also endows it with legal capacity to act. In this respect the fiction theory stops too early in equalizing natural and legal persons. In terms of the fiction theory, the company is incapable of having moral rights and obligations.⁶⁵ Realists similarly argue that the fiction theory fails to see the fact that the company is a real legal person because it ignores the real capacities and functions of the company. For them, the fiction theory ignores the sociological dimension of the law making process.⁶⁶

Wolff stated that one of the most important advantages of the fiction theory is to be found in its elasticity.⁶⁷ First, it allows certain bodies to be treated as persons in some respects and as non-persons in other respects.⁶⁸ Secondly, the fiction theory allows us to reject some of the undesirable consequences of legal personality. It is flexible enough to permit the piercing or lifting of the corporate veil to reveal the human beings who control and use companies whenever it may be necessary to ensure that legal rules become operative in their true sense.⁶⁹

3 THE AGGREGATE THEORY

3.1 The theory

The aggregate theory (also known as the contractual or associational theory) can be associated with the earliest appearance of the company, when the interests of the individual constituents were paramount and the collective rights and duties of the group were of secondary importance.⁷⁰ However as indicated before, the fiction theory was the dominant corporate personhood theory from the early history of the company until the first half of the nineteenth century. The aggregate

⁶⁵ Wolff (1938) *Law Quarterly Review* 494 509-511; Kribbe 14.

⁶⁶ Ghadas (2007) *US-China Law Review* 6 11.

⁶⁷ Wolff (1938) *Law Quarterly Review* 494 511.

⁶⁸ Wolff (1938) *Law Quarterly Review* 494 511-512.

⁶⁹ Wolff (1938) *Law Quarterly Review* 494 512-521.

⁷⁰ Carter 36; Horwitz (1985) *West Virginia Law Review* 173 182; Dibadj (2013) *Georgia State University Review* 731 738. Carter traces the roots of the aggregate theory back to Roman law (for example the *societas publicanorum*). See Carter 33.

theory of the company only really came to prominence during the second half of the nineteenth century.⁷¹ During this period, the role of the state in the incorporation of companies began to decrease. Incorporation statutes became more generalized and less restrictive.⁷² Companies were conceived as creations of their individual incorporators rather than the state. The ultimate control of companies vested in the shareholders. Directors were considered to be the agents of the shareholders and were often shareholders themselves.⁷³ There was no real separation of ownership and control of the company. The aggregate theory provided a counter-argument against state regulation in response to the regulatory regime envisaged by the fiction theory.⁷⁴ The law of partnership had a strong influence on company law and this remained the position up to the 1880s.⁷⁵

By the early 20th century Berle and Means identified the deep separation of ownership and control in major public companies.⁷⁶ The diverse and remote shareholders of these companies became passive investors who did not control the companies in any meaningful way. This made it difficult to continue conceptualising the company as an aggregate of the individual shareholders. As a result, the real entity theory (which will be discussed hereafter) gained in prominence.⁷⁷

⁷¹ Coates (1989) *New York University Law Review* 806 818; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 109-110; Colombo (2012) *Temple Law Review* 1 13; Petrin (2013) *Penn State Law Review* 1 9-10; Blair (2013) *University of Illinois Law Review* 785 801; Chopra & Arora *Company Law* 25; Harris (2015) *Seattle University Law Review* 537 551.

⁷² Colombo (2012) *Temple Law Review* 1 14; Blair (2013) *University of Illinois Law Review* 785 801-802.

⁷³ Blair (2013) *University of Illinois Law Review* 785 802; Harris (2015) *Seattle University Law Review* 537 550-551.

⁷⁴ Blair (2013) *University of Illinois Law Review* 785 804; Padfield (2013) *Oklahoma Law Review* 327 335. There is ample support for the view that the aggregate theory and the real entity theory emerged in response to the perceived excessively regulatory power of the state.

⁷⁵ Horwitz (1985) *West Virginia Law Review* 173 182 and 200-203; Chopra & Arora *Company Law* 24-25.

⁷⁶ Berle & Means *The Modern Corporation & Private Property* (1991) (hereinafter “Berle & Means *The Modern Corporation*”).

⁷⁷ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 111-112; Pollman (2011) *Utah Law Review* 1629 1630; Blair (2013) *University of Illinois Law Review* 785 804 and 809.

Beginning in the 1890s and reaching a high point around 1920, there was a virtual obsession in the legal literature with the corporate personhood of companies.⁷⁸ This was followed by a period roughly between the late 1920s and the 1970s when scholars, but less so the courts, tended to ignore the theories of the company.⁷⁹ The aggregate theory was again revived with the rise of the law and economics movement in the 1980s.⁸⁰ The law and economic scholars deny that the company is a separate entity and retain the notion of the contracting and bargaining individual. For them the company is an aggregation of persons.⁸¹

The aggregate theory is often associated with contractarianism.⁸² Padfield regards the former as a constitutional law theory, and the latter as a company law theory of the company.⁸³ The primary distinction between the initial version of the aggregate theory and the nexus of contracts version (the economic contractarian theory) that emerged in the 1980s is, that the initial version focussed almost exclusively on the company's shareholders thereby treating the company essentially as a partnership. In contrast thereto, the nexus of contracts version focuses on relationships more broadly. It deems the web of consensual transactions (or contract based relations) to be between not only the shareholders but between all the rational economic actors, including creditors and

⁷⁸ Horwitz (1985) *West Virginia Law Review* 173 217-218.

⁷⁹ Horwitz (1985) *West Virginia Law Review* 173 175; Colombo (2012) *Temple Law Review* 1 10; Petrin (2013) *Penn State Law Review* 1 14; Blair (2013) *University of Illinois Law Review* 785 807-808; Chopra & Arora *Company Law* 30.

⁸⁰ Millon (1990) *Duke Law Journal* 201 229-231; Colombo (2012) *Temple Law Review* 1 15; Blair (2013) *University of Illinois Law Review* 785 804-805, 808 and 814; Dibadj (2013) *Georgia State University Review* 731 737; Chopra & Arora *Company Law* 30-34; Padfield (2015) *William & Mary Business Law Review* 1 27. See Horwitz (1985) *West Virginia Law Review* 173 203-207 for a discussion of the more important supporters of the aggregate theory in the United States.

⁸¹ The contractarian theories were discussed in chapter 3. See also Alchian and Demsetz "Production, information costs and economic organization" (1972) *American Economic Review* 777; Jensen and Meckling "Theory of the firm: Managerial behavior, agency costs and ownership structure" (1976) *Journal of Financial Economics* 305; Easterbrook & Fischel *The Economic Structure of Corporate Law* (1991) 12. See further the discussion in Keay *The Corporate Objective* 189-191 and Talbot *Great Debates in Company Law* 1. Carter does not consider it strange that the aggregate conception of the company persisted in modern times. It is in his view never an inconsistency to say that the company is always an association of individuals acting together as a unit in the group name, no matter how real and distinct the corporate entity may be. See Carter 37.

⁸² Padfield (2013) *Oklahoma Law Review* 327 331; Dibadj (2013) *Georgia State University Review* 731 737.

⁸³ Padfield (2013) *Oklahoma Law Review* 327 330-331.

employees.⁸⁴ Blair states that the nexus of contracts version adopts three simplifying premises. First, shareholders are the “owners” of companies. Companies are conceived to be bundles of assets collectively owned by the shareholders. Secondly, directors and managers are the agents of the shareholders. Thirdly, the best way to achieve higher value for shareholders is to give them more power and control.⁸⁵ Millon conceives the nexus of contracts conceptualisation of the company as a novel and sophisticated version of the aggregate conception of the company that carried forward its normative tradition.⁸⁶ In sharp contrast to the concession and fiction theories, the aggregate theory does not consider the company to be a state concession.⁸⁷

The aggregate theory conceptualises the company as a collection or aggregate of individuals without a separate existence.⁸⁸ It rejects the notion of the company as an entity distinct from its individual constituents.⁸⁹ Shareholders are conceived as the true owners of the company and the subjects of its rights.⁹⁰ According to this theory, the company is owned, managed and administered by natural people. The company’s actions are merely manifestations of the actions of these people and not that of an imaginary person.⁹¹ The company concept is perceived as a shorthand or abbreviation for a collection of individuals marching under the same banner. In this sense (by emphasising the closeness of the individuals in the group to the entity itself) the aggregate theory may be said to recognize the essential reality of the separate corporate entity.⁹²

⁸⁴ Colombo (2012) *Temple Law Review* 1 13-15.

⁸⁵ Blair (2013) *University of Illinois Law Review* 785 814-816.

⁸⁶ Millon (1990) *Duke Law Journal* 201 231.

⁸⁷ Colombo (2012) *Temple Law Review* 1 13.

⁸⁸ Carter 33; Coates (1989) *New York University Law Review* 806 815; Millon (1990) *Duke Law Journal* 201 201 & 231; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 110; Bone “Legal perspectives on corporate responsibility: Contractarian or communitarian thought” (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Pollman (2011) *Utah Law Review* 1629 1641; Colombo (2012) *Temple Law Review* 1 13; Padfield (2015) *William & Mary Business Law Review* 1 27.

⁸⁹ Coates (1989) *New York University Law Review* 806 815.

⁹⁰ Carter 33; Wolff (1938) *Law Quarterly Review* 494 497; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 110; Padfield (2013) *Oklahoma Law Review* 327 336.

⁹¹ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 110.

⁹² Carter 34.

According to the aggregate theory directors and managers act as trustees or agents of the shareholders and not the company. They have a fiduciary duty to further the interests of shareholders.⁹³ As the company does not have a separate existence, only the directing minds of the company (for example the directors and managers) can be held liable for crimes and delicts and not the company itself. The company is incapable of assuming moral and social obligations.⁹⁴

As a normative matter the aggregate theory views the company as the product of private initiative and natural market forces. The company is conceptualised as a form of private property and contract. It follows that company law is perceived to be a part of private law.⁹⁵ The role of company law is to support and protect the rights of the consenting parties and to enforce or regulate the agreements between them. The theory promotes an anti-regulatory approach to companies.⁹⁶ The market is deemed to be the best indicator of individual desires and the law should operate only to perfect the market and make it run smoothly.⁹⁷ The aggregate theory is not normatively supportive of compulsory social responsibility or the protection of creditors and employees.⁹⁸

3.2 Arguments for and against the aggregate theory

The modern large public company cannot be conceived as just an aggregate of its shareholders. The shareholders of these public companies are not a static set of persons. They do not participate

⁹³ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁹⁴ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁹⁵ Millon (1990) *Duke Law Journal* 201 213-214, 225 & 227-228; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101 and 111; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278. Arguments for a private law conception of companies has deep roots in the *laissez-faire* ideology. See Williams “The development of the public/private distinction in American law” (1985) *Texas Law Review* 225 225.

⁹⁶ Coates (1989) *New York University Law Review* 806 815-816; Millon (1990) *Duke Law Journal* 201 214; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 111; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Padfield (2013) *Oklahoma Law Review* 327 336; Blair (2013) *University of Illinois Law Review* 785 804; Dibadj (2013) *Georgia State University Review* 731 736; Padfield (2015) *William & Mary Business Law Review* 1 27-28.

⁹⁷ Coates (1989) *New York University Law Review* 806 816.

⁹⁸ Padfield (2015) *William & Mary Business Law Review* 1 27-28. *Contra* however Petrin (2013) *Penn State Law Review* 1 25, who points out that a number of prominent law and economics scholars and other shareholder theorists have drawn upon the nexus of contracts theory to support corporate social responsibility.

in the management of these companies in any meaningful way.⁹⁹ A closely held company may in some ways arguably be conceived as an aggregate of individuals carrying on business together. The shareholders of these companies are far more involved in the business and affairs of the company than shareholders in public companies. But even so, the individual shareholders or a group cannot, save through or for the company, do certain things such as conclude contracts or hold property. The membership of these companies is often not static, yet the company continues to exist.¹⁰⁰ Members can further contract with the company. It is the company that institutes and defends legal proceedings and not the members. Therefore even closely held companies are separate legal persons. Wolff explained this with reference to the example of a number of companies that have the same five shareholders. Each of these companies has its own property and creditors. The creditors of the one company do not have claims against the property of the others.¹⁰¹

Wolff stated that the aggregate theory may be sound from an economic perspective when one has regard to what he calls “economic ownership” rather than “juristic ownership”. From a legal point of view it may be relevant when the corporate veil is pierced.¹⁰²

Padfield points out that by conceptualising a company as an aggregation of its shareholders, one is essentially back to a form of general partnership where the owners are personally liable for the debts of the company. He argues that the primary theoretical justification for limited liability is the separation of ownership from control, which is absent in the aggregate theory.¹⁰³

One may also question why it is necessary to incorporate a company if it is simply a contract between individuals. Clearly incorporation confers certain advantages that cannot be obtained contractually, including limited liability.¹⁰⁴

⁹⁹ Pollman (2011) *Utah Law Review* 1629 1662; Dibadj (2013) *Georgia State University Review* 731 750-751.

¹⁰⁰ Keay *The Corporate Objective* 190; Pollman (2011) *Utah Law Review* 1629 1662.

¹⁰¹ Wolff (1938) *Law Quarterly Review* 494 497;

¹⁰² Wolff (1938) *Law Quarterly Review* 494 497-498.

¹⁰³ Padfield (2013) *Oklahoma Law Review* 327 337; Blair (2013) *University of Illinois Law Review* 785 803.

4 THE REAL ENTITY THEORY

4.1 The theory

The real entity theory (also known as the natural entity or organic theory) was developed in Germany in the late nineteenth century in response to the fiction theory.¹⁰⁵ It gained popularity at the turn of the 20th century.¹⁰⁶ Individualism was under attack on the Continent by romantic conservatives who yearned for a return to a pre-commercial structured society based on status and hierarchies, and by socialists who wished to rise above the anti-collectivist approach of liberal social and legal thought. Non-individualistic or collectivist legal institutions, of which the company was perhaps the most powerful and prominent example, rose to the forefront.¹⁰⁷

The increasing importance and prevalence of companies led to dissatisfaction with the fiction theory. Companies began to develop their own personality or unique identity. This was not just a consequence of their size and also did not come about entirely by accident. As business people working in especially the large companies devised ways to market their products across great geographic, social and economic distances, branding became a key part of the corporate personality. It no longer seemed appropriate to regard companies as creatures of the state. Companies came to be regarded as private entities that should be free from state regulation and entitled to the same rights and privileges as all other individuals and groups. The fiction theory was also difficult to reconcile with the emergence of general incorporation acts. The work of Otto von Gierke, arguably the most prominent real entity theorist, became accessible to English and American intellectuals when Maitland, the great English legal historian, translated a portion of his work at the turn of the 20th century.¹⁰⁸ As a result, the real entity theory was transplanted from Germany to England and the United States where it gained traction, challenging both the fiction

¹⁰⁴ Dibadj (2013) *Georgia State University Review* 731 752.

¹⁰⁵ Colombo (2012) *Temple Law Review* 1 13; Petrin (2013) *Penn State Law Review* 1 6; Dibadj (2013) *Georgia State University Review* 731 742.

¹⁰⁶ Millon (1990) *Duke Law Journal* 201 211-213; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 112; Petrin (2013) *Penn State Law Review* 1 10; Chopra & Arora *Company Law* 36-37.

¹⁰⁷ Horwitz (1985) *West Virginia Law Review* 173 180-181.

¹⁰⁸ Maitland (ed) Von Gierke *Political Theories of the Middle Ages*. See Horwitz (1985) *West Virginia Law Review* 173 179; Chopra & Arora *Company Law* 26-27.

and aggregate theories.¹⁰⁹ The shift of power away from the shareholders of the company, first to the directors and later to professional managers, from the late nineteenth century did not fit in with the aggregate theory of the company.¹¹⁰

The real entity theory supports two contrasting normative visions of the company.¹¹¹ As indicated hereinbefore it initially formed the theoretical basis to argue that company law is a species of private law.¹¹² According to this vision, the company is a private rather than a public institution and should not be the subject of undue regulation.¹¹³ As a real and natural entity, a company should have the same rights and privileges as natural persons.¹¹⁴ However, in the 1930s Dodd employed the real entity theory to justify a completely different normative vision of the company.¹¹⁵ Dodd seized upon the real entity theory's core idea of the company as a separate legal entity to argue that managers are trustees of the company and not its shareholders. He argued that this freed the company to be a good corporate citizen. As articulated by Dodd, the real entity theory challenged the purely private conception of company law based on shareholder primacy.¹¹⁶ On this view the company should have regard to not only its investors, but also its

¹⁰⁹ Horwitz (1985) *West Virginia Law Review* 173 179-181, 183 and 218; Coates (1989) *New York University Law Review* 806 823; Pollman (2011) *Utah Law Review* 1629 1641-1642; Colombo (2012) *Temple Law Review* 1 11; Petrin (2013) *Penn State Law Review* 1 10-13; Blair (2013) *University of Illinois Law Review* 785 805-806 and 809-814; Dibadj (2013) *Georgia State University Review* 731 742-743.

¹¹⁰ Horwitz (1985) *West Virginia Law Review* 173 183. Freund conceptualised the company as a representative democracy governed by majority rule. He noted that many statutes in the United States vested corporate powers directly in the board of directors. This means that corporate capacity is shifted from the shareholders to the governing body and allows us to conceptualise the big companies as an aggregation of capital rather than an association of persons. See Freund *The Legal Nature of Corporations* 47 and 52 referred to in Horwitz (1985) *West Virginia Law Review* 173 219.

¹¹¹ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 116.

¹¹² Millon (1990) *Duke Law Journal* 201 213; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101-102 and 116.

¹¹³ Horwitz (1985) *West Virginia Law Review* 173 221; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 116-117.

¹¹⁴ Coates (1989) *New York University Law Review* 806 819; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 116.

¹¹⁵ Dodd "For whom are corporate managers trustees?" (1932) *Harvard Law Review* 1145; Millon (1990) *Duke Law Journal* 201 203.

¹¹⁶ Millon (1990) *Duke Law Journal* 201 217-220 & 224-225; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 117; Petrin (2013) *Penn State Law Review* 1 23-24.

other stakeholders such as creditors, employees, consumers and the society in which it operates. The company must be regulated to ensure that it does so. This view supports a public view of companies.¹¹⁷ Building on this foundation, other communitarians (or progressives), corporate social responsibility scholars and stakeholder scholars also justified the consideration of broader stakeholder interests by conceptualising the company as a distinct moral organism with social and ethical responsibilities.¹¹⁸ The real entity theory is the most recent genuine philosophical conceptualization of the company to precede the economic contractarian (or nexus of contracts) theory.¹¹⁹

Althusius, a German jurist, was the founder of the real entity theory.¹²⁰ But it was Otto von Gierke (1841-1921), a German historian and legal academic, who was more than any other person responsible for the development of the doctrine of the legal person as a living organism.¹²¹ Gierke rejected what he perceived as the Roman theory of the “*persona ficta*” (the fiction theory). He argued that although Roman law orientated jurisprudence developed a collection of artificial legal constructions between the omnipotent state on the one hand and the individual on the other hand, it did not succeed in placing the individual in an essential relationship with his or her community. Gierke adopted the old Germanic notion of the reality of the group entity. He found a theory that succeeded in placing the individual in an essential relationship with his or her community in the Germanic notion of “*gesammte hand*”. From this he developed his “*genossenschaftstheori*” which conceptualises the community as having been developed organically, and the company as a “*reale gesammperson*”. In contrast with the fiction theory’s conception of the company, Gierke’s “*reale gesammperson*” has the capacity to form a will and the capacity to act. He argued that the

¹¹⁷ Millon (1990) *Duke Law Journal* 201 203; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102 and 117.

¹¹⁸ Horwitz (1985) *West Virginia Law Review* 173 221; Petrin (2013) *Penn State Law Review* 1 24-25.

¹¹⁹ Colombo (2012) *Temple Law Review* 1 11.

¹²⁰ Ghadas (2007) *US-China Law Review* 6 10.

¹²¹ Machen (1911) *Harvard Law Review* 253 256; Carter 39-40; Wolff (1938) *Law Quarterly Review* 494 499-500; Horwitz (1985) *West Virginia Law Review* 173 179; Kribbe 15; Petrin (2013) *Penn State Law Review* 1 6; Blair (2013) *University of Illinois Law Review* 785 805-806. The most important works of Gierke are *Das Deutsche Genossenschaftsrecht* Band 1 (1868), Band II (1873), Band III (1881), Band IV (1913); *Das Genossenschaftstheorie und die Deutche Rechtsprechung* (1887); *Deutche Privatrecht* (1895). Wolff states that Immanuel Kant explained bodies politic by an analogy to natural organisms. Hugo Preuss assumed that there are two kinds of life namely, physical life and social life. See also Naudé *Die Regsposisie van die Maatskappydirekteur* 14.

company does not require for it to be represented by others. It acts through its own organs (including the general meeting of shareholders or the board of directors) just as a natural person does through for example words or gestures. Directors are accordingly perceived to be organs of the company and not its representatives. That does not mean that a company cannot be represented by a representative but such representation differs fundamentally from an act by the company itself through one of its organs.¹²²

Gierke warned that the concept of organs must not be confounded with anthropomorphisms.¹²³ For him the organisation of any legal person fundamentally revolves around the establishment of organs. The constitution of a legal person must prescribe who its organs are and, by delimiting its competencies, accord to each organ specific functions. The legal person may also have a hierarchy of organs. In contrast to its subsidiary organs, the main organs of a legal person are direct organs in the sense that their capacities are not derived from its other organs. In Gierke's "*körperschaften*" (or corporation) the general meeting of members is the highest organ. But even the general meeting's capacities are delineated by the capacities of other organs. The corporation may have more organs, but the general meeting and management are the most important.¹²⁴ Not all acts of the individuals that form part of the organs are necessarily acts of the legal person. In order to be an act of a legal person it must meet three requirements. First, the act must be taken by the organ that should perform that act. Secondly, the organ must act within the scope of its authority. Finally, if specific formalities are prescribed, they must be complied with.¹²⁵

The real entity theory is favoured more by sociologists than lawyers. This explains why the theory has been more popular in Germany and France compared to the United Kingdom. English law is based on judge made common law whilst in Germany and France jurists, who are mainly sociologists, played an important role in the drafting of the civil legal codes.¹²⁶

¹²² Naudé *Die Regsposisie van die Maatskappydirekteur* 15; Kribbe 15-16.

¹²³ By for example comparing the organs of the organization with human organs.

¹²⁴ Naudé *Die Regsposisie van die Maatskappydirekteur* 16.

¹²⁵ Naudé *Die Regsposisie van die Maatskappydirekteur* 16-17; Petrin (2013) *Penn State Law Review* 1 8.

¹²⁶ Ghadas (2007) *US-China Law Review* 6 11.

According to the real entity theory, the company is a living reality, a real person with a natural existence outside the law.¹²⁷ Machen explains that which is artificial can still be real. For example, an artificial lake or waterfall is not an imaginary lake or waterfall, it is real. We can see and touch it.¹²⁸ Similarly a company is not imaginary or fictitious but real. It is not artificial but natural.¹²⁹ The real entity theory conceptualises the company as a social organism just as humans are natural or physical organisms. The company thus obtains its political and legal status independent from the state and is a natural product of private initiative.¹³⁰ The actions of the company are its own and are carried out in the same way as normal human beings, not through agents or representatives as is the case with for example infants or mentally ill persons. Whereas humans use their bodily organs for this purpose, the company uses humans. It does not need to be represented like those who are incapable.¹³¹

Real entity theorists postulate that a company is not created by the state. It is not the law that gives the company life. A company exists prior to and separate from the state. The state merely grants it official recognition and permission to operate.¹³² According to this theory the state's issuance of a licence or certificate to a company to commence business (following on the filing of

¹²⁷ Machen (1911) *Harvard Law Review* 253 256; Carter 39; Wolff (1938) *Law Quarterly Review* 494 497-498; Horwitz (1985) *West Virginia Law Review* 173 220; Coates (1989) *New York University Law Review* 806 818; Millon (1990) *Duke Law Journal* 201 211& 216; Ghadas (2007) *US-China Law Review* 6 10; Lichner "Should shareholders' interests be the mainstay of corporate governance?" (2009) *European Business Law Review* 889 901; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 112; Pollman (2011) *Utah Law Review* 1629 1641-1642; Colombo (2012) *Temple Law Review* 1 11; Petrin (2013) *Penn State Law Review* 1 6-7; Dibadj (2013) *Georgia State University Review* 731 741; Chopra & Arora *Company Law* 28-29 and 36-39.

¹²⁸ Machen (1911) *Harvard Law Review* 253 257; Horwitz (1985) *West Virginia Law Review* 173 220; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 112; Chopra & Arora *Company Law* 6.

¹²⁹ Machen (1911) *Harvard Law Review* 253 261-262; Horwitz (1985) *West Virginia Law Review* 173 220.

¹³⁰ Wolff (1938) *Law Quarterly Review* 494 498-501; Millon (1990) *Duke Law Journal* 201 201; Dine *The Governance of Corporate Groups* (2000) (hereinafter "Dine *Corporate Groups*") 7; Chopra & Arora *Company Law* 36-39; Blair (2013) *University of Illinois Law Review* 785 806,

¹³¹ Wolff (1938) *Law Quarterly Review* 494 498; Ghadas (2007) *US-China Law Review* 6 10; Petrin (2013) *Penn State Law Review* 1 7.

¹³² Machen (1911) *Harvard Law Review* 253 256-257; Wolff (1938) *The Law Quarterly Review* 494 496; Horwitz (1985) *West Virginia Law Review* 173 220; Coates (1989) *New York University Law Review* 806 818-819; Keay *The Corporate Objective* 33 and 180-181; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101; Colombo (2012) *Temple Law Review* 1 11-12; Petrin (2013) *Penn State Law Review* 1 6-7; Blair (2013) *University of Illinois Law Review* 785 806. This approach was made popular with the work of Otto Gierke *Political theories of the Middle Ages*.

the requisite application and documents) is not altogether different than the state's issuance of a birth certificate (following the parent's submission of the appropriate documentation).¹³³

A company has its own will, sometimes referred to as a "collective will" or "common will" that is different from the will of its members. This collective will is the product of discussions and compromises between the individual constituent members.¹³⁴ The result is that the actions of the company are qualitatively different from those of its individual members. The company is responsible for its own actions and intentions and can thus commit crimes or delicts. However because the company can only act through its organs, it can only incur criminal or delictual liability if committed by one or more of its organs acting within their official capacities. If the members of organs act outside their capacities, the company cannot be held liable as the acts so performed are not acts of the company but of the individual members.¹³⁵ The organs are jointly and severally liable with the company for crimes and delicts.¹³⁶

Although the company is a creation of its incorporators, it exists as an entity independent and distinct from those who participate in the corporate enterprise. The company's existence and identity remains the same, even if its membership changes over time. Its existence is also independent of the state.¹³⁷ The real entity theory assumes that the subjects of human rights need not be human beings. Anything that possesses a will and life of its own may be the subject of

¹³³ Colombo (2012) Temple Law Review 1 11.

¹³⁴ Wolff (1938) Law Quarterly Review 494 498 & 501; Ghadas (2007) US-China Law Review 6 10; Ripken (2009) Fordham Journal of Corporate & Financial Law 97 114; Colombo (2012) Temple Law Review 1 12; Petrin (2013) Penn State Law Review 1 6; Dibadj (2013) Georgia State University Review 731 741-742. Gierke also spoke of the "collective will" of a company. See Wolff (1938) Law Quarterly Review 494 501.

¹³⁵ Naudé *Die Regsposisie van die Maatskappydirekteur* 17; Ripken (2009) Fordham Journal of Corporate & Financial Law 97 114-115; Petrin (2013) Penn State Law Review 1 7-8 and 26-32.

¹³⁶ Petrin (2013) Penn State Law Review 1 8. Petrin argues that approaches to the delictual liability of companies based on the real entity theory may yield unfortunate results as the liability of the company depends in part on the hierarchical position of those responsible for the violation in question. See Petrin (2013) Penn State Law Review 1 28-29.

¹³⁷ Smith "Legal personality" (1928) Yale Law Journal 283 286; Ripken (2009) Fordham Journal of Corporate & Financial Law 97 112-114; Colombo (2012) Temple Law Review 1 12; Blair (2013) University of Illinois Law Review 785 806.

rights.¹³⁸ By assuming that the company is a separate legal person, the real entity theory allows it to be treated much like an autonomous natural person.¹³⁹

The real entity theory differs from the fiction and concession theories in that it perceives the company to be a creation of private individuals rather than the state. The company is a natural existent entity, a natural outgrowth of the economic tendency towards business companies, which is recognised by the law or the state.¹⁴⁰ The law does not have the power to create an entity. It merely has the right to recognise or not to recognise an entity.¹⁴¹ In contrast to the fiction theory, the real entity theory views the company as a real person endowed with legal personality and with a natural existence independent of the state.¹⁴² The real entity theory differs from the new nexus of contracts version of the aggregate theory in that it is essentially managerialist in nature, whereas the new nexus of contracts version is anti-managerialist.¹⁴³ As opposed to the aggregate theory, the real entity theory conceptualises the company as a separate entity distinct from its constituents with the rights and corresponding responsibilities of a natural person. Dodd's normative conception of the real entity theory corresponds with that of the communitarian theory.¹⁴⁴ As indicated before, Dodd seized upon the real entity theory's core idea of the company as a separate legal entity to argue that the company should be a good corporate citizen that should have regard to all its stakeholders, including creditors, employees, consumers and the society in which it operates. Dodd supported a public view of companies.¹⁴⁵ Communitarians

¹³⁸ Wolff (1938) *Law Quarterly Review* 494 498.

¹³⁹ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 115.

¹⁴⁰ Millon (1990) *Duke Law Journal* 201 211 & 216; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 112-113.

¹⁴¹ Ghadas (2007) *US-China Law Review* 6 10.

¹⁴² Carter 39; Coates (1989) *New York University Law Review* 806 818; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 112; Petrin (2013) *Penn State Law Review* 1 6.

¹⁴³ Blair (2013) *University of Illinois Law Review* 785 815.

¹⁴⁴ Dodd (1932) *Harvard Law Review* 1145 1161; Kribbe 21-22; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 113-114; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284, 292 n95, 296.

¹⁴⁵ Millon (1990) *Duke Law Journal* 201 203, 217-220 and 224-225; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102 and 117; Petrin (2013) *Penn State Law Review* 1 23-24.

similarly emphasise the interdependence of persons in a shared community.¹⁴⁶ Padfield aligns the real entity theory with the team production theory of the company as well as the director primacy model of corporate governance.¹⁴⁷ He regards the real entity theory as a constitutional law theory of the company whereas the team production theory and the director primacy model are both company law theories of the company.¹⁴⁸

The real entity theory has important implications for company law. The *ultra vires* doctrine,¹⁴⁹ which is predicated on the notion that companies lack any powers beyond those conferred by the legislature, does not find support in this theory. Neither does the notion that companies can only conduct business within the country of their incorporation.¹⁵⁰ Under the real entity theory the state may regulate the company, but it may not extinguish it. Moreover, the constitution of a country may limit the state's ability to regulate the company.¹⁵¹ Historically the real entity theory helped support the trend to grant companies limited liability. If a company is conceptualized as a separate entity distinct from the individuals constituting it, it makes sense to treat it independently and separately for purposes of liability.¹⁵²

4.2 Arguments for and against the real entity theory

For Blair, business companies are more than just bundles of assets that belong to shareholders. It is so that shareholders provide the financial capital, without which many businesses cannot get out of the starting blocks. But it is the efforts of the entrepreneurs, managers and key employees, as

¹⁴⁶ Millon (1993) *Washington and Lee Law Review* 1373 1382; Kribbe 21-22; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

¹⁴⁷ Padfield (2013) *Oklahoma Law Review* 327 331.

¹⁴⁸ Padfield (2013) *Oklahoma Law Review* 327 330.

¹⁴⁹ According to the *ultra vires* doctrine any act outside the scope of a company's objects is void.

¹⁵⁰ Horwitz (1985) *West Virginia Law Review* 173 186-190; Colombo (2012) *Temple Law Review* 1 12-13.

¹⁵¹ Coates (1989) *New York University Law Review* 806 819.

¹⁵² Horwitz (1985) *West Virginia Law Review* 173 185 and 208-209; Colombo (2012) *Temple Law Review* 1 13; Petrin (2013) *Penn State Law Review* 1 21; Padfield (2013) *Oklahoma Law Review* 327 337.

well as business practices that cultivate innovation and collaboration in teams that add value to the financial capital. The real entity theory acknowledges this reality.¹⁵³

Pollman states that the real entity theory perhaps encapsulates our modern conception of the company the best. We do not conceive companies as creatures of the state or simply as aggregates of people. Large modern companies particularly are viewed neither as groups of individuals nor as part of the government but as organisations falling within their own category.¹⁵⁴

Wolff questioned the notion that a juristic person is a living organism.¹⁵⁵ He argued that this conception of the juristic person leads to fallacious legal arguments, for example that a subsidiary company will be *contra boni mores* “as this would mean the creation of a ‘living being’ to live the life of a slave or of a criminal eternally chained up in a dungeon.”¹⁵⁶ An amalgamation or merger agreement between companies which results in one or more of them ceasing to exist would also, for example constitute an immoral promise to commit suicide.¹⁵⁷ He concluded:-

“The doctrine of real, extra-judicial personality of a corporation therefore appears to be somewhat insecurely founded, seen from a sociological point of view. It takes verbal imagery for reality. It adopts romantic conceptions, the most typical quality of romanticism being perhaps the tendency to endow inanimate things with life.”¹⁵⁸

Welling similarly argues that the realist theory takes a romantic view of corporate behaviour and endows an inanimate concept with life.¹⁵⁹ But from a normative point of view, few would argue that a subsidiary company is like a slave or a criminal chained up in a dungeon. We also do not regard an amalgamation or merger agreement between two companies which results in one or

¹⁵³ Blair (2013) *University of Illinois Law Review* 785 814.

¹⁵⁴ Pollman (2011) *Utah Law Review* 1629 1662.

¹⁵⁵ Wolff (1938) *Law Quarterly Review* 494 499-501.

¹⁵⁶ Wolff (1938) *Law Quarterly Review* 494 501.

¹⁵⁷ Wolff (1938) *Law Quarterly Review* 494 501.

¹⁵⁸ Wolff (1938) *Law Quarterly Review* 494 502.

¹⁵⁹ Welling *Corporate Law in Canada* 113-114; Welling et al *Canadian Corporate Law* 127.

more of them ceasing to exist as an immoral promise to commit suicide. Not one of the examples cited by Wolff offends our sense of justice. The reason for this is that justice is not simply a matter of calculation and takes into account the qualitative differences in certain rights and obligations. If we accept that our approach to justice can and should not be neutral with respect to virtue or the good life, the normative implications of certain acts may well differ depending on whether the affected person is a natural or a juristic person.¹⁶⁰

Wolff also criticises the real entity theory on the basis that it does not explain the company's separate legal personality. He states that there are numerous companies, for example one-man companies or state owned companies, to whom no one can attribute a life or will of its own. Yet they are just as much legal persons as the other companies upon which this doctrine endows a life and a sole.¹⁶¹ The counter argument is that these one-man companies or state owned companies are in fact separate legal persons. A one-man company or a state owned company can for example contract with its sole shareholder. A one-man company will further remain in existence even if its sole shareholder passes away.

5 THE JURIDICAL REALITY THEORY

5.1 The theory

There was, as indicated hereinbefore, a period roughly between the late 1920s and the 1970s when the theories of the company were snubbed by legal scholars and the courts.¹⁶² During this anti-theoretical or pragmatic instrumentalism phase, large public American companies were dominated by professional corporate managers. The company was conceptualised from a managerialist rather than a theoretical perspective. Berle and Means highlighted the separation of ownership from control as the defining characteristic of the modern public company.¹⁶³ The real entity

¹⁶⁰ Compare Sandel *Justice What's the Right Thing to Do?* (2009) (hereinafter "Sandel *Justice*") 240-243, 251 and 260-261.

¹⁶¹ Wolff (1938) *Law Quarterly Review* 494 502-504.

¹⁶² Horwitz (1985) *West Virginia Law Review* 173 175; Colombo (2012) *Temple Law Review* 1 10; Petrin (2013) *Penn State Law Review* 1 14; Blair (2013) *University of Illinois Law Review* 785 807-808; Chopra & Arora *Company Law* 30.

¹⁶³ Colombo (2012) *Temple Law Review* 1 10-11; Pollman (2011) *Utah Law Review* 1629 1650-1652; Chopra & Arora *Company Law* 39-41.

theorists' conceptualisation of the company as a real living thing that exists as an objective fact in the extra-judicial sense of the world was questioned. This led to the emergence of the juridical reality theory,¹⁶⁴ which conceptualises the company simply as reality in the juridical sense. According to the juridical reality theory, a juristic person is equated with a natural person (accorded legal personality) insofar as it is legally necessary to answer the needs of society. The premise of this theory is thus the positive law.¹⁶⁵

The juridical reality theory can be traced back to the nineteenth century legal realists. The legal realists contended that corporate personhood theories are indeterminate.¹⁶⁶ They argued that general propositions do not decide concrete cases.¹⁶⁷ According to some commentators John Dewey's article "The historical background of corporate legal personality"¹⁶⁸ that was published in 1926 finally ended, or at least temporarily ended, the corporate personhood debate. Dewey argued that a legal person should be defined in terms of its consequences rather than by its nature. He perceived a legal person as mainly a "right-and-duty-bearing unit." A legal person is "whatever the law makes it mean."¹⁶⁹ He stated: "What 'person' signifies in popular speech, or in psychology, or in philosophy or morals, would be as irrelevant, to employ an exaggerated simile, as it would be to argue that because a wine is called 'dry', it has the properties of dry solids; or that, because it does not have those properties, wine cannot possibly be 'dry'."¹⁷⁰ Dewey maintained that corporate personhood theories were infinitely manipulable. The same theories can be used at different times both to expand and to limit the powers of juristic persons. Each corporate personhood theory has been used to serve the same and opposing ends.¹⁷¹

¹⁶⁴ In Afrikaans the "*juridiese realiteit teorie*" or the "*eenvoudige realiteit teorie*".

¹⁶⁵ Naudé *Die Regsposisie van die Maatskappydirekteur* 18.

¹⁶⁶ Horwitz (1985) *West Virginia Law Review* 173 175; Pollman (2011) *Utah Law Review* 1629 1650; Petrin (2013) *Penn State Law Review* 1 43; Dibadj (2013) *Georgia State University Review* 731 745-746.

¹⁶⁷ Horwitz (1985) *West Virginia Law Review* 173 176.

¹⁶⁸ Dewey (1926) *Yale Law Journal* 655.

¹⁶⁹ Dewey (1926) *Yale Law Journal* 655 656 and 660-662. See also Pollman (2011) *Utah Law Review* 1629 1650; Colombo (2012) *Temple Law Review* 1 10; Petrin (2013) *Penn State Law Review* 1 43, Padfield (2013) *Oklahoma Law Review* 327 343; Blair (2013) *University of Illinois Law Review* 785 786-787 and 807-808.

¹⁷⁰ Dewey (1926) *Yale Law Journal* 655 656.

The juridical reality theory conceptualises the company as a legislative tool that enables individuals to pursue certain collective goals (or in the case of a one-man company individual goals) in a more effective and convenient manner. Beyond this conception the law, in contrast perhaps to sociology and philosophy, does not need to concern itself with the nature of the company. Companies have those rights and duties that are conferred on them by legislatures and courts. These rights and duties should in turn be informed by what companies are meant to achieve and how it affects society.¹⁷² According to Hallis, “the conception of corporate personality expresses a juristic reality, that is, a reality from the juristic point of view, nothing more and nothing less.”¹⁷³ The juridical reality theory (insofar as it can be considered to be a theory) is a functional theory. It adopts a utilitarian approach. Company law is not deduced from a larger theoretical construct but rather driven by consequential concerns.¹⁷⁴

Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda and Rock adopt a strong functional approach in *The Anatomy of Corporate Law*¹⁷⁵ in the sense that they focus on the ways in which company law responds to the practical problems facing companies. They argue that the principal function of company law is to provide business enterprises with a legal form that possesses five core attributes namely, legal personality, limited liability, transferable shares, delegated management under a board structure and investor ownership. This enables entrepreneurs to transact easily through the medium of the company, lowers the costs of conducting business and addresses agency problems.¹⁷⁶ They are legal contractarians who conceptualise the company as a “nexus for contracts” (as opposed to the economic contractarians’ conceptualisation of the company as a “nexus of contracts”) in the sense that the company serves,

¹⁷¹ Dewey (1926) Yale Law Journal 655 669-670. Dewey dismissed the debate among the fiction theorists, the aggregate theorists and the real entity theorists as irrelevant as their views could be deployed to suit any purpose. See Dewey (1926) Yale Law Journal 655 673.

¹⁷² Pollman (2011) Utah Law Review 1629 1630-1631; Petrin (2013) Penn State Law Review 1 43; Blair (2013) University of Illinois Law Review 785 786.

¹⁷³ Hallis *Corporate Personality: A Study in Jurisprudence* 240; Naudé *Die Regsposisie van die Maatskappydirekteur* 18; Welling *Corporate Law in Canada* 113-114; Welling et al *Canadian Corporate Law* 127.

¹⁷⁴ Colombo (2012) Temple Law Review 1 10.

¹⁷⁵ Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda & Rock *The Anatomy of Corporate Law A Comparative and Functional Approach* (2009) (hereinafter “*The Anatomy of Corporate Law*”).

¹⁷⁶ Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 2-5.

fundamentally, as the common counterparty in numerous contracts with, amongst others, suppliers, customers and employees. For them, a core element of the firm as a nexus for contracts is its separate legal personality in the eyes of the law. The concept of the separate legal personality of the company is “a convenient heuristic formula” for describing organizational forms that enjoy the benefit of three foundational types of rules namely, entity shielding (shielding the assets of the company from the creditors of its owners), rules governing the allocation of authority (which can bind the company) and rules allowing the company to sue and be sued.¹⁷⁷ Pollman similarly argues for a functional approach, specifically in determining what constitutional rights should be afforded to companies.¹⁷⁸

Blair adopts a similar approach. She argues that when determining what rights, protections, remedies and responsibilities companies should have, we should begin with a clear understanding of the functions that personhood status plays in company law and the effectiveness of companies as business organisations and then consider each legal or constitutional issue in terms of whether the particular right, protection or remedy in question is necessary or important for carrying out those functions.¹⁷⁹ According to Blair corporate personhood plays four important functions, which she sources from the historical evolution of the company. First, it provides continuity and a clear line of succession in the holding of property and the carrying out of contracts.¹⁸⁰ Secondly, it provides an “identifiable persona” to serve as a central actor in carrying out the business activity. This persona serves as the counterparty in all the contracts that the company enters into with its various participants including managers, employees, customers, suppliers and investors. This persona can also sue and be sued in its own name and serves as the bearer of important and valuable intangible assets such as capabilities, goodwill, reputation and brand.¹⁸¹ Thirdly, corporate personhood provides a mechanism for asset partitioning. This makes it easier to commit specialized assets to the company and to lock-in those assets so that they remain committed to the

¹⁷⁷ Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 6-9.

¹⁷⁸ Pollman (2011) *Utah Law Review* 1629 1670-1675.

¹⁷⁹ Blair “The Four Functions of Corporate Personhood” in Grandori (ed) *Handbook of Economic Organisation* (2013) (hereinafter “Blair *Four Functions*”) 440; Blair (2013) *Illinois Law Review* 785 786.

¹⁸⁰ Blair *Four Functions* 441-442; Blair (2013) *University of Illinois Law Review* 785 787.

¹⁸¹ Blair *Four Functions* 441-442; Blair (2013) *University of Illinois Law Review* 785 787.

enterprise where they can realize their full potential.¹⁸² The other side of capital lock-in is limited liability. Limited liability makes it easier to raise equity capital for the company because shareholders are assured that they will not be held liable for the debts of the company.¹⁸³ Fourthly, it provides a framework for self-governance by the participants in the enterprise.¹⁸⁴ The governance structure prescribed by company law since the early nineteenth century is a managerial hierarchy topped by a board of directors that is distinct from the shareholders, managers and employees, and that has fiduciary duties to the company as well as the shareholders.¹⁸⁵ Blair argues that the first, third and fourth of these functions could have been adequately served by the device of making the company a separate entity (like a trust, for example) without the additional anthropomorphic device of making the company a “person”. However, the same could not be said for the second function. For her, the idea that the company has its own name and is able to act in that name means that it can take on an identity separate from any of its individual participants. It is to this identity that she refers to as the company’s persona.¹⁸⁶

Petrin employs the nineteenth-century realists’ and also in particular Dewey’s views as a basis to argue for a functional conceptualisation of the company. He argues that in assessing the rights and duties of companies, the focus should be on their broader economic and social functions and not on, for example, their “aggregate” or “contractual” nature. It should also not depend on attempts to extract meaning from labels such as “real” or “fictional”. Petrin identifies specific elements and considerations that should govern this alternative approach to conceptualising the

¹⁸² Hansmann & Kraakman “The essential role of organizational law” (2000) *Yale Law Journal* 387 391; Blair “Locking in capital: What corporate law achieved for business organizations in the nineteenth century” (2003) *UCLA Law Review* 387 391; Blair *Four Functions* 441-442; Blair (2013) *University of Illinois Law Review* 785 787.

¹⁸³ Hansmann & Kraakman (2000) *Yale Law Journal* 387 395; Blair (2013) *University of Illinois Law Review* 785 787.

¹⁸⁴ Blair *Four Functions* 452; Blair (2013) *University of Illinois Law Review* 785 787-788.

¹⁸⁵ Gevurtz “The historical and political origins of the corporate board of directors” (2004) *Hofstra Law Review* 89 92-95; Blair (2013) *University of Illinois Law Review* 785 788.

¹⁸⁶ Blair (2013) *University of Illinois Law Review* 785 796-799. Blair states that the corporate personhood of the company continues to be controversial. As company law developed, it took on at least three different meanings namely, the “artificial person” theory, the “contractual” (aggregate) theory and the “real entity” theory.

company.¹⁸⁷ He states that because many companies are fundamentally economic beings, economic considerations should be the starting point of the analyses.¹⁸⁸ A company has two core economic functions. First, a company has an asset partitioning function. It has its own assets, separate from those of its shareholders, directors, officers and employees. Secondly and relatedly, shareholders are not liable for the debts of a company. Limited liability minimizes the risks associated with investing and thereby assists in the accumulation of capital. It also reduces the need for investors to monitor managers and their fellow investors which, in turn, reduces the costs of investing. These attributes serve a greater economic purpose of profiting shareholders or, in the case of non-profit companies, to pursue other goals. The relevance of this is threefold. First, attempts and concepts that will weaken these core economic functions should be carefully scrutinised. Veil piercing and attempts to introduce forms of unlimited liability on shareholders are difficult to reconcile with this functional approach. Secondly, the rights accorded to companies should reflect their core economic function and purpose. It is for example justifiable to protect corporate commercial speech of a profit company because it serves the core function and purpose of that company. Thirdly, the economic function of a company should also dictate its duties. Petrin argues that on this basis, companies should incur criminal or delictual liability because it enhances loss prevention, helps to internalise costs and facilitates efficient risk allocation.¹⁸⁹

Petrin argues that the company also serves a social function and purpose. It can have a wide ranging effect (positive or negative) on the society. It can for example create and destroy employment opportunities and wealth; impact on health, safety and the environment; create tensions amongst different groups of society; develop new technologies; and effect behavioural change amongst others. These societal considerations must also be taken into account in the conceptualisation of the company and the determination of its rights and duties. It should be borne in mind that companies are also used for non-economic purposes. Companies that pursue non-economic goals should have such rights and duties that commensurate with their social, political, cultural, religious and other goals. However, all these rights must be circumscribed by

¹⁸⁷ Petrin (2013) Penn State Law Review 1 42-44.

¹⁸⁸ Petrin (2013) Penn State Law Review 1 49.

¹⁸⁹ Petrin (2013) Penn State Law Review 1 44-46 and 50.

their social effects. In the case of for-profit companies the case for granting them rights other than those pertaining to their economic function is less persuasive. It is, for example, difficult to justify granting a for-profit company the right to exercise religion. In determining the duties of for-profit companies, their social effects play an important role. Petrin asserts that companies are bearers of certain societal duties.¹⁹⁰ These societal duties must be factored into the determination of the rights and duties of companies for three reasons. First, it can help to ascertain what kinds of non-economic rights should be granted to companies. Secondly, the social element should play a role in the determination of the duties of a company. Thirdly, it can counterbalance a company's rights. Thus, even if a right conferred upon or demanded by a company is in line with its profit-making goal, it can be tempered or negated as a result of its negative social effects.¹⁹¹

The juridical reality theory is similar to the fiction theory in that it recognizes the company's dependence on the law to endow it with legal personality. But the juridical reality theory takes a more pragmatic and positivist approach than the fiction theory by postulating that the law accords such rights, duties and capacities on companies as are necessary to enable them to achieve their goals in society. The juridical reality theory also differs from the fiction theory in that it perceives the legal personality of the company to be a juristic reality and not a fiction. The juridical reality theory does not concern itself with the extra-judicial dimensions of the company. So, whilst the legal personality of the company is real from a juristic point of view, the juridical reality theory does not go as far as the real entity theory that views the company as a real living entity that exists as an objective fact not only in the juridical, but also the extra-judicial sense of the word.

5.2 Arguments for and against the juridical reality theory

The attractiveness of the juridical reality theory can be summarised in three points. First, it is so humble in declaring what a juristic person is that it finds application in a number of diverse juristic persons and their functions in a changing society. Secondly, the answer to the question whether the juristic person is a reality or fiction is convincing in its simplicity. The theory holds that the legal subjectivity of a juristic person is as real as it is with a natural person. It may not be observed through our senses but that does not make it a fiction. Whether the juristic person is a

¹⁹⁰ Petrin (2013) Penn State Law Review 1 46-48.

¹⁹¹ Petrin (2013) Penn State Law Review 1 48-49.

person in the extra-juridical sense is irrelevant. Thirdly, it is flexible as it is based on positive law, having regard to the needs of society. It allows the legislature and judiciary to ignore the separate personality of the juristic person in certain instances and to confer certain attributes of legal personality upon certain entities or associations of natural persons but not to others.¹⁹² The theory also does not categorically confer a capacity to form a will and a capacity to act on juristic persons.¹⁹³

In its simplest form, the juridical reality theory can be criticised in that it does not provide an answer to the question what rights and duties should be accorded to the company? Padfield states that, the judicial reality theory seems to beg the question of whether the company's core functions can be sufficiently defined without some reference as to its nature.¹⁹⁴ Since the rights and duties of the company are determined by reference to its functions, he questions whether a purely functional analysis advances the discussion meaningfully beyond where the theories of the company has already brought us. The stance that a legal person is whatever the law makes it mean reminds one of Lewis Carroll's Humpty Dumpty: "When I use a word," said Humpty Dumpty, "it means just what I choose it to mean – neither more nor less;" and when Alice objected, "The question is whether you can make words mean so many things," Humpty Dumpty replied, "The question is which is to be the master – that's all."¹⁹⁵

It therefore appears that a purely functional analysis is either incomplete without or merely overlaps with company theory. Either way, company theory cannot be ignored.¹⁹⁶ Horwitz states that, whilst there may be some truth in the proposition that general propositions do not decide concrete cases, most important legal abstractions or theories, when viewed in their specific historical contexts, do have determinate legal or political significance and more limited meanings.¹⁹⁷

¹⁹² Naudé *Die Regsposisie van die Maatskappydirekteur* 18.

¹⁹³ Naudé *Die Regsposisie van die Maatskappydirekteur* 19.

¹⁹⁴ Padfield (2013) *Oklahoma Law Review* 327 345.

¹⁹⁵ Machen (1911) *Harvard Law Review* 253.

¹⁹⁶ Padfield (2013) *Oklahoma Law Review* 327 345-346.

Petrin accepts that his functional approach can be criticised as being uncertain in that there can be different views on the content of a company's economic and social function, purpose and effect. He nevertheless argues that, it provides a more useful, measurable, transparent and goal-orientated approach by which to think about legal entities and their rights and duties than that of the traditional corporate personhood theories.¹⁹⁸

The juridical reality theory can also be criticised on the basis that it ignores the extra-judicial dimensions of the company. A company does not operate only in the legal sphere. It also has philosophical, organizational, physiological, sociological, political, spiritual and economical dimensions. The company is integral to society.¹⁹⁹

A further weakness of the juridical reality theory is that it lacks a strong normative or philosophical basis. It takes a pragmatic and positivist approach to the corporate personhood question.

The application of the corporate personhood theories in the United Kingdom, Canada, India and South Africa are considered briefly in the next two sections. A comprehensive discussion of this subject however falls outside the scope of this thesis. The focus is the particular jurisdiction's treatment of the corporate personhood or separate legal personality of the company, the capacity of the company and the legal position of the directors in relation to the company.

6 APPLICATION OF THE CORPORATE PERSONHOOD THEORIES IN THE UNITED KINGDOM, CANADA AND INDIA

It is important to accentuate the divergent historical paths of the evolution of the company in the United Kingdom and the United States of America in order to properly understand the different approaches that the company laws of the United Kingdom, Canada, India and South Africa adopt to the corporate personhood of the company. South African company law was originally firmly

¹⁹⁷ Horwitz (1985) West Virginia Law Review 173 175-176.

¹⁹⁸ Petrin (2013) Penn State Law Review 1 53

¹⁹⁹ See Ripken (2009) Fordham Journal of Corporate & Financial Law 97 for a comprehensive discussion of the other dimensions of the company.

rooted in the company law of the United Kingdom. However, since 1973 the two legal systems started to part ways and the gap between the two systems has widened substantially since then. Presently, the underlying philosophy and approach of South African company law is more aligned with that of Canadian corporate law. Canadian corporate law was in turn heavily influenced by American corporate law. Corporate law in both the United States of America and Canada is based on the concept of the corporation (*universitas*). Indian company law on the other hand is still firmly rooted in that of the United Kingdom. Both these systems are based more on partnership (*societas*) and contractual principles. There has thus been a fundamental shift in the underlying philosophy and approach of South African company law.

6.1 The divergent historical paths of the evolution of the company and corporate personhood in the United Kingdom and the United States

The evolution of corporate personhood in the United Kingdom followed its own unique historical path. Corporate personality became an attribute of the normal British company only at a comparatively late stage in its development.²⁰⁰ As indicated in the historical analyses, there were two main lines of development that resulted in the formation of the joint stock company in the United Kingdom. These were the medieval partnership (*societas*) and the growth of the idea of the corporation (*universitas*).²⁰¹ Corporations, which initially consisted mostly of ecclesiastical and public bodies, had corporate personality conferred upon them by charter from the crown or their feudal lords, or were deemed by prescription to have received such grant.²⁰² It is also an established common law principle that the debts of a corporation are not the debts of its members.²⁰³ The *societas* (which became the typical English partnership), on the other hand, was

²⁰⁰ Davies & Worthington *Gower & Davies Principles of Modern Company Law* 9th ed (2012) (hereinafter “*Gower & Davies Principles of Modern Company Law* 9th ed”) 35.

²⁰¹ Scott *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720, Volume 1 The General Development of the Joint-Stock System to 1720* (1912) (hereinafter “*Scott The General Development of the Joint-Stock System to 1720*”) 1; Cooke *Corporation, Trust and Company: An Essay in Legal History* (1950) (hereinafter “*Cooke Corporation, Trust and Company*”) 47; Cilliers *A Critical Enquiry into the Origin, Development and Meaning of the Concept 'Limited Liability' in Company Law* LLD thesis (1963) University of South Africa 22; Delpont “The Division of Powers in a Company” in Visser, Pretorius & Koekemoer (ed) *Essays in Honour of Frans Malan, former Judge of the Supreme Court of Appeal* (2014) (hereinafter “*Essays in Honour of Frans Malan*”) 81-84; Harris (2015) *Seattle University Law Review* 537 541.

²⁰² Cooke *Corporation, Trust and Company* 19-21; Gower *Gower's Principles of Modern Company Law* 5th ed (1992) (hereinafter “*Gower's Principles of Modern Company Law* 5th ed”) 19; Welling *Corporate Law in Canada* 90; Chopra & Arora *Company Law* 8.

not a separate legal person.²⁰⁴ The joint stock company was born during the course of the sixteenth and seventeenth centuries when the partnership principle of trading on joint account was adopted by the regulated companies and they became joint commercial enterprises instead of trade protection associations.²⁰⁵

Prior to the promulgation of the so-called *Bubble Act*²⁰⁶ (the *Bubble Act*) in 1720 joint stock companies (and in fact all companies or corporations created by charter) were separate legal persons. The chartered companies had the legal capacity and powers of natural persons and were not restricted to the business purposes listed in their charters.²⁰⁷

The *Bubble Act* had a telling, albeit unintentional, effect on the development of the company in the United Kingdom. It restricted incorporated companies (which were in law separate legal

²⁰³ *Anon (1441)*, Y.B. 19 Hy. VI, 80; *Edmonds v Brown (1668)*, 1 Lev. 237; *Case of the City of London (1680)*, 1 Ventr. 351, 86 ER 226; *Cooke Corporation, Trust and Company* 77; Cilliers 25; Lombard “n Historiese perspektief op die ontwikkeling van die maatskappy as ondernemingsvorm met besondere verwysing na die posisie van maatskappyskuldeisers en die aanspreeklikheid van direkteure (deel 1)” (2002) DJ 236 241; *Welling Corporate Law in Canada* 92. However, this asset partitioning was to an extent negated by the fact that certain corporations had the power to make calls or “levitations” on its members. See *Salmon v The Hamborough Company (1671)*, 1 Ch. Cas. 204.

²⁰⁴ Scott *The General Development of the Joint-Stock System to 1720* 1-2; *Cooke Corporation, Trust and Company* 46-47; Cilliers 25. The other form of partnership was the *commenda*. The *commenda* was a partnership in which one of the partners (the *commendator*) supplied the capital to another partner (the *commendatarius*) without actively taking part in the management of the venture. The liability of the *commendator* was limited to the capital that he advanced. In a more advanced form two additional practices were incorporated: The continuance of the partnership for a definite or indefinite period and the growth in the contributions of capital until a number of investors supplied one or more managing partners with capital. This is an approach nearly to the modern company except that it lacks the element of incorporation. The *commenda* is the direct ancestor of the French *société en commandite* and was only introduced in England in 1907 by the *Limited Partnerships Act, 1907 (7 Edw c 24)*. See Formoy *The Historical Foundations of Modern Company Law* (1923) for a general discussion of limited partnerships.

²⁰⁵ Formoy *The Historical Foundations of Modern Company Law* 1-5; Cilliers 28-32; Micklethwait & Wooldridge *The Company a Short History of a Revolutionary Idea* (2003) (hereinafter referred to as “Micklethwait & Wooldridge *The Company*”) 17; *Gower’s Principles of Modern Company Law* 5th ed 20-21; Blackman “Companies” in Joubert (ed) *LAWSA vol 4 part 1* (1995) (hereinafter “LAWSA vol 4 part 1”) par 4; Lombard (2002) DJ 236 239; Blair (2013) *University of Illinois Law Review* 785 792; *Terreblanche Western Empires, Christianity and the Inequalities between the West and the Rest 1500-2010* (2014) (hereinafter “Terreblanche *Western Empires*”) 102 and 118; Harris (2015) *Seattle University Law Review* 537 541.

²⁰⁶ 6 *Geo 1 c 18*.

²⁰⁷ *The Case of Sutton’s Hospital (1612)* 10 Co Rep 23a, 77 ER 973. See also *Welling Corporate Law in Canada* 91 and the Canadian case of *Communities Economic Development Fund v Canadian Pickles Corporation [1991]* 3 SCR 388, 85 DLR 4th 88 (*Man SCC*) 96.

persons) in the United Kingdom for the period of 105 years that the Act remained in force.²⁰⁸ During this period there was a general distrust and scepticism of the corporate form. As a result, there was a reluctance to grant incorporation by charter or statute.²⁰⁹ This led to the proliferation of unincorporated or deed of settlement companies as an alternative device to incorporated companies.²¹⁰ These unincorporated or deed of settlement companies were a cross between the partnership and the trust concepts.²¹¹ They were not separate legal persons and members could not limit their personal liability.²¹² Externally shareholders were in exactly the same position as partners in an ordinary partnership.²¹³ The management of these unincorporated or deed of settlement companies was delegated to a committee of directors. The nature of this delegation was the same as in the partnership situation. The powers of the directors were not original and could be revoked.²¹⁴

²⁰⁸ *Gower's Principles of Modern Company Law* 5th ed 27-28; See also Cilliers 47.

²⁰⁹ *Cooke Corporation, Trust and Company* 88-92; Cilliers 48-50; *Gower's Principles of Modern Company Law* 5th ed 29; *Welling Corporate Law in Canada* 93. Incorporations by private acts were mainly restricted to the field of semi-public utilities such as water, gas and canals.

²¹⁰ *Cooke Corporation, Trust and Company* 84. Had authorities granted incorporation more readily during this period, incorporated companies might have become the dominant type, as was the case in the United States. The United States inherited the corporation from English law as it stood at the close of the eighteenth century, but without its negative connotation or bad track record. See *Gower's Principles of Modern Company Law* 5th ed 29.

²¹¹ The company was normally formed by a "deed of settlement" in which the subscribers would agree to be associated in an enterprise with a prescribed joint stock divided into a specified number of shares. The management was delegated to a committee of directors and the company's property would be vested in a separate body of trustees. See Formoy *The Historical Foundations of Modern Company Law* 40-41; *Cooke Corporation, Trust and Company* 85-87; Cilliers 60.

²¹² Cilliers 63; *Gower's Principles of Modern Company Law* 5th ed 32; Lombard (2002) DJ 236 244-245. Limited liability appeared to be a secondary consideration during the eighteenth century. See Cilliers 63; *Gower's Principles of Modern Company Law* 5th ed 32; Lombard (2002) DJ 236 244-245. However by the nineteenth century limited liability became openly recognised as a factor of prime importance. Any stipulation in the deed of settlement limiting the liability of individual members was only operative between the members themselves and could not bind a third party, unless that third party had expressly contracted on those terms. It became the practice to include such stipulations in contracts of the formal type, such as insurance contracts, where such clauses were incorporated in the policies. See Formoy *The Historical Foundations of Modern Company Law* 42-43; *Cooke Corporation, Trust and Company* 86-87; *Gower's Principles of Modern Company Law* 5th ed 32-33; Lombard (2002) DJ 236 245-246.

²¹³ Formoy *The Historical Foundations of Modern Company Law* 41; Cilliers 60; *Gower's Principles of Modern Company Law* 5th ed 32.

²¹⁴ Formoy *The Historical Foundations of Modern Company Law* 40-41; *Cooke Corporation, Trust and Company* 85-87; Cilliers 60; Delport "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 82-83.

The main purpose of the *Joint Stock Companies Act 1844*²¹⁵ was to legitimise the activities of these unincorporated or deed of settlement companies by registration under the Act.²¹⁶ The Act set up the structure of modern company law, at least in the United Kingdom.²¹⁷ Noticeably the Act defined companies as “partnerships” with capital divided in freely transferable shares or having more than 25 members.²¹⁸ The focus of the Act was clearly on the new deed of settlement companies and the theory of corporate personality was swept under the rug as these companies were essentially partnerships acting under a statutory scheme.²¹⁹ Companies were subject to the *ultra vires* rule.²²⁰ They did not have the capacity and power of a fully capable adult individual. They were “more like a child, though an odd child, whose legal capacities were determined by constitutional documents.”²²¹ The Act laid down the principle that company direction was generally to be effected through two primary bodies namely, the general meeting of members and the board of directors (elected by the members).²²² Limited liability only came with the *Limited Liability Act 1855*.²²³

The *Companies Clauses Consolidation Act 1845*²²⁴ set forth the standard provisions normally included in private statutes of incorporation. After the promulgation of this Act these terms were

²¹⁵ 7 & 8 Vict. , c. 110.

²¹⁶ Section 1 of the *Joint Stock Companies Act 1844* supra. See also Welling *Corporate Law in Canada* 95; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 83.

²¹⁷ *Cooke Corporation, Trust and Company* 138; Blair (2013) *University of Illinois Law Review* 785 792-793.

²¹⁸ Section 2 of the *Joint Stock Companies Act 1844* supra. Insurance companies were specifically included and banks specifically excluded. See also Formoy *The Historical Foundations of Modern Company Law* 67-68; *Cooke Corporation, Trust and Company* 137; Cilliers 102; Lombard “’n Historiese perspektief op die maatskappy as ondernemingsvorm met besondere vewysing na die posisie van maatskappyskuldeisers en die aanspreeklikheid van direkteure (deel 2)” (2003) DJ 32 32-33; LAWSA vol 4 part 1 9.

²¹⁹ Welling *Corporate Law in Canada* 93.

²²⁰ This was settled in *Ashbury Railway and Iron Carriage Co Ltd v Riche* (1875) LR 7 HL 653. See also Welling *Corporate Law in Canada* 93-94. According to the *ultra vires* doctrine any act outside the scope of a company’s objects is void.

²²¹ Welling *Corporate Law in Canada* 94.

²²² *Mongalo Corporate Law and Corporate Governance A Global Picture of Business Undertakings in South Africa* (2003) (hereinafter “*Mongalo Corporate Law and Corporate Governance*”) 186-187.

²²³ 18 & 19 Vict, c. 133.

²²⁴ 8 & 9 Vict. c.16.

incorporated by reference, thus materially shortening the process of statutory incorporation.²²⁵ The *Companies Clauses Consolidation Act 1845*²²⁶ was the first to address the division of power in the company.²²⁷ Section 90 provided:

“The directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special Act to be transacted by a general meeting of the company; but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special Act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting.”

Section 91 of the Act reserved certain powers for the general meeting.²²⁸

The *Joint Stock Companies Act 1856*²²⁹ was the first of the modern Company Acts in the United Kingdom.²³⁰ It was passed in the height of *laissez-faire* and allowed incorporation to be obtained on complying with prescribed formalities and without being subjected to onerous requirements.²³¹ The Act prohibited partnerships of more than 20 persons unless they were constituted as a company under the Act.²³² Conversely, if the number of shareholders in a company fell below

²²⁵ *Cooke Corporation, Trust and Company* 141; *Gower's Principles of Modern Company Law* 5th ed 40.

²²⁶ *Supra*.

²²⁷ Delport “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 83.

²²⁸ For example to elect and remove directors, the choice of auditors, the determination of the remuneration of the directors and certain other functionaries, the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital and the declaration of dividends.

²²⁹ 19 & 20 Vict. c. 47.

²³⁰ Formoy *The Historical Foundations of Modern Company Law* 123; Cilliers 149; *Gower's Principles of Modern Company Law* 5th ed 45; LAWSA vol 4 part 1 10.

²³¹ Section 3 of the *Joint Stock Companies Act 1856* supra. See also Formoy *The Historical Foundations of Modern Company Law* 123; *Cooke Corporation, Trust and Company* 159; Cilliers 154-158; *Gower's Principles of Modern Company Law* 5th ed 46.

²³² Section 4.

seven, it became a partnership and could not carry on business as a company.²³³ The deed of settlement (as a constitutive document) was replaced by the memorandum and articles of association.²³⁴ The division of powers in the company was no longer contained in the Act itself but relegated in the model articles contained in Table B of the Act. Limitation of liability was integrated into the structure of the Act. The Act still retained the unlimited company as the basic form,²³⁵ allowing liability to be limited but only requiring the use of the suffix “limited” for this privilege.²³⁶ Limitation of liability was based on freedom of contract and statutory notice.²³⁷

The next important development in the United Kingdom, pertaining to the corporate personhood of the company, was the seminal case of *Salomon v Salomon & Co*²³⁸ that came before the House of Lords in 1897. The importance of this case was that the House of Lords held that a joint stock company registered under the *Companies Act 1862*²³⁹ was a juristic person separate from its

²³³ Section 39. See also Formoy *The Historical Foundations of Modern Company Law* 123 and 125-126; Cooke *Corporation, Trust and Company* 159; Cilliers 169-172. Talbot states that the development of the company as a distinct business form in England by the end of the nineteenth century necessitated a corresponding delineation from the partnership form. As a result, the privilege of limited liability was specifically denied to general partners. It also explains the reluctance of the judiciary in England to deviate from the attribute of the separate personality of the company and to pierce the corporate veil. This must be contrasted with the position in the United States which did not make such a sharp delineation. Most states had adopted the limited partnership form from the 1820s onwards. The American judiciary has also been more willing to pierce the corporate veil. See Talbot *Critical Company Law* (2008) 12-14.

²³⁴ Formoy *The Historical Foundations of Modern Company Law* 123-124; Cooke *Corporation, Trust and Company* 159; Cilliers 158-159; Gower's *Principles of Modern Company Law* 5th ed 45. Signature of the memorandum was to import a covenant by the person signing, and that person's heirs, executors and administrators to conform to all the regulations of such memorandum and articles, subject to the provisions of the Act. See sections 7, 9 and 10.

²³⁵ Cilliers 151-153 mentions several historical reasons for this. This includes the important part that the law of partnership played in the development of company law; that the practice of imposing a certain degree of liability for corporate debts on members was well established; that the concept of limitation of liability had been in existence since the sixteenth century; and the critical attitude that prevailed as a result of the bursting of the South Sea Bubble and the *Bubble Act* with the result that full incorporation was considered unsuitable.

²³⁶ Cilliers 160-168; Gower's *Principles of Modern Company Law* 5th ed 45-47; Henning & Wandrag “'n Oorsig van die herkoms van die private maatskappy en die huidige posisie in enkele regstelsels” (1993) DJ 14 17; LAWSA vol 4 part 1 10; Lombard (2003) DJ 32 38-39.

²³⁷ Cilliers 160-163 and 167.

²³⁸ 1897 AC 22 (HL); 1895-99 All ER Rep 33 (HL).

²³⁹ 25 & 26 Vict. c. 89.

shareholders and that the members were not liable for the company's debts.²⁴⁰ Lord McNaughton said:

“The company is at law a different person altogether from the subscribers to the memorandum; and ... the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable ... except to the extent and manner provided by the Act. That is, I think, the declared intention of the enactment.”²⁴¹

It is important to note is that the House of Lords came to the aforesaid conclusion because that is what the Act, in the Court's interpretation thereof, provided.²⁴² It is further important to note that the *Salomon* case did not deal with the corporate personhood of companies that were not registered under the *Companies Act 1862*.²⁴³ It did not deal with the position of a corporation (*universitas*),²⁴⁴ which had long been regarded as a legal person.²⁴⁵ It is therefore not accurate to state that this decision established the principle that a company (in general) is a separate legal person.

²⁴⁰ For a general discussion of this case, see Pretorius, Delpont, Havenga & Vermaas *Hahlo's South African Company Law through the Cases* 5th ed (1991) (hereinafter “Pretorius et al *Hahlo's Company Law*”) 14- 17; Welling *Corporate Law in Canada* 96-97; Rajak “Director and officer liability in the zone of insolvency: A comparative analyses” (2008) PELJ 1 6-10; Talbot *Critical Company Law* 24-29; Welling et al *Canadian Corporate Law* 128-131; Abbey *An Insightful Study of the Oppression Remedy under South African and Canadian Corporate Law* Master of Laws Thesis (2012) University of Western Ontario, Canada 62-66; Chopra & Arora *Company Law* 11-15; Dine & Koutsias *Company Law* 7th ed (2009) 33-35; Gower & Davies *Principles of Modern Company Law* 9th ed 35-39.

²⁴¹ *Salomon v Salomon & Co* supra 51.

²⁴² Welling *Corporate Law in Canada* 96-97. Welling makes the interesting point that the Act did not state this particularly clearly. Section 7 of the *Companies Act 1862* provided that the liability of members “may” be limited to the amount of unpaid shares held by the shareholders. Section 18 provided that upon registration of the memorandum of incorporation “the Subscribers” shall be a body corporate capable of exercising all the functions of an incorporated company, but with such liability on the member as provided for in the Act. The common law view is that the corporation itself (not its members) is a body corporate. Section 38 further provided that, in the event of the liquidation of the company, the members shall be liable to contribute an amount sufficient for payment of the debts and liabilities of the company with the qualification that the contribution shall not exceed the amount of the members' unpaid shares. The court also held that shareholders could not be held liable except to the extent provided for in the Act. On face value this means that the corporate veil could only be pierced or lifted if the Act so provided (which it did not).

²⁴³ *Supra*.

²⁴⁴ Including a company registered by charter or statute.

²⁴⁵ Welling *Corporate Law in Canada* 98.

The modern company in the United Kingdom thus “evolved from the unincorporated partnership, based on mutual agreement, rather than the corporation, based on grant from the state, and owes more to partnership principles than to rules based on corporate personality.”²⁴⁶

The historical development of corporate personhood in the United States of America followed a totally different path. The *Bubble Act* appears, wisely, to have been ignored in the United States despite the fact that it had been extended to the colonies by statute in 1741.²⁴⁷ In contrast to the United Kingdom, the corporation did not have a negative connotation or bad track record.²⁴⁸ Incorporation by charter or special act was granted far more readily than in the United Kingdom and was very general in form. There was no reason to develop unincorporated companies.²⁴⁹ Corporations were responsible for the very existence of the newly independent United States of America and provided some of the vital infrastructure of the new country such as universities, banks, churches, canals, railways and roads.²⁵⁰ By the end of the eighteenth century, the corporation was widely used in the United States.²⁵¹ This led to an early trend towards general acts of incorporation and a culture of non-interference by the states.²⁵² The first general Act of incorporation for business concerns was passed in New York State in 1811.²⁵³

²⁴⁶ Gower “Some contrasts between British and American corporation law” (1956) *Harvard Law Review* 1369 1372-1373.

²⁴⁷ *14 Geo. 2, c. 37 (1741)*. See Gower (1956) *Harvard Law Review* 1369 1372.

²⁴⁸ *Cooke Corporation, Trust and Company* 92-93; Blair (2013) *University of Illinois Law Review* 785 793-794.

²⁴⁹ *Cooke Corporation, Trust and Company* 92-93; Gower (1956) *Harvard Law Review* 1369 1372; Blair (2013) *University of Illinois Law Review* 785 792; Talbot *Critical Company Law* 5-7.

²⁵⁰ Micklethwait & Wooldridge *The Company* 43; Goforth “A corporation has no soul - modern corporation, corporate governance and involvement in the political process” (2010) *Houston Law Review* 617 625; Talbot *Critical Company Law* 7; Pollman (2011) *Utah Law Review* 1629 1633-1634; O’Kelley “The evolution of the modern corporation: Corporate governance reform in context” (2013) *University of Illinois Law Review* 1002 1009; Blair (2013) *University of Illinois Law Review* 785 793-794 and 805.

²⁵¹ *Cooke Corporation, Trust and Company* 92-93; Blair (2013) *University of Illinois Law Review* 785 793-794.

²⁵² Berle & Means *The Modern Corporation* 126; *Cooke Corporation, Trust and Company* 93-94; Micklethwait & Wooldridge *The Company* 45-46; Goforth (2010) *Houston Law Review* 617 627-628; Pollman (2011) *Utah Law Review* 1629 1640.

²⁵³ *Cooke Corporation, Trust and Company* 93-94.

Business in the United States was never troubled with the difference between corporate and incorporate form after independence. It moved rapidly towards corporations on the one hand and partnerships on the other.²⁵⁴ Modern American corporation law thus owes less to partnership and contractual principles than does that of the United Kingdom. Corporate personality was conferred by statute. American law distinguished the corporation as a public body rather than a creature of contract earlier than English law. This divergent historical development also explains the use of the terms “corporation” and “corporation law” (as well as the use of the suffix “incorporated” in American corporation names), as compared with the English use of the terms “company” and “company law” (and the use of the suffix “limited” in English company names).²⁵⁵

Where company law in the United Kingdom is based more on partnership (*societas*) and contractual principles, corporation law in the United States is based on the corporation (*universitas*).

6.2 Application of the corporate personhood theories in the United Kingdom

6.2.1 The separate legal personality of the company

Section 16 of the *Companies Act 2006*²⁵⁶ (the *Companies Act 2006*) of the United Kingdom provides that the registration of a company has the effect that “[t]he subscribers to the memorandum, together with such other persons as may from time to time become members of the company, are a body corporate by the name stated in the certificate of incorporation.”²⁵⁷ The section specifically confers separate legal personality on the company. What is noticeable is that the “subscribers” or “members” are deemed to be the body corporate. In other words, the company is seen as the aggregation of its members. This follows the aggregate theory’s conceptualisation of the company (although in contrast with the aggregate theory a company is

²⁵⁴ Cooke *Corporation, Trust and Company* 94.

²⁵⁵ Cooke *Corporation, Trust and Company* 94; Gower (1956) *Harvard Law Review* 1369 1372. See also Blair (2013) *University of Illinois Law Review* 785 792; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 89.

²⁵⁶ C 46.

²⁵⁷ Section 16(1) and (2) of the *Companies Act 2006*. This provision is probably necessary as the unincorporated company remains the basic form of company in the United Kingdom.

specifically determined to be “a body corporate”) and harks back to the partnership (*societas*) and contractual principles on which the British company is based. This aggregate conception of the company is buttressed by section 7 of the Act, which provides that a company is formed by one or more persons subscribing to the memorandum of association and on compliance with the requirements of the Act. Section 33 further provides that the “provisions of a company’s constitution binds the company and its members to the same extent as if there were covenants on the part of the company and each member to observe its provisions.”²⁵⁸ A company in the United Kingdom can be a limited or an unlimited company.²⁵⁹ In an unlimited company there is no limit on the members’ liability.²⁶⁰

The judiciary and the legislature have made exceptions to the principle of the separate legal personality of the company. This is traditionally referred to as the piercing or lifting of the corporate veil. The “corporate veil” is a metaphorical reference to the veil or curtain that is drawn between the company on the one hand and its shareholders and directors on the other. It is a consequence of the separate legal personality of the company – the fact that a company is a legal person distinct from its shareholders and directors.²⁶¹ Where the veil is “pierced” the liabilities of the company are treated as those of its shareholders and directors. In other words, the separate personality or identity of the company is disregarded. Where the veil is “lifted” the separate personality or identity of the company is not necessarily disregarded. The veil is merely lifted by taking into account who the company’s shareholders or directors are.²⁶² The piercing or lifting of

²⁵⁸ This statutory contract clause (indicative of a contractarian model or type of company constitution) is a legacy of the unincorporated deed of settlement companies that became prevalent after the promulgation of the *Bubble Act*. See Moore *Corporate Governance* 139-141.

²⁵⁹ Section 3 of the *Companies Act 2006*. See also Hanninghan “Companies” in MacKay *Halsbury’s Laws of England* 5th ed (2009) Vol 14 (hereinafter “Hanninghan *Companies*”) paras 81 and 102; Gower & *Davies Principles of Modern Company Law* 9th ed 19.

²⁶⁰ Not surprisingly, very few unlimited companies are incorporated. See Gower & *Davies Principles of Modern Company Law* 9th ed 19.

²⁶¹ Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 41; Chopra & Arora *Company Law* 161.

²⁶² Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 41 and 46-47; Chopra & Arora *Company Law* 134. See also *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR; *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 4 All ER 769 779. Delpont states that there is uncertainty about the significance of the difference between the piercing and lifting of the corporate veil. See Delpont *Henochsberg on the Companies Act 71 of 2008* vol 1 (2011) (Loose-leaf, update October 2014) (hereinafter “Delpont *Henochsberg vol 1*”) 85-86.

the corporate veil is one of the most litigated issues in company law. Yet it remains amongst the least understood and most confused areas of company law.²⁶³ The theoretical justification of the piercing of the corporate veil is founded in the fiction theory (and perhaps to a lesser extent the aggregate and juridical reality theories).

In the United Kingdom, the corporate veil can be pierced or lifted in terms of specific statutory provisions or the common law. There is no general statutory provision in the *Companies Act 2006* that provides for the piercing of the corporate veil.²⁶⁴ But the Act makes provision for the personal liability of certain persons (especially those in control of the company), in other words the lifting of the corporate veil, under certain specific circumstances.²⁶⁵

Outside specific statutory provisions, the doctrine of piercing or lifting the corporate veil plays a small role in the United Kingdom.²⁶⁶ But the courts have occasionally deemed it appropriate to pierce the corporate veil in terms of the common law. The jurisprudence regarding the circumstances under which they are prepared to do so has long been plagued by inconsistencies and uncertainty. The only principle that can be derived from the case law is that the courts will look at the human reality behind the company if the interest of justice provides a compelling reason to do so.²⁶⁷

The courts in the United Kingdom have also been prepared to lift the corporate veil in terms of the common law. One instance where the courts have been prepared to do so is if there is an

²⁶³ Chopra & Arora *Company Law* 136.

²⁶⁴ In contrast with section 20(9) of the South African Companies Act 71 of 2008.

²⁶⁵ This includes section 214 (wrongful trading), section 767 (premature trading) and section 993 (fraudulent trading) of the *Companies Act 2006*. See Lombard *Directors' Duties to Creditors* LLD thesis (2006) University of Pretoria 76-81; Key *Company Directors' Responsibilities to Creditors* (2007) 23-281 and Gower & Davies *Principles of Modern Company Law* 9th ed 225- 250 for a general discussion of these sections and sections 213 and 214 of the *Insolvency Act 1986* (C 62)(that deal with fraudulent trading).

²⁶⁶ Chopra & Arora *Company Law* 229-234; Gower & Davies *Principles of Modern Company Law* 9th ed 223. For a general discussion of the circumstances under which the courts are prepared to lift the corporate veil in terms of the common law see Gower & Davies *Principles of Modern Company Law* 9th ed 217-223.

²⁶⁷ Dine & Koutsias *Company Law* 21-24; Chopra & Arora *Company Law* 233-261; Gower & Davies *Principles of Modern Company Law* 9th ed 214-223. In *Re Polly Peck International plc* [1996] 2 All ER 433 447 the court stated that piercing the veil "is a vivid but imprecise metaphor".

underlying partnership intention between the shareholders of a company. These companies are sometimes referred to as “domestic companies” or “quasi partnerships”.²⁶⁸ In *Ebrahimi v Westbourne Galleries*²⁶⁹ the House of Lords stated “there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.”²⁷⁰ This approach finds justification in the aggregate theory’s conception of the company.²⁷¹ The courts in the United Kingdom have also sometimes relied on agency principles to impose liability on directors or controlling shareholders who treat the company as merely a means to further their own private goals. The company is regarded as the “agent”, “alter ego”, “puppet” or “instrumentality” of the directors or controlling shareholders. In these cases, the separate legal personality of the company is still recognised and the practical effect of lifting the corporate veil is achieved through agency principles.²⁷² The courts have also treated subsidiary companies as the agents of their holding company in certain circumstances.²⁷³

6.2.2 The capacity of the company

Historically the objects clause of a company played an important role in the United Kingdom. A company was required to state its objects in its memorandum. According to the *ultra vires* doctrine, a company existed in law only for the purposes of its objects and any objects that were reasonably incidental or ancillary thereto. In other words, the legal capacity of the company was determined by its objects clause. The external effect of the *ultra vires* doctrine was that any

²⁶⁸ Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42 and 50-51.

²⁶⁹ [1972] 2 All ER 492.

²⁷⁰ [1972] 2 All ER 492 500.

²⁷¹ Welling makes the point that a company and its shareholders can be partners if the requisites of a partnership is present. The partnership can even exist even though there is not an express partnership agreement. If anything this reinforces the separate legal personality of the company. Unfortunately in the past, when corporations acted as partners or agents of their shareholders “judges often missed the simple analogy and slipped back into the familiar rhetoric of ‘piercing the corporate veil.’” See Welling *Corporate Law in Canada* 140-143.

²⁷² *Wallerstein v Moir* [1974] 3 All ER 217 (CA) 238; *DeWitt Truck Brokers Inc v W Ray Flemming Fruit Co* 540 F. 2d 681 (4th Cir. 1976) 685-687; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42 and 52-53.

²⁷³ *Smith, Stone & Knight Ltd v Lord Mayor, Aldermen Citizens of the City of Birmingham* [1939] 4 All ER 116; *The Albazero* [1975] 3 All ER 21 (CA) 21; *Adams v Cape Industries plc* [1991] 1 All ER 929 (CA) 1016; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42 and 53-57.

action outside those objects were null and void. The internal consequences of an *ultra vires* act was that directors could be held liable for a breach of their fiduciary duties. Shareholders were also entitled to restrain the company from performing such an act.²⁷⁴ This approach was rooted in the fiction theory.

The position is substantially different under the *Companies Act 2006*. Section 16(3) provides that the company “is capable of performing all the functions of an incorporated company.”²⁷⁵ A company is no longer required to have an objects clause. Section 31(1) of the Act provides, that unless a company’s articles specifically restrict the objects of the company, its objects are unrestricted. Section 39 further provides that the validity of any act by the company shall not be called into question on the grounds of lack of capacity by reason of anything in the company’s constitution.²⁷⁶ Thus, even if a company’s constitution contains an objects clause, it will not affect the validity of any act exceeding those objects. A company can also amend its objects.²⁷⁷ The result is that the *ultra vires* doctrine has no external effect insofar as it is based on the company’s objects clause.²⁷⁸ A director acting contrary to the objects clause can however be held liable internally by virtue of the provisions of section 171 of the *Companies Act of 2006*. Section 171 further requires a director to act in accordance with a company’s constitution. The *ultra vires* doctrine accordingly still has an internal effect.²⁷⁹ This approach signifies a move away from the fiction theory and is more in line with the real entity’s conceptualisation of the company.

²⁷⁴ The *ultra vires* doctrine was first applied to joint stock companies by the House of Lords in *Ashbury Railway Carriage and Iron Co Ltd v Riche* supra. The next leading case of the House of Lords on this doctrine was *Attorney-General v Great Eastern Railway Co (1880) 5 APP CAS 473: (1874-80) All ER Rep Ext 1459 (HL)*. See also *Re Horsley & Weight Ltd [1982] 3 All ER 1045 (CA)*; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1985] 3 All ER 52 (ChD)*; Cassim FHI “Corporate Capacity, Agency and the Turquand Rule” in *Contemporary Company Law* 163-166; Davis (ed) *Companies and Other Business Structures in South Africa* 3rd ed (2013) (hereinafter “*Davis Companies and Other Business Structures*”); Singh *Company Law* 59-62.

²⁷⁵ This provision begs the question what the capacities of a company are.

²⁷⁶ Section 20(1) of the *Companies Act of 2008* contains a similar provision,

²⁷⁷ Section 31(2) and (3) of the *Companies Act 2006*.

²⁷⁸ *Gower & Davies Principles of Modern Company Law* 9th ed 166-168; Singh *Company Law* 58-59 and 65. According to the *ultra vires* doctrine any act outside the scope of a company’s objects is void.

²⁷⁹ The doctrine of constructive notice is not part of the *Companies Act of 2006*. It disappeared with the implementation of the *Companies Act of 1989 (c. 40)*. The doctrine of constructive notice holds that everyone is deemed to know the contents of the memorandum of association - which is a public document. See Dine & Koutsias

6.2.3 The legal position of the directors of the company

In the United Kingdom the shareholders constitute the ultimate source of managerial authority within the company. The directors obtain their powers by a process of delegation from the shareholders through the constitution of the company and not from the *Companies Act 2006*.²⁸⁰ The directors however owe their duties (fiduciary duties and duties of care and skill) to the company.²⁸¹

Directors have been described as “agents”²⁸² or “trustees”²⁸³ of the company. These descriptions correspond with the fiction theory’s conceptualisation of the directors of a company. Directors

Company Law 40; *Gower & Davies Principles of Modern Company Law* 9th ed 168-171. The *Turquand* or indoor management rule is still part of the United Kingdom company law and is confirmed by sections 40 and 161 of the *Companies Act of 2006*. The *Turquand* rule originates from the case of *Royal British Tank v Turquand (1856) 6 E & B 327: 119 ER 886*. According to this rule outsiders dealing with a company are entitled to assume that the internal procedures of the company have been complied with. See Dine & Koutsias *Company Law* 61; *Gower & Davies Principles of Modern Company Law* 9th ed 169-177.

²⁸⁰ *Gower & Davies Principles of Modern Company Law* 9th ed 64-65 and 384. The constitution of the company includes, but is not limited to, the articles of association. It also includes special resolutions of shareholders. It no longer includes the memorandum of incorporation. See Section 17 of the *Companies Act 2006*. See also *Gower & Davies Principles of Modern Company Law* 9th ed 67-68. A remarkable feature of company law in the United Kingdom is the extent to which it leaves regulation of the internal affairs of a company, such as the division of power between the organs of the company (the general meeting of the shareholders and the board of directors), to the company itself in its constitution.

²⁸¹ Section 170(1) of the *Companies Act 2006* provides that the duties of the directors (fiduciary duties and duties of care and skill) are owed to the company. Section 172(1) further provides that a director must act in a way that 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. This section will be discussed further in chapter 5.

²⁸² *Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq. 461; 2 Eq Rep 1281; [1843-1866] All ER Rep 249; Ferguson v Wilson (1866) LR 2 Ch 77 89-90; Great Eastern Railway Co v Turner (1872) LR 8 Ch App 149 152; Imperial Hydropathic Hotel Co Blackpool v Hampson (1882) 23 Ch D 1 (12); 49 LT 147; Automatic Self Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34 (CA); Regal (Hastings) v Gulliver [1942] 1 All ER 378 (HL); Industrial Development Consultants v Cooley [1972] 1 WLR 443; [1972] 2 All ER 162 124; Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1991] AC 187 (PC) 217-218. Like agents they also act for the benefit of some other person and do not generally incur personal liability. However because the company is incapable itself of acting and accordingly of conferring authority to act on its behalf, its directors are not strictly their agents. Their authority derives ultimately from the articles of the company and not from agency. See *Newborne v Sensolid (Great Britain) Ltd [1954] 1 QB 45 (CA) 51; [1953] 1 All ER 708 (CA) 710; Kunst, Delpont & Vorster Henochsberg on the Companies Act* 5th ed (1994) (Loose-leaf, update June 2011) (hereinafter “*Kunst et al Henochsberg on 1973 Act*”) 394; Cassim R “Governance and the Board of Directors” in *Contemporary Company Law* 412; Raju *Company Directors Fiduciary Duties & Liabilities under the Indian Company Law* (2013) (hereinafter “*Raju Company Directors*”) 69-84.*

²⁸³ *Re Forest of Dean Coal Mining Co (1878) LR 10 Ch 450; Re Exchange Banking Co (Flitcroft’s Case) (1882) LR 21 ChD 519 525; Imperial Hydropathic Hotel Co Blackpool v Hampson supra; Percival v Wright [1902] 2 Ch 421(ChD); Regal (Hastings) v Gulliver supra; Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555 1574-1577; Great Eastern Railway Co v Turner supra 152. Historically the legal position of a director in*

have also been described as the “managing partners”²⁸⁴ of a company, which corresponds with the aggregate theory’s conceptualisation of directors. The real entity theory’s conceptualisation of directors has also been adopted. Directors have for example, been described as the company’s “directing mind and will”,²⁸⁵ “brain”,²⁸⁶ “organs”²⁸⁷ or “director[s] or controller[s] of the company’s affairs.”²⁸⁸ Gower states that where the board or shareholders act collectively, they constitute the company, in other words, they act as the company.²⁸⁹ The aforesaid descriptions are however not used as exhaustive descriptions of directors but rather as indicating useful points of view from which they may for the moment and particular purpose be considered.²⁹⁰ The fact of the matter is that directors occupy a unique position.²⁹¹

England developed around the trust concept. Like a trustee a director also stands in a fiduciary relationship and acts for the benefit of some other person. But directors are not strictly trustees although they do stand in a fiduciary relationship to the company. See *Re Faure Electric Accumulator Co (1889) LR 40 ChD 141* 151; Kunst et al “*Henochsberg on 1973 Act*” 394; Cassim R “Governance and the Board of Directors” in *Contemporary Company Law* 412-413; Raju *Company Directors* 85-98.

²⁸⁴ *Re Forest of Dean Coal Mining Co* supra 453; *Re Faure Electric Accumulator Co* supra 151; *Automatic Self-Cleansing Filter Syndicate Co v Cuninghame* supra 45; *Regal (Hastings) v Gulliver* supra; Cassim R “Governance and the Board of Directors” in *Contemporary Company Law* 413-414. Like managing partners they are empowered to manage the business.

²⁸⁵ *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (HL)* 713; [1914-1915] All ER Rep 280 (HL); *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159 (CA)* 172; [1956] 3 All ER 624 636; *The Lady Gwendolen [1965] 2 All ER 283 (CA)* 302; *Tesco Supermarkets Ltd v Natrass [1972] AC 153 (HL)* 170-171 and 199-200; [1971] 2 All ER 127 132 and 135; *El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685 (CA)* 696, 699 and 706; *Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 All ER 918 (PC)* 923-924 and 925-926; Kunst et al “*Henochsberg on 1973 Act*” 393; Welling et al *Canadian Corporate Law* 134.

²⁸⁶ *Bath v Standard Land Co Ltd (1910) 2 Ch 408* 416.

²⁸⁷ *Daimler v Continental Tyre and Rubber [1916] 2 AC 307*. In *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* supra the court described the company as follows:

“A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind or will of the company and control what it does. The state of mind of these managers is the state of the mind of the company and is treated by law as such.”

See also for example *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1939) 2 KB 395* 408; (1939) 2 All ER 613 (CA); *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (1971) 2 QB 711*; (1971) 3 WLR 440; (1971) 3 All ER 16 (CA); Raju *Company Directors* 101-103.

²⁸⁸ *Moriarty v Regent’s Garage & Engineering Co Ltd [1921] 1 KB 423* 431.

²⁸⁹ *Gower & Davies Principles of Modern Company Law* 9th ed 165.

²⁹⁰ *Imperial Hydropathic Hotel Co Blackpool v Hampson* supra.

6.2.4 General

Early English company law incorporated the fiction theory into the common law.²⁹² Probably the most renowned citation of the fiction theory in the United Kingdom is the judgment of Coke J in *The Case of Sutton's Hospital*²⁹³ where he said "... a corporation aggregate of many is invisible, immortal, and rests only in the intendment and consideration of the law ... they cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls, neither can they appear by person, but by attorney..."²⁹⁴

Naudé states that the proponents of the fiction theory in the United Kingdom basically follow Savigny's conception of the company as an entity that is incapable of forming a will, but that they lack the finesse of the German jurists when it comes to the participation of the company in the legal sphere. Whereas Savigny compares the position of the company with that of a mentally ill person or an infant and relies on the concepts of representation in curatorship and guardianship of the Roman law, English jurists simply rely on agency.²⁹⁵

But as is evident from the above analyses, the aggregate and the real entity theories have also been adopted in the company law of the United Kingdom. Different theories have been used at different times for different purposes.

²⁹¹ *Regal (Hastings) v Gulliver* supra; Cassim R "Governance and the Board of Directors" in *Contemporary Company Law* 414.

²⁹² Petrin (2013) Penn State Law Review 1 5. See for example *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* supra 283.

²⁹³ *10 Co Rep 1a; 77 ER 937*.

²⁹⁴ Wishart maintains that *The Case of Sutton's Hospital* supra was more about establishing human beings as the subject of the law than deciding anything about corporations. See Wishart (2010) Journal of Corporate Law Studies 151 155. Machen points out that the formulation of Coke is based upon a misapplication of the fiction theory. He states:

"But although corporate personality is a fiction, the entity which is personified is no fiction. The union of the members is no fiction. The acting as if they were one person is no metaphor. In a word, although corporate personality is a fiction, yet it is a fiction founded upon fact."

See Machen (1911) Harvard Law Review 253 266. See also Machen (1911) Harvard Law Review 253 254 and 260-261.

²⁹⁵ Naudé *Die Regsposisie van die Maatskappydirekteur* 12.

6.3 Application of the corporate personhood theories in Canada

6.3.1 The separate legal personality of the corporation

The separate legal personality of a corporation is one of the four major principles on which Canadian corporate law is built.²⁹⁶ A corporation is treated as far as possible by analogy to a natural person.²⁹⁷ Section 15(1) of the *Canada Business Corporations Act*²⁹⁸ (the *Canada Business Corporations Act*) provides that “[a] corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” Section 45(1) provides that the shareholders are not, as shareholders, liable for any liability, act or default of the corporation save under certain specified circumstances provided for in the Act.²⁹⁹ Canadian law adopts the real entity theory’s conceptualisation of the company.

A comparison between section 15(1) of the *Canada Business Corporations Act* and section 16(2) of the *Companies Act 2006* of the United Kingdom (which provides that the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, are a body corporate) reveals the fundamentally different approaches of the two jurisdictions. In Canadian law the corporation is viewed as an entity (corporate person) distinct from its members. In British law the company is conceptualised as an aggregation of its members (although it is also deemed to be a separate entity).³⁰⁰ Canadian corporate law is thus firmly based

²⁹⁶ The three other principles are managerial power (the principle that the daily operation of a corporate business is to be done by a relatively independent managerial group), majority rule (the principle that the internal decisions are to be made by a democratic process among those constitutionally franchised on any particular issue), and minority protection (the principle that certain corporate, managerial or majority shareholder inclinations ought to be restrained from injuring the minority members of any group created by the corporate constitution). See Welling *Corporate Law in Canada* 57-68; Welling et al *Canadian Corporate Law* 114-118; McGuinness “Business Corporations” in Brecher *Halsbury’s Laws of Canada* 1st ed (2013) (hereinafter “McGuinness *Business Corporations*”) 221-235; Chopra & Arora *Company Law* 222-223. The letters of patent corporation that dominated Canadian corporate law for more than 100 years from 1864 until the 1970s was recognised by law as a separate legal person. See Welling *Corporate Law in Canada* 106.

²⁹⁷ Welling *Corporate Law in Canada* 84.

²⁹⁸ *R.S.C., 1985, c. C-44*.

²⁹⁹ For example sections 38(4), 118(4) or (5), 146(5), 226(4) or (5) of the *Canada Business Corporations Act*. See also McGuinness *Business Corporations* 229-232 and 238-240. By comparison a company can be a limited or an unlimited company in the United Kingdom. See section 3 of the *Companies Act 2006*. See also Hannigan *Companies* paras 81 and 102; *Gower & Davies Principles of Modern Company Law* 9th ed 19.

³⁰⁰ Welling *Corporate Law in Canada* 81-157; Welling et al *Canadian Corporate Law* 127-226.

on the corporation (*universitas*) whilst company law in the United Kingdom is based more on partnership (*societas*) and contractual principles.

As in the United Kingdom, there is no general statutory provision in Canadian corporate law that provides for the piercing of the corporate veil. But there are statutory provisions that provide for the lifting of the corporate veil and holding shareholders, directors or other persons in effective control of the corporation, or some relevant aspect of its activities, liable.³⁰¹

Canadian courts have been prepared to ignore the existence of the separate personality (and liability) of a corporation in terms of the common law.³⁰² As is the case in the United Kingdom, it is difficult to discern any general principle that the Canadian courts have followed in the handling of such cases. One unifying thread of reasonably broad application is that the separate personality of the corporation will be disregarded where the corporation has been used as a cover for deliberate wrongdoing.³⁰³ The practice of piercing or lifting the corporate veil has been subject to criticism. Welling for example makes out a compelling argument that the courts do not have the authority to pretend that a corporation does not exist unless the relevant statute gives them that power.³⁰⁴ He states that the term “corporate veil” is a pure mystification and points out that

³⁰¹ For example section 38(4) (shareholders’ liability to creditors for an unauthorised reduction of the stated capital), section 118 (directors’ liability), section 146(5) (liability of a shareholder who is a party to a unanimous shareholder agreement) and section 226(5) (reimbursement by shareholders following dissolution) of the *Canada Business Corporations Act*. See also McGuinness *Business Corporations* 229-232 and 238-240.

³⁰² See for example *Toronto (City) v Famous Players Canadian Corp* [1944] 3 DLR 609; *Clarkson Co v Zhelka* [1967] 2 O.R. 565, 64 D.L.R. (2d) 457 (H.C.); *Kosmopoulos v Constitution Insurance Co of Canada* [1987] S.C.J. No. 2, [1987] 1 S.C.R. 2, 34 D.L.R. (4th) 208; *Counsel de la Sante (Montreal) v City of Montreal* [1994] 3 SCR 29; *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* [1996] O.J. No. 1568, 28 O.R. (3d) 423; *Shillingford v Dalbridge Group Inc* [1996] A.J. No. 1063, 28 B.L.R. (2d) 281 (Alta. Q.B.); *Harrington v Dow Corning Corp* [1998] 55 BCLR (3d) 316. See further Welling *Corporate Law in Canada* 114-121; Welling et al *Canadian Corporate Law* 143-149; McGuinness *Business Corporations* 235-247; Chopra & Arora *Company Law* 223-229 for a more detailed discussion of this topic.

³⁰³ McGuinness *Business Corporations* 236-237.

³⁰⁴ See Welling *Corporate Law in Canada* 114-115. See also Welling et al *Canadian Corporate Law* 143-149; McGuinness *Business Corporations* 236-249. Welling also criticizes the disregarding of the separate legal personality of the corporation based on partnership and agency principles. He points out that a corporation and its shareholders can be partners if the requisites of a partnership is present. The partnership can exist even though there is not an express partnership agreement. See Welling *Corporate Law in Canada* 140-143 with reference to *Lansing Building Supply (Ontario) Ltd v Ierullo* (1989) 71 OR 2d 173 (Ont). Corporations can also act as agents – even as agents for their shareholders - in which case the shareholders can be held personally liable. See Welling *Corporate Law in Canada* 135-140. The problem is that in the past, when corporations acted as partners or agents of their

“[c]orporations don’t usually wear veils.”³⁰⁵ It is evident that Canadian courts are only prepared to ignore the separate legal personality in extraordinary and rare circumstances.³⁰⁶

6.3.2 The capacity of the corporation

As indicated before, section 15(1) of the *Canada Business Corporations Act* provides that a corporation has the capacity and, subject to the Act, the rights, powers and privileges of a natural person.³⁰⁷ Nearly all provincial Canadian corporate statutes contain similar provisions.³⁰⁸ In Canadian law a corporation has full legal personality and must, as far as possible, be treated by analogy to a natural person.³⁰⁹ This corresponds with the real entity theory’s conceptualisation of the company.

The external operation of the *ultra vires* doctrine disappeared from most Canadian jurisdictions through statutory reform.³¹⁰ But the *ultra vires* doctrine still has internal effect. For example, the corporation must comply with the provisions of its articles.³¹¹ Directors and officers of the

shareholders “judges often missed the simple analogy and slipped back into the familiar rhetoric of “piercing the corporate veil”. See Welling *Corporate Law in Canada* 140-143. If anything the fact that a company can be a partner of its shareholders reinforces its separate legal personality.

³⁰⁵ Just sometimes. In *Halpern v Canada (A-G)* (2003) 65 OR 3d 161, 225 DLR 4th 529 (Ont CA) 570 the Ontario Court of Appeal ruled that the correct definition of a marriage is “the voluntary union for life of two persons to the exclusion of all others.” Welling states:

“A corporation is a person, so the Ontario Court of Appeal has told us that a corporation can contract marriage. I have no difficulty imagining a corporation doing so in the conventional costume, including a bridal veil. Some bigots might disagree.”

See Welling *Corporate Law in Canada* 115 n 93.

³⁰⁶ Welling et al *Canadian Corporate Law* 149; McGuinness *Business Corporations* 236.

³⁰⁷ The *Companies Act 2006* of the United Kingdom does not have a corresponding provision. Section 16(3) of the *Companies Act 2006* provides that the company “is capable of performing all the functions of an incorporated company.”

³⁰⁸ “Capacity” describes the inherent capability, competence or potential to achieve legal objectives. “Right” describes what someone else is legally obliged to do for the person with the right. Rights are different than liberties. One is at liberty to do what the law does not prohibit, but one has a right to do only what the law authorises. “Powers” generally describes what a particular person has the wherewithal to achieve. “Privileges” probably mean liberties in this context. See Welling *Corporate Law in Canada* 106-109.

³⁰⁹ Welling *Corporate Law in Canada* 84; McGuinness *Business Corporations* 236

³¹⁰ See for example section 15(1) and section 16(3) of the *Canada Business Corporation Act*. Section 16(3) provides that no act of the corporation is invalid by reason only of it being contrary to the articles or the Act. See also Welling *Corporate Law in Canada* 101; McGuinness *Business Corporations* 366-367.

corporation are also required to comply with the Act, the regulations, articles, by-laws and any unanimous shareholder agreement.³¹²

The letters of patent corporation that dominated Canadian corporate law for more than 100 years from 1864 until the 1970s similarly has the capacity and powers of a natural person. The *ultra vires* doctrine does not apply to these corporations.³¹³ In contrast to letters of patent corporations, the capacities and powers of the special act corporations incorporated in Canada are limited to what their incorporating statutes provide.³¹⁴

6.3.3 The legal position of the directors of the corporation

In Canadian corporate law directors originally derived their powers from the articles. The ultimate power of the company vested in the shareholders. This delegated grant of the directors' powers can be traced back to the British roots of Canadian corporate law. However there was a fundamental shift from the 1970s when most provinces adopted an American model statute. In modern Canadian corporate law persons attaining the status of director are assigned statutory powers and obligations. Section 102(1) of the *Canada Business Corporations Act* provides: "Subject to any unanimous shareholders agreement, the directors shall manage, or supervise the management of, the business and affairs of the corporation." This is an original grant of power, not a delegated grant of power as in the United Kingdom. The powers and obligations of the directors can be clarified or modified, but only rarely removed, by the articles of incorporation and subordinate constitutional documents. This statutory source of the directors' powers and obligations distinguishes Canadian corporate law from that of the United Kingdom.³¹⁵

³¹¹ See for example section 16(2) of the *Canada Business Corporation Act*. See also McGuinness *Business Corporations* 367-368.

³¹² See for example section 122(2) of the *Canada Business Corporation Act*. See also McGuinness *Business Corporations* 367-368. The doctrine of constructive notice is strictly limited. See for example sections 17 and 18 of the *Canada Business Corporation Act*. See also Welling et al *Canadian Corporate Law* 248-251; Welling *Corporate Law in Canada* 195 and 221-222; McGuinness *Business Corporations* 373-375.

³¹³ *Bonanza Creek Gold Mining Co Ltd v The King* [1916] AC 566 (Ont JCPC); Welling *Corporate Law in Canada* 52-53, 100-101 and 106; McGuinness *Business Corporations* 366.

³¹⁴ *Communities Economic Development Fund v Canadian Pickles Corp* supra; Welling *Corporate Law in Canada* 99; McGuinness *Business Corporations* 366.

The position of directors in Canadian corporate law can be compared to the democratically elected representatives of a country and the shareholders compared with the electorate. Directors are elected to their positions by a theoretical shareholder democracy.³¹⁶ Once elected, the directors are collectively given the power to manage, or supervise the management of, the business and affairs of the corporation by statute. The managerial obligations and duties of directors and officers are public in nature. That is not to say that they owe it to the public. On the contrary, they owe these obligations and duties to the corporation as a separate legal entity. But, the managerial obligations and duties of directors and officers are public in the sense that they have a statutory origin. It is no different, in kind, to the duty of a motorist to drive a vehicle with due care and diligence. The governing statute typically contains a provision compelling directors and officers to comply with the provisions of that statute, the articles (or memorandum) of incorporation and by-laws under threat of criminal sanction for non-compliance.³¹⁷

In Canadian law directors are not agents of the electorate shareholders, nor are they simply agents of the corporation. Welling states:

“They will from time to time operate as agents of the corporation, in the sense that most corporate activity is perceived by the outside world as having been accomplished through the mechanism of human intervention. However, they are not agents doing the bidding of a principal. They must exercise their powers for the benefit of the corporation, but it is they who determine what the corporation wishes to be done.”³¹⁸

³¹⁵ The shift of Canadian law to American law is discussed more comprehensively in chapter 2. See also Welling *Corporate Law in Canada* 59-60 and 315; McGuinness *Business Corporations* 586; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 90.

³¹⁶ Welling *Corporate Law in Canada* 60-62 and 298; Welling et al *Canadian Corporate Law* 117. The daily running of the corporation, like the daily governmental participation in the life of a nation, is not done collectively by the board of directors, nor individually by any one of them, but is left in the hands of corporate officers who, like civil servants, are delegated specific tasks and are controlled by internal regulations. They can be compared to the executive branch of government. This describes the basic political hierarchy of a corporation under a division of powers statute. It operates on the fundamental principles of majority rule within each of the spheres of influence of the board of directors and shareholders; and managerial power, delegated to individual corporate officers.

³¹⁷ Welling *Corporate Law in Canada* 62-63.

³¹⁸ Welling *Corporate Law in Canada* 299. See also Welling et al *Canadian Corporate Law* 134; McGuinness *Business Corporations* 591.

Directors are also not trustees or delegates of the corporation. Under normal English usage the term “director” describes a person who controls, regulates, superintends, guides or orders a particular matter. This describes the position of a director in Canadian law better.³¹⁹ In Canadian corporate law directors must act in the best interests of the corporation, but in doing so they must consider the interests of a wide spectrum of stakeholders of the corporation, including communities, government and the environment, rather than focusing solely upon shareholders.³²⁰ This conception of the legal position of directors in Canadian law corresponds with that of the real entity theory.

6.3.4 General

It is evident that Canadian corporate law leans strongly towards the real entity theory. The legal personality of the company is perceived to be real and not a fiction.³²¹ Welling adopts a more positivist approach and emphasises the corporation’s dependence on the law to endow it with legal personality. He ignores the extra-judicial dimensions of the corporation and states that apart from a few exceptions, Canadian courts tend to ignore the fiction and reality theories and accept that the corporation is a legal person with the capacity, rights, powers and privileges similar to that of an individual “because the legislature said so.”³²² Welling’s approach corresponds with that of the juridical reality theory.

6.4 Application of the corporate personhood theories in India

6.4.1 The separate legal personality of the company

In Indian law a company is, in contrast to a partnership, a separate and distinct person from its members.³²³ The independent corporate existence of the company was recognised in India even

³¹⁹ McGuinness *Business Corporations* 591-592.

³²⁰ See the two seminal decisions of the Supreme Court of Canada in *Peoples Department Stores Inc v Wise* [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 and *BCE Inc v 1976 Debentureholders* [2008] S.C.J. No 37, [2008] 3 S.C.R. 560.

³²¹ Even so the Canadian courts have on occasion described the corporation as a legal fiction. See for example *DeWitt Truck Brokers v W. Ray Flemming Fruit Co* supra. See also Welling et al *Canadian Corporate Law* 127; McGuinness *Business Corporations* 236 and 585.

³²² Welling *Corporate Law in Canada* 114 and 298. See also Welling et al *Canadian Corporate Law* 133-134.

before the *Salomon* case.³²⁴ Section 9 of the Indian *Companies Act 2013*³²⁵ (the *Companies Act 2013*) provides that from the date of incorporation of a company “such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate...”³²⁶ The wording of this section is very similar to that of section 16(2) of the United Kingdom *Companies Act 2006*. India also inherited the statutory contract provision from the United Kingdom. Section 10 of the Indian *Companies Act 2013* provides: “Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its part to observe all the provisions of the memorandum and of the articles.”³²⁷ These provisions are reminiscent of the aggregate theory’s conceptualisation of the company and are based on partnership (*societas*) and contractual principles. Companies may be incorporated as either limited or unlimited liability companies.³²⁸ The approach of Indian company law to the separate legal personality of the company closely follows that of the United Kingdom.

There is, as in the United Kingdom and Canada, no general statutory provision in Indian company law that provides for the piercing of the corporate veil. But there are statutory provisions that

³²³ Kapoor & Dhamija *Taxmann’s Company Law* 17th ed (2014) (hereinafter “Kapoor & Dhamija *Taxmann’s Company Law*”) 5-7, 16 and 23-25; Singh *Company Law* 4. See also *Bacha F Guzdar v CIT*, AIR 1955 SC 74; (1995) 25 *Comp Cas* 1. Partnership law in India is codified in the *Partnership Act of IX of 1932* and the *Limited Partnership Act, 2008 (Act 6 of 2009)*.

³²⁴ Singh *Company Law* 7 with reference to the decision of the Calcutta High Court in *Kondoli Tea Co Ltd, re ILR (1886) 13 Cal 43*. See also for example *TR Pratt (Bombay) Ltd v ED Sasoon & Co Ltd*, AIR 1936 Bom 62; *Dhulia-Amalner Motor Transport Ltd v Raychand Rupsi Dharamsi* ILR 1952 Bom 795; AIR 1952 Bom 337; *Tata Engineering and Locomotive Co Ltd v State of Bihar (1964) 6 SCR 885*; *Praga Tools Corpn v CA Imanual (1996) 1 SCC 585*; AIR 1969 SC 1306; (1969) *Comp Cas* 889; *Singer India Ltd v Chandler Mohan Chadha (2004) 8 SCC 396*; *Mrs. Prem Lata Bhatia v Union of India (2006) 134 Comp Cas 92 (Del): (2006) 128 DLT 24*.

³²⁵ *Act 18 of 2013*.

³²⁶ See also Kapoor & Dhamija *Taxmann’s Company Law* 72; Singh *Company Law* 5.

³²⁷ See Kapoor & Dhamija *Taxmann’s Company Law* 110-113; Ghosh T.P. *Ghosh on Companies Act 2013* 2nd ed (2014) (hereinafter *Ghosh Ghosh on Companies Act*) 109-110; Singh *Company Law* 80-83 for a discussion of the statutory contract in Indian law. Section 10 of the Indian *Companies Act 2013* is similar to section 33 of the *Companies Act 2006* of the United Kingdom.

³²⁸ Section 2(92) of the *Companies Act 2013*. Section 3(2) allows a company to be registered as an unlimited company.

provide for the lifting of the corporate veil and holding shareholders, directors or other persons in effective control of the company liable under certain circumstances.³²⁹

Indian courts have relied on the common law to pierce or lift the corporate veil, although they only do so only in exceptional circumstances.³³⁰ In all the cases where the corporate veil was pierced or lifted, it was done to reveal the “true” identity of the company and to expose those persons who sought to use the corporate veil to hide and shun their exposure with a view of defeating public convenience, justifying a wrong, protecting fraud, or defending a crime.³³¹ The practice of the courts to pierce or lift the corporate veil has been criticised.³³²

6.4.2 The capacity of the company

Section 4(c) of the Indian *Companies Act 2013* requires that, the objects for which the company is proposed to be incorporated and any matter considered necessary in the furtherance thereof, be set out in the company’s memorandum of association.³³³ A company that has raised money from the public through a prospectus and that has still not utilised the whole of the amount so raised, shall not amend its objects unless a special resolution has been obtained in the prescribed manner.³³⁴ Other companies may amend their objects in the manner prescribed in their articles or, in cases

³²⁹ For example section 12 (incorrect description of name), sections 34 and 35 (misstatements in prospectuses), section 39 (failure to return application money), section 216 (investigating ownership of a company), section 219 (facilitating the task of an inspector), section 338 (failure to keep proper accounts), section 339 (fraudulent conducting of business) and section 464 (non-compliance with requirements of incorporation). See Kapoor & Dhamija *Taxmann’s Company Law* 10-12; Singh *Company Law* 26-31.

³³⁰ Chopra & Arora *Company Law* 319-324 and 345-411; Kapoor & Dhamija *Taxmann’s Company Law* 6 and 12-16; Singh *Company Law* 13-26. See also *S.A.E. (India) Ltd v E.I.D. Parry (India) Ltd* [1998] 18 SCL 481 (Mad); *Cotton Corporation of India Ltd v G.C. Odusumathd* [1999] 22 SCL 228 (Kar.).

³³¹ Chopra & Arora *Company Law* 319.

³³² Chopra and Arora for example state:

“How can the ‘legal person doctrine’ that is so central to corporate law in one sentence be disregarded so casually in the next? Both propositions cannot be true. Something cannot both ‘be’ and ‘not be’. This ‘very singular contradiction’ is logically impossible. As Lord Halsbury claimed in *Salomon’s* case itself: ‘Either a limited company was a legal entity or it was not.’ Until this contradiction at the heart of corporate law is explained in some principled fashion, or reliance upon the legal person doctrine is discontinued, Canadian corporate law will remain radically incoherent.”

See Chopra & Arora *Company Law* 223.

³³³ See also Ghosh *Ghosh on Companies Act* 111.

³³⁴ Section 18(3) of the *Companies Act 2013*. See also Kapoor & Dhamija *Taxmann’s Company Law* 97; Singh *Company Law* 72-73.

where the articles are silent on this issue, through a resolution by the directors.³³⁵ The *ultra vires* doctrine is still part of Indian company law. Any act beyond or outside the objects of a company is void.³³⁶ The approach of Indian company law with regards to the capacity of the company thus differs materially from both the law of the United Kingdom and Canada and is still based on the fiction theory's conceptualisation of the company.³³⁷

6.4.3 The legal position of the directors of the company

Section 179 of the Indian *Companies Act 2013* deals with the powers of the board of directors. Section 179(1) provides that the board of directors of a company “shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do” provided that the board shall comply with the provisions of the Act, the memorandum or articles and the regulations made by the company in general meeting; and provided further that the board shall not exercise any power or do any act or thing which “the company in general meeting” must exercise or act in terms of the Act, the memorandum, the articles, or any regulations not inconsistent therewith.³³⁸ Whilst these powers are, in contrast to the position in the United

³³⁵ Kapoor & Dhamija *Taxmann's Company Law* 96.

³³⁶ Kapoor & Dhamija *Taxmann's Company Law* 87-90; Singh *Company Law* 59-71. See also for example the decision of the Indian Supreme Court of Appeal in *Lakshmanaswami Mudaliar v LIC AIR 1963 SC 1185*: (1963) 33 Comp Cas 420, which affirmed the *ultra vires* doctrine as part of Indian company law. The doctrine of constructive notice and the indoor management (*Turquand*) rule are also still part of Indian company law. See Kapoor & Dhamija *Taxmann's Company Law* 113-117; Singh *Company Law* 88-101. Section 339 of the *Companies Act 2013* provides that the memorandum and articles “become public documents” on registration and can be inspected by anyone by electronic means on payment of a prescribed fee. See for example *Kotla Venkataswamy v Chinta Ramamurthy AIR 1934 Mad 579*; *Official Liquidator, Manasube & Co (P.) Ltd v Commissioner of Police (1968) 38 Comp Cas 884 (Mad)*.

³³⁷ Section 31(1) of the *Companies Act 2006* of the United Kingdom provides that unless a company's articles specifically restrict the objects of the company, its objects are unrestricted. Section 39 further provides that the validity of any act by the company shall not be called into question on the grounds of lack of capacity by reason of anything in the company's constitution. Section 15(1) of the *Canada Business Corporations Act* provides that a corporation has the capacity and, subject to the Act, the rights, powers and privileges of a natural person. In both the United Kingdom and Canada the *ultra vires* doctrine does not have external effect.

³³⁸ See also Ghosh *Ghosh on Companies Act* 439-440. Section 179(1) of the Indian *Companies Act 2013* is similar to the provision that was contained in section 90 of the *Companies Clauses Consolidation Act 1845* (supra) of the United Kingdom. The *Companies Act 2006* of the United Kingdom does not grant the directors the power to manage the company. They obtain their powers by a process of delegation from the shareholders through the constitution and not from the *Companies Act 2006*. Directors in modern Canadian corporate law, in contrast to the position in the United Kingdom, are assigned statutory powers and obligations. See for example section 102(1) of the *Canada Business Corporations Act*. This is an original grant of power, not a delegated grant of power as is the case in the United Kingdom.

Kingdom, original they are subject to material limitations. Section 179 of the Indian *Companies Act 2013* does not go as far as section 102(1) of the *Canada Business Corporations Act* - which provides that the directors shall manage, or supervise the management of, the business and affairs of the corporation subject to any unanimous shareholders agreement. As is the case in the United Kingdom, the ultimate power in the Indian company still vests with the shareholders and not the board of directors.³³⁹ Section 166(2) of the *Companies Act 2013* provides that a director of a company “shall act in good faith in order to promote the objects of the company³⁴⁰ for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community, and for the protection of the environment.” This provision is seemingly inspired by section 172(1) of the United Kingdom *Companies Act 2006*.³⁴¹ The corporate governance system that is adopted in the Indian *Companies Act 2013* is still strongly rooted in United Kingdom model.³⁴²

Directors have been described as “agents”³⁴³ or “trustees”³⁴⁴ of the company. This corresponds with the fiction theory’s conceptualisation of the company. They have also, true to the aggregate theory’s conceptualisation of the company, been described as “managing partners” of the

³³⁹ Singh *Company Law* 278-284.

³⁴⁰ Which must be stated in its memorandum. See section 4(c) of the *Companies Act 2013*.

³⁴¹ Deva “Socially responsible business in India: Has the elephant finally woken up to the tunes of international trends?” (2012) *Common Law Review* 299 312-313.

³⁴² See Ghosh *Ghosh on Companies Act* 719-782.

³⁴³ Raju *Company Directors* 69-84; Kapoor & Dhamija *Taxmann’s Company Law* 296-297; Singh *Company Law* 249-250. See also for example *Re Port Canning Land Investments Reclamation and Docking Company Ltd* (1871) 7 *Bengal LR* 583; *Re Behrens & Co* (1932) 2 *Comp Cas* 588; *R.K. Dalmia v Dehli Administration* (1962) 32 *Comp Cas* 699 (SC); *Ramchand & Sons Sugar Mills v Kanhayalal* (1966) 2 *Comp LJ* 224; *AIR 1966 SC 1899*; *Sadar Gulab Singh v Punjab Zamindara Bank Ltd* *AIR 1942 Lah* 47; *Puddokottah Textiles Ltd v B.R. Adityan* (1975) 88 *Mad LW* 688 790; *National Textile Workers’ Union v P.R. Ramakrishnan* *AIR 1983 SC 75*; (1983) 53 *Comp Cas* 184 (SC); (1983) 1 *SCC* 228; *Vineet Kumar Mathur v Union of India* (1996) 20 *CLA* 213 (SC); *Kirlampudi Sugar Mills Ltd v G Venkata Rao* (2003) 42 *SCL* 798 (AP); (2003) 114 *Comp Cas* 563 (CA); *Dale and Carrington Investments (P) Ltd v P. K. Prathapan* (2004) *Comp Cas* 161 (SC); (2005) 1 *SCC* 212. A transaction by the directors which is beyond their powers but within the powers of the company may be ratified by the general meeting or even by acquiescence. This is indicative of an agency relationship. See Kapoor & Dhamija *Taxmann’s Company Law* 297. See also *Bhajeekar v Shinkar* [1934] 4 *Comp Cas* 434 (Bom).

³⁴⁴ Raju *Company Directors* 69, 85-98; Kapoor & Dhamija *Taxmann’s Company Law* 297; Singh *Company Law* 250-254. See also *R.K. Dalmia v Dehli Administration* supra; *Ramchand & Sons Sugar Mills v Kanhayalal* supra; *Ramaswamy Iyer v Brahamayya & Co* (1966) 1 *Comp LJ* 107 (Mad); *Chevalier-II Iyyappan v Dharmodayam Co, Trichur* *AIR 1966 SC 1017*; (1963) 1 *SRC* 85; *Dale and Carrington Invt. (P) Ltd v P. K. Prathapan* supra. Directors are trustees of the company’s assets and of the powers entrusted to them.

company.³⁴⁵ However, as is the case in the United Kingdom, not one of these descriptions are exhaustive of the powers and duties of the directors.³⁴⁶ Directors have also been described as “organs” of the company.³⁴⁷ Singh states that the range of corporate responsibilities and liabilities of a company today almost corresponds with that of an individual. This transformation has been brought about under the influence of the real entity theory, “a theory which treats certain officials as organs of the company, for whose action the company is to be held liable just as a natural person is for the action of his limbs.”³⁴⁸ The modern director is more than a mere agent or trustee of the company. The board of directors is the primary organ of the company.³⁴⁹

6.4.4 General

Indian company law appears to favour the fiction theory. In *Vodafone International Holdings BV v Union of India*³⁵⁰ the Supreme Court of India regarded Pope Innocentius IV’s enunciation of the fiction theory as the foundation of the separate legal entity principle. But, as in the case of the United Kingdom, the aggregate and the real entity theories have also been adopted. Different theories have been used at different times for different purposes.

³⁴⁵ *Raju Company Directors* 65, 69. See also *Ramchand & Sons Sugar Mills v Kanhayalal* supra.

³⁴⁶ *Singh Company Law* 248-249. See also *Albert Judah Judah v Rampada Gupta* AIR 1959 Cal 715.

³⁴⁷ *Gopal Khaitan v State* AIR 1969 Cal 132 138; (1969) 39 *Comp Cas* 150; *Raju Company Directors* 65 and 101-103.

³⁴⁸ *Gopal Khaitan v State* supra.

³⁴⁹ *Singh Company Law* 254-258. See also *State Trading Corpn of India Ltd v CTO* AIR 1963 SC 1811 1832; (1963) 33 *Comp Cas* 1057; (1964) 4 *SCR* 99; *Raju Company Directors* 101-103.

³⁵⁰ (2012) 6 *SCC* 613; (2012) 170 *Comp Cas* 369.

7 APPLICATION OF THE CORPORATE PERSONHOOD THEORIES IN SOUTH AFRICA

7.1 The separate legal personality of the company

7.1.1 The Companies Act of 1973

Section 65(1) of the Companies Act 61 of 1973 (the Companies Act of 1973) provided that the incorporation of a company had the effect that “[t]he subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate with the name stated in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession, but with such liability (if any) on the part of the members to contribute to the assets of the company in the event of its being wound up as provided by this Act.” Section 65 is remarkably similar to section 16 of the *Companies Act 2006* of the United Kingdom and section 9 of the Indian *Companies Act 2013*. It corresponds with the aggregate theory’s conceptualisation of the company and can be traced back to the partnership (*societas*) and contractual principles on which the old unregulated or deed of settlement companies were based. The Companies Act of 1973 provided that the memorandum and articles of association constitutes a contract between the company and its shareholders, and between the shareholders *inter se*.³⁵¹ A company was conceived to be a legal person distinct from the members who composed it.³⁵² The Act did not make provision for the registration of an unlimited company.³⁵³

³⁵¹ See section 65(2) of the Companies Act 61 of 1973. See also *De Villiers v Jacobsdal Saltworks (Pty) Ltd* 1959 (3) SA 873 (O) 874; *Gohlke & Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) 692; *Mpofu v South African Broadcasting Corporation Ltd* (2008/18368) [2008] ZAGPHC 413 (16 September 2008) par 29; Cilliers & Benade *Korporatiewe Reg* (1987) paras 5.36-5.39; Kunst et al *Henochsberg on 1973 Act* 123 – 124; Delpont *Henochsberg vol 1* 74.

³⁵² See also *Reynolds v Oosthuizen* 1916 WLD 103; *Madrassa Anjuman Islamia v Johannesburg Municipal Council* 1919 AD 439, affirmed on appeal by the Privy Council [1922] 1 AC 500; *Dadoo v Krugersdorp Municipality* 1920 AD 530 550; *Goodall v Hoogendoorn* 1926 AD 11 16; *Estate Salzmann v Van Rooyen* 1944 OPD 1; *Ex parte Donaldson* 1947 (3) SA 170 (T) 173; *Minister of Agriculture v Federal Theological Seminary* 1979 (4) SA 162 (E); *Gumede v Bandhla Vukani Bakithi Ltd* 1950 (4) SA 560 (N); *S v De Jager* 1965 (2) SA 616 (A) 624-625; *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A); *Francis George Hill Family Trust v South African Reserve Bank* 1992 (3) SA 91 (A) 102; *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) 565-566; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C); Pretorius et al *Hahlo’s Company Law* 13-25; Cilliers & Benade *Korporatiewe Reg* par 1.17-1.19; Kunst et al “*Henochsberg on 1973 Act* 122(1); Davis *Companies and Other Business Structures* 29-30; Delpont *Henochsberg vol 1* 83-84.

The Act made provision for certain exceptions to the principle of the separateness of the company, in other words to lift the corporate veil, but did not grant the courts a general authority to pierce the corporate veil.³⁵⁴ The courts in South Africa have nevertheless been prepared to ignore the separateness of the company and to pierce the corporate veil in terms of the common law.³⁵⁵ More often than not, the courts have done so under the influence of the fiction theory. In *Ebrahim v Airports Cold Storage (Pty) Ltd*³⁵⁶ the Supreme Court of Appeal for example stated:

“It is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of the law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted.”³⁵⁷

There is no definite categorisation of the instances in which South African courts have been prepared to pierce the corporate veil in terms of the common law.³⁵⁸ The courts have for example, been prepared to pierce the corporate veil where the separate legal personality was used as a

³⁵³ Unlimited companies registered in terms of the Companies Act 46 of 1926 remained in existence. See Cilliers & Benade *Korporatiewe Reg* par 3.10. The memorandum of a company could provide for the joint and several liability of directors. See section 53(a) of the Companies Act of 1973 and Cilliers & Benade *Korporatiewe Reg* par 3.07.

³⁵⁴ For example sections 50(3) (incorrect use of name), 66 (membership reduced below minimum), 344(h) (liquidation on ground that it is just and equitable), 252 (oppression remedy) and 424 (liability of directors and others for fraudulent conduct) of the Companies Act of 1973. See also Cilliers & Benade *Korporatiewe Reg* par 1.22.

³⁵⁵ See for example *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 194-195; *Lategan v Boyes* 1980 (4) SA 191 (T); *Botha v Van Niekerk* 1983 (3) SA 513 (W) 525; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A); *Ebrahim v Airports Cold Storage (Pty) Ltd* 2008 (6) SA 565 (SCA); [2009] 1 All SA 330 (SCA); Pretorius et al *Hahlo's Company Law* 30-42; Cilliers & Benade *Korporatiewe Reg* paras 1.23-1.25; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42-46 and 48-57; Davis *Companies and Other Business Structures* 30-31.

³⁵⁶ 2008 (6) SA 565 (SCA); [2009] 1 All SA 330 (SCA).

³⁵⁷ Par 15.

³⁵⁸ *Lategan v Boyes* supra 200-202; *Banco de Mozambique v Inter-Science Research & Development Services (Pty) Ltd* 1982 (3) SA 330 (T) 344-345; *Botha v Van Niekerk* supra 519-524; *Dithaba Platinum (Pty) Ltd v Econovaal Ltd* 1985 (4) SA 615 (T) 624-625; *The Shipping Corporation of India Ltd v Evdomon Corporation and the President of India* supra 566; *Swire Pacific Offshore Services (Pty) Ltd v MV “Roxana Bank”* [2003] 4 All SA 520 (C) 526; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* supra 802; *Ex Parte Gore* 2013 (3) SA 382 (WCC); [2013] 2 All SA 437 (WCC) par 19; Benade “Verontagsaming van die selfstandigheid van die maatskappy-regspersoon” (1967) THRHR 213; Domanski “Piercing the corporate veil – a new direction?” (1986) SALJ 224; Larkin “Regarding judicial disregarding of the company’s separate identity” (1989) SA Merc LJ 277; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42 and 43; Delpoit *Henochsberg vol 1* 85. In *Ex parte Gore* supra par 19 the court stated:

“It is evident on a consideration of South African, English and Australian jurisprudence that the readiness of courts to pierce, lift or look behind the corporate veil has varied quite considerably with the facts of given cases. It is impossible to categorise the results premised on any finitely definable principles.”

device by a director to evade his or her fiduciary duty;³⁵⁹ where the separate legal personality was used to overcome a contractual duty,³⁶⁰ or where there was fraud, dishonesty or other improper conduct.³⁶¹ The courts have however not followed consistent principles in determining when they will pierce the corporate veil. What is clear is that the courts will not easily disregard the separate identity of a company.³⁶²

South African courts have also been prepared to lift the corporate veil and take cognisance of the individuals behind it in terms of the common law. They have for example been prepared to do so where there is an underlying partnership intention between the members of the company. They have often referred to these companies as “domestic companies” or “quasi partnerships”.³⁶³ In these instances they have effectively adopted the aggregate theory’s conceptualisation of the company as an aggregate of its shareholders. This conception can also be traced back to the partnership (*societas*) and contractual principles from which British company law evolved. The courts have also sometimes relied on agency principles to impose liability on directors or controlling shareholders who treat the company as merely a means to further their own private goals. In these instances, the company has for example been described as the “agent”, “alter ego”, “puppet” or “instrumentality” of the directors or controlling shareholders.³⁶⁴ The South African

³⁵⁹ *Robinson v Randfontein Estates Gold Mining Co Ltd* supra 802; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 43-44.

³⁶⁰ *Le’ Bergo Fashions CC v Lee* 1998 (2) SA 608 (C); *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) par 24; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 43-44.

³⁶¹ *Botha v Van Niekerk* supra 525; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* supra 803; *Die Dros (Pty) Ltd v Telefon Beverages CC* supra par 23.

³⁶² *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* supra 802; *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) par 20; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 48-50.

³⁶³ *Moosa v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) 137-138; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1128 (in finding director had breached fiduciary duty); *Rentekor (Pty) Ltd v Rheeder and Berman* 1988 (4) SA 469 (T) 500; *Hulett v Hulett* 1992 (4) SA 291 (A) 307; *Hughes v Ridley* 2010 (1) SA 381 (KZP) paras 25-26; Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42 and 50-51.

³⁶⁴ *Gering v Gering* 1974 (3) SA 358 (W) 361; *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd* [2010] 2 All SA 9 (SCA); Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 42 and 52-53.

courts have also treated subsidiary companies as the agents of their holding company in certain circumstances.³⁶⁵

The approach of the Companies Act of 1973 to the separate legal personality of the company was rooted in the partnership (*societas*) and contractual principles on which company law in the United Kingdom was based and essentially adopted the aggregate and fiction theories' conceptualisation of the company.

7.1.2 The Companies Act of 2008

The approach of the Companies Act 71 of 2008 (the Companies Act of 2008) to the separate legal personality of the company is fundamentally different to that of its predecessor. Section 19(1) of the Companies Act of 2008 provides that a company is a juristic person from the date of its incorporation and that it has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise.³⁶⁶ This section is similar to section 15(1) of the *Canada Business Corporations Act*. Section 8(4) of the our Constitution³⁶⁷ further provides that a juristic person (including a company) is entitled to the same fundamental rights as natural persons insofar as these rights may be exercised by a juristic person.³⁶⁸ In other words, as is the case in Canadian law, the company is treated, as far as possible, by analogy to a natural person. Section 19(2) of the Companies Act of 2008 provides that a person is not, solely

³⁶⁵ *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) 827-828; *Dithaba Platinum (Pty) Ltd v Econovaal Ltd* supra 625; *Ritz Hotel Ltd v Charles of The Ritz Ltd* 1988 (3) SA 290 (A) 314-315; Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 42 and 53-57. Compare also *Adcock-Ingram Laboratories Ltd v SA Druggists Ltd; Adcock-Ingram Laboratories v Lennon Ltd* 1983 (2) SA 350 (T); *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A); *Macadamia Finance Bpk v De Wet* 1993 (2) SA 743 (A) (cases where the court refused to pierce the corporate veil); Delpont *Henocheberg* vol 1 83.

³⁶⁶ See Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 31-41; Davis *Companies and Other Business Structures* 29-30 and 33-34 for a discussion of the separate legal personality of a company and the consequences thereof.

³⁶⁷ The Constitution of the Republic of South Africa, 1996.

³⁶⁸ However the Constitutional Court cautioned in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 CC at par 18 against equating the right to privacy of a juristic person to that of a natural person, as juristic persons are not bearers of human dignity. This will be discussed further in chapter 6.

by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that the Act or the company's memorandum of incorporation provides otherwise.³⁶⁹ The approach of the Companies Act of 2008 is aligned with that of Canadian corporate law and is based on the concept of the corporation (*universitas*) and the real entity theory.³⁷⁰ There has thus been a fundamental shift in the underlying philosophy and approach of South African company law to the corporate personhood of the company.

A further new feature of the Companies Act of 2008 is that courts are given a general statutory power to disregard the separate personality of the company.³⁷¹ Section 20(9) of the Companies Act of 2008 empowers the court to disregard the separate personality of the company if the incorporation or use of the company constitutes an unconscionable abuse of the juristic personality of a company as a separate entity.³⁷² It has been held that the statutory remedy is supplemental rather than substitutive of the common law.³⁷³ As indicated before, the theoretical justification for the piercing of the corporate veil is founded in the fiction theory (and perhaps to a lesser extent the aggregate and juridical reality theories).

The Act imposes liability on directors or prescribed officers of the company in certain circumstances.³⁷⁴ These provisions can more accurately be described as examples where the corporate veil is lifted.³⁷⁵

³⁶⁹ Note however that the directors of a personal liability company are jointly and severally liable, together with the company, for any debts and liabilities of the company that were contracted during their respective period of office (section 19(3) of the Companies Act of 2008). See Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 35-36 for a discussion of limited liability.

³⁷⁰ The statutory contract clause (section 15(6) of the Companies Act of 2008) was however retained. This clause does not fit in with the new approach of the Companies Act of 2008.

³⁷¹ A similar provision was already contained in section 65 of the Close Corporations Act 69 of 1984,

³⁷² For a discussion of section 20(9) see Cassim FHI "Introduction to the New Companies Act: General overview of the Act" in *Contemporary Company Law* 57-63; Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 57-63; Davis *Companies and Other Business Structures* 30-33; Cassim "Hiding behind the Veil" (2013) DR 35; Subramanien "Unconscionable abuse" (2014) *Obiter* 150-161; Delpont *Henochsberg vol 1* 99-100. See also *Bellini v Paulsen* [2013] 2 All SA 26 (WCC); *Ex parte Gore* supra; *Van Zyl v Kaye* 2014 (4) SA 452 (WCC).

³⁷³ *Ex parte Gore* supra par 34. See also Delpont *Henochsberg vol 1* 86(3) and 99.

³⁷⁴ For example section 77(3)(a) (where a director acts without authority), section 77(3)(b) (where a director acquiesced in the carrying on of a business in contravention of section 22 (reckless trading)), section 77(3)(c) (where a director was party to a fraudulent act), section 77(3)(d) (where a director participated in the making of false or

7.2 The capacity of the company

7.2.1 The Companies Act of 1973

The Companies Act of 1973 required a company to state its main object in the objects clause of its memorandum of association.³⁷⁶ Section 33 of the Act provided that a company would have the capacity determined by the main object stated in its memorandum and any objects ancillary thereto, except if such ancillary objects are specifically excluded. A company also had the plenary powers listed in schedule 2 of the Act.³⁷⁷ The legal capacity of a company was therefore determined by the objects of the company as set out in its memorandum of incorporation. The company could make additions or alterations to its objects.³⁷⁸ The approach of the Act to the capacity of the company corresponded with that of the fiction theory.

Section 36 of the Companies Act of 1973 abolished the external consequences of the *ultra vires* doctrine. It provided that no act of the company would be void by reason only of the fact that the company was without capacity or power to so act or because the directors had no authority to perform the particular act on behalf of the company.³⁷⁹ The section did not abolish the internal operation of the *ultra vires* doctrine.³⁸⁰ The approach of the Companies Act of 1973 to the

misleading statements), section 77(3)(e) (where a director participated in unlawful distributions), section 20(6) (in terms of which shareholders can claim damages against any person who intentionally, fraudulently or with gross negligence causes the company to act contrary to the Act or the company's memorandum of incorporation) and section 218(2) (in terms of which any person who contravenes any provision of the Act is liable to any other person who suffers loss or damage as a result of that contravention) of the Companies Act of 2008. See also Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 63-65; Davis *Companies and Other Business Structures* 31.

³⁷⁵ Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 63.

³⁷⁶ Section 52(1)(b) of the Companies Act of 1973. This was also historically the position in the United Kingdom and is still the position in India. Compare section 4(c) of the Indian *Companies Act 2013*.

³⁷⁷ Section 34 of the Companies Act of 1973. See generally Cilliers & Benade *Korporatiewe Reg* paras 6.10-6-15.

³⁷⁸ Section 55(1). See also Cassim FHI "Corporate Capacity, Agency and the Turquand Rule" in *Contemporary Company Law* 163-168.

³⁷⁹ Section 36 of the Companies Act of 1973 is similar to section 39 of the *Companies Act 2006* of the United Kingdom and section 16(3) of the *Canada Business Corporations Act*.

³⁸⁰ See Cilliers & Benade *Korporatiewe Reg* paras 6.16-6-19. Kunst et al *Henocheberg on 1973 Act* 58-59 and 64-68(1); Cassim FHI "Corporate Capacity, Agency and the Turquand Rule" in *Contemporary Company Law* 167-168. The doctrine of constructive notice formed part of South African law. See Cilliers & Benade *Korporatiewe Reg* paras 6.21-6.22; Davis *Companies and Other Business Structures* 55. The *Turquand*-rule was also part of South African

capacity of a company was very similar to that of the current *Companies Act 2006* of the United Kingdom.

7.2.2 The Policy Document

The Department of Trade and Industry's policy paper entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*³⁸¹ (the Policy Document) was published in 2004. It proposed that a company should have a broad purpose, which would be to do business, or to be not-for profit. Shareholders should have the option to limit the purpose of the company if they so wish. Where a company has stated objects, shareholders should be able to take proceedings to restrain the doing of anything contrary to such objects, without prejudice to any third party rights; and ratify such acts by ordinary resolution. Bona fide third parties should be entitled to assume a company's capacity and not be bound to enquire into the company's capacity.³⁸²

7.2.3 The Companies Act of 2008

The approach of the Companies Act of 2008 with regards to the capacity of a company differs materially from that of its predecessor. Section 19(1) of the Companies Act of 2008 provides that a company has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise.³⁸³ This provision is similar to section 15(1) of the *Canada Business Corporations Act* and is based on the real entity theory's conceptualisation of the company.

The company is no longer required to have an objects clause in its memorandum of association.³⁸⁴ However a company's memorandum may, on an optional basis, impose limitations, restrictions or

law. See *Mine Workers Union v Prinsloo* 1984 (3) SA 831 (A); Cilliers & Benade *Korporatiewe Reg* paras 6.23-6.34; Davis *Companies and Other Business Structures* 55-56.

³⁸¹ Government Gazette 26493 of 3 June 2004.

³⁸² Policy Document 33.

³⁸³ Cassim FHI "Corporate Capacity, Agency and the Turquand Rule" in *Contemporary Company Law* 168-169.

³⁸⁴ A non-profit company however has to set out at least one object in its memorandum of incorporation.

qualifications to its purposes, powers or activities.³⁸⁵ No action of the company is void by reason only that it is prohibited by a limitation, restriction or qualification of the purposes, powers or activities of the company or that the directors have no authority to authorise such action as a consequence of that limitation, restriction or qualification.³⁸⁶ The company or any other party is further precluded from relying on a limitation, restriction or qualification of the purposes, powers or activities of the company in order to assert that the action is void.³⁸⁷ The *ultra vires* doctrine thus has no external effect.³⁸⁸ Its internal effect is however preserved to the extent that the lack of capacity may be raised only as between the company, its directors, prescribed officers and its shareholders.³⁸⁹ One or more shareholders, directors or prescribed officers of a company may apply for an order restraining the company or the directors from doing anything inconsistent with any limitations, restrictions or qualifications of the company's purposes, powers or activities contained in its memorandum of incorporation.³⁹⁰ Shareholders can also hold any person that does anything inconsistent with such limitations, restrictions or qualifications liable for damages.³⁹¹ The company can also hold a director liable for any loss, damages or costs sustained by the company as a consequence of any breach by that director of any provision of the memorandum of incorporation (which will include doing anything inconsistent with any limitations, restrictions or qualifications contained therein).³⁹² Shareholders can ratify any action

³⁸⁵ Section 20(1) of the Companies Act of 2008. Section 20(1) is similar in effect to section 39 of the *Companies Act 2006* of the United Kingdom and section 16(3) of the *Canada Business Corporations Act*.

³⁸⁶ Section 20(1)(a) of the Companies Act of 2008.

³⁸⁷ Section 20(1)(b).

³⁸⁸ This is also the position in the United Kingdom and Canada but not in India, where the *ultra vires* doctrine still has external effect. The *ultra vires* doctrine will of course have no effect whatsoever if a company's memorandum does not impose limitations, restrictions or qualifications to the company's purposes, powers or activities, as it will then have the legal powers and capacity of an individual, except to the extent that it is incapable of exercising any such power, or having any such capacity.

³⁸⁹ This is not very different in effect from section 36 of the Companies Act of 1973. See Cassim FHI "Corporate Capacity, Agency and the Turquand Rule" in *Contemporary Company Law* 168-179; Davis *Companies and Other Business Structures* 56-57.

³⁹⁰ Section 20(5) of the Companies Act of 2008.

³⁹¹ Section 20(6). This section is similar to section 171 of the *Companies Act of 2006* of the United Kingdom.

³⁹² Section 77(2)(b)(iii) of the Companies Act of 2008.

by the company inconsistent with such limitations, restrictions or qualifications by special resolution.³⁹³

These provisions again emphasise the fundamental shift in the underlying philosophy and approach of South African company law to the corporate personhood of the company. The approach of the Companies Act of 2008 is now aligned with that of Canadian corporate law and is based on the concept of the corporation (*universitas*) and the real entity theory.

7.3 The legal position of the directors of the company

7.3.1 The Companies Act of 1973

The directors derived their powers from the articles of the company under the Companies Act of 1973. The division of powers in the company was regulated in the articles.³⁹⁴ The position under the Act was summarised as follows in *LSA UK Ltd (formerly Curtainz Ltd) v Impala Platinum Holdings*:³⁹⁵

“Our law recognizes what has been called ‘the doctrine of “supremacy of the articles of association”’... What it amounts to is that the founding members, and also a later body of members by special resolution, may order the internal affairs of their company in the way that suits them best, subject to such prohibitions as may exist in the Act or any other law, statutory or common ... The board of directors and the general meeting are both organs of

³⁹³ Section 20(2). The doctrine of constructive notice was finally abolished by section 19(4) of the Companies Act of 2008 subject to two exceptions. The two exceptions are first, section 19(5) which provides that a person is to be regarded as having knowledge of any provision of a company’s memorandum of association containing a restrictive condition coupled with a restrictive method of amendment or an entrenched provision that may not be amended at all, provided that the company’s name is suffixed by the initials “RF” (ring fenced) and the company’s notice of incorporation draws attention to the entrenched provision or the restrictive condition applicable to the company. Secondly, persons dealing with a personal liability company is deemed to be aware of the effect of the directors’ and former directors’ joint and several liability for debts and liabilities of the company contracted during their periods of office. See Cassim FHI “Corporate Capacity, Agency and the Turquand Rule” in *Contemporary Company Law* 179-181.

³⁹⁴ According to Delpont the basis for this was the *laissez faire* principle. Regulation 59 of table B and regulation 60 of table A of schedule 1 to the Companies Act of 1973 contained a provision that was virtually word for word similar to article 46 of the proposed articles that was contained in table B of the old British *Joint Stock Companies Act of 1856*. See Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 85. See also Delpont *Henocheberg vol 1* 250(2).

³⁹⁵ [2000] JOL 6308 (A) paras 21-22.

the company, each having its own original powers. The directors do not receive their powers as agents of the company, so that in the absence of a contrary provision in the memorandum and articles, even a unanimous general meeting may not supersede the directors' powers."³⁹⁶

The significance of this is that the articles, and therefore also the powers of the directors, could have been amended by the shareholders.³⁹⁷ The management powers of the directors were delegated and could be revoked by the company in general meeting.³⁹⁸

Internally directors (as well as the general meeting and sometimes even the managing director) were, according to Cilliers and Benade, the organs of the company under the Companies Act of 1973. The organs of the company were more than just its functionaries. The act of an organ of the company was for all practical purposes the act of the company itself.³⁹⁹ Under the Companies Act of 1973 the general meeting was the main or primary organ of the company in which the final authority vested.⁴⁰⁰ Externally the company could only be represented by representatives. It was accordingly not appropriate to refer to directors as organs. They were representatives of the company. The only exception was in the case of delict, where the intention of the act was determined with reference to the "directing mind" within the company.⁴⁰¹ Our courts have often

³⁹⁶ See also *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA) 134; *Scott v Scott* [1943] 1 All ER 582 (Ch) 584-585; *Van Tonder v Pienaar* 1982 (2) SA 336 (SEC) 341; *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (1) SA 635 (O) 637; Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 85-86. See also *Automatic Self-Cleansing Filter Syndicate Co v Cuninghame* supra.

³⁹⁷ Sections 55(1) and 56(4) of the Companies Act of 1973. See also *Ex parte Pinelands Development Co Ltd* 1973 (2) SA 223 (C) 228-229; *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd* 1975 (1) SA 572 (A); Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 87.

³⁹⁸ Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 87.

³⁹⁹ Cilliers & Benade *Korporatiewe Reg* paras 14.02, 16.01 and 16.04. See also Naudé *Die Regsposisie van die Maatskappydirekteur* 47; Du Plessis *Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure* LLD thesis (1990) University of the Orange Free State 17; Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 84.

⁴⁰⁰ Cilliers & Benade *Korporatiewe Reg* paras 14.01 and 14.08.

⁴⁰¹ Cilliers & Benade *Korporatiewe Reg* paras 14.03 and 16.05- 16.12. See also *Barkett v SA Mutual Trust & Assurance Co Ltd* 1951 (2) SA 353 (A) 362; [1951] 2 All SA (A); *Levy v Central Mining & Investment Corporation* 1955 (1) SA 141 (A) 149; [1955] 1 All SA 289 (A); *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) 606; [1956] 1 All SA 449 (A); *SIR v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) 669; [1975] 3 All SA 41 (A); *Ensor v Syfret's Trust & Executor Co (Natal) Ltd* 1976 (3) SA 762 (D) 763; [1976] 3 All SA 472 (A); *Harris v Unihold (Pty) Ltd* 1981 (3) SA 144 (W) 147; [1981] 3 All SA 472 (D); *Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*

held that the company is a fictional or artificial person that cannot act personally but must be represented.⁴⁰² Section 332 of the Criminal Procedure Act⁴⁰³ provides that the intent of the director or functionary who performs an act is attributed to the company.⁴⁰⁴

Havenga described directors as “the persons who direct the affairs of the company.”⁴⁰⁵ Directors were empowered by the articles to exercise all the powers of the company except those powers which had to be exercised by the company in general meeting.⁴⁰⁶ Cilliers and Benade stated that it was inappropriate to categorise directors as trustees or agents in South African law.⁴⁰⁷ In *Cohen v Segal*⁴⁰⁸ the legal position of directors was described as follows:

“Directors are from time to time spoken of as agents, trustees or managing partners of a company, but such expressions are not used as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered, points of view at which, for the moment, they seem to be falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall, *pro tanto*, within the principles which govern that particular class.”⁴⁰⁹

1985 (3) SA 916 (A) 932-933; *Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Ltd* 1987 (3) SA 506 (A) 515-516; [1985] 2 All SA 428 (A); [1987] 2 All SA 307 (A); *CIR v Malcomess Properties (Isando) (Pty) Ltd* 1991 (2) SA 27 (A) 36-37; [1991] 4 All SA 145 (A); *Simon v Mitsui and Co Ltd* 1997 (2) SA 475 (W) 527-531; [1996] 3 All SA 353 (W); *Mostert v Old Mutual Life Assurance Company* [2001] 2 All SA 465 (C); *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd* supra; Naudé *Die Regsposisie van die Maatskappydirekteur* 30-37; Kunst et al *Henochsberg on 1973 Act* 393.

⁴⁰² Naudé *Die Regsposisie van die Maatskappydirekteur* 25 n 3; *Yates Investments (Pty) Ltd v CIR* 1956 SA 364(A); [1956] 1 All SA 258 (A); *Ramsey v Fuchs Garage (Pty) Ltd* 1959 (3) SA 949 (C); [1959] 3 All SA 368 (C); *S A Cultivators (Pty) Ltd v Flange Engineering Co (Pty) Ltd* 1962 (3) SA 156 (T); [1962] 3 All SA 33 (T); *Dormehl's Garage (Pty) Ltd v Magagula* 1964 (1) SA 203 (T); [1964] 1 All SA 222 (T).

⁴⁰³ Act 51 of 1977.

⁴⁰⁴ Cilliers & Benade *Korporatiewe Reg* paras 35.01 to 35.03.

⁴⁰⁵ Pretorius et al *Hahlo's Company Law* 327.

⁴⁰⁶ Supra.

⁴⁰⁷ Cilliers & Benade *Korporatiewe Reg* par 16.03.

⁴⁰⁸ 1970 (3) SA 702 (W); [1970] 3 All SA 308 (W).

⁴⁰⁹ 706 E.

7.3.2 The Companies Act of 2008

The conceptualisation of the legal position of directors changed fundamentally under the Companies Act of 2008. Section 66(1) of the Act provides: “The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.” This section is very similar to section 102(1) of the *Canada Business Corporations Act*, which provides that subject to any unanimous shareholders agreement, the directors shall manage, or supervise the management of, the business and affairs of the corporation. As is the case in Canadian corporate law, persons attaining the status of director are now assigned statutory powers and obligations.

In contrast to the position under the Companies Act of 1973, the directors’ powers are now original and not delegated. This statutory source of the directors’ powers and obligations distinguishes South African and Canadian company law from that of the United Kingdom. It corresponds with the real entity theory’s conceptualisation of the legal position of directors. Section 66(1) brought about a fundamental shift in the underlying philosophy and approach to the company constitution, away from a contractarian (or English model) company to a division of power corporation.⁴¹⁰

The significance of section 66(1) of the Companies Act of 2008 is the following: First, the powers of the directors are now original and not delegated from the shareholders through the articles of association as it was in the Companies Act of 1973. The powers and duties of the directors thus have a constitutional (or statutory) and not a contractual base. The powers conferred on the directors are not delegated or derived from an agreement between the directors and shareholders. Secondly, the ultimate power in the company now vests with the board of directors and not the shareholders. Unless the qualifications of section 66(1) applies, the board of directors is the ultimate organ of the company. The only control that the shareholders have over the directors, other than the power to appoint⁴¹¹ or remove⁴¹² them, is if the shareholders act unanimously.⁴¹³

⁴¹⁰ Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 123-124.

⁴¹¹ Section 66(4) of the Companies Act 2008.

Thirdly, it confirms that a company is an institution rather than a partnership or a contractual arrangement (a *universitas* rather than a *societas*).⁴¹⁴

As section 66(1) confers original powers and duties on directors, they can no longer be conceptualised as agents of the company.⁴¹⁵ It is also not appropriate to describe a director as a trustee in South African law. Trust property vests in the trustee whilst company property vests in the company and not in its directors.⁴¹⁶ The standard of care and skill required from directors is also less strict than is the case of trustees.⁴¹⁷ Since there is a definite shift in our company law from *societas* to *universitas*, it is also not appropriate to compare a director with a managing partner. This analogy may be stronger in the case of domestic companies or the so called quasi-partnership companies.⁴¹⁸

⁴¹² Section 71.

⁴¹³ *Pretorius v PB Meat (Pty) Ltd* (1057/2013) [2013] ZAWCHC 89 (14 June 2013); *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] JOL 32101 (WCC) par 31; Katz “Governance under the Companies Act 71 of 2008: Flexibility is the keyword” (2010) AJ 248 259; Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 123-124; Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 90-92; Delpont *Henocheberg vol 1* 250(3); Esser & Delpont “Shareholder protection philosophy and the Companies Act of 2008” (2016) THRHR 1 9-10.

⁴¹⁴ Compare De Jongh *Between societas and universitas. The listed company in historical perspective (Tussen societas en universitas. De beursvennootskap en haar aandeelhouders in historish perspectief)* (2013) Supreme Court of Netherlands - Research Department (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368748 (accessed 2014-04-09)) (hereinafter “De Jongh *Between societas and universitas*”) 561-562.

⁴¹⁵ This is also borne out by section 44 of the Companies Act of 2008 which provides that the board may authorise the company to provide financial assistance to persons who subscribe to or purchase shares in the company. Agents cannot authorise their principal. See Delpont “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 91 n 69. Cassim R “Governance and the Board of Directors” in *Contemporary Company Law* 412 states that even the analogy of a director as an agent of the company (as opposed to the shareholders) is not as strong as in the Companies Act of 1973.

⁴¹⁶ *Dadoo v Krugersdorp Municipal Council* supra 550-551; Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 412.

⁴¹⁷ Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 123-124.

⁴¹⁸ *Moosa v Mavjee Bhawan (Pty) Ltd* supra 137-138; *Emphy v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D); [1979] 2 All SA 35 (D) 36; *Roderick v AB Jackson (Pty) Ltd*; *Roderick v Bremco (Pty) Ltd* [2007] JOL 20079 (C); *Apco Africa Inc v Apco Worldwide (Pty) Ltd* 2008 (5) SA 615 (SCA) paras 18-19; [2008] 4 All SA 1 (A); Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 413-414.

The legal position of a director is *sui generis*.⁴¹⁹ As indicated before, the term “director” in its ordinary English usage describes a person who controls, regulates, superintends, guides or orders a particular matter. This describes the position of a director in South African and Canadian law better.⁴²⁰ As is the case in Canadian corporate law, the position of directors can be compared to the democratically elected representatives of a country and the shareholders with the electorate. Directors are elected to their positions by a theoretical shareholder democracy.⁴²¹ Once elected, the directors are collectively given the power to manage, or supervise the management of, the business and affairs of the corporation by statute. The managerial obligations and duties of directors and officers are public in nature in the sense that they have a statutory origin. Section 76(3) of the Companies Act of 2008 provides that directors must exercise their powers and functions in the best interests of the company.

7.4 General

In South African law the company has, under the influence of the fiction theory and British company law, been described as for example, an “artificial legal entity”,⁴²² a “persona by a fiction of law”,⁴²³ a “fictitious entity”,⁴²⁴ as “merely a legal concept” with “no physical existence”,⁴²⁵ as an entity whose separate existence remains “a figment of law”⁴²⁶ and as a “legal fiction”.⁴²⁷ The

⁴¹⁹ Cassim MF “Formation of Companies and the Company Constitution” in *Contemporary Company Law* 414.

⁴²⁰ McGuinness *Business Corporations* 591-592.

⁴²¹ Welling *Corporate Law in Canada* 60-62 and 298; Welling et al *Canadian Corporate Law* 117. The daily running of the corporation, like the daily governmental participation in the life of a nation, is not done collectively by the board of directors, nor individually by any one of them, but is left in the hands of corporate officers who, like civil servants, are delegated specific tasks and are controlled by internal regulations. They can be compared to the executive branch of government. This describes the basic political hierarchy of a corporation under a division of powers statute. It operates on the fundamental principles of majority rule within each of the spheres of influence of the board of directors and shareholders; and managerial power, delegated to individual corporate officers.

⁴²² See, for example, Kunst et al “*Henochsberg on 1973 Act* 392.

⁴²³ See, for example, Kunst et al “*Henochsberg on 1973 Act* 122(1); Delpont *Henochsberg vol 1* 82.

⁴²⁴ *Ramsey v Fuchs Garage (Pty) Ltd* supra 950;

⁴²⁵ Cassim R “The Legal Concept of a Company” in *Contemporary Company Law* 31. See also *CIR v Richmond Estates (Pty) Ltd* supra 606; *Manong & Associates (Pty) Ltd v Minister of Public Works* 2010 (2) SA 167 (SCA) par 4; [2010] 1 All SA 267 (A).

⁴²⁶ *Ebrahim v Airports Cold Storage (Pty) Ltd* supra.

aggregate theory has also been followed. Our courts have for example equated what they term “domestic” companies with a partnership. On this basis they have been prepared to liquidate such companies in terms of the just and equitable provision contained in section 344(h) of the Companies Act of 1973 where there is a deadlock in the management or in circumstances analogous to those for the dissolution of partnerships.⁴²⁸ Welling points out that a company and its shareholders can be partners if the requisites of a partnership is present. The partnership can even exist even though no express partnership relationship exist.⁴²⁹ If anything, the fact that a company can be a partner of its shareholders reinforces its separate legal personality. The juridical reality theory also had its supporters in South African law.⁴³⁰ Different personhood theories have been used at different times for different purposes.

There has however been a fundamental shift in the underlying philosophy and approach of South African company law to the corporate personhood of the company with the introduction of the

⁴²⁷ See, for example, *Dadoo Ltd and Others v Krugersdorp Municipal Council* supra 550-551; *The Shipping Corporation of India Ltd v Evdomon Corporation* supra 565-566; *Ebrahim v Airports Cold Storage (Pty) Ltd* supra par [15]; *Ex parte Gore* supra par 4. In *Ex parte Gore* supra the court held:

“Juristic personality is a legal fiction (or a ‘figment of law’ as it has been on occasion referred to and thus, when the circumstances of a particular case make it appropriate to do so – inevitably in matters in which the concept has been used improperly, in a manner inconsistent with the rationale for the creation and maintenance of the legal fiction – courts will disregard it.”

Binns-Ward J goes on to state (in footnote 6) that this is not to suggest that the existence of a company as a separate entity distinct from its members is merely an artificial and technical concept. To the contrary, it can own property separate from its members. See also *Dadoo Ltd v Krugersdorp Municipal Council* supra 550-551 and *The Shipping Corporation of India Ltd v Evdomon Corporation* supra 565-566.

⁴²⁸ The “deadlock” principle was derived from the decision of *In re Yenidje Tobacco Co Ltd [1916] 2 Ch 426 (CA)*. See for example *Redler v Collier and The Cereal Manufacturing Co Ltd* 1923 CPD 458; *Petsch v Durban Glass Works (Pty) Ltd* 1932 NP 160; *Ronaasen v Ronaasen & Morgan (Pty) Ltd* 1935 CPD 562; *Lawrence v Lawrich Motors (Pty) Ltd* 1948 (2) SA 1029 (W); *Marshall v Marshall (Pty) Ltd* 1954 (3) SA 571 (N); *Moosa v Mavjee Bhawan (Pty) Ltd* supra; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D); *Emphy v Pacer Properties (Pty) Ltd* supra; *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W); *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W); *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 (4) SA 31 (T); *Hulett v Hulett* supra; *Robson v Wax Works (Pty) Ltd* 2001 (3) SA 1117 (C); *Apco Africa Incorporated v Apco Worldwide (Pty) Ltd* supra; *Weare v Ndlebele* 2009 (1) SA 600 (CC); *Cunninghame v First Ready Development* 249 (*Association incorporated in terms of section 21*) [2010] 1 All SA 473 (SCA); *Cilliers & Benade Korporatiewe Reg* paras 30.54 and 30.46; *Kunst et al “Henochsberg on 1973 Act 704(1)-705; Delpport Henochsberg on the Companies Act 71 of 2008 vol 2 (2011) (Loose-leaf, update May 2014) (hereinafter “Delpport Henochsberg vol 2”) APPI-54 – APPI-55.*

⁴²⁹ Welling *Corporate Law in Canada* 140-143 with reference to *Lansing Building Supply (Ontario) Ltd v Ierullo* supra.

⁴³⁰ *Hallis Corporate Personality: A Study in Jurisprudence* 240; Naudé *Die Regsposisie van die Maatskappydirekteur; Pienaar Die Gemeenregtelike Regspersoon in die Suid-Afrikaanse Privaatreg* LLD thesis (1982) Potchefstroomse Universiteit vir Christelike Hoër Onderwys; Pienaar “Regspersone: fiksie of feit” (1983) THRHR 62; *Cilliers & Benade Korporatiewe Reg* par 1.16.

Companies Act of 2008. The approach of the Companies Act of 2008 to the corporate personhood of the company is now aligned with that of Canadian corporate law and is based on the concept of the corporation (*universitas*) and the real entity theory. Our company law has moved away from the partnership (*societas*) and contractual principles on which the company law in the United Kingdom and India is based.

8 CONCLUSION

The most important attribute of the company is its separate legal personality, which it derived from the medieval corporation or *universitas*. The characteristics of perpetual succession and asset partitioning (including limited liability) are consequences of the company's separate legal personality.⁴³¹

The more prominent corporate personhood theories and their normative consequences are considered in this chapter. The fiction (or artificial entity) theory was the dominant theory until the first half of the nineteenth century. Until then, companies were mostly incorporated by charter or special act on a case by case basis. The state played a decisive role in the incorporation and operation of companies (including the protection of other stakeholders).⁴³² The fiction theory contains a fictional and a dependence component.⁴³³ Its fictional component emphasises that the company is, through legal fiction, endowed with legal personality (or legal subjectivity) as if it is a human being.⁴³⁴ According to the fiction theory, the company is a real entity distinct from its members, but that does not mean that it is endowed with legal personality. Whereas human beings are by nature legal persons that is not the case with companies. A company is treated by

⁴³¹ Berle and Means *The Modern Corporation* 120; Welling et al *Canadian Corporate Law* 128; Gower & Davies *Principles of Modern Company Law* 9th ed 12; Cassim R "The Legal Concept of a Company" in *Contemporary Company Law* 35-41; Blair (2013) *University of Illinois Law Review* 785 787-788 and 795-796; Harris (2015) *Seattle University Law Review* 537 550.

⁴³² Coates (1989) *New York University Law Review* 806 814; Millon (1990) *Duke Law Journal* 201 205-207 and 207-211; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107-108; Colombo (2012) *Temple Law Review* 1 15; Petrin (2013) *Penn State Law Review* 1 5 and 9.

⁴³³ Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 106.

⁴³⁴ Carter 40; Wolff (1938) *Law Quarterly Review* 494 494-496 and 505-521; Millon (1990) *Duke Law Journal* 201 205-206; Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 106; Keay *The Corporate Objective* 33 and 812.

legal fiction as if it is a legal person. In this sense the company is a legal construct or a fictional entity. The dependence component of the fiction theory emphasises the company's dependence on the law to endow it with legal personality.⁴³⁵ The rights, duties and capacities of a company totally depend on how much the law imputes to it by fiction.⁴³⁶ As a result of this dependence component the fiction theory is often equated with the concession theory that is discussed in chapter 3.⁴³⁷ Just like a person who is incapable to act (for example a person who is mentally ill or an infant), the company can only act through an authorised representative.⁴³⁸ Directors and managers are perceived to be representatives of the company.⁴³⁹ The fiction theory is normatively supportive of a public orientated view of companies and company law. As a creation of the state, the company serves a public purpose and as a vehicle to pursue public policy objectives.⁴⁴⁰ The fiction theory provides a theoretical basis for the statutory regulation of the relationship between the company and its stakeholders, including its creditors and employees.⁴⁴¹

With the appearance of general incorporation laws from the beginning of the nineteenth century, the idea that the company existed only because of a concession of the state became less persuasive and the dominance of the fiction theory started to deteriorate.⁴⁴² After the 1880s three corporate personhood theories competed for dominance namely, the fiction theory, the aggregate theory and

⁴³⁵ Carter 40; Coates (1989) *New York University Law Review* 806 811-812; Millon (1990) *Duke Law Journal* 201 206; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107; Blair (2013) *University of Illinois Law Review* 785 799; Dibadj (2013) *Georgia State University Review* 731 754-758.

⁴³⁶ Ghadas (2007) *US-China Law Review* 6 9; Blair (2013) *University of Illinois Law Review* 785 800; Dibadj (2013) *Georgia State University Review* 731 733 and 735.

⁴³⁷ Ghadas (2007) *US-China Law Review* 6 9; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 107; Pollman (2011) *Utah Law Review* 1629 1633-1639; Colombo (2012) *Temple Law Review* 1 15-16; Padfield "Rehabilitating concession theory" (2013) *Oklahoma Law Review* 327 330-331; Chopra & Arora *Company Law* 23-24; Padfield (2015) *William & Mary Business Law Review* 1 20-21.

⁴³⁸ Naudé *Die Regsposisie van die Maatskappydirekteur* 13; Petrin (2013) *Penn State Law Review* 1 5-6.

⁴³⁹ Naudé *Die Regsposisie van die Maatskappydirekteur* 12.

⁴⁴⁰ Coates (1989) *New York University Law Review* 806 809-810; Millon (1990) *Duke Law Journal* 201 207; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101 and 108-109; Blair (2013) *University of Illinois Law Review* 785 800-801.

⁴⁴¹ Millon (1990) *Duke Law Journal* 201 210-211.

⁴⁴² Horwitz (1985) *West Virginia Law Review* 173 181; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 109.

the real entity theory.⁴⁴³ The aggregate (contractual or associational) theory provided a counter-argument against state regulation in response to the fiction theory's public orientated view of companies.⁴⁴⁴ The aggregate theory conceptualises the company not so much as a legal construct but as an association forged by the individuals composing it. The company is thus the collection or aggregate of its individual human constituents, without whom it would have no identity or ability to function.⁴⁴⁵ The original version of the aggregate theory essentially treats the company as a partnership. The company is not recognised as an entity distinct from its individual constituents.⁴⁴⁶ Directors and managers act as trustees or agents of the shareholders and not the company. They have a fiduciary duty to further the interests of the shareholders.⁴⁴⁷ Normatively this theory takes a private-orientated view of the company and company law. The aggregate theory promotes an anti-regulatory approach to companies. The role of company law is to support and protect the right of the consenting parties and to enforce or regulate the agreements between them.⁴⁴⁸ This ideology has its roots in the *laissez-faire* economic and political policy.⁴⁴⁹ The aggregate theory is not normatively supportive of compulsory social responsibility or the protection of creditors and employees.⁴⁵⁰

The real entity theory (also known as the natural entity or organic theory) was developed in Germany in the late nineteenth century in response to the fiction theory.⁴⁵¹ It gained popularity at

⁴⁴³ Horwitz (1985) *West Virginia Law Review* 173 184-185.

⁴⁴⁴ Blair (2013) *University of Illinois Law Review* 785 804; Padfield (2013) *Oklahoma Law Review* 327 335.

⁴⁴⁵ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 100-101.

⁴⁴⁶ Coates (1989) *New York University Law Review* 806 815.

⁴⁴⁷ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁴⁴⁸ Williams (1985) *Texas Law Review* 225 225; Coates (1989) *New York University Law Review* 806 815-816; Millon (1990) *Duke Law Journal* 201 213-214, 225 & 227-228; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101-102 and 111; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Padfield (2013) *Oklahoma Law Review* 327 336; Blair (2013) *University of Illinois Law Review* 785 804; Dibadj (2013) *Georgia State University Review* 731 736; Padfield (2015) *William & Mary Business Law Review* 1 27-28.

⁴⁴⁹ Williams (1985) *Texas Law Review* 225 225; Coates (1989) *New York University Law Review* 806; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102.

⁴⁵⁰ Padfield (2015) *William & Mary Business Law Review* 1 27-28. *Contra* however Petrin (2013) *Penn State Law Review* 1 25, who points out that a number of prominent law and economics scholars and other shareholder theorists have drawn upon the nexus of contracts theory to support corporate social responsibility.

the turn of the 20th century.⁴⁵² According to the real entity theory the company is a real person and not an artificial or fictional entity. It is an independent reality that exists as an objective fact. It is not a creation of the law or the state. The law merely grants it official recognition and permission to operate.⁴⁵³ The company is not simply an aggregate of individuals but is a real person qualitatively different in kind from the individual persons who are part of its makeup.⁴⁵⁴ The real entity theory assumes that the subjects of rights need not be human beings. Anything that possesses a will and life of its own may be the subject of rights.⁴⁵⁵ By assuming that the company is a separate legal person, the real entity theory allows it to be treated much like an autonomous natural person.⁴⁵⁶ Directors are perceived to be organs of the company and not its representatives.⁴⁵⁷ The real entity theory supports two contrasting normative visions of the company.⁴⁵⁸ Initially it formed the theoretical basis to argue that the company is a private rather than a public institution and should not be subject to undue regulation.⁴⁵⁹ As a real and natural entity, a company should have the same rights and privileges as natural persons.⁴⁶⁰ However in the 1930s Dodd employed the real entity theory to justify a completely different normative vision of the company.⁴⁶¹ On this vision the company, because it is a real person, should have the same legal, social and moral responsibilities as a natural person. The company must be a good corporate citizen. As articulated by Dodd, the real entity theory challenged the purely private

⁴⁵¹ Colombo (2012) *Temple Law Review* 1 13; Petrin (2013) *Penn State Law Review* 1 6; Dibadj (2013) *Georgia State University Review* 731 742.

⁴⁵² Millon (1990) *Duke Law Journal* 201 211-213; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 112; Petrin (2013) *Penn State Law Review* 1 10; Chopra & Arora *Company Law* 36-37.

⁴⁵³ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101.

⁴⁵⁴ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 101.

⁴⁵⁵ Wolff (1938) *Law Quarterly Review* 494 498.

⁴⁵⁶ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 115.

⁴⁵⁷ Keay *The Corporate Objective* 33.

⁴⁵⁸ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 116.

⁴⁵⁹ Horwitz (1985) *West Virginia Law Review* 173 221; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 116-117.

⁴⁶⁰ Coates (1989) *New York University Law Review* 806 819; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 116.

⁴⁶¹ Dodd (1932) *Harvard Law Review* 1145; Millon (1990) *Duke Law Journal* 201 203.

conception of company law based on shareholder primacy.⁴⁶² On this view the company should have regard to not only its shareholders, but also its other stakeholders such as creditors, employees, consumers and the society in which it operates. The company must be regulated to ensure that it does so. This view supports a public view of companies.⁴⁶³ Building on this foundation, other communitarians (or progressives), corporate social responsibility scholars and stakeholder scholars also justified the consideration of broader stakeholder interests by conceptualising the company as a distinct moral organism with social and ethical responsibilities over and above the demands of the law and market forces.⁴⁶⁴ The real entity theory is the most recent genuine philosophical conceptualisation of the company to precede the economic contractarian (or nexus of contracts) theory.⁴⁶⁵

During the period of roughly between the late 1920s and the 1970s, the theories of the company were largely ignored by legal scholars and the courts.⁴⁶⁶ The real entity theorists' conceptualisation of the company as a real living thing that exists as an objective fact in the extra-judicial sense of the world was questioned. This led to the emergence of the juridical reality theory. The juridical reality theory conceptualises the company simply as reality in the juridical sense. A juristic person is accorded legal personality insofar as it is legally necessary to answer the needs of society.⁴⁶⁷ Companies have those rights and duties that are conferred on them by legislatures and courts. These rights and duties should in turn be informed by what companies are meant to achieve and how it affects society.⁴⁶⁸ According to this theory the term "person" can

⁴⁶² Coates (1989) *New York University Law Review* 806 809-810; Millon (1990) *Duke Law Journal* 201 217-220 & 224-225; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102 and 117; Petrin (2013) *Penn State Law Review* 1 23-24.

⁴⁶³ Millon (1990) *Duke Law Journal* 201 203; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102 and 117.

⁴⁶⁴ Horwitz (1985) *West Virginia Law Review* 173 221; Bakan *The Corporation* 156-158; Greenfield *The Failure of Corporate Law Fundamental Flaws & Progressive Possibilities* (2006) (hereinafter "Greenfield *The Failure of Corporate Law*") 127-152; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 129; Petrin (2013) *Penn State Law Review* 1 24-25.

⁴⁶⁵ Colombo (2012) *Temple Law Review* 1 11.

⁴⁶⁶ Horwitz (1985) *West Virginia Law Review* 173 175; Colombo (2012) *Temple Law Review* 1 10; Petrin (2013) *Penn State Law Review* 1 14; Blair (2013) *University of Illinois Law Review* 785 807-808; Chopra & Arora *Company Law* 30.

⁴⁶⁷ Naudé *Die Regsposisie van die Maatskappydirekteur* 18.

signify whatever we want the law to make it signify.⁴⁶⁹ The juridical reality theory (insofar as it can be considered to be a theory) is a functional theory. It adopts a utilitarian approach. Company law is not deduced from a larger theoretical construct but rather driven by consequential concerns.⁴⁷⁰ The juridical reality theory lacks a strong normative or philosophical basis. It takes a pragmatic and positivist approach to the corporate personhood question.⁴⁷¹

The aggregate theory was again revived with the rise of the law and economics movement in the 1980s.⁴⁷² The law and economic scholars deny that the company is a separate entity and retain the notion of the contracting and bargaining individual. For them the company is an aggregation of persons.⁴⁷³ Whereas the initial version of the aggregate theory focussed almost exclusively on the company's shareholders, thereby treating the company essentially as a partnership, the nexus of contracts version (or economic contractarian theory) discussed in chapter 3 focuses on relationships more broadly. It deems the web of consensual transactions (or contract based relations) to be between not only the shareholders but between all the rational economic actors, including creditors and employees.⁴⁷⁴ Directors and managers are seen to be the agents of the shareholders (because they are deemed to be the residual risk bearers).⁴⁷⁵ The economic contractarian theory is based on the methodological individualist conception of human beings and their behaviour. For economic contractarians the basic unit of analysis for any economic, political or legal theory is always the individual, never the group. Individuals are ontologically prior to

⁴⁶⁸ Pollman (2011) *Utah Law Review* 1629 1630-1631; Petrin (2013) *Penn State Law Review* 1 43; Blair (2013) *University of Illinois Law Review* 785 786.

⁴⁶⁹ Dewey (1926) *Yale Law Journal* 655; Welling *Corporate Law in Canada* 112-121; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 110.

⁴⁷⁰ Colombo (2012) *Temple Law Review* 1 10.

⁴⁷¹ Naudé *Die Regsposisie van die Maatskappydirekteur* 18.

⁴⁷² Millon (1990) *Duke Law Journal* 201 229-231; Colombo (2012) *Temple Law Review* 1 15; Blair (2013) *University of Illinois Law Review* 785 804-805, 808 and 814; Dibadj (2013) *Georgia State University Review* 731 737; Chopra & Arora *Company Law* 30-34; Padfield (2015) *William & Mary Business Law Review* 1 27.

⁴⁷³ Alchian and Demsetz (1972) *American Economic Review* 777; Jensen and Meckling (1976) *Journal of Financial Economics* 305; Easterbrook & Fischel *The Economic Structure of Corporate Law* (1991) 12. See further the discussion in Keay *The Corporate Objective* 189-191 and Talbot *Great Debates in Company Law* 1.

⁴⁷⁴ Colombo (2012) *Temple Law Review* 1 13-15.

⁴⁷⁵ Padfield (2013) *Oklahoma Law Review* 327 330-331.

companies which, as fictions, have significance only because of the freely contracted arrangements of their human constituents.⁴⁷⁶ This individualistic view has its roots in classical liberalism which focuses on individual freedom rather than utilitarian social maximization. It presumes that people are and should be free to make their own choices about how to live their lives and achieve their goals.⁴⁷⁷

From a normative perspective the real entity theory, as articulated by Dodd, is the most acceptable theory about the corporate personhood of the company. Dodd's normative conception of the real entity theory corresponds with that of the communitarian theory.⁴⁷⁸ It is concluded in the historical analysis in chapter 2 that the concept of the company and the consequences that the law ascribes to incorporation is a function of the underlying economic, political and social environment in which it operates.⁴⁷⁹ The company is not a creation of the law and does not only have a legal dimension. The history of the company shows that the law more often responds to the evolution of the company rather than shapes it.⁴⁸⁰ The real entity theory also perhaps encapsulates our modern conception of the company the best. We do not conceive companies as creatures of the state or as simply aggregates of people. Large modern companies in particular are viewed neither as groups of individuals nor as part of the government, but as organisations falling in their own category.⁴⁸¹

Ripken maintains that each of the fiction, aggregate and real entity theories captures elements of the truth and each makes valid points. But, for her the role of companies in our lives is extremely

⁴⁷⁶ Horwitz (1985) *West Virginia Law Review* 173 181; McMahon "The ontological and moral status of organizations" (1995) *Business Ethics Quarterly* 541 541; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 161.

⁴⁷⁷ Butler & Ribstein "Opting out of fiduciary duties: A response to the anti-contractarians" (1990) *Washington Law Review* 1 7-8; Callison "Federalism, regulatory competition and the limited liability movement: The coyote howled and the herd stampeded" (2001) *Journal of Corporate Law* 951 957; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 161-162.

⁴⁷⁸ Dodd (1932) *Harvard Law Review* 1145 1161; Kribbe 21-22; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 113-114; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284, 292 n95, 296.

⁴⁷⁹ Katzew (2011) *SALJ* 686 688.

⁴⁸⁰ *Cooke Corporation, Trust and Company* 189-190; McBride (2011) *Law and contemporary problems* 1 4-5.

⁴⁸¹ Pollman (2011) *Utah Law Review* 1629 1662.

complex and not one of the corporate personhood theories, standing alone, is sufficient to give us a completely satisfactory picture of companies and their place in our society. In contrast to the juridical reality theorists, who focus only on the legal dimension of the company, she conceptualises the company as “a multi-faceted entity that requires several different lenses to see it in its entirety.”⁴⁸² The concept of a corporate person depends on a collection of legal and non-legal considerations: philosophical, moral, metaphysical, political, historical, sociological, psychological, theological and economic. These disciplines do not necessarily conceptualise the company in the same manner. But whilst there may be the fear that this can muddle the picture of the company, it gives us a more realistic and accurate view of a complicated multi-faceted entity.⁴⁸³

The various theories of the corporate personhood of the company are in tension with each other. Each theory supports its own normative value system. But the more complete picture we have of corporate personhood, the more informed the debate will be. Ripken argues that, there is no one “right” or “best” theory of the company for all purposes and all times. Different theories may be used at different times for different purposes.⁴⁸⁴ She states:

“The corporation is a constantly evolving entity that shapes and is shaped by society’s shifting views of the nature of corporate life. ... Our circumstances, our economy, our political structures, our laws, our belief systems, and our culture can change and, with them, our view of corporations. The corporate person is malleable rather than fixed, and its role in our society is, in part, a product of all our own constantly changing moral, legal, philosophical and legal imagination.”⁴⁸⁵

⁴⁸² Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102. A company can perform different functions depending on what or whom it is in relation to, yet they are all aspects of the same entity. A human being can similarly be seen as occupying different identities for different functions. A man can, for example, simultaneously be a successful businessman, a fair employer, a patriotic citizen, a conscientious neighbour, a devotee Christian, an affectionate husband, a good father and an avid sportsman. These are all aspects of the same person. See Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 168-169. See also Keay *The Corporate Objective* 3-4 and 16-17.

⁴⁸³ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 169-170.

⁴⁸⁴ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 169-171.

⁴⁸⁵ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 171.

What this means for company law is that, just as companies evolve and our theories of companies change, the law must develop in a continuously dynamic way.⁴⁸⁶ Allen concludes that company law must be “worked out, not deduced, [and] [i]n this process, efficiency concerns, ideology, and interest group politics will commingle with history ... to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more”.⁴⁸⁷ The law, in order to balance the private rights of individuals with the legitimate public concerns of society, should be sensitive to the multi-dimensional nature of the company and the different ways in which it can be viewed.⁴⁸⁸

It may be argued that such a multi-dimensional approach may make the interpretation of law difficult and lead to inconsistencies and arbitrariness.⁴⁸⁹ The counter argument is that a multi-dimensional approach might make for inconsistent law but it recognizes the multi-faceted nature of the company.⁴⁹⁰ Company law must mediate between the various conceptual viewpoints. When a problem occurs which raises two or more valid but conflicting or inconsistent normative demands, it is a function of the law to determine which one to adopt. In doing so the law will benefit in adopting a multi-disciplinary approach. By considering the descriptive and normative components of different theories of the company at once, the law adopts a richer, more informed conception of the company.⁴⁹¹

Ripken argues that the impact that companies have on society leads to the inclination that they must be controlled to comply with the demands of society. We may therefore come to the conclusion that companies are moral persons with moral rights, even if we cannot prove it in purely philosophical terms. Ultimately, if we focus primarily on the social impact of corporate

⁴⁸⁶ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 171.

⁴⁸⁷ Allen “Our schizophrenic conception of the business corporation” (1992) *Cardoza Law Review* 261 281; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 171.

⁴⁸⁸ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 172.

⁴⁸⁹ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 172.

⁴⁹⁰ Wolfe “The modern corporation: Private agent or public actor?” (1993) *Washington & Lee Law Review* 1673 1676; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 173.

⁴⁹¹ Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 173-174.

activity, it may make little difference how we define the company from a legal or philosophical perspective. Instead, we would work on shaping corporate behaviour to conform to our notions of what is just. It may be better, in answering the moral corporate personhood question, not to equate the company with individuals, but rather to accept that companies are unique entities with functions and features that cannot be equated with those of human individuals. In this manner we can devise criteria of moral personhood that are specifically tailored to companies.⁴⁹²

The *Companies Act 2006* of the United Kingdom, the Indian *Companies Act 2013* and the South African Companies Act of 1973 all provide that the subscribers to the memorandum of a company and all other persons who may become members of that company are a body corporate.⁴⁹³ All three these Acts also contain a statutory contract clause which provides that the memorandum and articles of the company constitute a statutory contract between the company and each member of the company.⁴⁹⁴ These provisions represent the aggregate theory's conceptualisation of the company (although in contrast with the aggregate theory a company is specifically determined to be "a body corporate") and can be traced to the partnership (*societas*) and contractual principles on which British company law is based. In contrast to this, the *Canada Business Corporations Act* and the South African Companies Act of 2008 treat the corporation or company by analogy to a natural person or an individual.⁴⁹⁵ The corporation or company is viewed as an entity (corporate person) distinct from its members. This represents the real entity theory's conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*).

The courts in all four of the jurisdictions of the United Kingdom, Canada, India and South Africa are prepared to pierce or lift the corporate veil in terms of the common law, although they do so sparingly. The practice of piercing or lifting the corporate veil has been subject to criticism. The question can be asked how the separate legal personality of the company that is regarded as the

⁴⁹² Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 129-130.

⁴⁹³ Section 16 of the *Companies Act 2006* of the United Kingdom; Section 9 of the Indian *Companies Act 2013*; Section 65(1) of the South African Companies Act of 1973.

⁴⁹⁴ Section 33 of the *Companies Act 2006* of the United Kingdom; Section 10 of the Indian *Companies Act 2013*; Section 65(2) of the Companies Act of 1973.

⁴⁹⁵ Section 15(1) of the *Canada Business Corporations Act*; section 19(1) of the South African Companies Act of 2008.

company's most fundamental attribute on the one hand, can simply be ignored on the other. A compelling argument can be made out that the courts do not have the authority to pretend that a corporation does not exist unless the relevant statute gives them such power.⁴⁹⁶ The piercing or lifting of the corporate veil is among the least understood and most confused areas of company law.⁴⁹⁷ The theoretical justification for the piercing of the corporate veil is founded in the fiction theory (and perhaps to a lesser extent the aggregate and juridical reality theories). The company law statutes of all four jurisdictions make provision for the lifting of the corporate veil to hold mostly directors and those in control of the company personally liable under certain circumstances. South African company law is unique amongst the four jurisdictions in that the courts are given a general statutory power to disregard the separate personality of the company if the incorporation or use of the company constitutes an unconscionable abuse of the juristic personality of a company as a separate entity.⁴⁹⁸

Historically the objects clause of a company played an important role in the United Kingdom. A company was required to state its objects in its memorandum. According to the *ultra vires* doctrine a company existed in law only for the purposes of its objects and any objects that were reasonably incidental or ancillary thereto. In other words, the legal capacity of the company was determined by its objects clause. The *ultra vires* doctrine is rooted in the fiction theory. The *Companies Act of 2006* of the United Kingdom no longer requires a company to have an objects clause. Section 31(1) of the Act provides that, unless a company's articles specifically restrict the objects of the company, its objects are unrestricted. The *ultra vires* doctrine still has internal effect but no external effect. This approach signifies a move away from the fiction theory and is more in line with the real entity's conceptualisation of the company. The approach of the *Companies Act of 1973* to the capacity of the company was very similar to that of the current *Companies Act 2006* of the United Kingdom. The Indian *Companies Act 2013* still requires the objects of the company to be set out in the company's memorandum of association.⁴⁹⁹ The *ultra*

⁴⁹⁶ See Welling *Corporate Law in Canada* 114-115; Welling et al *Canadian Corporate Law* 143-149; McGuinness *Business Corporations* 236-249; Chopra & Arora *Company Law* 223.

⁴⁹⁷ Chopra & Arora *Company Law* 136.

⁴⁹⁸ Section 20(9) of the *Companies Act of 2008*. A similar provision is contained in section 65 of the *Close Corporations Act 69 of 1984*.

vires doctrine is therefore still part of Indian company law. Any act beyond or outside the objects of a company is void.⁵⁰⁰ In this respect Indian company law still clings to the fiction theory's conceptualisation of the company.

The approach of the South African Companies Act of 2008 with regards to the capacity of a company differs fundamentally from that of its predecessor, the Companies Act of 1973. Section 19(1) of the Companies Act of 2008 provides that a company has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise. This provision is similar to section 15(1) of the *Canada Business Corporations Act* and is based on the real entity theory's conceptualisation of the company. Under the Companies Act of 2008 the company is no longer required to have an objects clause in its memorandum of association.⁵⁰¹ The *ultra vires* doctrine has no external effect in either Canadian or South African company law.⁵⁰²

In the United Kingdom the shareholders constitute the ultimate source of managerial authority within the company. The directors obtain their powers by a process of delegation from the shareholders through the constitution of the company and not from the *Companies Act 2006*.⁵⁰³ The position was the same under the South African Companies Act of 1973.⁵⁰⁴ Whilst the directors in Indian company law obtain their powers from the *Companies Act 2013*, they are

⁴⁹⁹ Section 4(c) of the *Companies Act 2013*. See also Ghosh *Ghosh on Companies Act* 111.

⁵⁰⁰ Kapoor & Dhamija *Taxmann's Company Law* 87-90; Singh *Company Law* 59-71. See also for example the decision of the Indian Supreme Court of Appeal in *Lakshmanaswami Mudaliar v LIC* supra, which affirmed the *ultra vires* doctrine as part of Indian company law.

⁵⁰¹ A non-profit company however has to set out at least one object in its memorandum of incorporation.

⁵⁰² See for example section 15(1) and section 16(3) of the *Canada Business Corporation Act* and section 20(1) of the South African Companies Act of 2008.

⁵⁰³ *Gower & Davies Principles of Modern Company Law* 9th ed 64-65 and 384. A remarkable feature of company law in the United Kingdom is the extent to which it leaves regulation of the internal affairs of a company, such as the division of power between the organs of the company (the general meeting of the shareholders and the board of directors), to the company itself in its constitution.

⁵⁰⁴ According to Delpont the basis for this was the *laissez faire* principle. See Delpont "The Division of Powers in a Company" in *Essays in Honour of Frans Malan* 85. See also Delpont *Henochsberg vol 1* 250(2).

subject to material limitations.⁵⁰⁵ As is the case in the United Kingdom, the ultimate power in the Indian company still vests with the shareholders and not the board of directors.⁵⁰⁶

In modern Canadian corporate law persons attaining the status of director are assigned statutory powers and obligations to manage the business and affairs of the corporation.⁵⁰⁷ Section 66(1) of the South African Companies Act of 2008 similarly provides that the business and affairs of a company must be managed by or under the direction of its board. In contrast to the position in the United Kingdom and under the Companies Act of 1973, the directors' powers are now original and not delegated. This statutory source of the directors' powers and obligations distinguishes South African and Canadian company law from that of the United Kingdom. It corresponds with the real entity theory's conceptualisation of the legal position of directors. Section 66(1) of the Companies Act of 2008 signifies a fundamental shift in the underlying philosophy and approach to the company constitution, away from a contractarian (or English model) company to a division of power corporation.⁵⁰⁸

The Nigerian *Companies and Allied Matters Act, 1990*⁵⁰⁹ defines directors as follows: "Directors of a company registered under this Act are persons duly appointed by the company to direct and manage the business of the company." This definition encapsulates the true essence of a director. It makes it clear, first, that directors are appointed by the company, not by or on behalf of the shareholders. Secondly, their function is to direct and manage the business of the company. Section 1 of the South African Companies Act of 2008 defines a director as: "a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated." Section 66(1) in turn provides that the business and affairs of a company must be managed by or under the direction of its board. A definition of directors that encapsulates their

⁵⁰⁵ Section 179 of the *Companies Act 2013*.

⁵⁰⁶ Singh *Company Law* 278-284.

⁵⁰⁷ Section 102(1) of the *Canada Business Corporations Act*

⁵⁰⁸ Cassim MF "Formation of Companies and the Company Constitution" in *Contemporary Company Law* 123-124.

⁵⁰⁹ Chapter 59 Laws of the Federal Republic of Nigeria, referred to in Singh *Company Law* 248.

legal position more accurately under the Companies Act of 2008 can be as follows: Directors are persons duly appointed by the company, in terms of the Act, to manage and direct the business and affairs of the company, including alternate directors and all persons occupying the position of a director or alternate director, by whatever name designated.

It is not clear whether the words “except to the extent that ... the company’s Memorandum of Incorporation provides otherwise” in section 66(1) of the South African Companies Act of 2008 extends to the management of the business or affairs of the company or whether it only applies to the authority to “exercise all of the powers and perform any of the functions of the company”.⁵¹⁰ This uncertainty can be removed by rewording the subsection as follows: The business and affairs of a company must be managed by or under the direction of its board. The board has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.

The approach of South African law to the corporate personhood of companies has changed fundamentally with the introduction of the Companies Act 71 of 2008. The approach of South African law to the corporate personhood of companies is now aligned with Canadian company law rather than that of the United Kingdom.

⁵¹⁰ Delport “The Division of Powers in a Company” in *Essays in Honour of Frans Malan* 91; Delport *Henochsberg* vol 1 250(2).

CHAPTER 5

THE CORPORATE OBJECTIVE

- 1 INTRODUCTION**
 - 2 THE DEBATE BETWEEN BERLE AND DODD**
 - 3 BERLE AND MEANS**
 - 4 THE SHAREHOLDER PRIMACY MODEL**
 - 5 THE STAKEHOLDER MODEL**
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 - 7 THE ENTITY MAXIMISATION AND SUSTAINABILITY MODEL**
 - 8 THE CORPORATE OBJECTIVE IN THE UNITED KINGDOM, CANADA AND INDIA**
 - 9 THE CORPORATE OBJECTIVE IN SOUTH AFRICA**
 - 10 CONCLUSION**
-

1 INTRODUCTION

“Every organisation attempting to accomplish something has to ask and answer the following question: what are we trying to accomplish? Or, put even more simply: when all is said and done, how do we measure better versus worse. Even more simply, how do we keep score?”¹

¹ Jensen “Value maximisation, stakeholder theory and the corporate objective function” (2002) Business Ethics Quarterly 235 235-236. Jensen states this is the issue at the organisational level. At the economy wide or social level the issue is the following:

“[I]f we could dictate the criterion or objective function to be maximised by firms (that is, the criterion by which executives choose among alternative policy options), what would it be? Or, even more simply, how do we want the firms in our economy to measure better versus worse?”

All purposeful activity requires some objective. The same applies to the company.² Before the objective of the company is determined, it is not possible to formulate measures to ensure that there is good corporate governance. A clear objective will provide guidance to directors how to carry out their functions and shape the normative content of their roles.³ Defining the corporate objective is regarded as one of the most important theoretical and practical issues confronting us today and is the subject, directly or indirectly, of a substantial amount of literature in many disciplines, including law, finance, organisational behaviour, ethics and economics.⁴ It also has important implications for the welfare of society. Jensen describes the corporate objective as “the business equivalent of the medical profession’s Hippocratic Oath.”⁵

The purpose of the company must not be confused with its nature. The nature of the company is analysed in chapters 2 and 3. What the purpose of the company is and whose interests are paramount is a separate, but obviously related issue.⁶ It is related because the theories of the nature of the company inform and shape the model of corporate governance that is adopted.⁷ The theories of the company deal with the debate of what the company is. The models of corporate governance⁸ deal with the further debates of what the purpose of the company is, whose interests are paramount and how should the company be managed?⁹

² See generally Keay *The Corporate Objective* (2011) 8-13.

³ Carver “A case for global governance theory” (2010) *Corporate Governance: An International Review* 149 at 149-150; Keay *The Corporate Objective* 9-10 and 20-21.

⁴ Hu “Buffet, corporate objectives, and the nature of sheep” (1997) *Cardoza Law Review* 379 380; Walsh “Introduction to the ‘Corporate Objective Revisited’ exchange” (2004) *Organization Science* 349 349; Keay *The Corporate Objective* 19.

⁵ Jensen (2002) *Business Ethics Quarterly* 235 236.

⁶ Keay *The Corporate Objective* 24; Talbot *Palgrave Great Debates in Company Law* (2014) (hereinafter referred to as “Talbot *Great Debates in Company Law*”) vii.

⁷ Dine *The Governance of Corporate Groups* (2000) (hereinafter “Dine *Corporate Groups*”) 24; Esser *Recognition of Various Stakeholder Interests in Company Management* LLD thesis (2008) University of South Africa 19.

⁸ The terms “model of corporate governance” or “corporate governance model” are preferred to the terms “theory of corporate governance” or “corporate governance theory” and will be used in this thesis

⁹ Esser 32; Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) (hereinafter “Keay *The Enlightened Shareholder Value Principle*”) 14-15; Talbot *Great Debates in Company Law* vii. Padfield states that the competing models of corporate governance not only seeks to explain what the purpose of the company is, but

The objectives of a company must also be distinguished from its responsibilities. The question whether or not companies have responsibilities (outside of legal ones) and if so, to whom and what these responsibilities entail is a debate on its own. The constitutional obligations of the company is discussed in chapter 6. If the company is considered a member of society, deeper normative questions arise regarding its role and responsibilities. For instance, should companies carry broader social responsibilities? But before the objectives of the company are ascertained, it is arguably not possible to map out its responsibilities.¹⁰

The purpose of this chapter is to evaluate the corporate objective. The debate as to what the goal or purpose of the company should be has gone on for years. It is often said to have commenced with the debate between Berle and Dodd in the early 1930s.¹¹ This debate is accordingly the starting point of this analyses. Thereafter consideration is given to what Berle and Means considered to be the corporate objective in their seminal work, *The Modern Corporation & Private Property*.¹²

This is followed by a discussion of the more prominent models of corporate governance namely, the shareholder primacy model, the stakeholder model, the enlightened shareholder value model and the entity maximization and sustainability (EMS) model. The shareholder primacy model and the stakeholder model are two diametrically opposed models of corporate governance which dominated the issue of the corporate objective since the nineteenth century.¹³ The enlightened shareholder value model is a variant of the shareholder primacy model which emerged in the United Kingdom at the end of the 20th century. The discussion of the models of corporate

also where the locus of control over the company resides. See Padfield “Corporate social responsibility & concession theory” (2015) William & Mary Business Law Review 3 6.

¹⁰ Key *The Corporate Objective* 14, 20 and 332. Ripken argues that “we cannot ignore the expectations we have for corporations to fulfil multiple social rolls in our society: as a source of profitable investment, as a producer of essential products, as a law-abiding citizen, as an honest employer, as a responsible manager of environmental resources, as a charitable neighbour, as a fair competitor, and as an innovative social designer.” See Ripken “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle” (2009) Fordham Journal of Corporate & Financial Law 97 140 with reference to Stone *Where the Law Ends: The Social Control of Corporate Behavior* (1975) 231-232.

¹¹ Key *The Corporate Objective* 10-13.

¹² Berle & Means *The Modern Corporation & Private Property* (1991) (hereinafter “Berle & Means *The Modern Corporation*”).

¹³ Key *The Enlightened Shareholder Value Principle* 14.

governance focuses on the historical and socio-economic context of each model, its content and how it perceives the corporate objective. How each model treats the creditors and employees of the company is also analysed. An important facet of any model of corporate governance is its enforcement. How can the directors and managers be held accountable if they ignore the corporate objective? There must be enforcement mechanisms for a model to be of any practical use.¹⁴ The emphasis in this thesis is on certain selected non-contractual legal enforcement mechanisms, particularly derivative proceedings and the oppression remedy.¹⁵ The normative basis of each model is also analysed.

Thereafter the application of the models of corporate governance and the conceptualisation of the corporate objective in the United Kingdom, Canada, India and South Africa are considered briefly. A comprehensive discussion of the application of the models of corporate governance and the conceptualisation of the corporate objective in these jurisdictions falls outside the scope of this thesis. Finally certain conclusions are drawn.

¹⁴ Keay *The Corporate Objective* 231.

¹⁵ There is a mixture of contractual, regulatory, market and fiduciary constraints on the actions directors can take. But these constraints do not give stakeholders straightforward remedies to either stop directors from ignoring the corporate objective or to hold them accountable. Examples of the methods that stakeholders may invoke are to exit the company (shareholders can sell their shares, employees can resign and suppliers can refuse to supply the company); to voice their concerns (shareholder activism or influential creditors may approach the board); to exert pressure (shareholders may threaten to sell their shares, creditors may withdraw credit or supplies, employees may strike, consumers may boycott the company's products and communities may take political action); board representation; liquidation; or government intervention. See Keay *The Corporate Objective* 234-251. Armour, Hansmann and Kraakman divides the legal strategies to control agency costs into two subsections. The first is regulatory strategies that consist of rules (*ex ante*) and standards (*ex post*); and setting the terms of entry (*ex ante*) or exit (*ex post*) of principals. The second is governance strategies which consists of appointment rights (the power of principals to select (*ex ante*) or remove (*ex post*) directors or other managers); decision rights (which grant principals the power to initiate (*ex ante*) or ratify (*ex post*) management decisions); and trusteeship (*ex ante*) and reward (*ex post*). They further distinguish three modes of enforcement namely, public enforcement (legal and regulatory actions of organs of the state), private enforcement (civil lawsuits such as class actions and derivative suits) and "gatekeeper control" (which involves the conscript of non-corporate actors such as accountants and lawyers in policing the conduct of corporate actors). Disclosure further plays a fundamental role in controlling agency costs. See Armour, Hansmann and Kraakman "Agency Problems and Legal Strategies" in Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda & Rock *The Anatomy of Corporate Law A Comparative and Functional Approach* (2009) (hereinafter "*The Anatomy of Corporate Law*") 35-37;

2 THE DEBATE BETWEEN BERLE AND DODD

Arguably the most famous debate regarding the corporate objective is the one between Adolf A Berle and Merrick Dodd in the Harvard Law Review in the early 1930s.¹⁶ The debate inadvertently commenced with the article of Berle, “Corporate powers in trust”,¹⁷ in May 1931. Berle argued that no corporate power,¹⁸ however absolute expressed in the empowering document, is absolute in fact. Every corporate power is subject to the limitation that it must be exercised to the benefit of the shareholders.¹⁹ In this concept company law becomes in substance a branch of the law of trusts, although the rules of application are less rigorous, since the business situation demands greater flexibility than the trust situation.²⁰ It should however be noted that Berle was not of the view that the interests of other stakeholders (non-shareholder stakeholders) were not deserving of protection.²¹ His concern was rather how directors and managers could be held accountable. His point was that the accountability of directors and managers will be eroded

¹⁶ Talbot *Great Debates in Company Law* vii. For a discussion of this debate see also Lee “Peoples Department Stores v. Wise and the ‘best interests of the corporation’” (2005) Canadian Business Law Journal 212 212; Grossman “Refining the role of the corporation: The impact of social responsibility on shareholder primacy theory” (2005) Deakin Law Review 572 573-575; Esser 21-22; Esser & Du Plessis “The stakeholder debate and directors’ fiduciary duties” (2007) SA Merc LJ 346 347-348; Lichner “Should shareholders’ interests be the mainstay of corporate governance? (2009) European Business Law Review 889 889-890; Talbot *Critical Company Law* (2007) 113-116; Key *The Corporate Objective* 12-13 and 60; Stewart “Berle’s conception of shareholder primacy: A forgotten perspective for reconsideration during the rise of finance” (2011) Seattle University Law Review 1457 1474-1491; Bone “Legal perspectives on corporate responsibility: Contractarian or communitarian thought?” (2011) Canadian Journal of Law and Jurisprudence 277 295-297; Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2010) (hereinafter “Welling et al *Canadian Corporate Law*”) 207-208; Cassim FHI “The Duties and Liabilities of Directors” in Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2nd ed (2012) (hereinafter “*Contemporary Company Law*”) 518; Davis & Le Roux “Changing the role of the corporation: A journey away from adversarialism” (2012) AJ 306 310-311; Talbot *Great Debates in Company Law* vii-ix.

¹⁷ Berle “Corporate powers in trust” (1931) Harvard Law Review 1049.

¹⁸ Whether they be corporate powers granted to the corporation, to the management or to any group of the corporation (for example the majority of shareholders); and whether derived from statute or charter or both. See Berle (1931) Harvard Law Review 1049 1049.

¹⁹ Berle (1931) Harvard Law Review 1049 1049 and 1073-1074.

²⁰ Berle (1931) Harvard Law Review 1049 1074.

²¹ For example, Berle accepted that some of the rules that were developed regarding the issuing of stock were not only to protect the shareholders, but also the creditors of the corporation. See Berle (1931) Harvard Law Review 1049 1052 and 1055-1056. See also Esser & Du Plessis (2007) SA Merc LJ 346 348.

if they also have a duty towards other interest groups. In his view many of the rules protecting shareholders²² are in reality not rights but equitable remedies.²³

A year later Dodd responded in an article, “For whom are corporate managers trustees?”²⁴ He argued that the traditional view that directors are fiduciaries that must manage the business in the sole interest of the shareholders rested upon two assumptions. The first was that the company is a form of private property. Dodd believed this assumption was rapidly being undermined. He argued: “Business – which is the economic organization 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 owners are thereby curtailed.”²⁵ In Dodd’s view, ownership of a modern railroad at the time was considerably less absolute than was the ownership of a cotton mill at the time when the economic and legal theories of *laissez faire* were most completely accepted.²⁶ The second assumption was that directors of a company are fiduciaries (directly if the corporate fiction is disregarded and otherwise indirectly) for the shareholders.²⁷ Dodd believed that this assumption was also wrong. He stated: “Despite many attempts to dissolve the corporation into

²² For example the rule granting shareholders a pre-emptive right on the issuing of new shares.

²³ Berle (1931) Harvard Law Review 1049 1074. See also Esser & Du Plessis (2007) SA Merc LJ 346 348; Keay *The Corporate Objective* 237.

²⁴ Dodd “For whom are corporate managers trustees?” (1932) Harvard Law Review 1145.

²⁵ Dodd (1932) Harvard Law Review 1145 1162. Dodd pointed out that several hundred years ago, when business enterprises were relatively small and involved the activities of men rather than the employment of capital, the law viewed business as a public profession rather than a purely private matter. The businessman, far from being free to pursue the maximum profit, had a legal duty to provide adequate service and products at a reasonable rate. Although a growing belief in the freedom of contract and the effectiveness of the free market led to the abandonment of this theory as a whole, it survived as the rule applicable to carrier and innkeeper. Later it was expanded to public utility businesses and it may well be that the law is approaching the point that it regards all business as affected with a public interest. He also referred to the increased legislative regulation of the business and particularly referred to legislation designed to protect the health and safety, and even to a slight extent the financial awards of the employee. See Dodd (1932) Harvard Law Review 1145 1148-1152.

²⁶ Dodd (1932) Harvard Law Review 1145 1152.

²⁷ Dodd (1932) Harvard Law Review 1145 1162. Dodd accepted that the prevalent theory at the time was that the corporate entity is a fiction, that its entity character is conferred on it “by a mysterious rite called incorporation.” Others viewed the corporation as a mere aggregate of shareholders. Dodd preferred the real entity theory whereby the corporation is a real entity and not simply a fiction. See Dodd (1932) Harvard Law Review 1145 1145-1146 and 1160.

an aggregate of stockholders, our legal tradition is rather in favour of treating it as an institution directed by persons who are primarily fiduciaries for the institution rather than for its members.”²⁸ Dodd argued that on this basis the interests of employees and consumers were as important as the interests of shareholders.²⁹

In contrast with Berle, Dodd argued that society should trust the discretion of managers rather than rely on shareholders to safeguard the relevant interests. As the more important business enterprises were owned by investors who took no part in the carrying on of the business, one could not look at the shareholders to ensure that these interests were safeguarded. He believed that “[i]f incorporated business is to become professionalized, it is to the managers, not to the owners, that we must look to accomplish this result.”³⁰ Relying on the enlightened management practices of General Electric Company, he believed that those who manage companies should concern themselves with the interests of employees, consumers and the general public, as well as of the stockholders.³¹

Berle responded to Dodd’s argument in an article, “For whom corporate managers are trustees: A note.”³² He stated that no one could seriously dispute the propositions “...first, that the present mode of life entails a high degree of large-scale production; second, that this necessitates an unprecedented degree of financial concentration which has clothed itself in the corporate form; and, third, the net result of such concentration has been, and must be, to pose a few large organisms, the task of whose administrators is, fundamentally, that of industrial government.”³³ In other words, the great industrial managers (and those who control them) and their bankers function more as princes and ministers than as promoters or merchants. But, stated Berle, this is

²⁸ Dodd (1932) Harvard Law Review 1145 1162-1163.

²⁹ Dodd (1932) Harvard Law Review 1145 1149-1152.

³⁰ Dodd (1932) Harvard Law Review 1145 1153.

³¹ Dodd (1932) Harvard Law Review 1145 1156. He relied for this proposition on the statements of leading executives such as Mr Young and his colleague, Mr Swope, of the General Electric Company. See Dodd (1932) Harvard Law Review 1145. See also Talbot *Great Debates in Company Law* viii.

³² Berle “For whom corporate managers are trustees: A note” (1932) Harvard Law Review 1365.

³³ Berle (1932) Harvard Law Review 1365 1366.

the theory and not the practice. He stated that “[t]he industrial ‘control’ does not now think of himself as a prince; he does not now assume responsibilities to the community; his bankers do not now undertake to recognize social claims; his lawyers do not advise him in terms of social responsibility.”³⁴ Nor was there any mechanism in sight to enforce this theoretical function. Berle argued that until such time as a clear and reasonably enforceable scheme of responsibilities to someone else is devised, the only existing bulwark against managerial abuse is the assertion of fiduciary duties. If neither a strong government nor fiduciary duties were in place management control would for all practical purposes become absolute.³⁵ Control would simply be handed over to the present administrators “with a pious wish that something nice would come out of it.”³⁶

The ultimate aim of Berle was to ensure that the company was managed in the interests of society. He stated that “[m]ost students of corporation finance dream of a time when corporate administration will be held to a high degree of required responsibility – a responsibility conceived not merely in terms of stockholders’ rights, but in terms of economic government satisfying the respective needs of investors, workers, customers and the aggregated community.”³⁷ In this respect Berle and Dodd were in agreement. They however differed in their approach as to how this could be achieved. Talbot states that the generally held view that Berle supported shareholder primacy is incorrect and that it is clear from all his subsequent writing that he was the more socialist of the two. He was clearly not promoting the shareholder primacy *status quo*.³⁸

Twenty years after this debate, Berle conceded that Dodd’s view, that directors and managers owe fiduciary duties to the company as an institution rather than to the shareholders alone, had prevailed.³⁹

³⁴ Berle (1932) *Harvard Law Review* 1365 1366-1367.

³⁵ Berle (1932) *Harvard Law Review* 1365 1366-1368 and 1371-1372. See also Keay *The Corporate Objective* 237; Talbot *Great Debates in Company Law* viii-ix.

³⁶ Berle (1932) *Harvard Law Review* 1365 1368.

³⁷ Berle (1932) *Harvard Law Review* 1365 1372. See also Stewart (2011) *Seattle University Law Review* 1457.

³⁸ Talbot *Great Debates in Company Law* ix. See also Keay *The Corporate Objective* 12-13.

³⁹ Berle *The Twentieth Century Capitalist Revolution* (1954) 169. See also Lee (2005) *Canadian Business Law Journal* 212 212.

3 BERLE AND MEANS

The seminal work of Berle and Means, *The Modern Corporation & Private Property*,⁴⁰ was originally published in 1932 as the Great Depression drew to a close.⁴¹ Their identification of the separation of ownership and control of the company stimulated the debate about the purpose and governance of the company.⁴²

Berle and Means conceptualised the company from a communitarian perspective. They believed that the modern company had brought about such changes as to make the free market theory of Adam Smith inapplicable.⁴³ In their view, the powers of the company must be used for the public benefit.⁴⁴ Berle and Means recognised a wide constituency of company interests and responsibilities. They wrote:

“The [company] calls for analyses, not in terms of business enterprise but in terms of social organization. On the one hand, it involves a concentration of power in the economic field comparable to the concentration of religious power in the mediaeval church or of political power in the national state. On the other hand, it involves the interrelation of a wide diversity of economic interests, – those of the ‘owners’ who supply capital, those of the workers who ‘create,’ those of the consumers who give value to the products of the enterprise, and above all those of the control who wield power.

Such a great concentration of power and such a diversity of interest raise the long-fought issue of power and its regulation – of interest and its protection. ... Absolute power is useful in building the organization. More slow, but equally sure is the development of social pressure demanding that the power shall be used for the benefit of all concerned. ...

⁴⁰ Berle & Means *The Modern Corporation*.

⁴¹ The Great Depression lasted from 1923 to 1933.

⁴² Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2005) (hereinafter “Bakan *The Corporation*”) 19-20; Stewart (2011) *Seattle University Law Review* 1457 1467-1473; Greenfield “The third way: Beyond shareholder or board primacy” (2014) *Seattle University Law Review* 749 752.

⁴³ Berle & Means *The Modern Corporation* 303-308.

⁴⁴ Berle & Means *The Modern Corporation* 310.

Observable throughout the world, and in varying degrees of intensity, is this insistence that power in economic organization shall be subjected to the same tests of public benefit which have been applied in their turn to power otherwise located. In its most extreme aspect this is exhibited in the communist movement, which in its purest form is an insistence that *all* of the powers and privileges of property shall be used only in the common interest. In less extreme forms of socialist dogma, transfer of economic powers to the state for public services is demanded. In the strictly capitalist countries, and particularly in time of depression, demands are constantly put forward that the men controlling the great economic organisms be made to accept responsibility for the well-being of those who are subject to the organization, whether workers, investors, or consumers. In a sense the difference in all of these demands lies only in degree.”⁴⁵

The question is how to make these demands effective. Berle and Means noted some of the more important lines of possible development. The first line of development that they considered was the shareholder primacy model.⁴⁶ The second line was to give those in control absolute powers that are not limited by any implied obligation with respect to their use – in other words the model proposed by Dodd. They concluded that if these were the only two models, the former would appear to be the lesser of two evils. However they also identified a third possibility:

“The control groups have, rather, cleared the way for the claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.

This third alternative offers a wholly new concept of corporate activity. Neither the claims of ownership nor those of control can stand against the paramount interests of the community. ... When a convincing system of community obligations is worked out and is generally accepted, in that moment the passive property right of today must yield before the larger interests of society. Should the corporate leaders, for example, set forth a program comprising fair wages, security to employees, reasonable service to the public, and stabilization of business, all of which would divert a portion of the owners of passive

⁴⁵ Berle & Means *The Modern Corporation* 309-310.

⁴⁶ Berle & Means *The Modern Corporation* 310-311.

property, and should the community generally accept such a scheme as a logical and human solution to industrial difficulties, the interests of passive property owners would have to give way. Courts would almost of necessity be forced to recognize the result, justifying it by whatever of the many legal theories they might choose. It is conceivable, - indeed it seems almost essential if the corporate system is to survive, - that 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.”⁴⁷

Essential to this last model advanced by Berle and Means is the separation between the shareholders and the company, and the status of the company as a separate autonomous entity. Corporate governance rules are required that separate control of the company from the contribution of capital.⁴⁸ Berle wrote: “It was apparent to any thoughtful observer that the American corporation had ceased to be a private business device and had become an institution.”⁴⁹ As indicated hereinbefore, Berle later conceded that Dodd was correct in stating that directors and managers owe fiduciary duties to the company as an institution rather to the shareholders alone.⁵⁰

The more prominent models of corporate governance are considered next. Two dominant but diametrically opposed models namely, the shareholder primacy model and the stakeholder model, are considered first. A variant of the shareholder primacy model, the enlightened shareholder value model, is discussed next. Finally Keay’s proposed entity maximization and sustainability model is considered.

⁴⁷ Berle & Means *The Modern Corporation* 312-313.

⁴⁸ Weinstein “Firm, property and governance: From Berle and Means to the agency theory and beyond” (2012) *Accounting, economics and Law: A Convivium* 1 5-6; Clarke “The impact of financialisation on international corporate governance: The role of agency and maximising shareholder value” (2014) *Law and Financial Markets* 39 40.

⁴⁹ Berle “Preface” in Berle & Means *The Modern Corporation* li.

⁵⁰ Berle *The Twentieth Century Capitalist Revolution* 169. See also Lee (2005) *Canadian Business Law Journal* 212 212.

4 THE SHAREHOLDER PRIMACY MODEL

4.1 The model

Although corporate governance is as old as corporate entities, the serious review of the subject is relatively new.⁵¹ Mongalo traces the foundations of corporate governance back to the transformation of company law in the nineteenth century and specifically the *Joint Stock Companies Act 1844*⁵² of the United Kingdom, which established the foundation for the manner in which companies are currently governed and regulated. Until then corporate governance did not envisage the issues with which contemporary corporate governance attempts to deal.⁵³ It was however the seminal work of Berle and Means, *The Modern Corporation & Private Property*,⁵⁴ originally published in 1932 (in which they identified the separation of ownership and control of the company), which really stimulated the debate about the purpose and governance of the company. This work led to a reconsideration of the role of business corporations in society and the appreciation of the importance of corporate governance.⁵⁵

As is evident from the historical analyses in chapter 2, the company and its predecessors were public institutions which served a public purpose throughout most of its evolution.⁵⁶ The expansion of this purpose to include private interests only occurred with the arrival of the general

⁵¹ Mongalo *Corporate Law and Corporate Governance A Global Picture of Business Undertakings in South Africa* (2003) (hereinafter referred to as “Mongalo *Corporate Law and Corporate Governance*”) 185, with reference to Tricker (ed) *Corporate Governance* (2000) xiii stating that “corporate governance has been practiced for so long as there have been corporate entities.”

⁵² 7 & 8 Vict c 110.

⁵³ Mongalo *Corporate Law and Corporate Governance* 185. The Act required the directors to perform certain corporate governance activities such as conducting and managing the affairs of the company, holding of periodical meetings of members, keeping books of account and the production of balance sheets to the members. It also required the company to appoint auditors. The Act laid down the principle that company direction was generally to be effected through two primary bodies namely, the general meeting of members and the board of directors (elected by the members). See Mongalo *Corporate Law and Corporate Governance* 186-187.

⁵⁴ Berle & Means *The Modern Corporation*.

⁵⁵ Bakan *The Corporation* 19-20; Greenfield (2014) *Seattle University Law Review* 749 752.

⁵⁶ Compare for example the Indian *sreni*, the Roman *societas publicanorum*, the medieval corporation or *universitas*, the guilds, the chartered joint stock companies of the Western maritime empires as well as the chartered and statutory companies that were incorporated during the eighteenth and nineteenth centuries (and even today). Some early corporations were created as quasi-governmental bodies with broad political, taxation and coercive powers.

incorporation laws in the nineteenth century.⁵⁷ It was only then that the company evolved from an arrangement in which an association of owners controlled their property under close state supervision to an arrangement in which they surrendered control of their capital to those in control of the company.⁵⁸ From a historical perspective shareholder primacy is therefore a recent event.⁵⁹

The dominance of the shareholder primacy model has fallen and risen since the nineteenth century depending on the economic and social conditions prevalent at the time.⁶⁰ Its prominence (especially in the United Kingdom and the United States) has been the greatest since the late 1970s. A New Right or neoliberalist pro-market thinking emerged and the law and economics movement, who embraced the model, started to gain momentum. Institutional investors also began to support the employment of the shareholder primacy model.⁶¹ A resistance developed against the regulation of companies and the power of trade unions. This was accompanied by an increasing removal of the controls that held finance in check.⁶² This period saw the rise of the phenomenon of financialisation (or finance capitalism) which sought to replace the productive economy with a finance economy.⁶³

⁵⁷ See Micklethwait & Wooldridge *The Company a Short History of a Revolutionary Idea* (2003) (hereinafter referred to as "Micklethwait & Wooldridge *The Company*") 181; Bakan *The Corporation* 153; Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 101 n 1; McBride "General corporation laws: History and economics" (2011) *Law and contemporary problems* 1 5; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁵⁸ Berle & Means *The Modern Corporation* 120-128.

⁵⁹ Greenfield *The Failure of Corporate Law Fundamental Flaws & Progressive Possibilities* (2006) (hereinafter "Greenfield *The Failure of Corporate Law*") 126.

⁶⁰ Keay *The Corporate Objective* 43. One of the early manifestations of the shareholder primacy model is to be found in the judgment of the Michigan Supreme Court in the United States in the case of *Dodge v Ford Motor Corp* 170 N.W. 668 in 1919. According to Keay the term "shareholder value" was introduced in the 1980s by consultants in the United States who were selling value-based management to companies who were already under pressure from the stock market to increase returns. See Keay *The Enlightened Shareholder Value Principle* 15-16.

⁶¹ Keay *The Corporate Objective* 41-42; Keay *The Enlightened Shareholder Value Principle* 15-16; Moore *Corporate Governance in the Shadow of the State* (2013) (hereinafter referred to as "Moore *Corporate Governance* ") 67; Talbot *Great Debates in Company Law* 142-143. See also Bainbridge "In defence of the shareholder wealth maximization norm: A reply to Professor Green" (1993) *Washington & Lee Law Review* 1423; Roe "The shareholder wealth maximization norm and industrial organization" (2001) *University of Pennsylvania Law Review* 2063. During the 1980s, libertarian ideas found prominent expression in the pro-market, anti-government rhetoric of Ronald Reagan and Margaret Thatcher.

⁶² Talbot *Great Debates in Company Law* 142-143 and 146.

⁶³ Talbot *Great Debates in Company Law* 146. Talbot states:

There are a number of definitions of financialisation.⁶⁴ In broad terms it is a convenient word for a bundle of more or less discrete structural changes in the economies of the industrialised world. The structural effects of financialisation occur on three levels.⁶⁵ First, financial markets and institutions increasingly displace other sectors of the economy as the source of profitable activity. Profits accrue primarily through financial channels rather than through trade and commodity production.⁶⁶ Secondly, the adoption of the shareholder primacy model of corporate governance. The emphasis is on financial performance with increasingly short-term horizons. Profits are not reinvested in the company's productive activities but rather distributed to shareholders through dividend payments and share buy-backs.⁶⁷ Thirdly, the increasing incorporation of people into financial activity which leads to a convergence of finance and lifestyles.⁶⁸

“Neoliberal politics intended to replace the troublesome productive economy with the seemingly more manageable finance economy. At the same time financial players sought to develop a market in financial property forms.”

⁶⁴ Foroohar “Saving Capitalism” in *Time* (2016-05-23) 22, an article based on her book Foroohar *Makers and Takers* (2016), defines financialisation as follows at 25:

“[Financialization is] an academic term for the trend by which Wall Street and its methods have come to reign supreme in America, permeating not just the financial industry but also much of American business. It includes everything from the growth in size and scope of finance and financial activity in the economy; to the rise of debt-fuelled speculation over productive lending; to the ascendancy of shareholder value as the sole model for corporate governance; to the proliferation of risky, selfish thinking in both private and public sectors; to the increasing political power of financiers and the CEOs they enrich; to the way in which a ‘markets know best’ ideology remains the status quo. Financialization is a big unfriendly word with broad disconcerting implications.”

The term “finance capitalism” was first coined by Hilferding, an Austrian economist, in 1910. See Ireland “Financialization and corporate governance” (2009) *Northern Ireland Legal Quarterly* 1 5-6, with reference to Bottomore (ed) Rudolph Hilferding *Finance Capital. A Study of the Latest Phase of Capitalist Development* (1981) (first published in 1910). See also Ireland (2009) *Northern Ireland Legal Quarterly* 1; Lazonick “Innovative business models and varieties of capitalism: Financialization of the U.S. corporation” (2010) *The Business History Review* 675; Deakin “What directors do (and fail to do): Some comparative notes on board structure and corporate governance” (2010) *New York School Law Review* 525; Mitchell “Financialism, a (very) brief history” (2010) *Creighton Law Review* 323; Stewart (2011) *Seattle University Law Review* 1457; Lazonick “The financialization of the U.S. corporation: What has been lost, and how it can be regained” (2013) *Seattle University Law Review* 857; Van der Zwan “Making sense of financialisation” (2013) *Socio-Economic Review* 99; Talbot *Great Debates in Company Law* 146-153; Foroohar *Makers and Takers*; Foroohar *Time* (2016-05-23) 22 for a discussion of financialisation.

⁶⁵ Van der Zwan (2013) *Socio-Economic Review* 99; Clarke (2014) *Law and Financial Markets* 39 39-40.

⁶⁶ Clarke (2014) *Law and Financial Markets* 39 40.

⁶⁷ Clarke (2014) *Law and Financial Markets* 39 40.

⁶⁸ Van der Zwan (2013) *Socio-Economic Review* 99 101; Clarke (2014) *Law and Financial Markets* 39 40.

Lately there has again been a swing back towards constituency or multi fiduciary models.⁶⁹ Several states in the United States of America passed what is termed constituency statutes⁷⁰ in the 1980s and 1990s⁷¹. In general terms these statutes allow directors of public corporations to consider an expanded group of interests when making decisions. These statutes either require or permit directors to consider the interests of several kinds of stakeholders, for example creditors and employees.⁷² Whilst it could be argued that these statutes incorporated a stakeholder element, they had very little impact and in practical terms shareholder value continued to hold sway.⁷³ In this sense these statutes have a close resemblance to the enlightened shareholder value model which was adopted in the *Companies Act 2006*⁷⁴ (the *Companies Act 2006*) of the United Kingdom. It is said that the shareholder primacy model is still the prevalent model of corporate governance in the United Kingdom and the United States.⁷⁵ The constituency statutes and the enlightened shareholder value model are essentially variants of the shareholder primacy model of corporate governance.

⁶⁹ Dine *Corporate Groups* 31-36; Lichner (2009) *European Business Law Review* 889 894; Keay *The Enlightened Shareholder Value Principle* 185-202; Botha “Evaluating the social and ethics committee: Is labour the missing link? (1)” (2016) *THRHR* 580 583.

⁷⁰ Also known as stakeholder statutes or non-shareholder statutes.

⁷¹ Keay “Tackling the issue of the corporate objective: An analysis of the United Kingdom’s ‘enlightened shareholder value approach’” (2007) *Sydney Law Review* 577 594; Lichner (2009) *European Business Law Review* 889 904-905; Keay *The Enlightened Shareholder Value Principle* 187.

⁷² Keay (2007) *Sydney Law Review* 577 595; Lichner (2009) *European Business Law Review* 889 904; Keay *The Enlightened Shareholder Value Principle* 188.

⁷³ Keay (2007) *Sydney Law Review* 577 595-596; Lichner (2009) *European Business Law Review* 889 905; Keay *The Enlightened Shareholder Value Principle* 183, 187, 196-199 and 201.

⁷⁴ *C* 46.

⁷⁵ Lee (2005) *Canadian Business Law Journal* 212 212-213; Lichner (2009) *European Business Law Review* 889 893-894; Keay *The Corporate Objective* 42 and 109-112; Cassim FHI “The Duties and Liabilities of Directors” in *Contemporary Company Law* 519; Keay *The Enlightened Shareholder Value Principle* 211-218 and 284-285. Hansmann & Kraakman even asserted that there is no serious competitor to this model. They boldly proclaimed that the three alternative corporate governance models which they identified namely, the manager-orientated model (in which corporate managers serve as disinterested technocratic fiduciaries who guide business corporations to perform in ways that serves the public interest), the labour-orientated model (in which employees are directly involved in corporate governance by, for example, representation on the board of directors as in Germany) and the state-orientated model (in which governments play a strong direct role in the affairs of large companies to provide some assurance that they would serve public interests as was the case in post-war France and Japan) have failed. See Hansmann & Kraakman “The end of history for corporate law” (2001) *Georgetown Law Journal* 439 439 and 443-447.

One of the most vigorous proponents of the shareholder primacy model is the late Nobel Prize winning economist Milton Friedman, who argued that the socially responsible objective of companies is to increase profits.⁷⁶ Friedman famously stated “[the responsibility of managers] is to conduct the business in accordance with [the] desires [of shareholders], which generally will be to make as much money as possible while conforming to the basic rules of society, both those embodied in law and in ethical custom.”⁷⁷

According to the shareholder primacy model⁷⁸ the objective of the company is to maximise shareholder wealth. Directors have a positive obligation to do things that will maximise the wealth of shareholders and a negative obligation to refrain from doing anything which may derogate from the wealth of shareholders.⁷⁹ Wealth is viewed as realised value and expressed in monetary terms. The managers thus only have economic goals and responsibilities.⁸⁰

According to Hansmann and Kraakman the shareholder primacy model has the following elements: First, the ultimate control of the company is in the hands of the shareholders; secondly, the managers manage the company in the interests of its shareholders; thirdly, the interests of other stakeholders such as creditors and employees are protected by contractual and regulatory measures rather than through participation in corporate governance; fourthly, non-controlling

⁷⁶ Lichner (2009) *European Business Law Review* 889 892; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 286.

⁷⁷ Friedman “The social responsibility of the corporation is to increase its profits” *New York Times Magazine* (1970-09-13) 32.

⁷⁸ This model is also known as the “shareholder value”, “shareholder wealth maximization”, “the contractual” or the “classical” model. See Dine *Corporate Groups* 30-35; Esser 32; Keay *The Corporate Objective* 40; Keay & Rodoula “Shareholder value and UK companies: A positivist inquiry” (2012) *European Business Organization Law Review* 1 5; Davis (ed) *Companies and Other Business Structures in South Africa* 3rd ed (2013) (hereinafter “*Davis Companies and Other Business Structures*”) 10. See also Keay “Tackling the issue of the corporate objective: An analysis of the United Kingdom’s ‘enlightened shareholder value approach’” (2007) *Sydney Law Review* 577 580-588; Keay “Shareholder primacy in corporate law: Can it survive? Should it survive?” (2010) *European Company and Financial Law Review* 369; Keay “Getting to grips with the shareholder value theory in corporate law” (2010) *Common Law World Review* 358 for a general discussion of this model.

⁷⁹ Keay *The Corporate Objective* 46; Lichner (2009) *European Business Law Review* 889 891; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 286; Keay & Rodoula (2012) *European Business Organization Law Review* 1 6; Keay *The Enlightened Shareholder Value Principle* 16-17. In essence directors are required to make as much money as they can for shareholders.

⁸⁰ Keay *The Corporate Objective* 41; Keay *The Enlightened Shareholder Value Principle* 17.

shareholders receive strong protection from exploitation at the hands of controlling shareholders; and lastly, the principal measure of the interests of the publicly traded company's shareholders is the market value of their shares in the company.⁸¹ Hansmann and Kraakman accept that the ultimate purpose of companies is to serve society as a whole and that the interests of shareholders deserve no greater weight than other stakeholders, but argue that the standard shareholder orientated model is the best means to achieve this.⁸² By maximising profits, the company creates wealth for the entire economy and promotes efficient source allocation, which ultimately benefits all of its constituencies and society as a whole.⁸³

The director primacy model is a variant of the shareholder primacy model of corporate governance. This model differs from the shareholder primacy model in that it vests the ultimate control of the company in the directors and not the shareholders.⁸⁴ Directors negotiate with and hire the various factors of production. In order to ensure effective corporate decision-making, neither shareholders nor the courts should, subject to narrow exceptions, trump the directors' decision-making authority. But like the shareholder primacy model, the director primacy model postulates that it is the duty of directors to maximise shareholder wealth.⁸⁵ Bainbridge is most frequently associated with the director primacy model of corporate governance.⁸⁶ It is contended

⁸¹ Hansmann & Kraakman (2001) *Georgetown Law Journal* 439 440-441. See also Bainbridge "Director primacy: The means and ends of corporate governance" (2003) *Northwestern University Law Review* 547 573.

⁸² In this respect Hansmann and Kraakman adopt the view of Berle.

⁸³ Hansmann & Kraakman (2001) *Georgetown Law Journal* 439 441. See also Ripken (2009) *Fordham Journal of Corporate and Financial Law* 97 146; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁸⁴ Padfield (2015) *William & Mary Business Law Review* 3 7-8. Padfield states that, having regard to the deference granted to directors to choose the course of action of shareholder wealth under the business judgement rule, it is perhaps more apt to refer to shareholder wealth satisfaction.

⁸⁵ Bainbridge (2003) *Northwestern University Law Review* 547 550; Keay *The Enlightened Shareholder Value Principle* 259; Petrin "Reconceptualizing the theory of the firm – from nature to function" (2013) *Penn State Law Review* 1 36; Padfield (2015) *William & Mary Business Law Review* 3 7.

⁸⁶ Bainbridge "Why a board: Group decision-making in corporate governance" (2002) *Vanderbilt Law Review* 1; Bainbridge (2003) *Northwestern University Law Review* 547; Talbot *Great Debates in Company Law* 79-83; Padfield (2015) *William & Mary Business Law Review* 3 7.

by some that the director primacy model is mirrored by the decision-making structure of the modern public company in many jurisdictions.⁸⁷

The Shareholder primacy model is, as the name suggests, focussed on the shareholders of the company. Directors and managers may take the interests of other stakeholders (including creditors and employees) into account, but only insofar as they contribute to achieving shareholder wealth maximisation.⁸⁸ Directors are responsible for relations with other stakeholders but they are accountable to the shareholders.⁸⁹ The shareholder primacy model assumes that the interests of other stakeholders are adequately protected through contracts.⁹⁰ Some supporters of the shareholder primacy model (particularly legal contractarians like Hansmann and Kraakman) argue that creditors should be the exception to this assumption. According to them company law should directly regulate some aspects between a company and its creditors, such as the rules governing veil-piercing and limits to the distribution of dividends in the presence of inadequate capital. This is because there are unique problems of creditor contracting that are integral to the corporate form, owing principally to the presence of limited liability as a structural characteristic of the company.⁹¹ The need for company law to respond to shareholder-creditor agency problems and to protect creditors is particularly strong when companies are financially distressed (“in the vicinity of insolvency”) or where the creditors concerned are not able to adjust the terms of their exposure to reflect the risk that they bear (the so-called “non-adjusting” creditors).⁹² Enriques,

⁸⁷ Petrin (2013) Penn State Law Review 1 36. Rodrigues for example states that “[i]n the 1970s corporate codes were amended to add that the corporation is managed by ‘or under the direction of’ the board of directors – a nod to the changed reality of corporate America.” See Rodrigues “A conflict primacy model of the public board” (2013) University of Illinois Law Review 1051 1086.

⁸⁸ For example, it will be in the interests of the shareholders to retain employees who have particular skills or to pay crucial suppliers timeously as this will enhance shareholder value. See Keay *The Corporate Objective* 45; Keay *The Enlightened Shareholder Value Principle* 17.

⁸⁹ *Committee on Corporate Governance: Final Report (Hampel Report)* (1998) par 1.17, referred to in Keay *The Enlightened Shareholder Value Principle* 17.

⁹⁰ Keay *The Corporate Objective* 46.

⁹¹ Hansmann & Kraakman (2001) Georgetown Law Journal 439 442. See also Fourie “Die plig van direkteure teenoor maatskappyskuldeisers” (1992) SA Merc LJ 25; Lombard *Directors’ Duties to Creditors* LLD thesis (2006) University of Pretoria; Keay *Company Directors’ Responsibilities to Creditors* (2007); Esser; Armour, Hertig & Kanda “Transactions with Creditors” in the *Anatomy of Corporate Law* 115-151 for a more comprehensive discussion of the position of creditors.

⁹² Armour, Hertig & Kanda “Transactions with Creditors” in the *Anatomy of Corporate Law* 116-121 and 134-142.

Hansmann and Kraakman also point out that in practice employees enjoy governance protection as a matter of right in some jurisdictions.⁹³ They argue however that company law constraints for protecting employees are either toothless or narrowly targeted.⁹⁴ Generally speaking the shareholder primacy model does not provide a basis for the protection of creditors and employees.

The shareholders are central to the enforcement of the corporate objective in the shareholder primacy model. The fiduciary duties of directors to the shareholders serve as gap-filling and contract enforcing devices to hold directors and managers accountable. Shareholders have legal remedies to enforce the corporate objective. One possible legal remedy is the right of shareholders to institute derivative proceedings where directors have breached their fiduciary duties. This allows shareholders to commence or continue proceedings on behalf of their company against persons who have harmed the company in some way and in circumstances where the board of directors fails or refuses to initiate such proceedings. This will often be the case where the directors themselves are the wrongdoers.⁹⁵ A further possible legal remedy of the shareholders is the oppression remedy, which shareholders can use when the business or affairs of the company have been conducted in a manner that is oppressive or unfairly prejudicial to them.⁹⁶ Besides these legal remedies, shareholders are able, provided that they can muster sufficient support, to have directors removed from office. Alternatively they can withhold their support for directors at re-election time.⁹⁷ Shareholders are, according to the shareholder primacy model, the best group to monitor and hold directors accountable.⁹⁸

⁹³ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in *The Anatomy of Corporate Law* 89-105. The first governance protections afforded to employees are appointment and decision rights. The corporate laws of many west European countries mandate employee-appointed directors in at least some large companies. German law, for example, provides that half of the members of supervisory boards of companies with over 2000 (German based) employees be appointed by employees. The second governance protections are incentives strategies. Enriques, Hansmann and Kraakman argue that incentive devices are less important in protecting employees. Lastly employees are protected through constraints strategies that is largely embodied in separate legislation such as labour law.

⁹⁴ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in *The Anatomy of Corporate Law* 104-105.

⁹⁵ Keay *The Corporate Objective* 233-234 and 254.

⁹⁶ Keay *The Corporate Objective* 235.

⁹⁷ Keay *The Corporate Objective* 235.

The shareholder primacy model is based on the contractarian theories that are discussed in chapter 3.⁹⁹ The contractarian theories emphasise the freedom of the individual, liberty, competition and the limitation of interference in the free-market. Contractarians object to legal rules that redistribute wealth, mandate particular behaviour or prevent people from making bargains that they would otherwise choose to make.¹⁰⁰ The director primacy model is similar to the team production theory in that it also locates the control of the company in the board of directors. It differs from the team production theory in that it requires directors to advance the interests of the shareholders, whereas the team production theory postulates that directors must mediate the competing interests of the various stakeholders.¹⁰¹

⁹⁸ Esser “The enlightened-shareholder-value approach versus pluralism in the management of companies” (2005) *Obiter* 719 721; Moore *Corporate Governance* 76-78; Keay *The Corporate Objective* 62-63, 87-90 and 93; Keay *The Enlightened Shareholder Value Principle* 22.

⁹⁹ Millon “New directions in corporate law: Communitarians, contractarians and the crises in corporate law” (1993) *Washington and Lee Law Review* 1373 1377; Esser 32; Lichner (2009) *European Business Law Review* 889 895; Ripken (2009) *Fordham Journal of Corporate and Financial Law* 97 163-164; Keay *The Corporate Objective* 59-61. The contractarian theories are based on the philosophies of amongst others Jeremy Bentham (who founded utilitarianism), John Stuart Mill, Frederick Hayek, Milton Friedman, and Robert Nozick.

¹⁰⁰ Millon (1993) *Washington and Lee Law Review* 1373 1382; Sandel *Justice What’s the Right Thing to Do?* (2009) (hereinafter “Sandel *Justice*”) 61; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Colombo “The corporation as a Toquevillian enterprise” (2012) *Temple Law Review* 1 8. Sandel explains that the standard case for unfettered markets (and hence also contractarianism and the shareholder primacy model) revolves around two ideas namely, maximising welfare (utilitarianism) and respecting freedom (libertarianism). The first claim of those arguing for unfettered markets is that markets promote the welfare of society as a whole. They equate welfare with economic prosperity, though welfare is a broader concept that can include non-economic aspects of social well-being. The second claim is that markets respect individual freedom. Rather than imposing values on persons, markets let people choose for themselves what value to place on things they exchange. This presupposes that all things can be valued in monetary terms. See Sandel *Justice* 6, 20, 41-48, 49, 60-64 and 75-102. Contractarians find the virtue argument for justice discomfoting as it seems more judgemental than arguments that appeal to welfare and freedom. See Sandel *Justice* 8. Sandel points out that one of the great questions of political philosophy is whether a just society should seek to promote the virtue of its citizens or whether the law should be neutral toward competing conceptions of virtue, so that citizens can be free to choose for themselves the best way to live. Philosophers such as Immanuel Kant (although he rejects utilitarianism and connects justice and morality to freedom), John Rawls (although he rejects utilitarianism and purely *laissez-faire* utilitarian principles), Jeremy Bentham, John Stuart Mill and Robert Nozick argue that principles of justice that define our rights should not rest on any particular concept of virtue, or of the best way to live. This view is also supported by, for example, Milton Friedman. For philosophers such as Aristotle, Elizabeth Anderson, Alasdair MacIntyre and Sandel the law cannot be neutral on questions of virtue. This view is supported by, for example, Jean-Jacques Rousseau, Martin Luther King Jnr, John F. Kennedy, Barack Obama, and even abolitionists and the Taliban, who all draw their visions of justice from moral and religious ideas. See Sandel *Justice* 9, 12, 20, 34-48, 61, 87, 97-98, 104-109, 140-142, 151-166, 184-207, 218-243, 244-251 and 260-269.

¹⁰¹ Blair & Stout “A team production theory of corporate law” (1999) *Virginia Law Review* 247 280-281; Petrin (2013) *Penn State Law Review* 1 36; Padfield (2015) *William & Mary Business Law Review* 3 10.

4.2 Arguments for and against shareholder primacy

Theorists rely on a number of different arguments in support of the shareholder primacy model. Some of the leading arguments will be mentioned briefly.¹⁰² The one argument is that the shareholders own the company or its assets. They can accordingly claim that the company be managed in their best interest.¹⁰³ This argument can be traced back to the unincorporated deed of settlement companies of the eighteenth and nineteenth centuries. The shareholders of these unincorporated companies were in effect partners and partners are in common law co-owners of the partnership's property. The company has however evolved since then.¹⁰⁴ As indicated in chapter 4, the modern company is a separate legal person. The property and assets of the company belong to the company and not the shareholders.¹⁰⁵ Shareholders own shares, not the company or its assets. Shares are tradable bundles of personal rights that are detached from company assets.¹⁰⁶ Shares are items of property in their own right, but this does not provide

¹⁰² See Keay (2007) *Sydney Law Review* 577 582-588; Lichner (2009) *European Business Law Review* 889 894-898; Keay *The Corporate Objective* 61-68; Keay *The Enlightened Shareholder Value Principle* 18-42 for discussion of these arguments.

¹⁰³ Esser 35; Lichner (2009) *European Business Law Review* 889 894-896; Keay *The Corporate Objective* 66; Keay & Rodoula (2012) *European Business Organization Law Review* 1 8-9; Keay *The Enlightened Shareholder Value Principle* 318.

¹⁰⁴ Keay *The Corporate Objective* 102; Keay *The Enlightened Shareholder Value Principle* 33.

¹⁰⁵ See, for example, *Bligh v Brent (1837) 2 Y. & C. 268*; *Salomon v Salomon & Co Ltd [1897] AC 22 (HL)*; *Macaura v Northern Assurance Co Ltd [1925] AC 619 (HL(Ir))*; *Short v Treasury Commissioners [1948] 1 KB 116*; *Dadoo v Krugersdorp Municipal Council 1920 AD 530 at 550-551*; *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd 1962 (1) SA 458 (A) 471-472*; *S v De Jager 1965 (2) SA 616 (A) at 625*; *Francis George Hill Family Trust v South African Reserve Bank 1992 (3) SA 91 (AD) at 102*; *The Shipping Corporation of India Ltd v Evdomon Corporation 1994 (1) SA 550 (AD) at 565-566*; *Hughes v Ridley 2010 (1) SA 381 (KZP) par 22*; Formoy *The Historical Foundations of Modern Company Law* (1923) 7-8; *Cooke Corporation, Trust and Company: An Essay in Legal History* (1950) (hereinafter "*Cooke Corporation, Trust and Company*") 71-72; Greenfield "The place of workers in corporate law" (2001) *Boston College Law Review* 283 288-295; Esser (2005) *Obiter* 719 721; Greenfield "Proposition: Saving the world with corporate law" (2008) *Emory Law Journal* 948 962; Greenfield "Defending stakeholder governance" (2008) *Case Western Reserve Law Review* 1043 1051-1054; Talbot "Enumerating old themes? Berle's concept of ownership and the historical development of English company law in context" (2010) *Seattle University Law Review* 1201 1216; Keay *The Corporate Objective* 100-101; Keay *The Enlightened Shareholder Value Principle* 32; Cassim FHI "Introduction to the New Companies Act: General Overview of the Act" in *Contemporary Company Law* 36-38; Talbot *Great Debates in Company Law* 27-28. The principle that shareholders do not own assets in the company is underpinned by cases on the doctrine of the separate corporate personality of a company.

¹⁰⁶ See, for example, *Bradbury v English Sewing Cotton Co Ltd [1923] AC 744 (HL)* at 746; *Liquidators, Union Share Agency v Hatton 1927 AD 240 at 250*; *Standard Bank of South Africa v Ocean Commodities Inc 1983 (1) SA 276 (A) at 288*; *Cooper v Boyes 1994 (4) SA 521 (C) at 535*; Greenfield "New principles for corporate law" (2005) *Hastings Business Law Journal* 87 87-88; Esser 35; Esser & Du Plessis (2007) *SA Merc LJ* 346 358; Jooste & Yeats "Shares, Securities and Transfer" in *Contemporary Company Law* 213-215; Davis *Companies and Other Business Structures* 76-77 & 177; Talbot *Great Debates in Company Law* 26-49. The definition of a share in section 1 of the

owners with any interest in the company's property or enable them to assert ownership in the company.¹⁰⁷ Even from an accounting perspective the funds provided by shareholders to the company becomes the equity of the company.¹⁰⁸ Keay points out that the argument that the shareholders own the company is in fact inconsistent with the economic contractarian theory (which conceptualizes the company as a nexus of contracts) on which the shareholder primacy model is based. According to the economic contractarian theory, there is no firm that can be owned and the shareholders merely supply one factor in the production process namely, the capital.¹⁰⁹ The ownership argument is probably the least persuasive of the arguments for shareholder primacy.¹¹⁰

The primary argument advanced by scholars favouring this model is probably that shareholders are the ones who bear the residual risk. Residual claimants are defined as those who see gains on their investment only after all fixed claims have been satisfied. In contrast to other stakeholders, shareholders enter into a notionally "incomplete" contract with the company in which their returns are unspecified.¹¹¹ Because shareholders are the residual risk bearers, they are the best group to monitor and hold directors accountable.¹¹² The counter-argument is that there are a number of

Companies Act of 2008 as "one of the units into which the proprietary interest in a profit company is divided" is thus unfortunate. The rights of shareholders to vote, to receive a dividend and to certain remedies, for example the derivative action, flows from being the holders of shares and not from being the owners of the company. See Keay *The Corporate Objective* 102.

¹⁰⁷ *The Corporate Objective* 101. The modern view of share as personal property was established since 1836 in *Bligh v Brent* supra. The court held that shareholders have no claim on the assets of a company but only on the surplus that those assets produce. The court conceptualised assets and the profits derived from those assets as two different forms of property, with the company owning the former and the shareholder the latter. A shareholder's interest thus became a tradable bundle of rights which were detached from company assets.

¹⁰⁸ Keay *The Corporate Objective* 101-102; Keay *The Enlightened Shareholder Value Principle* 33.

¹⁰⁹ Keay *The Corporate Objective* 101.

¹¹⁰ Lee (2005) *Canadian Business Law Journal* 212 218; Greenfield *The Failure of Corporate Law* 43-47; Keay *The Corporate Objective* 104.

¹¹¹ *Hampel Report* par 1.17, referred to in Keay *The Enlightened Shareholder Value Principle* 17; Lichner (2009) *European Business Law Review* 889 896; Harner "Corporate control and the need for meaningful board accountability" (2010) *Minnesota Law Review* 541 563-564; Keay & Rodoula (2012) *European Business Organization Law Review* 1 7-8; Lazonick "The financialization of the U.S. corporation: What has been lost, and how it can be regained" (2013) *Seattle University Law Review* 857 888.

¹¹² Esser (2005) *Obiter* 719 721; Moore *Corporate Governance* 76-78; Keay *The Corporate Objective* 62-63, 87-90 and 93; Keay *The Enlightened Shareholder Value Principle* 22. In addition there is also significant opposition to the

other stakeholders, such as creditors, employees, suppliers and communities that make firm-specific investments that tie their economic fortunes to the fate of the company. This counter-argument is even stronger if the company is seen as a nexus of contracts where there are many persons who constitute the nexus that can be said to be in the position of residual claimants. Employees, when viewed as investors of their own human capital, have an equal or even greater right to be regarded as the residual risk bearers than shareholders.¹¹³ Shareholders can reduce their risk by diversifying and spreading their shareholding in a number of companies.¹¹⁴ Employees cannot do so. It is also easier for shareholders, at least shareholders in public companies, to exit the company than it is for other stakeholders.¹¹⁵ The risk of shareholders are further reduced by the rapid rise of institutional investors who wield considerable power.¹¹⁶ Furthermore, in most jurisdictions shareholders have a number of legal remedies at their disposal which other stakeholders do not have.¹¹⁷ A strong argument can be made out that it is not shareholders who absorb the risk. To the contrary, they externalise and transfer the risk to other stakeholders, notably employees.¹¹⁸

Some supporters of this theory argue that shareholders warrant special consideration as they, in contrast to other stakeholders, are not able to protect themselves contractually. In a similar vein it

contention of the director primacy model that the board of directors is an effective monitor. See Talbot *Great Debates in Company Law* 83.

¹¹³ Greenfield (2001) *Boston College Law Review* 283 303-311; Greenfield (2008) *Case Western Reserve Law Review* 1043 1054-1059; Lichner (2009) *European Business Law Review* 889 896; Keay *The Corporate Objective* 87-89 and 93-94; Keay *The Enlightened Shareholder Value Principle* 23-24. Unsecured creditors will often not get paid if the company is liquidated. Employees also often develop firm-specific skills which may make them vulnerable. See also Greenfield *The Failure of Corporate Law* 53-56; Davis & Le Roux (2012) *AJ* 306 308.

¹¹⁴ Esser 36; Esser & Du Plessis (2007) *SA Merc LJ* 346 358-359; Keay *The Corporate Objective* 108. Enriques, Hansmann and Kraakman state that for most employees who invest their human capital in the company fixed payments are clearly the dominant risk-sharing arrangement, since the company's shareholders are generally able to diversify their financial investments across a number of companies. See Enriques, Hansmann & Kraakman "The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies" in *The Anatomy of Corporate Law* 103.

¹¹⁵ Greenfield *The Failure of Corporate Law* 52-53; Keay & Rodoula (2012) *European Business Organization Law Review* 1 8; Keay *The Enlightened Shareholder Value Principle* 23.

¹¹⁶ Esser 36; Keay *The Corporate Objective* 106-107.

¹¹⁷ Keay *The Corporate Objective* 107.

¹¹⁸ Keay *The Corporate Objective* 108.

is argued that other stakeholders are protected by regulatory law, whilst shareholders are not.¹¹⁹ Greenfield's reply is that once other stakeholders are seen as investors, there is no reason to deny them the same access to corporate governance than shareholders receive.¹²⁰ Furthermore, whilst individual shareholders may not have access to negotiations with the company, they are often ably represented by venture capitalists, investment bankers, large institutional shareholders and the like.¹²¹ They normally have the power to appoint and remove directors. Very often certain actions of the company require a resolution of the general meeting of shareholders. Shareholders also often have access to information that the other stakeholders do not have. Furthermore contracts are infrequently concluded by equals in the real world. Other stakeholders are often unable to negotiate with the company on equal terms and must accordingly be protected. The other stakeholders frequently suffer from informational asymmetry.¹²² Creditors are often not able to protect themselves adequately contractually. Limited liability confers significant benefits, especially on owners of closely held companies and provides opportunities for abuse of the corporate entity.¹²³ Greenfield questions the assumption that employees have the power to protect themselves through contract, collective bargaining and market forces.¹²⁴ Employees face daunting contracting problems. It is as difficult for them to anticipate the various contingencies that may

¹¹⁹ Esser (2005) *Obiter* 719 721; Esser 37; Esser & Du Plessis (2007) *SA Merc LJ* 346 359; Keay *The Corporate Objective* 67-68; Keay *The Enlightened Shareholder Value Principle* 35.

¹²⁰ Greenfield (2008) *Case Western Reserve Law Review* 1043 1059 in reply to Dent "Stakeholder Governance: A bad idea getting worse" (2008) *Case Western Law Review* 1107; Lazonick (2013) *Seattle University Law Review* 857 889.

¹²¹ Greenfield (2001) *Boston College Law Review* 283 318-319.

¹²² Keay *The Corporate Objective* 106 and 135-136; Keay *The Enlightened Shareholder Value Principle* 36 and 44. Sandel points out that contracts are also not self-sufficient moral instruments. Contracts carry moral weight only insofar as they realise two ideals: First, they must be autonomous in the sense that must be truly free. A contracting party can exercise free choice only if he or she is not unduly pressured and reasonably well informed. Secondly, they must be reciprocal. The obligation to fulfil them must arise from the obligation to repay the other party for the benefits provided by that party. In practice these ideals are imperfectly realised. Persons are situated differently in real life. The bargaining power and knowledge of the contracting parties often differ. As long as this is true the existence of the agreement does not, by itself, guarantee the fairness of the agreement. See Sandel *Justice* 95 and 142-151.

¹²³ Ziegel "Creditors as corporate stakeholders: The quiet revolution - an Anglo-Canadian perspective" (1993) *Toronto Law Journal* 511 530; Rajak "Director and officer liability in the zone of insolvency: A comparative analyses" (2008) *PER* 1 3 and 8-9. Information about the company's finances is often seriously deficient and open to manipulation. Furthermore the company's financial situation can change very quickly, as many creditors have learnt at their cost.

¹²⁴ Greenfield (2001) *Boston College Law Review* 283 314.

affect their claims as the other stakeholders in the company. He states that if the presence of fiduciary duties are necessary in the shareholding-management context to serve as gap-filling and contract enforcing devices, they could certainly serve an analogous purpose in the employment relation.¹²⁵ The subject matter of collective bargaining of employees is often also limited.¹²⁶ Many regulatory laws are of limited or no benefit to stakeholders.¹²⁷ Greenfield points out that even some of the shareholder primacy scholars agree that the markets are a product of law and that regulation is often necessary to overcome market defects to give effect to the public interest. The difference between the shareholder primacy model and the stakeholder model discussed hereafter, is that the stakeholder scholars disagree that the legal protection should only be focused on shareholders.¹²⁸

A further argument advanced in favour of the shareholder primacy model is that it is certain, clear and more cost effective. Directors will be more efficient if they only have one objective and the interests of one stakeholder group on which they need to focus. In other words, the approach is workable.¹²⁹ However, it is also argued with some force that there are a number of significant uncertainties surrounding this model and its practical implementation.¹³⁰ It is argued that the shareholder primacy model has no precise meaning and that its objective is unclear and ill-defined. For example, opinion varies if and how shareholder value can be measured. Shareholder value can mean different things to different shareholders.¹³¹ The theory also does not state the time period over which the objective is to be achieved, although the emphasis in the past has been on the short term.¹³² The theory can thus be used to support or attack any management action.¹³³

¹²⁵ Greenfield (2001) *Boston College Law Review* 283 315-317.

¹²⁶ Greenfield (2001) *Boston College Law Review* 283 318-319.

¹²⁷ Key *The Corporate Objective* 106-109.

¹²⁸ Greenfield (2008) *Case Western Reserve Law Review* 1043 1061.

¹²⁹ Key *The Corporate Objective* 64; Key & Rodoula (2012) *European Business Organization Law Review* 1 9-10; Key *The Enlightened Shareholder Value Principle* 25.

¹³⁰ See Key *The Corporate Objective* 47-58 and Key *The Enlightened Shareholder Value Principle* 25-26 for a more detailed discussion of these uncertainties.

¹³¹ The investment strategies of investors can differ materially. For example, how a long term shareholder measures shareholder value will differ materially from that of a short term investor.

A further argument in favour of shareholder primacy is that, it increases social wealth in general terms because of market mechanisms as resources are allocated most efficiently. The argument is what is good for shareholders is good for companies, and what is good for companies is good for society. This is the so-called efficiency argument.¹³⁴ The interests of shareholders and the company do however not always coalesce.¹³⁵ Talbot further points out that the efficient market hypothesis assumes parity in knowledge between the market actors. It is however clear that there are information asymmetries between the actors. She states:

“In the end, share price is the accumulation and average of what many different people with their own misaligned knowledge and perverse incentives, most of whom are not connected to, and have little knowledge of, the productive assets of the company, think about how well the productive assets will perform. The margin of error is almost limitless!”¹³⁶

Arguably shareholder primacy does not really increase social wealth. It only benefits shareholders and, perhaps, not even all the shareholders. Shareholder returns cannot be the only measure of economic success and much less of the success of society. Greenfield points out that it is awkward to assert that the managers of companies will best advance societal well-being by ignoring it.¹³⁷

¹³² Froud, Haslam, Johal & Williams “Shareholder value and financialization: Consultancy promises, management moves” (2010) *Economy and Society* 80 81, referred to in Keay *The Corporate Objective* 57; Keay *The Enlightened Shareholder Value Principle* 26-29.

¹³³ Keay *The Corporate Objective* 77; Keay *The Enlightened Shareholder Value Principle* 29.

¹³⁴ Williamson *The Economic Institutions of Capitalism* (1985); Hansmann & Kraakman (2001) *Georgetown Law Journal* 439 450; Greenfield *The Failure of Corporate Law* 21-22; Lichner (2009) *European Business Law Review* 889 897; Keay *The Corporate Objective* 64-65; Keay & Rodoula (2012) *European Business Organization Law Review* 1 10; Keay *The Enlightened Shareholder Value Principle* 24; Talbot *Great Debates in Company Law* 150-153.

¹³⁵ Lee (2005) *Canadian Business Law Journal* 212 218-219 and 221-222; Greenfield (2008) *Case Western Reserve Law Review* 1043 1056.

¹³⁶ Talbot *Great Debates in Company Law* 152. Talbot points out that an excitement can build up around shares where there is no rational reason therefor. It can be purely speculative. The South Sea Bubble is one of the first examples of this. A more recent example of share fever was seen around the dot.com companies in the 1990s. See Talbot *Great Debates in Company Law* 151.

¹³⁷ Greenfield *The Failure of Corporate Law* 136; Greenfield (2008) *Emory Law Journal* 948 966; Greenfield (2008) *Case Western Reserve Law Review* 1043 1047-1050. See also Lichner (2009) *European Business Law Review* 889 897; Talbot *Great Debates in Company Law* 140 and 153; Clarke (2014) *Law and Financial Markets* 39 44-45.

It is also contended that it is more efficient to regulate companies from the “outside” than from the “inside.”¹³⁸ Greenfield characterises the regulation of companies to fall into three categories: First, regulation requiring or encouraging certain results (for example pollution laws that prohibit the discharge of certain effluents); secondly, regulation requiring or encouraging certain processes or actions (for example disclosure and non-discrimination laws); and thirdly, regulation requiring or encouraging certain internal structures (for example a board that is elected by shareholders).¹³⁹ He questions why regulation of the corporate structure (what he calls “the stuff of corporate law”) is not being utilised to its full potential. He highlights two particular failures of corporate accountability and governance namely, environmental degradation and economic disparity that can, in his view, be addressed more effectively by internal rather than external regulation because corporate managers may have more expertise in these areas than government bureaucrats do.¹⁴⁰

Greenfield criticizes the shareholder primacy model as being too restricted in four respects. First, it focuses on only one single objective and this is unreasonable in a complex world. Secondly, its focus is purely on making money. Thirdly, it fails to consider values other than efficiency. Fourthly, there are other stakeholders that warrant consideration from directors.¹⁴¹ Greenfield is of the view that all the justifications for shareholder primacy can also be applied, and perhaps more so, to employees.¹⁴²

Communitarian scholars object to the shareholder primacy model on normative grounds. They embrace a normative world view that people are part of a shared community. Consequently directors should be obliged to manage companies for the benefit of all stakeholders, not just shareholders.¹⁴³ The shareholder primacy model does not emanate from any moral or ethical

¹³⁸ Greenfield (2008) *Emory Law Journal* 948-970.

¹³⁹ Greenfield (2008) *Emory Law Journal* 948-971-973.

¹⁴⁰ Greenfield (2008) *Emory Law Journal* 948-973-974.

¹⁴¹ Keay *The Corporate Objective* 86-90; Keay *The Enlightened Shareholder Value Principle* 40.

¹⁴² Greenfield *The Failure of Corporate Law* 43-71.

¹⁴³ Millon (1993) *Washington and Lee Law Review* 1373-1385; Greenfield *The Failure of Corporate Law* 142-146; Keay *The Corporate Objective* 70.

reason, but from the desire to be efficient. There is no consideration of values such as fairness, equality or justice.¹⁴⁴

As indicated in chapter 2, the normative or philosophical foundation of the contractarian theories (and hence also the shareholder primacy model) revolve around two ideas namely, maximising welfare (utilitarianism) and respecting freedom (libertarianism). Sandel argues that the utilitarian approach is flawed in two respects: First, it makes justice a matter of calculation, not principle. Secondly, it attempts to measure all human goods in monetary terms and ignores the qualitative differences between them.¹⁴⁵ The libertarian approach solves the first defect but not the second. Except for singling out certain rights worthy of respect, the libertarian approach accepts people's preferences as they are and ignores their moral value.¹⁴⁶ The moral basis of libertarianism is self-ownership.¹⁴⁷ Whilst the notion of self-ownership is appealing, especially to those who seek a strong foundation for individual rights, it has implications that are not easy to embrace, such as an unfettered market without a safety net for those who fall behind, a minimal state that rules out most measures to ease inequality and promote the common good and a celebration of consent so complete that it permits self-inflicted affronts to human dignity such as cannibalism or selling oneself into slavery.¹⁴⁸ The liberal conception of freedom does not explain a range of moral and political obligations that we commonly recognise, or even prize. These include obligations of

¹⁴⁴ Greenfield *The Failure of Corporate Law* 17-19 and 38; Keay *The Enlightened Shareholder Value Principle* 41; Clarke (2014) *Law and Financial Markets* 39 44.

¹⁴⁵ Sandel *Justice* 260. Sandel demonstrates with reference to poignant examples (placing a value on loss of life, pain or virtue and paying persons to wage war and bear children) that it is not possible to capture all values in monetary terms and that certain goods are corrupted or degraded if bought or sold for money. See Sandel *Justice* 41-48 and 75-102.

¹⁴⁶ Sandel *Justice* 260-261. According to the libertarian approach obligations can arise in only two ways: First, natural duties that are universal and do not require consent. Secondly, voluntary obligations that are particular and require consent. Sandel identifies a third source of obligation (based on a narrative conception of persons) namely, obligations of solidarity that are particular and do not require consent. They involve moral responsibilities we owe to those with whom we share a certain history. Only this third category of obligations can explain public apologies and reparations; collective responsibility for collective injustice; the special responsibilities of family members, and fellow citizens, for one another; solidarity with comrades; allegiance to one's town or city, community or country; patriotism; pride and shame in one's nation or people; fraternal and filial loyalties. See Sandel *Justice* 224-240.

¹⁴⁷ The idea that I own my body, my life and my person and should be free to do whatever I want to do with them, as long as I do not hurt others. See Sandel *Justice* 70.

¹⁴⁸ Sandel *Justice* 65, 69-74 and 103-105.

solidarity and loyalty, historic memory and religion.¹⁴⁹ The normative or philosophical basis of the shareholder primacy model is therefore questionable. It provides disproportionate benefits to those who are already financially well-off and thus permeates economic inequality.¹⁵⁰ Gevurtz reasons that the law has a legitimate concern not only with the total wealth produced by companies but also in helping to ensure that the distribution of this wealth reflects societal values.¹⁵¹ Shandu argues that, given the South African socio-economic conditions which still persist, we cannot afford to adopt the shareholder primacy model.¹⁵² Other commentators who specialise in ethics, organisational behaviour and other management disciplines also embrace a wider perspective.¹⁵³ The profit motive and the need to encourage entrepreneurial activities such as risk taking and corporate investment to ensure the benefits of economic development are important but cannot be the sole and exclusive purposes of the modern company.¹⁵⁴

A further criticism is that shareholder primacy is unduly focussed on the short term.¹⁵⁵ Corporate health is equated with share price or, more accurately, the positive movement of share price in the

¹⁴⁹ Sandel *Justice* 220-221.

¹⁵⁰ Mongalo “The emergence of corporate governance as a fundamental topic in South Africa” (2003) SALJ 173 191; Shandu “Shareholders’ interests versus social demands: Incongruous agendas” (2005) *Obiter* 87 92; Greenfield “Reclaiming corporate law in a new gilded age” (2008) *Harvard Law & Policy Review* 1 10-16.

¹⁵¹ Whether this value is equality or, less ambitious, that distributions reflect fully informed contracts rather than opportunistic exploitation. See Gevurtz “Using comparative and transnational corporate law to teach corporate social responsibility” (2011) *Pacific McGeorge Global and Development Law Journal* 39 39. See also Greenfield (2001) *Boston College Law Review* 283 322 and 325-326. Sandel identifies four rival theories of distributive justice namely, the feudal or caste system (a fixed hierarchy based on birth), the libertarian system (free market with formal equality of opportunity), the meritocratic system (free market with fair equality of opportunity) and the egalitarian system (Rawls’s difference principle of encouraging the gifted to exercise their talents, but with the understanding that the rewards these talents reap in the market belong to the community as a whole). See Sandel *Justice* 157.

¹⁵² Shandu (2005) *Obiter* 87 92 and 96.

¹⁵³ Key *The Corporate Objective* 71; Key *The Enlightened Shareholder Value Principle* 42. The goal of Galbraith’s “technocratic” corporation, for example, does not include maximising shareholder wealth or the wealth of the firm. The goals of the technocracy (the internal bureaucracy) are firstly to ensure the survival of the corporation, second to maintain the autonomy of the technocracy, third the growth of the corporation and last “technological virtuosity.” See Galbraith *The New Industrial State* (1967) 167-175 referred to in O’Kelley “The evolution of the modern corporation: Corporate governance reform in context” (2013) *University of Illinois Law Journal* 1002 1039-1041.

¹⁵⁴ Havenga “Directors’ fiduciary duties under our future company law regime” (1997) SA Merc LJ 310 314; 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 2007” (2011) SALJ 686 688.

short term.¹⁵⁶ A fixation on short term is often directly in conflict with the interests of the company and other stakeholders (like the creditors and employees of the company), who are more interested in long-term success and stability. It causes corporations to externalise costs, even to future shareholders.¹⁵⁷ Many commentators believe that short termism was one of the major causes of the Global Financial Crisis in 2007 to 2008.¹⁵⁸

Talbot argues that if a company is to be moral or at least to be morally free to make informed decisions, it must have sufficient freedom to do so – in other words it must be free and capable of independent decision making. Corporate social responsibility is premised on the assumption that companies have this freedom. If companies are constrained to pursue shareholder wealth and not social values by, for example, the equities market where the valuation of shares (and therefore also the measure of management competency) is based on the expected returns of shareholders in the short term, they will not have the freedom to act morally.¹⁵⁹ She states: “Taking a strong moral position will rarely be the kind of signal a market will reward, and therefore a company bound to the market does not seem to have much opportunity for the voluntary, moral decision making that might be effective in achieving social good.”¹⁶⁰ Talbot concludes:

¹⁵⁵ Greenfield (2008) *Harvard Law & Policy Review* 1 9-10; Keay *The Corporate Objective* 82-83; Keay *The Enlightened Shareholder Value Principle* 39-40 and 230-239. Although managing for short-term gains does not appear to be as acceptable as it once was. See Jensen (2002) *Business Ethics Quarterly* 235 252-253; Hansmann & Kraakman (2001) *Georgetown Law Journal* 439 439 referred to in Keay & Rodoula (2012) *European Business Organization Law Review* 1 6.

¹⁵⁶ Lichner (2009) *European Business Law Review* 889 898; Greenfield (2014) *Seattle University Law Review* 749 754. For a general discussion of the problem of short-termism see Greenfield “The puzzle of short-termism” (2011) *Wake Forest Law Review* 627.

¹⁵⁷ Greenfield *The Failure of Corporate Law* 22-23; Greenfield (2008) *Emory Law Journal* 948 967-968; Greenfield (2008) *Harvard Law & Policy Review* 1 12; Greenfield (2011) *Wake Forest Law Review* 627 628; Keay *The Corporate Objective* 94-95; Keay *The Enlightened Shareholder Value Principle* 29-31; Clarke (2014) *Law and Financial Markets* 39 43-44.

¹⁵⁸ Keay “Risk, shareholder pressure and short-termism financial institutions: Does enlightened shareholder value offer a panacea?” (2011) *Law and Financial Markets Review* 435 439; Greenfield (2011) *Wake Forest Law Review* 627 629; Clarke (2014) *Law and Financial Markets* 39 43. Clarke points out that there is a profound distinction between investing and trading. High frequency traders are driven by short term market trends. Underlying performance is of less interest than immediate opportunity. High frequency trading is often simply predatory and is sometimes manipulative or illegal. In contrast, investors intent on investing in the long term will consider and analyse a company’s prospects and underlying performance.

¹⁵⁹ Talbot *Great Debates in Company Law* 138-140.

¹⁶⁰ Talbot *Great Debates in Company Law* 140.

“Today, the size of a company does not seem to present the same opportunity for corporate morality. Instead, size seems to make a company immune to change, a vessel bound to a market-based course, unable to change direction. When it springs a leak, the public pays because it is ‘too big to fail’. Companies are anthropomorphised as an immense (leaky) toddler flaying around, inevitably facing injury after injury as it plays with its rough and even more immense friend, the anthropomorphised market. The public, an indulgent parent, bandages the injuries and then sets them off again. Apparently lacking any authority to say ‘stop playing that game’, the public sighs and says ‘companies will be companies’!”¹⁶¹

According to Talbot companies enjoyed sufficient freedom from the market to make moral decisions during the periods 1930 to 1970 in the United States and 1945 to 1970 in the United Kingdom. During these periods, mainly due to the separation of ownership from control, the market no longer dictated the activities and goals of the large companies. These large companies, as near oligopolies,¹⁶² determined how they were organised and what they produced. Control over the productive process vested in those involved in the actual productive process (the management) and not in the providers of financial capital. Management was, to a degree, insulated from market pressure. The economy was shaped around these companies rather than the market dictating their activities.¹⁶³ The politico-economic model of *laissez-faire*, which was adopted in the United Kingdom from 1846 until 1914 and in the United States from approximately 1870 to 1929, was discarded.¹⁶⁴ The governments of Britain, Europe and the United States became more involved in their domestic economies and social spending. There was a political commitment to stability, growth and redistribution. The role of trade unions was strengthened.¹⁶⁵ The role of companies in

¹⁶¹ Talbot *Great Debates in Company Law* 142.

¹⁶² An oligopoly is a market structure in which a few firms dominate. The market is thus highly concentrated.

¹⁶³ Talbot *Great Debates in Company Law* 141 and 143-146; Clarke (2014) *Law and Financial Markets* 39 40.

¹⁶⁴ Talbot *Critical Company Law* 18; O’Kelley (2013) *University of Illinois Law Review* 1002 1023; Terreblanche *Western Empires, Christianity and the Inequalities between the West and the Rest 1500-2010* (2014) (hereinafter “Terreblanche *Western Empires*”) 372. Wall Street crashed in 1929. This was followed by the promulgation of legislation aimed at correcting informed market investments and share trading abuses.

¹⁶⁵ Terreblanche *Western Empires* 369-370 and 375; Talbot *Great Debates in Company Law* 142.

society was reconsidered and there was an appreciation of the importance of corporate governance.¹⁶⁶ Policies restricted what finance could do and enhanced what management and labour could do.¹⁶⁷ Companies were in general no longer conceived as economic institutions in the classical sense of the term, but as historically peculiar, quasi-public institutions whose characteristics and effects were more appropriately deciphered through the lens of political as opposed to economic theory. Management was expected to deliver on the social and welfare political agenda set by government.¹⁶⁸ Freed from the market, these companies could choose to be moral.¹⁶⁹

The aforesaid fundamental orientation of companies changed in the early 1980s and the change was ideological.¹⁷⁰ There was a shift from Keynesian social democracy towards neoliberalism and globalism from 1979.¹⁷¹ The failures of *laissez-faire* capitalism and the free-market ideology of the first half of the 20th century was forgotten.¹⁷² The Keynesian welfare state was replaced with a new-liberal agenda of privatisation and deregulation.¹⁷³ Terreblanche believes that “the

¹⁶⁶ Bakan *The Corporation* 19-20; Greenfield (2014) *Seattle University Law Review* 749 752.

¹⁶⁷ Talbot *Great Debates in Company Law* 142-146.

¹⁶⁸ Berle *Power Without Property: A New Development in American Political Economy* (1959) 91-92; Berle and Means *The Modern Corporation* 310-313; Ireland (2009) *Northern Ireland Legal Quarterly* 1 14-18; Roe “Political preconditions separating ownership from control” (2000) *Stanford Law Review* 539; Moore *Corporate Governance* 69-70; Talbot *Great Debates in Company Law* 143-146; Clarke (2014) *Law and Financial Markets* 39 46.

¹⁶⁹ Talbot *Great Debates in Company Law* 141 and 143-146. Many prominent scholars assumed that these large companies could and would set the corporate compass in the direction of morality which would provide for the needs of society. See Keynes “The end of *laissez-faire*” in *Keynes Essays in Persuasion* (1931); Dodd (1932) *Harvard Law Review* 1145; Berle and Means *The Modern Corporation* Book IV Chapter IV; Kaysen “The social significance of the modern corporation” (1975) *American Economic Review* 311. Crosland argued in *Crosland The Future of Socialism* (2006) that nationalization, a strong government and especially strong unions meant that companies were bound to act morally.

¹⁷⁰ Ireland (2009) *Northern Ireland Legal Quarterly* 1 18-21; Talbot *Great Debates in Company Law* 142-143.

¹⁷¹ Talbot *Critical Company Law* 119-129 and 124-125; Moore *Corporate Governance* 65 and 69-72; O’Kelley (2013) *University of Illinois Law Review* 1002 1045-1046; Terreblanche *Western Empires* 70, 135-136. According to the neoliberalist ideology the market is a self-regulating and natural mechanism in which the state should not intervene. See Terreblanche *Western Empires* 163. The multinational company was an important instrument in the drive towards globalism. See Terreblanche *Western Empires* 137. See also Micklethwait & Wooldridge *The Company* 162-179 for a discussion of the influence of multinational companies.

¹⁷² O’Kelley (2013) *University of Illinois Law Review* 1002 1048; Terreblanche *Western Empires* 137.

¹⁷³ Bakan *The Corporation* 21; Talbot *Critical Company Law* 119-124; Nehme and Wee “Tracing the historical development of corporate social responsibility and corporate social reporting” (2008) *James Cook University Law*

capitalist or corporate sector was the *agent provocateur* behind the Reagan counter-revolution in the early 1980s.”¹⁷⁴ This period also saw the rise of the “law and economics” movement which played a particularly dominant role in the corporate field. This movement believes that market forces should regulate corporate and managerial behaviour rather than the law. Shareholder primacy trumps stakeholder concerns.¹⁷⁵

The legislative restrictions on finance “were gradually lifted and finance was able to proliferate to seek increasing fluidity and to create more fictitious property forms and more exchanges.”¹⁷⁶ At the same time organised labour was subjected to increasing control.¹⁷⁷ This led to the emergence of the phenomenon of financialisation.¹⁷⁸ The financialisation of the company is legitimized by the shareholder primacy model.¹⁷⁹ Talbot summarises the position as follows:

“From the early 1980s the shift to the New Right or neoliberalism was accompanied by a removal of union power and an enhancement of freedom for finance. The controls that had held finance in check were gradually removed, and new financial property forms emerged and were exchanged with increasing [rapidity]. ‘Deregulation’ set aside many of the controls which arrested the proliferation of property forms. Neoliberal politics intended to replace the troublesome productive economy with the seemingly more

Review 129 153-155; Greenfield (2014) *Seattle University Law Review* 749 753. The deregulatory revolution started in Britain, where Margaret Thatcher privatised the state owned companies after she came into power in 1979. Other European governments followed suit. Even the Yeltsin government in Russia embarked on a programme of privatisation after the fall of the Soviet Union in 1991. The Chinese followed more cautiously. See Micklethwait & Wooldridge *The Company* 126-127; Terreblanche *Western Empires* 70.

¹⁷⁴ Terreblanche *Western Empires* 137.

¹⁷⁵ Branson “Corporate governance ‘reform’ and the new corporate social responsibility” (2001) *University of Pittsburgh Law Review* 605 618-620; Talbot *Critical Company Law* 124-129; Mongalo *Corporate Law and Corporate Governance* 193; Bellish “Towards a more realistic vision of corporate social responsibility through the lens of the *lex mercatoria*” (2012) *Denver Journal of International Law & Policy* 548 559; Branson “Proposals for corporate governance reform: Six decades of ineptitude and counting” (2013) *Wake Forest Law Review* 673 678-681; Greenfield (2014) *Seattle University Law Review* 749 753-756;

¹⁷⁶ Talbot *Great Debates in Company Law* 143; Clarke (2014) *Law and Financial Markets* 39 40.

¹⁷⁷ Talbot *Great Debates in Company Law* 143.

¹⁷⁸ Key *The Enlightened Shareholder Value Principle* 230-239.

¹⁷⁹ Lazonick (2013) *Seattle University Law Review* 857 859.

manageable finance economy. At the same time financial players sought to develop a market in financial property forms.”¹⁸⁰

The principle agents for financialisation, the institutional investors such as commercial and investment banks, were encouraged by both stock exchange policies and legislation to develop into risk-taking institutions whose core business shifted from financing productive industry to being individual rent seekers. Where banks once made their money underwriting securities, arranging deals, and providing financial advice to clients, they now moved in the direction of property trading, that is, trading for their own profits and the development of what are generally referred to as “new financial products”.¹⁸¹ The number of people owning shares increased dramatically. In addition, investors started to pursue income rather than capital gains and therefore started to purchase shares as short-term rather than long-term investments. Reinvestment was (and still is) increasingly drawn from debts, so that more profits could be returned to shareholders.¹⁸² Directors and managers became more and more pressurised and rewarded for delivering returns for shareholders on the short-term. As a result they did not have the freedom to act morally.¹⁸³ Lipton, Mirvis and Lorsch wrote:

“Short-termism is a disease that infects American business and management boardroom judgment. But it does not originate in the boardroom. It is bred in the trading rooms of the hedge funds and professional institutional investment managers who control more than 75% of the shares of most major corporations.”¹⁸⁴

Lazonick’s research of the evolution of the United States economy in the past half century revealed that there has been “an unrelenting disappearance of middle-class jobs accompanied by

¹⁸⁰ Talbot *Great Debates in Company Law* 146.

¹⁸¹ Ireland (2009) *Northern Ireland Legal Quarterly* 1 7-13; Mitchell (2010) *Creighton Law Review* 323 329; Talbot *Great Debates in Company Law* 147.

¹⁸² Mitchell (2010) *Creighton Law Review* 323 327-328 and 331; Talbot *Great Debates in Company Law* 146-150.

¹⁸³ Talbot *Great Debates in Company Law* 138-140 and 147.

¹⁸⁴ Lipton, Mirvis and Lorsch, “The Proposed ‘Shareholder Bill of Rights Act of 2009’” (2009) *Harvard Law School Forum on Corporate Governance & Financial Regulation* (2009) (available at <http://blogs.law.harvard.edu/corpgov/2009/05/12/the-proposed-%20%80%9cshareholder-bill-of-rights-act-of-2009%e2%80%9d> (accessed 2016-08-03))

ever-growing economic inequality with an increasingly extreme concentration of income and wealth among a very small number of people at the top” since the early 1980s.¹⁸⁵ He attributes this to the financialisation of the United States corporation.¹⁸⁶ Lazonick concludes that shareholder primacy “is an ideology that results in inequality and instability and that ultimately undermines the productive foundations of economic growth.”¹⁸⁷

Foroohar identifies financialisation, a product of the deregulatory economic policies of the Reagan and Clinton administrations, as the root cause of the present “economic illness” of America and many other countries.¹⁸⁸ She argues that finance traditionally served the interest of business by providing capital and investing in long-term growth. Over the past few decades finance has turned away from this traditional role. Most of the money in the system is being used for lending against existing assets such as housing, stocks and bonds. Financing has become an end in itself. This has had a stifling effect on the economy.¹⁸⁹ Foroohar bemoans the fact that “[t]he people who manage our retirement money – fund managers working for asset-management firms - are typically compensated for delivering returns over a year or less.” That means that they use their financial muscle “to push companies to produce quick-hit results rather than execute long-term strategies.”¹⁹⁰ She states:

“An ideologically broad range of financiers and elite business managers – Warren Buffet, BlackRock’s Larry Fink, Vanguard’s John Bogle, McKinsey’s Dominic Barton, Allianz’s Mohamed El-Erian and others – have started to speak out publicly about the need for a new and more inclusive type of capitalism, one that also helps businesses to make better long-term decisions rather than focussing only on the next quarter. The Pope has become

¹⁸⁵ Lazonick (2013) *Seattle University Law Review* 857 857-858 and 871-879. See also Ireland (2009) *Northern Ireland Legal Quarterly* 1 24-26.

¹⁸⁶ Lazonick (2013) *Seattle University Law Review* 857 860 and 899. Lazonick states that the managers of corporations in the United States have become focussed on creating profits for the sake of higher share prices rather than creating high value-added jobs that are the essence of a prosperous economy. See Lazonick (2013) *Seattle University Law Review* 857 870. What is particularly significant is the importance of the stock market as a source of income for the richest Americans in the 2000s. See Lazonick (2013) *Seattle University Law Review* 857 874.

¹⁸⁷ Lazonick (2013) *Seattle University Law Review* 857 907.

¹⁸⁸ Foroohar *Makers and Takers*; Foroohar *Time* (2016-05-23) 22.

¹⁸⁹ Foroohar *Time* (2016-05-23) 22 24. See also Ireland (2009) *Northern Ireland Legal Quarterly* 1 26-27 and 29-30.

¹⁹⁰ Foroohar *Time* (2016-05-23) 22 28.

a vocal critic of modern market capitalism, lambasting the ‘idolatry of money and the dictatorship of an impersonal economy’ in which ‘man is reduced to one of his needs alone: consumption.’”¹⁹¹

5 THE STAKEHOLDER MODEL

5.1 The model

The second dominant model of corporate governance is the stakeholder model. As indicated before, the company was seen as a public institution that served a public purpose through most of its evolution until at least the nineteenth century.¹⁹² It can accordingly be argued that the stakeholder model of corporate governance held sway through most of the company’s history, although the corporate objective only really demanded attention from the nineteenth century. Since then, the relative dominance of the stakeholder model has (like the shareholder primacy model) fallen and risen depending on the prevailing economic and social conditions.¹⁹³

It may be said that from the 1930s to 1970s forms of the stakeholder model held sway in academia and practice. The institutional economists believed that the market no longer dictated the activities and goals of large companies. This freed these companies to act morally and provide for the needs of society as a whole.¹⁹⁴ It was a period during which labour was empowered and corporate governance emphasised.¹⁹⁵ Elements of the stakeholder model is evident in the work of Berle and of Dodd, as well as the seminal work of Berle and Means, *The Modern Corporation & Private Property*, that was originally published in 1932. In the United States President Roosevelt,

¹⁹¹ Foroohar Time (2016-05-23) 22 25.

¹⁹² Compare for example the Indian *sreni*, the Roman *societas publicanorum*, the medieval corporation or *universitas*, the guilds, the chartered joint stock companies of the Western maritime empires as well as the chartered and statutory companies that were incorporated during the eighteenth and nineteenth centuries (and even today). Some early corporations were created as quasi-governmental bodies with broad political, taxation and coercive powers.

¹⁹³ See Key *The Corporate Objective* 121-123.

¹⁹⁴ See also Berle (1931) Harvard Law Review 1049; Dodd (1932) Harvard Law Review 1142 1163; Keynes *The End of Laissez-Faire* (1926) (available at <http://www.panargy.org/Keynes/laissezfaire.1926.html> (accessed 2016-07-02)); Kaysen (1957) American Economic Review 311; Talbot *Great Debates in Company Law* 141-142 and 143-146.

¹⁹⁵ Talbot *Great Debates in Company Law* 143-146.

through no small influence of Berle, implemented the New Deal in 1934.¹⁹⁶ The corporation was, in general, conceived as a quasi-public institution.¹⁹⁷ After the Second World War, especially after the Cold War erupted in 1947, the Western countries, led by the United States, reached consensus to build a new world order based on a social democratic ideological approach.¹⁹⁸ This led to increased statutory regulation of the company.¹⁹⁹ In 1953 the economist Howard Bowen coined the term “corporate social responsibility”.²⁰⁰ The corporate social responsibility movement played a dominant role from the 1960s to the 1970s. This coincided with the recognition and acceptance of Keynesian welfare by governments around the world.²⁰¹ Environmental law, anti-discrimination law, anti-corruption law and consumer law were strengthened. There was a rise in so-called stakeholder statutes.²⁰² By the early 1970s companies were expected to look after other stakeholders.²⁰³

Nonetheless it has only been since the early 1980s that there has been a detailed explication of the stakeholder model of corporate governance.²⁰⁴ The development of the stakeholder model is usually traced to Edward Freeman’s influential book, *Strategic Management: A Stakeholder Approach* that was published in 1984.²⁰⁵

¹⁹⁶ Bakan *The Corporation* 20-21; O’Kelley (2013) *University of Illinois Law Review* 1002 1025-1032.

¹⁹⁷ Berle *Power Without Property: A New Development in American Political Economy* 91-92; Berle & Means *The Modern Corporation* 310-313 referred to in Moore *Corporate Governance* 69-70.

¹⁹⁸ Talbot *Critical Company Law* 116-119; O’Kelley (2013) *University of Illinois Law Review* 1002 1033 and 1037-145; Terreblanche *Western Empires* 134.

¹⁹⁹ Micklethwait & Wooldridge *The Company* 115; Greenfield (2014) *Seattle University Law Review* 749 752-753.

²⁰⁰ Bowen *Social Responsibilities of the Businessman* (1953); Nehme and Wee (2008) *James Cook University Law Review* 129 145; Bellish (2012) *Denver Journal of International Law & Policy* 548 556.

²⁰¹ The Keynesian welfare state assumes that government expenditure leads to public spending, which stimulates the economy and leads to higher tax revenue leading to more generous spending. See Nehme & Wee (2008) *James Cook University Law Review* 129 145; Bellish (2012) *Denver Journal of International Law & Policy* 548 556.

²⁰² Greenfield (2014) *Seattle University Law Review* 749 753. See also Bellish (2012) *Denver Journal of International Law & Policy* 548 558-559; Branson (2013) *Wake Forest Law Review* 673 678-680.

²⁰³ Micklethwait & Wooldridge *The Company* 126.

²⁰⁴ Lichner (2009) *European Business Law Review* 889 892; Keay *The Corporate Objective* 41; Keay *The Enlightened Shareholder Value Principle* 45.

²⁰⁵ Freeman *Strategic Management: A Stakeholder Approach* (1984), referred to in Lichner (2009) *European Business Law Review* 889 892; Keay *The Corporate Objective* 122.

The stakeholder model of corporate governance has again become popular in the past 20 years.²⁰⁶ It is now generally accepted that other stakeholders' interests must be taken into account. Even contemporary advocates of the shareholder primacy model accept that, to the extent that the stakeholder model asserts that companies should pay attention to its other stakeholders, the model is unassailable.²⁰⁷ Sheehy and Feaver wrote:

“Whereas in the last century Friedman could boldly assert that the corporation’s social responsibility was to maximise wealth and Kraakman, in a moment of neo-classical economic triumphalism, declared that corporate law’s evolution had reached its zenith in a particularly ideological version of American shareholder primacy, the facts tell a different story. Even as they were undertaking their research, the planet was going in a different direction – in which corporate power carries corporate social responsibility. From the international and transnational soft law initiatives such as the UN’s Global Compact, the Global Reporting Initiative and corporate sponsored regulatory initiatives such as the Kimberley Process, aimed at improving social performance, to the hard law of regulatory reform and judgments of courts supporting and imposing such social initiatives, law has moved in a different direction at odds with the voices of the business press. Far from precluding expenditure of corporate wealth on social issues as those scholars may suggest, not only does the law allow attention to social issues, but in particular contexts, even mandates such attention.”²⁰⁸

The stakeholder model operates widely in many continental European and East Asian countries with Germany and Japan regarded as prime examples.²⁰⁹

²⁰⁶ Dine *Corporate Groups* 31-36; Shandu (2005) *Obiter* 87 90; Lichner (2009) *European Business Law Review* 889 894; Keay *The Corporate Objective* 115.

²⁰⁷ Jensen (2002) *Business Ethics Quarterly* 235 241; Lichner (2009) *European Business Law Review* 889 899.

²⁰⁸ Sheehy & Feaver *Directors’ Legal Duties and CSR: Prohibited, Permitted or Prescribed in Contemporary Corporate Law?* (2014) (available at http://works.bepress.com/cgi/viewcontent.cgi?Article=10177context=benedict_sheehy (accessed 2015-07-15)) 3-4, referred to in Ajibo “A critique of enlightened shareholder value: Revisiting the shareholder primacy theory” (2014) *Birbeck Law Review* 37 37-38; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 286.

²⁰⁹ For example Germany, Netherlands, Austria and Japan. See Lichner (2009) *European Business Law Review* 889 892; Keay *The Corporate Objective* 114; Gevurtz (2011) *Pacific McGeorge Global and Development Law Journal* 39 45-46; Keay *The Enlightened Shareholder Value Principle* 42; Ajibo (2014) *Birbeck Law Review* 37 38 n1.

The stakeholder model of corporate governance is the antithesis of the shareholder primacy model. There are actually several approaches to the corporate objective that may be described as stakeholder orientated, including the communitarian theories, the pluralist theories and the social responsibility movement. The emphasis of this discussion is the main aspects of the stakeholder model that are common to most of the approaches.²¹⁰

According to the stakeholder or pluralist model of corporate governance, the economic and social purpose of the company is to create and distribute wealth and value to all its stakeholders, without favouring one group at the expense of another. Stakeholders are seen as persons or groups having a stake in the company. A stake is an asserted or real interest, claim or right, whether legal or moral, or an ownership share in an undertaking. The stakeholder model rejects the idea of one single objective, namely, maximising shareholder wealth.²¹¹ In contrast with the shareholder primacy model, the interests of shareholders do not receive precedence over the interests of other stakeholders. Because non-shareholder stakeholders also contribute to a company and its success, their interests should also be taken into account.²¹² In this regard, the point is often made that there are many stakeholders that make firm specific investments in the company.²¹³ In other words, in managing the company, the directors or managers must give independent value to and balance the interests of all the various stakeholders. This balancing of the interests is a critical

Germany, where co-determination is strong, is now the economic powerhouse of Europe. See Greenfield (2014) *Seattle University Law Review* 749 762.

²¹⁰ Keay *The Corporate Objective* 115. Freeman suggested that there is a genre of stakeholder theories, and not one basic theory. See Freeman "The politics of stakeholder theory: Some future directions" (1994) *Business Ethics Quarterly* 409.

²¹¹ Ryan "The evolution of stakeholder management: Challenges and potential conflicts" (1990) *International Journal of Value Based Management* 105 108; Clarkson "A stakeholder framework for analysing and evaluating corporate social performance" (1995) *The Academy Management Review* 92 112; Keay *The Corporate Objective* 120 and 133; Glynn "Communities and their corporations: Towards a stakeholder conception of the production of corporate law" (2008) *Case Western Reserve Law Review* 1067 1074.

²¹² Esser "Stakeholder protection: The position of employees" (2007) *THRHR* 407 410-412; Greenfield (2008) *Case Western Reserve Law Review* 1043 1043-1044; Keay *The Corporate Objective* 119; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 287; Keay *The Enlightened Shareholder Value Principle* 42-43; Davis *Companies and other Business Structures* 9-10; Cassim R "Corporate Governance" in *Contemporary Company Law* 495-497; Greenfield (2014) *Seattle University Law Review* 749 763-764.

²¹³ Freeman & Phillips "Stakeholder theory: A libertarian defence" (2002) *Business Ethics Quarterly* 331 338, referred to in Keay *The Corporate Objective* 132. For example, employees undergo specialised training that they may not be able to use elsewhere and suppliers might acquire specialised machinery to supply the company. See also Keay *The Enlightened Shareholder Value Principle* 42-43.

element of the stakeholder model. The fact that all stakeholders are regarded as even does however not mean that all claims and interests of stakeholders are equal or relevant in any given situation. Who gets what from the outputs of the company depends on the facts and is based on a meritocracy namely, what stakeholders contributed to the company. Unlike the case in the shareholder primacy model, stakeholders are treated as ends rather than means.²¹⁴ The stakeholder model requires a company to act with economic, social and environmental responsibility.²¹⁵

Stakeholder scholars argue that the company requires the input of all of its stakeholders to thrive and survive. It is accordingly more reasonable and beneficial to take the interests of all the stakeholders into account and not just that of the shareholders. If these other stakeholders are not considered, they will have no commitment to the company and this may lead to their withdrawal.²¹⁶ The long-term profitability of the company will then suffer.²¹⁷

Greenfield argues that the stakeholder model offers a better way to moderate and mitigate the pathological features of the company. It unlocks the company's distinctive attributes to serve society. The company can be used not only to create more wealth but also to share such wealth more broadly. Greenfield believes that this can be achieved without destroying the company's distinctive ability to create wealth.²¹⁸ His argument is based on four premises. First, company law is not an area of law governed by rights of ownership in the traditional sense. Shareholders do not have a complete "bundle of rights" to make them "owners" in the traditional sense, nor are they owners in any other sense that would distinguish their contribution to the company from the contribution of other stakeholders. Secondly, companies, and therefore company laws, are created in the interest of society as a whole. In other words the company has a social responsibility to

²¹⁴ Keay *The Corporate Objective* 118-120 and 134; Keay *The Enlightened Shareholder Value Principle* 44.

²¹⁵ Davis *Companies and other Business Structures* 9-10; Cassim R "Corporate Governance" in *Contemporary Company Law* 495-497; Esser (2007) THRHR 407 410-412.

²¹⁶ Keay *The Corporate Objective* 130; Keay *The Enlightened Shareholder Value Principle* 43.

²¹⁷ Keay *The Corporate Objective* 133. It is also argued that most stakeholders are unable to negotiate with the company on equal terms and that they must accordingly be protected. This is a form of a social contract approach to the issue. See Keay *The Corporate Objective* 135-136; Keay *The Enlightened Shareholder Value Principle* 44.

²¹⁸ Greenfield (2008) *Emory Law Journal* 948 961.

society.²¹⁹ It is interesting to note that Berle and Dodd, two of the most prominent company law scholars, were both of the view that the ultimate aim of the company is to benefit the society. They believed that the interests of all the stakeholders are worthy of protection.²²⁰ The third premise on which Greenfield bases his argument is that the socially optimal amount of regulation of companies is not zero. Company law is a powerful tool that can and must be used to achieve regulatory objectives.²²¹ The free market is not a self-sufficient instrument to increase social welfare. In fact the free market is a figment of the imagination, and an outlandish one at that. Fourthly, the company is a collective entity, demanding a variety of investments from a variety of sources or investors.²²² All of these investors have a stake in the success of the company.²²³

Wallis identifies four interlinked systemic crises that humanity currently faces: The first is planetary environmental limits; the second, rapidly rising social inequality; the third, major global financial instability and debt; and the last, huge wasted opportunity.²²⁴ He argues that in order to face these crises we need to discard three pervasive myths. The first is that we can continue growing forever. Infinite growth in a finite world is not possible.²²⁵ The second myth is that markets are always fair. The third is that prices tell the whole truth.²²⁶ This implies a major

²¹⁹ See also Lichner (2009) *European Business Law Review* 889-893; Keay *The Corporate Objective* 119; Cassim R “Corporate Governance” in *Contemporary Company Law* 495; Cassim FHI “The Duties and Liability of Directors” in *Contemporary Company Law* 520; Keay *The Enlightened Shareholder Value Principle* 45-47.

²²⁰ As a normative matter even ardent contractarians and supporters of the shareholder primacy model such as Armour, Hansmann and Kraakman acknowledge that the overall objective of company law (as is the case with any branch of law) is to serve the interests of society as a whole. The narrower view that the purpose of company law is to maximise shareholder wealth can be understood as saying that the pursuit of shareholder value is generally an effective means of advancing overall social welfare. See Armour, Hansmann & Kraakman “What is Corporate Law” in *The Anatomy of Corporate Law* 28-29.

²²¹ Glynn (2008) *Case Western Reserve Law Review* 1067-1086-1095.

²²² Greenfield (2008) *Emory Law Journal* 948-962-964.

²²³ Greenfield (2005) *Hastings Business Law Journal* 87-89-118; Greenfield (2008) *Case Western Reserve Law Review* 1043-1043-1044.

²²⁴ Wallis “The future economy. Pursuing social responsibility in business.” (2013) *Harvard International Review* 78-78-79.

²²⁵ For everyone on earth to live at the current European average level of consumption, more than double the planet’s available bio-capacity would be required to sustain us. If everyone on earth consumed at the current United States rate, we would require nearly five earths to sustain us. See Wallis (2013) *Harvard International Review* 78-79.

change in the corporate objective, away from maximizing shareholder value in monetary terms to creating economic, social and environmental value for all stakeholders. The value of a company cannot be measured only in monetary terms, as is the case in the shareholder primacy model. It must be measured against the economic, social and environmental value which it is creating or destroying.²²⁷ It is not possible to capture all values in monetary terms. In fact, certain values are corrupted or degraded if they are bought or sold for money.²²⁸

The interests of creditors and employees are protected in the stakeholder model of corporate governance. As stakeholders of the company, their interests must be balanced against the interests of the other stakeholders.²²⁹ Some stakeholder scholars argue that non-shareholder stakeholders, especially employees, should be represented at board level.²³⁰ Many west European countries mandate employee-appointed directors in at least some large or state-owned companies. Germany, which adopted a two-tier board system, is a primary example. Employees are also represented in the one-tier boards of Denmark, Sweden and Luxembourg.²³¹ The only European

²²⁶ Wallis cites Øystein Dahle, the vice president of Exxon Mobile from 1985 to 1995, who said that communism collapsed because it did not tell the economic truth, but that capitalism will collapse because it does not allow prices to tell the ecological truth. See Wallis (2013) *Harvard International Review* 78 80.

²²⁷ Wallis (2013) *Harvard International Review* 78 80. See also Greenfield “The disaster of Bhopal: Lessons for corporate law” (2008) *New England Law Review* 755.

²²⁸ Sandel demonstrates this with poignant examples where attempts are made to place a value on loss of life, pain or virtue; or where persons are paid to wage war or bear children. See Sandel *Justice* 41-48 and 75-102.

²²⁹ Talbot goes even further and propose a labour-orientated (as opposed to a shareholder-orientated) model of corporate governance. This will not necessarily involve direct labour representation on the board, but that decisions should be made in the interests of labour and not shareholders because, in so doing, desirable social outcomes will be achieved. She argues that workers have every incentive to make sure that the companies they work for survive and thrive, since their own well-being is more closely tied to the company than that of shareholders. Labour’s interests include long-term development, good wages and concern for the environment. In contrast, shareholder-orientated governance will deliver only short-termism and this has a regressive impact on society. See Talbot *Great Debates in Company Law* 163-182. See also Greenfield *The Failure of Corporate Law* 26-27 and 56-57. Even some contractarians such as Enriques, Hansmann and Kraakman believe that a strong argument can be made out that labour directors benefit the firm, its shareholders as well as its employees. See Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in *The Anatomy of Corporate Law* 110. Whether this is correct in the South African context is debatable. Employees are arguably primarily interested in increasing their remuneration and working conditions and are not so much concerned with long-term development of the company and the environment.

²³⁰ Greenfield (2008) *Harvard Law & Policy Review* 1 24-25; Greenfield (2014) *Seattle University Law Review* 749 764.

²³¹ Keay *The Corporate Objective* 129.

Union countries that have not introduced any form of employee board representation are Portugal, Belgium, Italy and the United Kingdom.²³²

The issue of enforcement is something that has plagued the stakeholder model ever since the debate between Berle and Dodd in the 1930s.²³³ The various stakeholder models generally postulate that directors have a fiduciary responsibility to all the various stakeholders. Alternatively it is said that directors have a fiduciary duty to advance the interests of the company as a separate legal entity. Some supporters of the stakeholder model, like Dodd, place their trust in the trustworthiness and professionalism of directors and managers to enforce the model. Berle did not have the same confidence in them. Others argue for institutional representation of non-shareholder stakeholders at the board level or the extension of legal remedies to enforce the corporate objective (for example derivative proceedings and the oppression remedy) to non-shareholder stakeholders.²³⁴

The shareholder primacy and stakeholder models are based on radically different normative premises.²³⁵ The stakeholder model is based on the communitarian theories that are discussed in chapter 2.²³⁶ Communitarians emphasise the sociological and moral phenomenon of the company as a community and the interdependence of individuals.²³⁷ They find support in the philosophy of *ubuntu*. Whereas the normative or philosophical foundation of the contractarian theories (and hence also the shareholder primacy model) revolve around maximising welfare (utilitarianism) and respecting freedom (libertarianism), communitarians see justice as bound up with virtue and

²³²Shandu (2005) *Obiter* 87 89; Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in the *Anatomy of Corporate Law* 100-102 and 110-113. Shandu argues that the two-tier board is more suitable for any country intent on initiating a broad-based, stakeholder- and shareholder-inclusive corporate governance model. See Shandu (2005) *Obiter* 87 92-94. The United Kingdom has now decided to leave the European Union.

²³³ Keay *The Corporate Objective* 232 and 236.

²³⁴ Keay *The Corporate Objective* 236-237.

²³⁵ Keay *The Corporate Objective* 22-23.

²³⁶ Keay *The Corporate Objective* 134; Ajibo (2014) *Birbeck Law Review* 37 42.

²³⁷ Millon (1993) *Washington and Lee Law Review* 1373 1382; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

the good life.²³⁸ Communitarians reject the contractarians' focus on profit and consider a wider array of social and political values, such as respect for human dignity, ethical behaviour, cooperation, trust, justice, fairness, stability, sustainability, civic responsibility and the overall welfare of society.²³⁹ Esser argues that the stakeholder model can also be based on the concession theories of the company, specifically Dine's "bottom-up" concession theory.²⁴⁰ The stakeholder model further finds support in the real entity theory, specifically Dodd's normative conception of the real entity theory. Dodd seized upon the real entity theory's core idea of the company as a separate legal entity to argue that the company should be a good corporate citizen that should have regard to all its stakeholders, including creditors, employees, consumers and the society in which it operates.²⁴¹ The stakeholder model can also find justification in the team production theory. According to the team production theory, the board of directors must protect the firm-specific investments of the whole corporate team including shareholders, managers, employees, and possibly other groups, such as creditors.²⁴² Keye states that some stakeholder theorists embrace a form of agency theory, with stakeholders being regarded as the principals. Even economic contractarianism can be associated with the stakeholder model on the basis that all stakeholders are part of the nexus of contracts and therefore on equal footing.²⁴³

The work of the social contract philosophers such as Thomas Hobbes²⁴⁴ and John Rawls²⁴⁵ can serve as a normative foundation for the stakeholder model. Social contract theory conveys

²³⁸ Sandel *Justice* 20 and chapters 8-10.

²³⁹ Esser 31; Greenfield (2008) *Case Western Law Reserve Review* 1043 1055; Keye *The Corporate Objective* 36-37 and 125-126; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

²⁴⁰ Esser 32-33.

²⁴¹ Millon "Theories of the corporation" (1990) *Duke Law Journal* 201 203, 217-220 and 224-225; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102 and 117; Lichner (2009) *European Business Law Review* 889 901-902; Petrin (2013) *Penn State Law Review* 1 23-24.

²⁴² Blair & Stout (1999) *Virginia Law Review* 247 253-254 and 288-289; Lichner (2009) *European Business Law Review* 889 900. Although according to the team production theory directors should not be under direct control of either the shareholders or other stakeholders.

²⁴³ Keye *The Corporate Objective* 128.

²⁴⁴ Hobbes *Leviathan* (1994) 218. Hobbes argued that in the state of nature the life of man is "solitary, poor, nasty, brutish and short". Citizens surrendered their natural liberty in the social contract. Claims to just treatment must

morality as a set of rules that individuals voluntarily agree to abide by in a social contract.²⁴⁶ Some also invoke the philosophies of Immanuel Kant in support of the stakeholder model and say that the idea of respecting others (equals) and accepting all groups as having intrinsic worth, leads us to see people not as means, but ends in themselves.²⁴⁷

5.2 Arguments for and against the stakeholder model

A compelling argument for the stakeholder model is its strong moral basis.²⁴⁸ In fact the central core of the theory is normative.²⁴⁹ Unlike the shareholder primacy model, which focuses on efficiency, the stakeholder model also embraces other endearing values such as trust, justice and fairness.²⁵⁰

The supporters of the stakeholder model also argue that the adoption of this model will benefit the company and produce greater social wealth.²⁵¹ Greenfield asserts that social wealth is not maximised unless that wealth is widely distributed. His reasons are partly economic (because of the diminishing utility of money, widely shared wealth raises social welfare more than

therefore be based on the social contract. See Hobbes *Leviathan* Ch. 13, referred to in Harris *Legal Philosophies* (1980) 10.

²⁴⁵ Rawls *A Theory of Justice* (1972); Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 288. Rawls argued that people choose, by unanimous agreement, the principles which will regulate whatever society they belong to. In making this choice, they are guided only by rational self-interest. See Harris *Legal Philosophies* 264. These principles are first, that each person is to have an equal right to the most extensive total system of equal liberties compatible with a similar system of liberty for all. Secondly, social and economic inequalities are to be arranged so that they are both to the greatest benefit of the least advantaged, consistent with the just savings principle, and attached to offices and positions open to all under conditions of fair equality and opportunity.” See Rawls *A Theory of Justice* 302.

²⁴⁶ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 288; Keay *The Enlightened Shareholder Value Principle* 49.

²⁴⁷ Gibson “The moral basis of stakeholder theory” (2000) *Journal of Business Ethics* 245 248; Keay *The Corporate Objective* 135.

²⁴⁸ Keay *The Corporate Objective* 135-136.

²⁴⁹ Keay *The Corporate Objective* 117. Yet the stakeholder model has been criticised on the basis that it lacks solid normative foundations. This is probably because its proponents have advanced different philosophical bases for the model. See Keay *The Corporate Objective* 137-138; Keay *The Enlightened Shareholder Value Principle* 49.

²⁵⁰ Keay *The Corporate Objective* 125-127; Keay *The Enlightened Shareholder Value Principle* 44.

²⁵¹ Albert *Capitalism vs Capitalism* (1993) 113 n 29; Greenfield *The Failure of Corporate Law* 27-28; Greenfield (2008) *Emory Law Journal* 948 975; Keay *The Enlightened Shareholder Value Principle* 43.

concentrated wealth), partly political (democracy thrives better in a society without huge economic disparities), and partly social (inequality creates the context for crime, social unrest and other ills).²⁵² He also argues that the allocation of wealth at the level of the company will be more effective to address the wealth and income disparity that currently exists in many countries than government distribution after the fact. He thus prefers wealth allocation through a stakeholder-orientated corporate governance system to a governmentally imposed system which distributes wealth through, for example, minimum wage acts.²⁵³

A further argument that is advanced for this model is that the inclusion of broader stakeholder concerns will allow for the adoption of a more long term view of the company. Stakeholders in general, with employees and communities in particular, know their interests are not well served by prioritizing the short term.²⁵⁴ Greenfield specifically believes that the interests of employees are more closely aligned with the interests of the company. Employees have a financial interest that rises and falls with the fortunes of the firm. They accordingly value decisions that value stability and long-term growth. Including employees' interests into the fabric of corporate governance will encourage firms to be more dedicated to their own success.²⁵⁵

Greenfield argues for pluralism at board level and believes that this will lead to better decision making. He states that group decision making is one of the reasons why the company is so successful. A diversity of perspectives and allowance for dissent and disagreement will lead to better decisions over time.²⁵⁶

A major criticism of the stakeholder model is that it has been a difficult concept to define. One difficulty has been to identify and define who the stakeholders are.²⁵⁷ This is not a

²⁵² Greenfield (2008) *Case Western Reserve Law Review* 1043 1055-1057.

²⁵³ Greenfield (2008) *Harvard Law & Policy Review* 1 25-26; Greenfield (2014) *Seattle University Law Review* 749 765-766.

²⁵⁴ Greenfield (2014) *Seattle University Law Review* 749 767-768.

²⁵⁵ Greenfield (2008) *Case Western Reserve Law Review* 1043 1058-1059.

²⁵⁶ Greenfield (2014) *Seattle University Law Review* 749 766-767.

²⁵⁷ Lichner (2009) *European Business Law Review* 889 892; Keay *The Corporate Objective* 123-125 and 138-143.

straightforward issue. Many commentators distinguish between primary (inside or internal) stakeholders such as shareholders, employees, financiers, customers and suppliers on the one hand, and secondary (outside or external) stakeholders such as governments, environmentalists, non-government organisations, critics and the media on the other hand.²⁵⁸ The majority of commentators identify shareholders; creditors; employees; financial institutions and lenders; suppliers and customers as stakeholders.²⁵⁹

Stakeholder groups are also not homogenous and this creates difficulties in balancing the interests of the various stakeholders.²⁶⁰ A further difficulty is to ascertain the basis for balancing the interests of the various stakeholders and to what end it should be directed. It is argued that it is impossible for directors and managers to attempt to balance the interests of all the stakeholders. It is also argued that the stakeholder model lacks clarity as to what the balancing would entail, especially if there are conflicting interests.²⁶¹ The end result is that it creates the opportunity for

²⁵⁸ Lichner (2009) *European Business Law Review* 889 892-893; Cassim R “Corporate Governance” in *Contemporary Company Law* 495. The King IV Report on Corporate Governance for South Africa 2016 (the King IV Report) also distinguishes between internal stakeholders (who are directly affiliated with the company including its board of directors, management, employees and shareholders) and external stakeholders (including trade unions, civil society organisations, government, customers and consumers). See Institute of Directors in Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (2016) (hereinafter referred to as “the King IV Report”) 17. Some scholars refer to persons who contribute to the company as “stakeholders”, “constituencies” or “contributors”. Others use the term “stakeholders” to describe people who are affected or who can potentially be affected by the company. Keay *The Corporate Objective* 114

²⁵⁹ Keay *The Corporate Objective* 123-124; Keay *The Enlightened Shareholder Value Principle* 47-48; Botha “Responsibilities of companies towards employees” (2015) *PELJ* 1 7-8. The King Report on Governance for South Africa 2009 (the King III Report) define the stakeholders of a company as “[a]ny group affected by and affecting the company’s operations.” Institute of Directors in Southern Africa *King III Report on Corporate Governance for South Africa 2009* (2009) (hereinafter referred to as “the King III Report”) 99. The King IV Report define stakeholders as “[t]hose groups or individuals that can reasonably be expected to be significantly affected by an organisation’s business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organisation to create value over time.” See King IV Report 17.

²⁶⁰ Keay *The Corporate Objective* 138-143. A company may, for example, have a number of different classes of creditors such as secured creditors, general trade creditors, suppliers with a reservation of ownership clause in their supply contracts, suppliers with long term contracts, suppliers that must obtain firm specific infrastructure to supply the company, employees, landlords, tax authorities, persons with delictual claims against the company and so forth. The interests of these classes of creditors clearly differ materially. See Keay *The Corporate Objective* 143-150; Keay *The Enlightened Shareholder Value Principle* 45-47.

²⁶¹ For example, in *BCE Inc v 1976 Debentureholders* [2008] S.C.J. No 37; [2008]3 S.C.R. 560 par 84 the Supreme Court of Canada said that there is no principle that one set of interests should prevail over the other. Which set prevails would depend on the situation before the directors and they would have to use their business judgment. See also Keay *The Enlightened Shareholder Value Principle* 45-47.

directors and managers to avoid responsibility altogether and they end up being accountable to no one.²⁶² This is the so-called “two masters” argument. The model is therefore unworkable.²⁶³ Greenfield responds by pointing out that this argument is rarely used outside company law. Multiple obligations routinely exist, even in business institutions. Managers are required to balance a multitude of obligations all the time. Whether managers are able to do so or not is not a function of the number and scope of their responsibilities, but how they are enforced. Company law does not enforce the duties imposed on managers in a way that would allow them to play one duty off the other.²⁶⁴ He further points out that this argument is inconsistent with the so-called efficiency argument advanced in support of the shareholder primacy model namely, that company law need not concern itself with other stakeholder interests because looking after shareholder interests will inevitably help other stakeholders as well.²⁶⁵

Allied to this is the criticism that there are significant problems in implementing and enforcing the stakeholder model.²⁶⁶ Berle believed that the company must be managed in the interests of society and all its stakeholders. He observed though that until such time as a clear and reasonably enforceable scheme of responsibilities to someone else is devised, the only existing bulwark against managerial abuse is the shareholder primacy model.²⁶⁷ He however later conceded that Dodd’s view, that directors and managers owe fiduciary duties to the company as an institution

²⁶² Keay *The Corporate Objective* 144-157 & 150-152. This is specifically the case as in many jurisdictions directors are protected by the business judgment rule which provides, in a nutshell, that courts will not substitute their judgement for that of the informed, reasonable director who acts *bona fide* in the best interests of the company. See Keay *The Corporate Objective* 152-155; Keay *The Enlightened Shareholder Value Principle* 46. The second King Report (King II) also stated in par 5 note 5 that “the stakeholder concept of being accountable to all must be rejected for the simple reason that to ask boards to be accountable to everyone would result in their being accountable to no one.”

²⁶³ Keay *The Corporate Objective* 157-160; Keay *The Enlightened Shareholder Value Principle* 261.

²⁶⁴ Greenfield *The Failure of Corporate Law* 138-139; Greenfield (2008) *Harvard Law & Policy Review* 1 28-30; Greenfield (2014) *Seattle University Law Review* 749 769-770.

²⁶⁵ Greenfield (2014) *Seattle University Law Review* 749 768.

²⁶⁶ Millon (1993) *Washington and Lee Law Review* 1373 1387-1388; Havenga (1997) *SA Merc LJ* 310 320-321; Keay *The Corporate Objective* 155 and 161-163; Keay *The Enlightened Shareholder Value Principle* 50-51. This was, as indicated before, the primary concern of Berle. See Berle (1932) *Harvard Law Review* 1365 1367.

²⁶⁷ Berle (1932) *Harvard Law Review* 1365 1367. See also Keay *The Corporate Objective* 161 and 171; Talbot *Great Debates in Company Law* viii-ix.

rather than to the shareholders alone, had prevailed.²⁶⁸ Dodd acknowledged that there were significant problems in the implementation of the stakeholder model.²⁶⁹ Non-shareholder stakeholders often do not have legal remedies to enforce the corporate objective. An example is the fact that in most Anglo-American jurisdictions only shareholders can institute derivative proceedings against the directors and other miscreants who caused the company damages. For the most part, other stakeholders do not have *locus standi* to institute derivative proceedings.²⁷⁰ Shareholder primacy scholars argue that whilst the stakeholder model may be attractive from a normative perspective, it has significant problems in implementation. The shareholder primacy model on the other hand is arguably not as attractive from a normative perspective, but it might be regarded as pragmatic and workable.²⁷¹ The counter argument is that some jurisdictions do in fact give non-shareholder stakeholders access to legal remedies, such as derivative proceedings or the oppression remedy.

It is also argued that the adoption of the stakeholder model can deter potential investors in the company. It can further deter competent directors from becoming directors due to the fear of personal liability.²⁷² This would kill the golden goose of competitiveness. Greenfield argues that this is analogous to an objection to any regulatory effort that imposes costs on capital. The question is not whether there will be short-term costs on capital, but whether benefits can be gained from the regulation that will balance those costs. Greenfield believes that there will be such benefits and that investors and directors will not be deterred.²⁷³

²⁶⁸ Berle *The Twentieth Century Capitalist Revolution* 169. See also Lee (2005) *Canadian Business Law Journal* 212 212.

²⁶⁹ Dodd "Is effective enforcement of the fiduciary duties of corporate managers practicable?" (1943) *University of Chicago Law Review* 194 199; Keay *The Corporate Objective* 161.

²⁷⁰ Keay *The Corporate Objective* 161-162.

²⁷¹ Keay *The Corporate Objective* 170-172.

²⁷² Esser (2007) *TRHR* 407 412; Greenfield (2008) *Harvard Law & Policy Review* 1 30-32; Greenfield (2014) *Seattle University Law Review* 749 772.

²⁷³ Greenfield (2008) *Harvard Law & Policy Review* 1 30-32; Greenfield (2014) *Seattle University Law Review* 749 772.

A further objection is that should this approach be adopted, it would be necessary to change the company law structure as it currently stands.²⁷⁴ It would be senseless to provide stakeholders with direct protection if they have no say in the appointment and removal of directors and have no voting rights.²⁷⁵

6 THE ENLIGHTENED SHAREHOLDER VALUE MODEL

6.1 The model

In 1998 the Department of Trade and Industry of the United Kingdom appointed an independent body, the Steering Group, to manage a comprehensive company law review process.²⁷⁶ The Steering Group published a number of consultation documents between 1999 and 2001; and a Final Report in 1999.²⁷⁷ The Steering Group rejected the stakeholder model and recommended that shareholder value should remain the ultimate purpose of the company in the United Kingdom. It proposed the introduction of the so-called enlightened shareholder value model of corporate governance, which was eventually adopted in the *Companies Act 2006* of the United Kingdom.²⁷⁸ The model is similar to the “enlightened value maximization theory” that Michael Jensen, a supporter of the shareholder primacy model for much of his academic life, proposed in the beginning of the century.²⁷⁹ It also has similarities with the constituency statutes that were enacted in the United States from the 1980s.²⁸⁰

²⁷⁴ See also the Department of Trade and Industry’s policy paper entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* Government Gazette 26493 of 3 June 2004 (the Policy Document) 24.

²⁷⁵ Du Plessis “Werkersdeelname in die bestuursorgane van ‘n maatskappy” (1981) THRHR 394; Esser (2007) TRHR 407 412.

²⁷⁶ Keay *The Enlightened Shareholder Value Principle* 1.

²⁷⁷ *Modern Company Law for a Competitive Economy: Final Report Volume 1 and 2* URN 01/942 and URN 01/943 released in July 2001 (hereinafter “the Final Report”). For a more comprehensive discussion of the review process, see Esser 82-111; Keay *The Enlightened Shareholder Value Principle* 65-84; Hannigan “Companies” in MacKay *Halsbury’s Laws of England* 5th ed (2009) Vol 14 (hereinafter “Hannigan Companies”) par 16.

²⁷⁸ It is effectively constituted by two provisions in the *Companies Act 2006* namely, section 172 (the directors’ duty to promote the success of the company) and section 414A (the strategic report).

²⁷⁹ Jensen (2002) *Business Ethics Quarterly* 235; Keay *The Enlightened Shareholder Value Principle* 61 and 63. Jensen wrote that the debate on the corporate objective should not focus on the conflict between the various constituencies or stakeholders of the company. The real issue to be considered is what behaviour of the company will result in the least social waste, or equivalently what behaviour would get the most out of society’s limited resources,

The enlightened shareholder value model's perception of the corporate objective is based on that of the shareholder primacy model. According to the enlightened shareholder value model, the directors must have regard to the long-term interests of the shareholders and, where appropriate, take into account the interests of other stakeholders. Like the shareholder primacy model, the ultimate goal of the company is to maximise profits for the benefit of the shareholders of the company. But the interests of other stakeholders are taken into account if it is likely to promote the success of the company for the benefit of the shareholders.²⁸¹ The enlightened shareholder value model seeks a more inclusive approach that values the building of long-term relationships.²⁸² It eschews the exclusive focus of the shareholder value model on the short-term financial bottom line.²⁸³ The model takes cognisance of the fact that the very character of large public companies has changed from being purely economic entities to being entities that also have social functions to fulfil.²⁸⁴

and not whether one group is or should be more privileged than another. See Jensen (2002) *Business Ethics Quarterly* 235 239-240. Jensen argued that purposeful behaviour requires the existence of a single valued objective and that it is logically impossible to maximise in more than one dimension at a time unless the dimensions are monotone transformations of one another. See Jensen (2002) *Business Ethics Quarterly* 237-238. He compared this with a scorecard in sport. The scorecard tells the players how the score will be kept, not how to play, practice or whom to choose. The last mentioned are functions are part of the competitive and organizational strategy of any team or organization. See Jensen (2002) *Business Ethics Quarterly* No 2 235 245 and 249. He wrote that there is a way out of the conflict between value maximization and stakeholder theory namely, to mould together what he called enlightened value maximization and enlightened stakeholder theory. See Jensen (2002) *Business Ethics Quarterly* 235 245. Enlightened value maximization specifies long-term value maximization or value seeking as the corporate objective. Managers should make all decisions so as to increase the total long-run value of the firm. Total value is the sum of all financial claims on the firm including equity, debt, preferred stock and warrants. See Jensen (2002) *Business Ethics Quarterly* 235 236 and 245-247. Jensen stated that the argument of the stakeholder theory that companies should pay attention to all their stakeholders is unassailable. The flaw in the stakeholder theory is that it does not specify a criterion for making the trade-off amongst the company's stakeholders. Enlightened value maximization thus utilizes much of the structure of stakeholder theory but accepts maximization of the long-term value of the company as the criterion for making the requisite trade-offs amongst its stakeholders. See Jensen (2002) *Business Ethics Quarterly* 235 241-242 and 246. Keay is of the view that, apart from emphasising that the firm must be managed for the long term, the enlightened value maximization theory is very similar to the mainstream shareholder primacy model. See Keay *The Enlightened Shareholder Value Principle* 61-62.

²⁸⁰ Keay *The Enlightened Shareholder Value Principle* 71.

²⁸¹ Esser 34; Keay (2007) *Sydney Law Review* 577 592-610; Cassim R "Corporate Governance" in *Contemporary Company Law* 495; Cassim FHI "The Duties and Liability of Directors" in *Contemporary Company Law* 519-520; Keay *The Enlightened Shareholder Value Principle* 216 and 284; Davis *Companies and Other Business Structures* 10.

²⁸² Keay *The Enlightened Shareholder Value Principle* 283.

²⁸³ *Company Law Review Modern Company Law for a Competitive Economy: Developing the Framework* (2000) paras 2.21 and 3.52; Keay *The Enlightened Shareholder Value Principle* 71.

²⁸⁴ Cassim FHI "The Duties and Liability of Directors" in *Contemporary Company Law* 519.

The interests of creditors and employees are protected, but only if it promotes the success of the company for the benefit of the shareholders. Whilst the normative basis for protecting creditors and employees is theoretically stronger than in the case of the shareholder primacy model, in practical terms the interests of shareholders trump those of the creditors and employees.

The enforcement of the corporate objective is essentially left to the shareholders. Other stakeholders cannot enforce the corporate objective directly and must rely on the shareholders to do so.

The enlightened shareholder value model can be construed as an attempt to connect the social welfare principles of socialism with the neoliberalism's individualism and free market principles or what Giddens terms "third way" politics.²⁸⁵ Giddens argues that expanding individualism would mean expanding individual obligations. Thus a consciousness must be nurtured which allows for a responsible mature individualism.²⁸⁶ In the context of the company, it means that its individual freedom to operate in the market must be tempered by some limited state intervention to encourage socially responsible and community-sensitive commerce.²⁸⁷

It is said that the enlightened shareholder model of corporate governance is a compromise between the shareholder primacy model and the stakeholder model.²⁸⁸ Keay rejects the view that the enlightened shareholder value approach adopted in the United Kingdom's *Companies Act 2006* is a move towards a true stakeholder approach. He points out that even under the shareholder primacy model, directors can take the interests of other stakeholders into account as long as it does not conflict with those of the shareholders. A good number of the proponents of the shareholder primacy model also advocates the need for directors to manage the company in the long term.²⁸⁹ Probably the biggest obstacle in seeing the enlightened shareholder value model

²⁸⁵ Giddens *The Third Way* (1998) 46; Keay *The Enlightened Shareholder Value Principle* 213-214.

²⁸⁶ Giddens *The Third Way* 113.

²⁸⁷ Talbot *Critical Company Law* 147.

²⁸⁸ Williams & Conley "An emerging third way? The erosion of the Anglo-American shareholder value construct" (2005) *Cornell International Law Journal* 493; Keay *The Enlightened Shareholder Value Principle* 211-212.

to be a true stakeholder approach is the lack of remedies available to other stakeholders.²⁹⁰ The fact that the authority of the directors is derived from the shareholders through a process of delegation through the articles of association rather than legislation reinforces the shareholder-centred nature of the company law of the United Kingdom.²⁹¹ Keay furthermore points out that the Steering Group specifically dismissed the stakeholder model and embraced the shareholder primacy model.²⁹²

According to Keay the enlightened shareholder value model “may be regarded as making only a slight change to the shareholder value theory as it involves directors not only having to act in the collective best interests of shareholders, but it demands an approach that values the building of long-term relationships.”²⁹³ Talbot similarly argues that whilst the enlightened shareholder value model is a seemingly inclusive approach rather than an exclusive approach, it locates the achievement of this inclusive approach in the polishing up of the shareholder primary model and relies more on wishful thinking than rigorous analysis.²⁹⁴ The enlightened shareholder value model is based on the shareholder primacy model and its theoretical underpinnings.²⁹⁵

6.2 Arguments for and against the enlightened shareholder value model

Some argue that the enlightened shareholder value model provides the necessary balance between running the company for the benefit of the shareholders collectively and ensuring, where possible, that directors take the interests of other stakeholders into account.²⁹⁶ It is also argued that the

²⁸⁹ See, for example, Hansmann and Kraakman (2001) 89 *Georgetown Law Journal* 439. See Keay *The Corporate Objective* 154-155.

²⁹⁰ Keay *The Enlightened Shareholder Value Principle* 211-218. In contrast to the position in the United Kingdom, other stakeholders have remedies available to them both Canadian and South African law. See Keay *The Enlightened Shareholder Value Principle* 267-271 and 273-275. These two jurisdictions are closer to stakeholderism than most, if not all other Anglo-American jurisdictions.

²⁹¹ Davies & Worthington *Gower & Davies Principles of Modern Company Law* 9th ed (2012) (hereinafter “*Gower & Davies Principles of Modern Company Law* 9th ed”) 384.

²⁹² Keay *The Enlightened Shareholder Value Principle* 212-214.

²⁹³ Keay *The Enlightened Shareholder Value Principle* 84.

²⁹⁴ Talbot *Critical Company Law* 150.

²⁹⁵ Keay *The Enlightened Shareholder Value Principle* 13.

²⁹⁶ Policy Document ch 3 par 3.2.2; Shandu (2005) *Obiter* 87 91; Esser (2007) *TRHR* 407 411.

enlightened shareholder value model ensures that companies act in a responsible manner and thereby avoid the adverse consequences that they will suffer if they fail to do so.²⁹⁷

Because it is a variant of the shareholder primacy model, many of the criticisms against that model also applies to the enlightened shareholder value model. An additional criticism that is raised against the enlightened shareholder value model is that it is legally unenforceable as it is optional for directors to take the interests of non-shareholder stakeholders into account.²⁹⁸

7 THE ENTITY MAXIMISATION AND SUSTAINABILITY MODEL

7.1 The model

Keay formulated a new model dealing with the issue of the corporate objective which he calls the entity maximisation and sustainability model (EMS model).²⁹⁹ An important aspect of the EMS model is that it focuses on the company as an entity or enterprise in its own right. For Keay the company is an entity that is real and has interests that are independent from those people or groups who affect, or who are affected by it. The company is not a fiction or simply the aggregate of its members. It is an independent body that is self-sufficient, self-renewing and has legal personality.³⁰⁰ The EMS model is thus rooted in the real entity theory.³⁰¹ Keay's conceptualisation of the company is based on the concept of the corporation (*universitas*). To distinguish it from the other models, Keay refers to those people and groups who have interests in the company as investors (instead of stakeholders).³⁰²

²⁹⁷ Esser (2007) TRHR 407 411.

²⁹⁸ Shandu (2005) *Obiter* 87 96; Esser 2007 TRHR 407 411-412; Keay *The Enlightened Shareholder Value Principle* 137-141.

²⁹⁹ Keay "Ascertaining the corporate objective: An entity maximisation and sustainability model" (2008) *The Modern Law Review* 633; Keay "The ultimate objective of the company and the enforcement of the entity maximisation and sustainability model" (2010) *Journal of Corporate Law Studies* 35; Keay *The Corporate Objective* 173-319.

³⁰⁰ Keay *The Corporate Objective* 175 and 178-183; Talbot *Great Debates in Company Law* 12. Keay contrasts this company with the unincorporated deed of settlement companies which were popular in the nineteenth century and which involved a mere collection of individuals which constituted the company. See Keay *The Corporate Objective* 179.

³⁰¹ Keay *The Corporate Objective* 180-183.

The EMS model has two elements to it. The first is to maximise or foster the wealth of the company as a separate entity. The focus is on the entity and what will enhance its position rather than on the investors and their interests. Keay explains:

“Entity maximisation involves the fostering of entity wealth, which will involve directors endeavouring to increase the overall long-run market value of the company as a whole, taking into account the investment made by various people and groups. In other words, directors should seek to maximise the total wealth-creating potential of the company, so they should do that which value-maximises the corporate entity, with the result that the net present value to the company as a whole is enhanced, and so is its strategic importance. The aim is that the company fulfils itself and grows and develops to the best it can be. All of this means that the directors are to foster the success of the company in terms of meeting its individual goals. In doing all of this directors should have concern for the ‘community of interest.’ This means that the common interest of all who have invested in the company is to be fostered, but it does not mean that at some point one group will not benefit at the expense of another. It also means that the common interest of the investors does not, at any time, supersede the interest of the entity as a whole.”³⁰³

Entity maximisation may, in concrete terms, benefit the investors. It may, for example, lead to improved dividends for shareholders; timely repayment of, and reduction of risk for, creditors;

³⁰² Keay *The Corporate Objective* 174. For example, shareholders invest money when they subscribe to shares, creditors invest money when they give credit, employees invest their skill and time, local governments invest services and so on.

³⁰³ Keay *The Corporate Objective* 198. See also Keay (2008) *The Modern Law Review* 663-685; Talbot *Great Debates in Company Law* 12. Havenga similarly argues that directors’ fiduciary duties are owed to the company as a whole, and not to individual shareholders, creditors, employees or other stakeholders. See Havenga (1997) *SA Merc LJ* 310-324. Esser and Du Plessis propose what they call a “merry-go-round” approach that also emphasises that the directors owe their fiduciary duties to the company alone as a separate legal entity. The company is represented by several interests including the interests of shareholders, employees, consumers and the environment. Requiring the directors to act in good faith in the interests of the company means a blend of these interests, but first and foremost they must act in the best interest of the company as a separate legal entity. The courts must give different weights to the degree of interests, having regard also to the remedies that a particular stakeholder enjoys under other legislation. An interest that may be primary at one particular time of a company’s existence, may well become secondary at a later stage. This is a continuing process and can be compared to a merry-go-round. See Esser & Du Plessis (2007) *SA Merc LJ* 346-359-362; Esser 37-39. Greenfield adopts a similar approach but takes it one step further by arguing that other stakeholders should also be represented on the board. See Greenfield *The Failure of Corporate Law* 148-152; Greenfield (2014) *Seattle University Law Review* 749-751, 761 and 763-764. Enriques, Hansmann and Kraakman point out that the company law of many jurisdictions provides that directors owe their duty of loyalty to the company rather to any of its constituencies. See Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in *The Anatomy of Corporate Law* 103. See for example section 122(1) of the *Canada Business Corporations Act R.S.C., 1985, c. C-44* and section 76(3)(b) of the *South African Companies Act of 2008*.

improved working conditions, greater job security and bonuses for employees; and a stable living environment in which the company operates. But the focus is on the entity and what will enhance its position rather than the investors and their interests. Any benefits for investors flow from the object to maximise or foster the wealth of the company as a separate entity.³⁰⁴

The wealth of the company as an entity must be maximised for the long term. This may even entail making less profit in one year than the previous one if it maximises the value of the entity in the long term.³⁰⁵ The EMS model furthermore does not focus solely on profit maximisation. It embraces things such as enhancing the reputation of the company, the development of intellectual property, research and development, know-how, brands and ideas. The object is to augment not only the company's tangible assets (such as plant, equipment, land and stock), but also its intangible assets (such as goodwill, employment satisfaction and creditor protection). The vision for the long term and the maximising of entity wealth means avoiding actions such as trimming labour costs, neglecting the health and safety of its employees and the community, delaying payment to creditors and embarking on risky ventures.³⁰⁶

The idea behind the EMS model is adding value.³⁰⁷ How directors are going to maximise the wealth of the entity will differ from company to company, but they obviously need to consider what produces wealth. Blair argues that there are three different ways that wealth can be generated. First, by supplying products and services to the market that are worth more to the customer than the customer pays for them. Secondly, by providing opportunities to employees to be more productive at their jobs than they could be in other available employment. Thirdly, by providing a return to its investors that is greater than investors could get by investing elsewhere.³⁰⁸

³⁰⁴ Key (2008) *The Modern Law Review* 663-685; Talbot *Great Debates in Company Law* 13.

³⁰⁵ Key (2008) *The Modern Law Review* 663-685; Talbot *Great Debates in Company Law* 13.

³⁰⁶ Key *The Corporate Objective* 202.

³⁰⁷ Key *The Corporate Objective* 198-203 and 210-211.

³⁰⁸ Key *The Corporate Objective* 208-209; Blair *Ownership and Control* (1995) 240-241.

The second element of the EMS model is sustainability.³⁰⁹ Keay states that the term sustainability does not have a consistent meaning. Some believe that the concept has three dimensions namely, the economic, the social and the environmental. This is often referred to as the triple bottom line of corporate sustainability.³¹⁰ For Keay sustainability for purposes of the EMS model simply means, for the most part, to sustain the company as a going concern, in other words to ensure its survival. This may, depending on the nature of a company's business and the position it finds itself in at the time, by necessity involve having regard to the economic, social and environmental sustainability of the company.³¹¹ To survive, a company must properly manage its employees so that they are effective and have a common vision. The company must be able to perpetuate itself. It must be able to adapt to the socio-economic environment in which it operates. A minimum profitability must be maintained that is adequate, having regard to the risks that are assumed. The company must be able to pay its overhead expenses. Keay argues that the sustainability over time of sound economic and financial conditions is the necessary requirement for the company to remain a going concern and satisfies all investor interests.³¹² De Jongh also emphasises the importance of creating sustainable value for the entity. He proposes that the emphasis should shift from the distribution of wealth amongst the various constituencies to value creation for the company as a collective interest of all constituencies, in other words, a move from *societas* to *universitas*. He reasons that this will also align the interest of the company with the public interest.³¹³

³⁰⁹ Keay *The Corporate Objective* 175.

³¹⁰ See, for example, Dyllick & Hockerts "Beyond the case for corporate sustainability" (2002) *Business Strategy and Environment* 130-132; Hardjono & De Klein "Introduction on the European sustainability Framework (ECSF)" (2004) *Journal of Business Ethics* 99-99; Keay *The Corporate Objective* 218. Compare also the King III Code which states that sustainability is the primary moral and economic imperative of the 21st century and is one of the key aspects of the King III Code. The King IV Report similarly emphasises sustainable development. See King IV Report 3 and 26.

³¹¹ Keay *The Corporate Objective* 218.

³¹² Keay *The Corporate Objective* 223.

³¹³ De Jongh *Between societas and universitas. The listed company in historical perspective (Tussen societas en universitas. De beursvennootskap en haar aandeelhouders in historisch perspectief)* (2013) Supreme Court of Netherlands - Research Department (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368748 (accessed 2014-04-09)) (hereinafter "De Jongh *Between societas and universitas*") 564-365.

The interests of creditors and employees may in concrete terms be protected under the EMS model, but the focus is on the entity and what will enhance its position.³¹⁴ Directors owe their fiduciary duties to the company and not to any of the investors.

Keye argues that the oppression remedy is not an appropriate legal remedy to enforce the EMS model as it tends to personalise the effects of the board's wrongful actions and is focussed on the personal rights of the investors. What is needed is a mechanism to enforce the obligation of directors to maximise and sustain the entity and not a mechanism that is geared to investors gaining some personal benefit. A further limitation of the oppression remedy (as an effective remedy to enforce the corporate objective) is that it is only available to members of the company in a number of the Anglo-American jurisdictions.³¹⁵ Keye reasons that the derivative action is better suited to enforce the corporate objective as the emphasis is on corporate rather than personal concerns. Employing the derivative action to enforce the corporate objective will also not revolutionise the law that has been introduced in many jurisdictions, because derivative actions are only permitted when the company has suffered harm. But if the EMS model is adopted, the derivative action cannot only be available to shareholders. A wider group of investors should have access to the derivative action.³¹⁶ Keye has confidence in the ability of the courts to review the decisions of directors. He notes that the courts have been judging the actions of different kind of fiduciaries for years. They have also demonstrated a good deal of understanding of the position that directors found themselves at the relevant time. In several jurisdictions specialised courts or judges hear company law matters.³¹⁷

The EMS model differs from the shareholder primacy model in that it seeks to enhance the wealth of the entity, and not only the wealth of shareholders. In the EMS model shareholder wealth may be a by-product of corporate welfare, whereas under the shareholder primacy model the maximisation of the shareholder wealth is sought directly.³¹⁸ The EMS model differs from the

³¹⁴ Keye *The Corporate Objective* 199 and 202-204.

³¹⁵ Keye *The Corporate Objective* 253-254 and 255.

³¹⁶ Keye *The Corporate Objective* 256-257, 260 and 275.

³¹⁷ Keye *The Corporate Objective* 267- 274.

stakeholder model in that it does not require the directors to balance all the investors' interests or resolve conflicts per se, but merely to ascertain what action will maximise the wealth of the entity.³¹⁹

Talbot classifies EMS as a legal model of a company in that it utilises the existing legal structure of the company to emphasise its entity preserving aspects, as well as the financial and human logic in following this model in corporate decision making.³²⁰ From a normative perspective, the EMS model does not only focus on profit maximization but embraces a wider array of values, such as, the community of interest, cooperation, justice, fairness, stability, sustainability, civic responsibility and the overall welfare of society. In this respect EMS adopts a communitarian approach. The EMS model differs from the team production theory of Blair and Stout in that the corporate objective is not directly related to the investors (the team), while the team production theory requires directors, without any guidance, to look after the team members' interests. The team production theory is furthermore a theory of the firm, whereas the EMS model is a corporate governance model which sets out a corporate objective.³²¹ The EMS model is based on the real entity theory of corporate personhood.

In a division of power model of corporation, the directors also owe their obligations and duties to the corporation as a separate legal entity.³²² The EMS model further corresponds with Dodd's

³¹⁸ Keay *The Corporate Objective* 228-229; Talbot *Great Debates in Company Law* 12.

³¹⁹ Keay *The Corporate Objective* 229.

³²⁰ Talbot *Great Debates in Company Law* 13.

³²¹ Keay *The Corporate Objective* 229-230.

³²² As discussed in chapter 3, the powers within the corporate constitution in the internal business and affairs of a division of power corporation is divided by statute amongst the participants (directors, officers, shareholders and, to a limited extent, creditors and employees). A division of power corporation is status and remedy orientated. Every person attaining a specific status (for example director, officer, shareholder, creditor or employee), is assigned statutory powers, obligations and remedies. The corporate constitution is not a contract among the participants. The managerial obligations and duties of directors and officers are public in the sense that they have a statutory origin. This provision of remedies designed for specific purposes to specific persons; and the technique of curbing managerial power are the most distinguishing features between division of power corporations and contractarian (or English model) companies. See Welling *Corporate Law in Canada* 59-60 and 62-63; Welling et al *Canadian Corporate Law* 116; Abbey *An Insightful Study of the Oppression Remedy under South African and Canadian Corporate Law* Master of Laws thesis (2012) University of Western Ontario, Canada 20; Delpont "The Division of Powers in a Company" in Visser, Pretorius & Koekemoer (ed) *Essays in Honour of Frans Malan, former Judge of the Supreme Court of Appeal* (2014) (hereinafter "*Essays in Honour of Frans Malan*") 89-91.

conceptualisation of the company. Dodd conceptualised the company as an institution directed by persons who are primarily fiduciaries for the institution rather than for its members.³²³ But, Dodd went one step further and seized upon the real entity theory's core idea of the company as a separate legal entity to argue that the company should be a good corporate citizen that should have regard to all its stakeholders including, creditors, employees, consumers and the society in which it operates.³²⁴ De Jongh also emphasises the institutional nature of the company. He argues that the modern company is based on *universitas* rather than a *societas*. The company is no longer considered to be a contract between the shareholders. The rules that govern the company are of an institutional rather than contractual nature. Directors are no longer considered to be the agents of the shareholders but derive their powers directly from the legal order itself. The company has its own interests separate from those of its shareholders.³²⁵ Like Keay, De Jongh emphasises the importance of creating sustainable value for the entity. He proposes that the emphasis should shift from the distribution of wealth amongst the various constituencies to value creation for the company as a collective interest of all constituencies, in other words, a move from *societas* to *universitas*. This will also align the interest of the company with the public interest.³²⁶

7.2 Arguments for and against the entity maximisation and sustainability model

Keay argues that the EMS model is attractive in a number of respects. First, investors are protected as the directors or managers do not look after the interests of any one investor or group of investors. This promotes fairness and decency.³²⁷ Secondly, by focusing on the company's wealth, the EMS model encourages the optimum use of the company's assets. Directors are expected to ensure that the assets of the company are used effectively and not mismanaged. Thirdly, the EMS model tempers some of the harsh results of capitalism in that the directors and managers are not required to pursue shareholder wealth at all costs. Fourthly, it may be argued

³²³ Dodd (1932) Harvard Law Review 1145 1162-1163.

³²⁴ Millon (1990) Duke Law Journal 201 203, 217-220 and 224-225; Ripken (2009) Fordham Journal of Corporate & Financial Law 97 102 and 117; Petrin (2013) Penn State Law Review 1 23-24.

³²⁵ De Jongh *Between societas and universitas* 561.

³²⁶ De Jongh *Between societas and universitas* 564-365.

³²⁷ Keay *The Corporate Objective* 175-176 and 205-206.

that, when investing in a company, the investors actually expect their investment to be used to maximise the company wealth. That is how they benefit from their investment.³²⁸

A significant advantage of the EMS model is that the directors, while respecting investors and recognising their importance, are not accountable to any specific group of investors, but instead are accountable to the company.³²⁹ It can be argued that the model is fair because the focus is on the company as a separate legal entity. While the company owes something to each of its investors, it is owned by nobody. It is an end in itself, autonomous and has a life of its own. It is not an instrument of anyone. In contrast to the stakeholder model, directors do not have to balance the interests of the investors as their aim is to maximise entity wealth. To be sure, the directors will have to do some balancing, as is necessary in applying most principles, including the principle of shareholder primacy. But unlike in the stakeholder model, the balancing is not the balancing of interests, but of courses of action with a clear goal namely, the maximisation and sustainability of the company. It can also be argued that the model is efficient as it may result in fewer transaction costs as investors will not be so concerned about the implementation of costly measures to provide them with the same sort of protection than may be the case if some other corporate objective is pursued.³³⁰ Keay states: “What EMS does is to enable managers to do what they are effectively employed to do namely, to act in the best interests of the company, which is the overarching duty of directors in over 40 jurisdictions around the world.”³³¹

The EMS model can be criticised (albeit tentatively) on normative grounds. The first element of EMS is a commitment to maximise the wealth of the company. Keay specifically proposes that the corporate objective under this model is not the attainment of the public good. He argues however “that seeking to meet the objective set out pursuant to this model will undoubtedly benefit the public good as the enhancement of the entity will result in benefits to the company’s investors who are integral members of the society, and whose good fortune from their involvement with the company can be transmitted into benefits for others not related to, or

³²⁸ Keay *The Corporate Objective* 175-176.

³²⁹ Keay *The Corporate Objective* 208.

³³⁰ Keay *The Corporate Objective* 176 and 206.

³³¹ Keay *The Corporate Objective* 209.

associated for the company.”³³² In other words, the public good is a by-product of the EMS model rather than its direct objective. From a normative perspective the proposition that the purpose of the company is not the attainment of the public good is not attractive. There is a broad consensus that as a normative matter the overall objective of a company and company law must be to serve the interests of society as a whole. Keye accepts this. He wrote “that all companies need to have an ultimate objective, and whatever is formulated by the directors in terms of goals, it must be congruent with the interest of society as a whole.”³³³ If the company is conceptualised as a separate entity, as Keye does, it is part of a shared community. The members of a shared community are interdependent and owe obligations to each other.³³⁴ A just society must cultivate a concern in citizens for the whole and a dedication to the common good and civic virtue, as opposed to purely privatised notions of the good life.³³⁵

Although Keye specifically state that the EMS model does not focus solely on profit maximisation (in other words its aims are not only financial in nature), it focusses on maximising the welfare of the company. It can be argued that the EMS model does not place sufficient emphasis on the importance of virtue or the common good. But this normative objection can be addressed by incorporating a third element to the EMS model namely, that the company must act like a good corporate citizen. As a separate legal entity, a company should have the rights and corresponding responsibilities of a natural person.³³⁶ As such, legal constraints are necessary to ensure that companies are accountable to the society in which they operate.³³⁷ This philosophy forms the basis of the discipline of corporate social responsibility.³³⁸ Corporate social responsibility implies an ethical relationship of responsibility between the company and the society in which it operates.

³³² Keye *The Corporate Objective* 175.

³³³ Keye *The Corporate Objective* 9.

³³⁴ Millon (1993) *Washington and Lee Law Review* 1373 1382; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

³³⁵ Sandel *Justice* 263.

³³⁶ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 284, 292 n95, 296; Dodd (1932) *Harvard Law Review* 1145 1161.

³³⁷ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292 n 95 and 293.

³³⁸ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292-294; Botha (2015) *PELJ* 1 9-14.

As a responsible corporate citizen, a company should protect, enhance and invest in the well-being of the economy, society and natural environment.³³⁹ The company is a living system and its sole objective can never simply be the creation of wealth.³⁴⁰

Bakan reasons that the company is a state-created tool for advancing social and economic policies. It should have only one institutional purpose namely, to serve the public.³⁴¹ As a result, companies must be reconstituted to serve, promote, and be accountable to broader domains of society than just themselves and their shareholders.³⁴² Companies are our creations. They have no lives, no powers and no capacities beyond what we, through our governments, give them.³⁴³ According to Bakan, the company's current tenants poorly reflect us. Whilst individualistic self-interest and consumer desires are core parts of who we are, they are not all who we are. Corporate rule must be challenged to revive the values and practices that it contradicts: democracy, social justice, equality and compassion.³⁴⁴ The company's legally defined mandate became to pursue, relentlessly and without exception, its own self-interest, regardless of the harmful consequences that it might cause to others. As a result, the company "is a pathological institution, a dangerous possessor of the great power it wields over people and societies."³⁴⁵ As a psychopathic creature, the company can neither recognise nor act upon moral reasons to refrain from hurting others. Its legal makeup forces it to pursue its own selfish ends and cause harm when the benefits of doing so outweigh the costs. It is an "externalizing machine".³⁴⁶

³³⁹ Compare The King III Code 50; King IV Report 18, 25 and 45-46.

³⁴⁰ Compare Jensen (2002) *Business Ethics Quarterly* 235 253.

³⁴¹ Bakan *The Corporation* 156-158; Greenfield *The Failure of Corporate Law* 172-130.

³⁴² Bakan *The Corporation* 106.

³⁴³ Bakan *The Corporation* 164.

³⁴⁴ Bakan *The Corporation* 166-167; Greenfield *The Failure of Corporate Law* 1-5.

³⁴⁵ Bakan *The Corporation* 16.

³⁴⁶ Bakan *The Corporation* 60-84. See also Greenfield *The Failure of Corporate Law* 30; Greenfield (2008) *Emory Law Journal* 948 959; Greenfield (2011) *Wake Forest Law Review* 627 627-628.

Enriques, Hansmann and Kraakman maintain that “the injunction to boards to pursue their corporation’s interests is less a species of equal sharing than, at best a vague counsel of virtue, and, at worst, a smokescreen for board discretion.”³⁴⁷ They reason that in practice courts lack the information to determine which policies maximize aggregate private welfare, so the duty to pursue their company’s interest is unenforceable. De Jongh, on the other hand, maintains that entity maximisation will not result the board being accountable to nobody, as the board has a clear duty to promote the long term success of the company. Where conflicts of interest between the *socii* (the investors) and the *universitas* (the company) cannot be eliminated, the principle of proportionality can be a useful tool. The directors must promote the long term success of the company but do so without disproportionately affecting the interests of other constituencies. De Jongh reasons that a focus on sustainable value creation aligns the public interest with the interests of the company.³⁴⁸

8 THE CORPORATE OBJECTIVE IN THE UNITED KINGDOM, CANADA AND INDIA

The approach of the company laws of the United Kingdom, Canada and India to the corporate objective are considered briefly in this section. A comprehensive discussion of this theme falls outside the scope of this thesis. The emphasis will be on the model of corporate governance that each jurisdiction adopts, the beneficiaries of the fiduciary duties of the directors and the legal enforcement (particularly by derivative and the oppression remedy) of the corporate objective.

8.1 United Kingdom

Before the promulgation of the present *Companies Act 2006*, the United Kingdom followed the shareholder primacy model of corporate governance.³⁴⁹ The directors were required to manage

³⁴⁷ Enriques, Hansmann & Kraakman “The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies” in *The Anatomy of Corporate Law* 103.

³⁴⁸ According to De Jongh this will not result the board being accountable to nobody, as the board has a clear duty to promote the long term success of the company. See De Jongh *Between societas and universitas* 564.

³⁴⁹ See for example *Percival v Wright* [1902] 2 Ch 421 (ChD); *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258; [1983] 2 All ER 653 (CA); *Grove v Flavel* (1986) 43 SASR 410; *Peskin v Anderson* [2000] 2 BCLC 1. See also Esser 55-56; Bone (2011) Canadian Journal of Law and Jurisprudence 277 298.

the company in the interests of its shareholders. The interests of creditors and employees did however receive some attention. The *Companies Act 1980*,³⁵⁰ which implemented the Second EC Council Directive, required directors to take the interests of employees into account in the performance of their duties.³⁵¹ This obligation was retained in the *Companies Act 1985*.³⁵² Since the 1980s, the courts in the United Kingdom have further, under the influence of several decisions delivered in Australasia,³⁵³ imposed a duty on directors to consider the interests of the creditors of the company when insolvency is imminent. The cases are not clear about when exactly this duty is triggered. This is an extension of the traditional duties of directors and is owed to the company and not to the creditors individually.³⁵⁴

³⁵⁰ C 22.

³⁵¹ Gower *Gower's Principles of Modern Company Law* 5th ed (1992) (hereinafter "*Gower's Principles of Modern Company Law* 5th ed") 51; Esser 47-48; Hannigan *Companies* par 13; Blackman "Companies" in Joubert (ed) *LAWSA* vol 4 part 1 (1995) 11; Clarke (2014) *Law and Financial Markets* 39 46. For a discussion of the debates and bills leading to the provision that directors are obliged to take the interests of employees into account, see Wedderburn "Employees, Partnership and Company Law" (2002) *Industrial Law Journal* 99 99-106.

³⁵² C 6. The *Companies Act 1985* was the first consolidating Act after the United Kingdom became a member state of the European Communities (which later became the European Union) in 1973. Section 309(1) of the *Companies Act 1985* provided: "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 members." Section 309(2) of the Act provided that the duty of the directors imposed in section 309 "is owed to them by the company (and the company alone) and is enforceable in the same way as any other duty owed to a company by its directors." See also Delpont "Korporatiewe reg en werkplekforums" (1995) *DJ* 409 414; Villiers "Section 309 of the Companies Act 1985: Is it time for a reappraisal?" in Collins, Davies & Rideout *Legal Regulation of the Employment Relation* (2000). Section 309 has been described as "toothless" or "a lame duck" because of the fact that neither the employees nor anyone acting on their behalf could enforce the section. See Talbot *Critical Corporate Law* 124; Keay *The Corporate Objective* 239. Section 719 of the Act further gave the company specific authority to make payments to employees on the cessation or transfer of the business of the company or part thereof notwithstanding that it is not in the best interests of the company (in other words, severance pay). Wedderburn points out that this development was partly in consequence of the judgement in *Parke v Daily News* [1962] Ch 927, which held that *ex gratia* payments of corporate funds by sympathetic directors to redundant employees, without taking account the interest of shareholders, was *ultra vires* and a breach of the directors' fiduciary duties. See Wedderburn (2002) *Industrial Law Journal* 99 105-106.

³⁵³ For example *Walker v Wimborne* (1976) 137 CLR 1; *Ring v Sutton* (1980) 5 ACLR 546; *Kinsela v Russel Kinsela Pty Ltd* (1986) 4 ACLC 215; (1986) 10 ACLR 395; *Grove v Flavel* supra; *Jeffree v NCSC* (1989) 7 ACLC 556; *Galladin v Aimmorth Pty Ltd* (1993) 11 ACSR 23; *Re New World Alliance Pty Ltd* (1994) 122 ALR 531; 51 FCR 425; *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465; *Spies v The Queen* (2000) 201 CLR 603; [2000] HCA 43; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2001] WASC 315; *Geneva Finance Ltd v Resource & Industry Ltd* (2002) 20 ACLC 1427; *Johnson Matthey (Aus) Pty Ltd v Dascorp Pty Ltd* [2003] VSC 291; *Emanuel Management Pty Ltd v Foster's Brewing Group* (2003) 178 *Federal Law Reports* in Australia and *Nicholson v Permakraft (NZ) Ltd* (1985) 3 ACLC 453; *Hilton International Ltd v Hilton* [1989] 1 NZLR 442 in New Zealand. See also Lombard 101-103, 106-109, 116-118, 123-125 and 127-128; Keay *The Enlightened Shareholder Value Principle* 223-226.

The Company Law Review Steering Group proposed the introduction of the enlightened shareholder value model in the United Kingdom.³⁵⁵ Following these proposals, this model was adopted in the *Companies Act 2006*.³⁵⁶ The Act restated the common law duties of the directors.³⁵⁷ Section 172 of the Act, which deals with the fiduciary duties of directors, is the heart of the enlightened shareholder value model.³⁵⁸ Section 172(1) provides as follows:

“A director of a company must act in a way that 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 between the members of the company.”³⁵⁹

³⁵⁴ *Winkworth v Edward Baron Development Co Ltd* [1986] 1 W.L.R. 1512; [1987] 1 All ER 114; *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 B.C.C. 30; *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1998] BCC 870; [1989] 1 All ER 705; *Facia Footwear Ltd (in administration) v Hincliffe* [1998] 1 BCLC. 218; *Re Pantone 485 Ltd* [2002] 1 BCLC 266; *Gwyer v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153; [2002] EWHC 2748; *Re MDA Investment Management Ltd* [2004] BPIR 75; See also Lombard 103-104, 109-110, 119-120, 125 and 128; *Keay Company Directors’ Responsibilities to Creditors* 153- 286; *Gower & Davies Principles of Modern Company Law* 9th ed 542 (2007) 553-557; *Raju Company Directors Fiduciary Duties & Liabilities under Indian Company Law* (2013) (hereinafter “*Raju Company Directors*”) 174-181.

³⁵⁵ *Company Law Review Modern Company Law for a Competitive Economy: Strategic Framework* (1999) paras 5.1.4-5.1.7, 5.1.17 and 5.1.22. See also *Keay The Enlightened Shareholder Value Principle* 63 and chapter 13; *Company Law Review Modern Company Law for a Competitive Economy: Developing the Framework* chapter 3; *Company Law Review Modern Company Law for a Competitive Economy: Completing the Structure* (2000) chapter 3; *Keay Company Directors’ Responsibilities to Creditors* 173-174; *Esser* 82-110; *Keay The Enlightened Shareholder Value Principle* chapter 3; *Gower & Davies Principles of Modern Company Law* 9th ed 542; *Clarke* (2014) *Law and Financial Markets* 39 47.

³⁵⁶ Sections 172 and chapter 4A of the *Companies Act 2006*. See also *Bone* (2011) *Canadian Journal of Law and Jurisprudence* 277 298; *Clarke* (2014) *Law and Financial Markets* 39 47.

³⁵⁷ Section 173(3) and (4). See also *Gower & Davies Principles of Modern Company Law* 9th ed 502-504.

³⁵⁸ *Keay The Enlightened Shareholder Value Principle* 85.

³⁵⁹ See *Esser* 118-122; *Keay The Enlightened Shareholder Value Principle* 85-144; *Gower & Davies Principles of Modern Company Law* 9th ed 540-558 for a discussion of section 172. It should be noted that section 172 provides that directors must promote the “success” of the company. Success is a more general word than “value”. The reason

Section 172(3) provides that the duty imposed under section 172 “has effect subject to any enactment ... requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.”³⁶⁰ Section 247 provides that the powers of the directors include, if they would not otherwise do so, to make provision for employees or former employees of the company or any of the subsidiaries in connection with the cessation or transfer of the undertaking of the company or its subsidiary.³⁶¹ Directors must accordingly have regard to more than just the interests of shareholders. Section 414A requires the directors to prepare a strategic report. The purpose of the strategic report is “to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company).”³⁶² Section 170(1) makes it clear that the duties of the directors (fiduciary duties and duties of care and skill) are owed to the company and not to the shareholders.³⁶³

Section 178 provides that the civil consequences of breaches of the statutory duties of directors are those that would apply in common law.³⁶⁴ Davies and Worthington believe that the extended

for this is that not all companies formed under the *Companies Act 2006* are aimed at maximising the financial interests of its shareholders. See *Gower & Davies Principles of Modern Company Law* 9th ed 544-545. How the government of the United Kingdom interpreted this new clause was elaborated on in the 2005 White Paper:

“The basic goal for directors should be the success of the company for the benefit of its members as a whole; but that, to reach this goal, directors would need to take a properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers and suppliers, and in the community more widely. The Government strongly agrees that this approach, which [is] called ‘enlightened shareholder value’, is most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all.”

See Department of Trade and Industry “*Company Law Reform*” (2005), Cm 6456, par 3.3.

³⁶⁰ See Key *The Enlightened Shareholder Value Principle* 218-230; *Gower & Davies Principles of Modern Company Law* 9th ed 540-558 for a discussion of section 172.

³⁶¹ See Wedderburn (2002) *Industrial Law Journal* 99 105-106. See also *Gower & Davies Principles of Modern Company Law* 9th ed 189-190 and 552-553 for a discussion of section 247.

³⁶² Section 414C(1) of the *Companies Act 2006*. See Key *The Enlightened Shareholder Value Principle* 145- 184 for a discussion of section 417 (the predecessor of section 414C). Talbot states that in the United Kingdom the imperative to pursue responsible governance is constructed around legislative provisions such as section 172 and section 417 (now section 414C), which require some account of corporate social responsibility-related activity. The corporate governance codes require listed companies to comply with certain corporate standards or explain why they have not. These are very weak guarantees of corporate responsibility. See Talbot *Great Debates in Company Law* 153.

³⁶³ Section 170(1) of the Act provides that: “The general duties specified in sections 171 to 177 are owed by a director of a company to the company.” See also *Gower & Davies Principles of Modern Company Law* 9th ed 506-507.

³⁶⁴ The Company Law Review Steering Group hoped to be able to recommend codification of the remedies for breaches of the statutory duties of directors, but did not have enough time to produce a workable scheme. This

reporting requirements of directors to shareholders will play the major role in enforcing the duties of directors and that litigation to enforce section 172 is likely to be relatively uncommon and probably even less successful.³⁶⁵ There are however potential legal remedies over and above the common law remedies.³⁶⁶ The right to bring derivative actions has been codified in Part 11 of the *Companies Act 2006*.³⁶⁷ Derivative claims can now only be brought under the Act. Section 260 provides that a member of a company has standing to bring a derivative action in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Members require the permission or leave of the court to continue with a derivative action.³⁶⁸

Theoretically members can also employ section 994 (the oppression remedy) to seek relief if the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or some part of the members; or an actual or proposed act or omission of the company is or would be so prejudicial. Such actions have been rare where public companies are concerned.³⁶⁹ The oppression remedy in the United Kingdom is often used to take action against directors and/or controlling shareholders in so called quasi-partnership companies in a variety of situations, but often where the complainant had been excluded from the management of the company. Only members have *locus standi* to invoke the oppression

resulted in the incorporation of section 178 in the *Companies Act 2006*. See Gower & Davies *Principles of Modern Company Law* 9th ed 505.

³⁶⁵ Gower & Davies *Principles of Modern Company Law* 9th ed 543 and 545-550. See also Keay *The Enlightened Shareholder Value Principle* 137-141.

³⁶⁶ In terms of the common law the company may obtain an injunction against directors who act in breach of their duties. The company can also recover the profits that miscreant directors made as a result of such breach.

³⁶⁷ Keay *The Corporate Objective* 234 and 255. The aim of the codification was the simplification and modernisation of the law in order to improve the accessibility to this remedy. See Gower & Davies *Principles of Modern Company Law* 9th ed 643-666 for a more comprehensive discussion of the derivative action in the United Kingdom.

³⁶⁸ Sections 261-264 and 266-269 of the *Companies Act 2006*; Keay *The Corporate Objective* 234; Keay *The Enlightened Shareholder Value Principle* 137-141; Gower & Davies *Principles of Modern Company Law* 9th ed 653 and 655-659.

³⁶⁹ Keay *The Corporate Objective* 235. The reason why the oppression remedy is seldom employed in the case of public companies is probably primarily due to the fact that shareholders prefer to sell their shares rather than resorting to costly litigation. See Gower & Davies *Principles of Modern Company Law* 9th ed 719-747 for a discussion of the oppression (or unfair prejudice) remedy in the United Kingdom.

remedy.³⁷⁰ One of the biggest obstacles in seeing the enlightened shareholder value model in the United Kingdom as a move towards a true stakeholder approach is the fact that no other stakeholder, other than a shareholder, has the right to enforce any breach of section 172 by the directors.³⁷¹

According to Keay, the purpose behind section 172 was primarily to emphasise the fact that directors should not run a company for short-term gains alone but to take into account long-term consequences. The section, together with the strategic report provided for in chapter 4A, was to make the process of management more enlightened and it did this so as to ensure that directors would consider a much wider range of interests, with hope that there would be more responsible decision-making.³⁷² Section 172 and the enlightened shareholder value model is essentially a variation of the shareholder primacy model.³⁷³ Directors do not owe a fiduciary duty to creditors, employees or other stakeholders.³⁷⁴

8.2 Canada

Contemporary Canadian corporate law regards the corporate objective completely different than that of the United Kingdom, where the emphasis is still on the interests of the shareholders of the company.³⁷⁵ Although Canadian corporate law originally adopted the shareholder primacy model

³⁷⁰ Keay *The Corporate Objective* 251. The fraudulent trading provision (section 231) is only available to liquidators. See Keay *Company Directors' Responsibilities to Creditors* (2007) 31-70 for a discussion of the fraudulent trading provision.

³⁷¹ Keay *The Enlightened Shareholder Value Principle* 216.

³⁷² Keay "The duty to promote the success of the company: Is it fit for purpose in a post-financial crisis world?" in Loughrey (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (2013); Keay "Good faith and directors' duty to promote the success of the company" (2011) *The Company Lawyer* 138; Keay "Moving towards stakeholderism: Enlightened shareholder value, constituency statutes and more: Much ado about little?" (2011) *European Business Law Review* 1; Keay "Risk, shareholder pressure and short-termism in financial institutions: Does enlighten shareholder value offer a panacea?" (2011) *Law and Financial Markets Review* 435.

³⁷³ Keay *The Corporate Objective* 223-224; *Gower & Davies Principles of Modern Company Law* 9th ed 541.

³⁷⁴ *Yukong Line Ltd v Rendsburg Investments Corporate (No. 2)* [1998] 1 WLR 294; *Gower & Davies Principles of Modern Company Law* 9th ed 509 and 552-557.

³⁷⁵ See Welling et al *Canadian Corporate Law* vi and 219-226.

of corporate governance, there has since been a fundamental shift to the stakeholder model.³⁷⁶ The separate legal personality of a corporation is one of the cornerstones of Canadian corporate law.³⁷⁷ Directors are required to act in the best interests of the corporation. Section 122(1) of the federal *Canada Business Corporations Act*³⁷⁸ (the *Canada Business Corporations Act*) provides as follows:

“Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”³⁷⁹

Two critically important decisions of the Canadian Supreme Court have unequivocally rejected the shareholder primacy model.³⁸⁰ The first one, *Peoples Department Stores Inc v Wise*,³⁸¹ was

³⁷⁶ Francis “*Peoples Department Stores Inc. v. Wise: The expanded scope of directors’ officers’ fiduciary duties and duties of care*” (2005) *Canadian Business Law Journal* 175 175; MacPherson “The Supreme Court restates directors’ fiduciary duty – a comment on *Peoples Department Stores v. Wise*” (2005) *Alberta Law Review* 383 388-389; Keay *The Enlightened Shareholder Value Principle* 267.

³⁷⁷ See Welling *Corporate Law in Canada* 57-68; Welling et al *Canadian Corporate Law* 114-118 and 226; McGuinness “Business Corporations” in Brecher *Halsbury’s Laws of Canada* 1st ed (2013) (hereinafter “McGuinness *Business Corporations*”) 221-235; Chopra & Arora *Company Law Piercing the Corporate Veil* (2013) (hereinafter referred to as “Chopra & Arora *Company Law*”) 222-223.

³⁷⁸ *R.S.C., 1985, c. C-44.*

³⁷⁹ Section 122(1)(a) of the *Canada Business Corporations Act* sets out the statutory “fiduciary duty” or “duty of loyalty” of directors, and section 122(1)(b) their “duty of care”. Compare also section 122(1) of the *Alberta Business Corporations Act, R.S.A. 2000, c B-9*; section 142(1) of the *British Columbia Business Corporations Act, S.B.C. 2002, c 57*; section 117(1) of the *Manitoba Corporations Act, C.C.S.M. c. C225*; section 79(1) of the *New Brunswick Business Corporations Act S.N.B. 1981, c B-9.1*; section 203(1) of the *Newfoundland and Labrador Corporations Act, R.S.N.L., 1990 c C-36*; section 123(1) of the *Northwest Territories Business Corporations Act, S.N.W.T. 1996, c 19*; section 123(1) of the *Nunavut Business Corporations Act, S.N.W.T. (Nu) 1996, c 19*; section 134(1) of the *Ontario Business Corporations Act, R.S.O. 1990, c B.16*; section 117(1) of the *Saskatchewan Business Corporations Act R.S.S. 1978, c B-10*; section 124(1) of the *Yukon Business Corporations Act R.S.Y. 2002 c 20*. Note that Canada is a federal state consisting of 10 provinces, each with its own sphere of legislative powers, three territories with limited self-government, and a central (federal) Parliament. Each state has its own *Corporations Act*. The *Canada Business Corporations Act* is a federal act. See further Francis (2005) *Canadian Business Law Journal* 175 177; Bradley “*BCE Inc. v. 1976 Debentureholders: The new fiduciary duties of fair treatment, statutory compliance and good corporate citizenship?*” (2010) *Ottawa Law Review* 326 329. Deva is of the view that, as opposed to the obligatory model of the United Kingdom (where directors are required by section 172(1) of the *Companies Act 2006* to consider the interests of specified non-shareholders), Canada follows a permissive model, under which company law permits directors to take into account the interests of non-shareholders. See Deva “*Socially responsible business in India: Has the elephant finally woken up to the tunes of international trends?*” (2012) *Common Law Review* 299 304.

³⁸⁰ Keay *The Corporate Objective* 168-169; Keay *The Enlightened Shareholder Value Principle* 267.

decided in October 2004. The trustees of a bankrupt subsidiary corporation brought a claim on behalf of the unsecured creditors of the corporation against the directors, *inter alia* claiming that the directors had breached their statutory fiduciary duty and duty of care (contained in section 122 of the *Canada Business Corporations Act*) in adopting a new inventory procurement policy. The Supreme Court of Appeal held on the facts that the adoption of the policy was a reasonable business decision adopted by the directors. However in its discussion of the legal issues, the Court explicitly acknowledged the rights of creditors and significantly expanded the potential scope of directors' duties and liabilities towards creditors and other stakeholders.³⁸² The Court observed:

“Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the ‘best interests of the corporation’ should be read not simply as the ‘best interests of the shareholders.’...[I]n determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the Board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.”³⁸³

The Court held that from an economic perspective the “best interests of the corporation” means the maximisation of the value of the corporation.³⁸⁴ It also held that the directors' duties of care contained in section 122(1)(b) is also owed to creditors.³⁸⁵ The Court thus clearly rejected the

³⁸¹ [2004] S.C.J. No 64, [2004] 3 S.C.R. 461. See Francis (2005) *Canadian Business Law Journal* 175; MacPherson (2005) *Alberta Law Review* 383; Lee (2005) *Canadian Business Law Journal* 212; Welling et al *Canadian Corporate Law* 219-222; Key *Company Directors' Responsibilities to Creditors* 168-170; Key *The Enlightened Shareholder Value Principle* 267-268 for a discussion of this case.

³⁸² Francis (2005) *Canadian Business Law Journal* 175 176.

³⁸³ [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 42. See also Francis (2005) *Canadian Business Law Journal* 175 178-179.

³⁸⁴ Welling et al *Canadian Corporate Law* 220.

³⁸⁵ The Court noted that unlike section 122(1)(a), section 122(1)(b) does not refer to any identifiable party as the beneficiary of the duty and concluded that the beneficiary “must include creditors”. See [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 57. See also Francis (2005) *Canadian Business Law Journal* 175 181 and 183. This means that creditors may institute claims directly against directors who acted negligently. The Court however noted that the directors' conduct must still be measured against the business judgement rule. See [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 67. The Court held that there was no need to expand the fiduciary duties of directors contained in section 122(1)(a) of the *Canada Business Corporations Act* as creditors already had other direct remedies available to them, including the oppression remedy. [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 48. See also Francis (2005) *Canadian Business Law Journal* 175 180.

shareholder primacy model of corporate governance and adopted the stakeholder model.³⁸⁶ Bradley wrote: “*Peoples* represented a critical shift away from the traditional model of shareholder primacy in Canadian jurisprudence; instead, it took the pluralist model of the corporation from its customary, cozy place by the academic hearth and thrust it into the harsh light of legal reality.”³⁸⁷

The second important judgement of the Canadian Supreme Court, *BCE Inc v 1976 Debentureholders*,³⁸⁸ was delivered four years later in the summer of 2008, in the midst of the Global Financial Crisis of 2007 to 2008. The fate of the largest leveraged buy-out in Canadian history was at stake.³⁸⁹ The debenture holders of BCE’s subsidiary challenged the proposed transaction on the basis that it was not fair and reasonable for either the shareholders or the debenture holders due to the negative effect it would have on their economic interests. They also claimed that the leveraged buy-out and related transactions “unfairly disregarded” their interests, entitling them to relief under section 241 of the *Canada Business Corporations Act* (the oppression remedy). The Court again emphasized that the fiduciary duty of the directors is owed to the corporation and not to any particular stakeholder. But in acting in the best interests of the corporation, the directors may be obliged to consider the impact of their decisions on corporate stakeholders. This, explained the Court, is what they mean when they speak of “a director being required to act in the interests of the corporation viewed as a good corporate citizen.”³⁹⁰ If a conflict arises between the interests of the stakeholders *inter se* “it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”³⁹¹ The Court stated that the cases on oppression confirm “that the duty of the directors to act in the best interests of the corporation

³⁸⁶ MacPherson (2005) *Alberta Law Review* 383 398 and 403; Lee (2005) *Canadian Business Law Journal* 212 213; Key *The Enlightened Shareholder Value Principle* 267.

³⁸⁷ Bradley (2010) *Ottawa Law Review* 326 333.

³⁸⁸ [2008] S.C.J. No 37, [2008] 3 S.C.R. 560. See Welling et al *Canadian Corporate Law* 222-225, 507-510 and 531-540; Bradley (2010) *Ottawa Law Review* 326; Key *The Enlightened Shareholder Value Principle* 268-269; McGuinness *Business Corporations* 875 for a discussion of this case.

³⁸⁹ Bradley (2010) *Ottawa Law Review* 326 327 and 328.

³⁹⁰ [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 66.

³⁹¹ [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 81.

comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly.”³⁹² The Supreme Court of Canada thus adopted the stakeholder model of corporate governance.³⁹³

A feature of the *Canada Business Corporations Act* (and most of the other provincial statutes) is the extensive remedies that it provides for shareholders and other complainants.³⁹⁴ The remedies are about standing, not about substantive rights.³⁹⁵ Unlike the law in the United Kingdom, Canadian law provides remedies to non-shareholder stakeholders if directors do not comply with their duties.³⁹⁶ One remedy that can be used by stakeholders to enforce the corporate objective is the statutory representative or derivative action.³⁹⁷ Derivative proceedings are permissible only where the corporation has suffered damages, or is or has been or will be prejudiced.³⁹⁸ Section 239 of the *Canada Business Corporations Act* provides that “a complainant” may apply to court for leave to bring an action in the name of a corporation or any of its subsidiaries, or to intervene

³⁹² [2004] S.C.J. No 64, [2004] 3 S.C.R. 461 par 82.

³⁹³ Bradley (2010) *Ottawa Law Review* 326 331-336; Welling et al *Canadian Corporate Law* vi and 226; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 298; Keay *The Enlightened Shareholder Value Principle* 269.

³⁹⁴ See part XX of the *Canada Business Corporations Act*. These remedies include a derivative action (sections 239-240), an oppression remedy (section 241), an application to rectify the records of the company (section 243) and a right to apply for a restraining or compliance order (section 247).

³⁹⁵ Welling *Corporate Law in Canada* 62-64.

³⁹⁶ Keay *The Enlightened Shareholder Value Principle* 269.

³⁹⁷ Section 239 of the *Canada Business Corporations Act*; section 240 of the *Alberta Business Corporations Act*; section 232 of the *British Columbia Business Corporations Act*; section 232 of the *Manitoba Corporations Act*; section 164 of the *New Brunswick Business Corporations Act*; section 369 of the *Newfoundland and Labrador Corporations Act*; section 241 of the *Northwest Territories Business Corporations Act*; 3rd Sched section 4 of the *Nova Scotia Companies Act*; section 241 of the *Nunavut Business Corporations Act*; section 246 of the *Ontario Business Corporations Act*; section 232 of the *Saskatchewan Business Corporations Act*; section 241 of the *Yukon Business Corporations Act*. See Welling *Corporate Law in Canada* 509-528; Welling et al *Canadian Corporate Law* 399 and 461- 490; McGuinness *Business Corporations* 931-940 for a discussion of the representative or derivative action. The statutory derivative action displaced the common law derivative action. See Welling et al *Canadian Corporate Law* 399; McGuinness *Business Corporations* 921. The term “derivative action” is not used in the aforesaid sections but is borrowed from American corporate law to describe a common law action brought by a minority shareholder. It was also introduced in the company law of the United Kingdom. In America and the United Kingdom the term is used to describe a common law right of minority shareholders whereas the statutory remedy in Canada is more like a litigious right vested in a statutorily created guardian *ad litem*.

³⁹⁸ McGuinness *Business Corporations* 925.

in an action to which the corporation is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation.

A further remedy that can be employed by stakeholders is the oppression remedy.³⁹⁹ Section 241 of the *Canada Business Corporations Act* provides that “a complainant” may apply to a court for an order under this section if any act or omission of the corporation or any of its affiliates effects a result; the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer. Relief is not limited to the making of an order against the corporation. A remedy can also be granted against individuals, including directors and officers.⁴⁰⁰ The oppression remedy and the derivative action are not mutually exclusive and can be relied on in the same proceedings.⁴⁰¹ The Canadian oppression remedy has been described as the broadest, most comprehensive and most open-ended corporate law remedy in the common law world.⁴⁰²

³⁹⁹ Section 241 of the *Canada Business Corporations Act*; section 242 of the *Alberta Business Corporations Act*; section 227 of the *British Columbia Business Corporations Act*; section 234 of the *Manitoba Corporations Act*; section 166 of the *New Brunswick Business Corporations Act*; section 371 of the *Newfoundland and Labrador Corporations Act*; section 243 of the *Northwest Territories Business Corporations Act*; 3rd Sched section 5 of the *Nova Scotia Companies Act*; section 243 of the *Nunavut Business Corporations Act*; section 248 of the *Ontario Business Corporations Act*; section 234 of the *Saskatchewan Business Corporations Act*; section 243 of the *Yukon Business Corporations Act*. See Welling *Corporate Law in Canada* 533-556; Welling et al *Canadian Corporate Law* 490-540; Abbey; McGuinness *Business Corporations* 869-913 for a more comprehensive discussion of the oppression remedy in Canadian law. Welling states that the complex wording of the oppression remedy in the Canadian statutes was designed to get around the failures of the oppression remedy in the United Kingdom where the judges read into the remedy barriers that were never intended by the legislature. As a result few United Kingdom cases are of much use in interpreting the Canadian oppression remedies. See Welling *Corporate Law in Canada* 534-535. The Dickerson Report noted that the oppression remedy that it proposed for the *Canada Business Corporations Act* was substantially broader than its British antecedent and that the report was guided “by its conception of corporate law as a balancing of interests among shareholders, creditors, management and the public, essentially ensuring adequate investor protection and maximum management flexibility, if they were given a broad discretion to apply general standards of fairness.” See Dickerson, Howard, Getz & Bertrand *Proposals for a New Business Corporations Act for Canada* (1971) (hereinafter “*the Dickerson Report*”) 5; Abbey 46.

⁴⁰⁰ McGuinness *Business Corporations* 910.

⁴⁰¹ Welling *Corporate Law in Canada* 534; Welling et al *Canadian Corporate Law* 510-525 (specifically 523-525 for the relationship between the oppression remedy and the fiduciary duties of directors); McGuinness *Business Corporations* 911.

⁴⁰² See, for example, Welling *Corporate Law in Canada The Governing Principles* 2nd ed (1991) 563-564; Van Duzer “Who may claim relief from oppression: The complainant in Canadian corporate law” (1993) *Ottawa Law Review* 465 465; Keay *The Enlightened Shareholder Value Principle* 252; Abbey 93.

A further remedy that is available to stakeholders is a compliance order.⁴⁰³ Section 247 of the *Canada Business Corporations Act* provides that where a corporation or any director, officer, employee, agent or mandatory, auditor, trustee, receiver, receiver-manager, sequestrator or liquidator of a corporation does not comply with the Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, “a complainant” or creditor of the corporation may, in addition to any other remedy that they may have, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and on such application the court may so order and make any further order it thinks fit. The compliance remedy provides “a complainant” or creditor with a procedural vehicle to enforce the corporate constitution.⁴⁰⁴

Consistent with the stakeholder approach adopted in Canadian law (and in contrast with the approach adopted in the United Kingdom), “a complainant” for purposes of the aforesaid remedies is defined widely.⁴⁰⁵ Section 238 of the *Canada Business Corporations Act* defines “a complainant” to include a registered or beneficial holder, and a former registered or beneficial holder of a security of a corporation or any of its affiliates; a director or an officer, or former director or officer of the corporation; the Director; and any other person who, in the discretion of

⁴⁰³ Section 247 of the *Canada Business Corporations Act*; section 248 of the *Alberta Business Corporations Act*; section 228 of the *British Columbia Business Corporations Act*; section 240 of the *Manitoba Corporations Act*; section 172 of the *New Brunswick Business Corporations Act*; section 378 of the *Newfoundland and Labrador Corporations Act*; section 249 of the *Northwest Territories Business Corporations Act*; 3rd Schedule section 6 of the *Nova Scotia Companies Act*; section 249 of the *Nunavut Business Corporations Act*; section 253(1) of the *Ontario Business Corporations Act*; section 240 of the *Saskatchewan Business Corporations Act*; section 249 of the *Yukon Business Corporations Act*; section 460 of the *Québec Business Corporations Act, R.S.Q., c S 31.1*. See Welling *Corporate Law in Canada* 528-533; Welling et al *Canadian Corporate Law* 478-490; McGuinness *Business Corporations* 941 for a more comprehensive discussion of the compliance order in Canadian law.

⁴⁰⁴ Welling *Corporate Law in Canada* 59 and 529. This remedy is will be inappropriate in contractarian companies (also referred to as ‘English model companies’ or ‘memorandum and article companies’), which are based on a statutory contract and are rights orientated rather than status and remedy orientated. These companies are based on *societas* (partnership) rather than *universitas* (corporation). Canadian division of power corporations, in contrast, are status and remedy orientated.

⁴⁰⁵ Section 238 of the *Canada Business Corporations Act*; section 239 of the *Alberta Business Corporations Act* (include creditors); section 227(1) of the *British Columbia Business Corporations Act* (merely beneficial owners and not any other persons); section 231 of the *Manitoba Corporations Act*; section 163 of the *New Brunswick Business Corporations Act (NBBCA)* (include creditors); section 368(b) of the *Newfoundland and Labrador Corporations Act, R.S.N.L.*; section 240 of the *Northwest Territories Business Corporations Act*; 3rd Schedule section 7(5)(b) of the *Nova Scotia Companies Act*; section 240 of the *Nunavut Business Corporations Act*; section 245 of the *Ontario Business Corporations Act*; section 231(b) of the *Saskatchewan Business Corporations Act*; section 244 of the *Yukon Business Corporations Act*. See also Welling et al *Canadian Corporate Law* 453; McGuinness *Business Corporations* 895-904 (specifically 901-904 insofar as creditors are concerned).

the court, is a proper person.⁴⁰⁶ This can include creditors and employees. The Canadian courts have been aware of the potential width of the oppression remedy and have restricted who can employ it. Creditors have often invoked the oppression remedy, but the courts have required them to demonstrate that they have a legitimate interest in the manner in which the company is being run or has a direct financial interest in how directors are managing the company's affairs.⁴⁰⁷

It has been said that Canadian stakeholder protection law is unique in that it imposes statutory duties on directors and gives the stakeholders of a corporation the benefit of the oppression remedy to protect them against unfairly prejudicial conduct.⁴⁰⁸

8.3 India

The traditional position in India was that the directors were required to manage the company in the best interests of the company, which was understood to mean the body of shareholders as a whole.⁴⁰⁹ The directors' duties have now for the first time been codified in section 166 of the *Indian Companies Act 2013*⁴¹⁰ (the *Companies Act 2013*). Section 166(2) provides that a director of a company "shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment."⁴¹¹

⁴⁰⁶ Welling et al *Canadian Corporate Law* 399 and 490-540; Welling et al *Canadian Corporate Law* 524-525; Keay *The Corporate Objective* 258; Abbey 96-97; Keay *The Enlightened Shareholder Value Principle* 269-270; McGuinness *Business Corporations* 869-890.

⁴⁰⁷ Keay *The Corporate Objective* 252; Abbey 93; McGuinness *Business Corporations* 898-904 and 921. See also *Royal Trust Corp. of Canada v Hordo* [1993] O.J. No 1560, 10 B.L.R. (2d) 86 (Ont. Gen. Div. – C.L.) 92.

⁴⁰⁸ Bradley (2010) *Ottawa Law Review* 326-330.

⁴⁰⁹ *M.A. Malik v V.S. Thiruverngadaswami Mudaliar* (1949) 19 *Comp Cas* 311 (Mad); *Bajaj Auto Ltd. v N.K. Firodia* AIR 1971 SC 321; *Sangramsinh P Gaekwad v Shantadevi P Gaekwad* (2005) 11 SCC 314; *Raju Company Directors* 163-174. There appears to be some recognition in Indian Law of an indirect duty towards creditors if the company is insolvent. See *Raju Company Directors* 174-181.

⁴¹⁰ *Act 18 of 2013*.

⁴¹¹ See Kapoor & Dhamija *Taxmann's Company Law* 17th ed (2014) (hereinafter "Kapoor & Dhamija *Taxmann's Company Law*") 331-338; Ghosh *T.P. Ghosh on Companies Act 2013* 2nd ed (2014) (hereinafter Ghosh *Ghosh on Companies Act*) 402-403; Singh *Company Law* 16th ed (2015) (hereinafter "Singh *Company Law*") 290-324 for a more detailed discussion of the statutory duties of the directors.

This provision was seemingly inspired by section 172(1) of the United Kingdom *Companies Act 2006*.⁴¹² There are however important differences between the two sections. First, whereas section 172(1) of the United Kingdom *Companies Act 2006* provides that directors must promote “the success of the company”, section 166(2) of the Indian *Companies Act 2013* provides that they must promote “the objects of the company”. This can probably be attributed to the important role that the objects of the company still play in Indian company law.⁴¹³ Secondly, section 172(1) of the United Kingdom *Companies Act 2006* provides that directors must “have regard (amongst other matters) to” the factors listed in section 172(1)(a) to (f) (including the interests of the employees and the impact of the company on the community and the environment) in promoting the success of the company for the benefit of its members as a whole. Section 166(2) of the Indian *Companies Act 2013* on the other hand provides that directors must promote the objects of the company not only for the benefit of its members as a whole, but also “in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.” In this respect, section 166(2) of the Indian *Companies Act 2013* appears to lean more towards a stakeholder model of corporate governance.

India has a rich tradition in corporate social responsibility.⁴¹⁴ The Supreme Court of India has recognised the social character of a company even before the *Companies Act 2013* came into

⁴¹² Deva (2012) *Common Law Review* 299 312-313.

⁴¹³ Section 4(c) of the Indian *Companies Act 2013* requires that the objects for which the company is proposed to be incorporated and any matter considered necessary in the furtherance thereof, be set out in the company’s memorandum of association. The *ultra vires* doctrine is still part of Indian company law. Any act beyond or outside the objects of a company is void. In comparison, section 31(1) of the *Companies Act 2006* of the United Kingdom provides that unless a company’s articles specifically restrict the objects of the company, its objects are unrestricted. Section 39 further provides that the validity of any act by the company shall not be called into question on the grounds of lack of capacity by reason of anything in the company’s constitution. Section 15(1) of the *Canada Business Corporations Act* provides that a corporation has the capacity and, subject to the Act, the rights, powers and privileges of a natural person. In both the United Kingdom and Canada the *ultra vires* doctrine does not have external effect. The approach of Indian company law with regards to the capacity of the company thus differs materially from both the law of the United Kingdom and Canada and is still based on the fiction theory’s conceptualisation of the company. See also Ghosh *Ghosh on Companies Act* 111.

⁴¹⁴ See Sharma “Corporate social responsibility in India: An overview” (2009) *The International Lawyer* 1515; Gowda “The evolution of corporate social responsibility (CSR) in India” (2013) *Indian Streams Journal* 1; Garg K *Bharat’s Corporate Social Responsibility* (2014) 22-26 for a discussion of the history of corporate social responsibility in India. Sharma argues that the corporate philanthropy (involving charitable donations made by business houses) first practiced by Indian businesses was initially rooted in religious belief and culture. With time there has been a significant shift in the approach which resulted in the emergence of four different models - the trusteeship model propounded by Mahatma Gandhi, the statist model put forward by Nehru, the liberal model

force. In 1951 the Court stated: “A corporation which is engaged in the production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest money in it.”⁴¹⁵ In *National Textile Workers’ Union v PR Ramakrishnan*⁴¹⁶ the Supreme Court also remarked:

“The traditional view that the company is the property of the shareholders is now an exploded myth. ... Today social scientists and thinkers regard a company as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contribute to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive domain over the concern, as if the concern belongs to it? A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions.”⁴¹⁷

The *Companies Act 2013* provides that any director who contravenes his statutory duties commits an offence which shall be punishable with a fine.⁴¹⁸ Unlike the United Kingdom and Canada, India does not have a statutory derivative action. But any member or members of the company may, in terms of the common law, bring an action in the name of the company to safeguard its

proposed by Friedman, and the stakeholder model proposed by Edward. See Sharma (2009) *The International Lawyer* 1515 1516-1517. See also Ghosh *Ghosh on Companies Act I-5*.

⁴¹⁵ *Charanjit Lal Chowdhurry v Union of India AIR 1951 SC 41, 59: 1950 SCR 869: (1951) 21 Comp Cas 33*, quoted in *Singh Company Law* 245.

⁴¹⁶ *AIR 1983 SC 75; (1983) 53 Comp Cas 184 (SC); (1983) 1 SCC 228*.

⁴¹⁷ *1983 SCR (1) 922 942-944*.

⁴¹⁸ Section 166(7) of the *Companies Act 2013*. See also Kapoor & Dhamija *Taxmann’s Company Law* 337.

interests where the controlling shareholders would not permit such an action.⁴¹⁹ This common law derivative action is only available to a member or members of the company.

The *Companies Act 2013* contains a statutory oppression remedy. Section 241(1) of the *Companies Act 2013* provides that certain prescribed members may apply to the National Company Law Tribunal (the Tribunal) for relief if the affairs of the company have been or are being conducted in a manner prejudicial to the public interest or in a manner oppressive to any member or members. Alternatively an application can be made on the basis that a material change has taken place in the management or control of the company which is not in the interest of any of the creditors, debenture holders or class of shareholders of the company.⁴²⁰ The Central Government can also apply for relief if the affairs of the company have been or are being conducted in a manner prejudicial to the public interest.⁴²¹

Section 245 further provides that a prescribed number of member or members, depositor or depositors⁴²² or any class of them can bring a class action before the Tribunal on behalf of members or depositors if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or its members or depositors.⁴²³ The orders that may be sought include an order to restrain the company from committing an act which is *ultra vires* the articles or memorandum of the company, an order to restrain the company from committing any breach of any provision of the company's

⁴¹⁹ *Satya Charan Law v Rameshwar Prasad Bajoria AIR 1950 FC 133; (1949-50) 11 FCR 673; (1950) Comp Cas 39; VP Singh v Metropolitan Council of Dehli AIR 1969 Del 295; Chandrate "Business Corporations (Companies and Corporations)" in Prasad, Mohan & Kumar Halsbury's Laws of India vol 27 (2013) (hereinafter "Chandrate Business Corporations") 441-442; Singh Company Law 488-489.*

⁴²⁰ This remedy is only available to certain members prescribed in section 244 or the Central Government. See Singh *Company Law* 493-518 for a discussion of the statutory oppression and mismanagement remedy in India.

⁴²¹ See Kapoor & Dhamija *Taxmann's Company Law* 476-484; Singh *Company Law* 493-518 for a discussion of the statutory oppression and mismanagement remedy in India.

⁴²² A depositor means any member who has made a deposit with the company in accordance with section 73(2), or any person who has made a deposit with a public company in terms of section 76. Section 2(31) provides that the term "deposit" includes any receipt of money by way of deposit or loan or in any other form by the company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

⁴²³ Kapoor & Dhamija *Taxmann's Company Law* 484-486; Ghosh *Ghosh on Companies Act* 971- 981; Singh *Company Law* 526-528.

memorandum or articles, an order to restrain the company from acting contrary to the Act or any other law, and an order to restrain the company from taking action contrary to any resolution passed by the members.⁴²⁴

As indicated in chapter 2, the ultimate power in the company in Indian law still vests with the shareholders and not the board of directors.⁴²⁵ It has been said that the corporate governance system that was adopted in the *Companies Act 2013* is still strongly rooted in United Kingdom model (which is essentially still shareholder centric).⁴²⁶ But of the two jurisdictions, India appears to have positioned itself nearer to the stakeholder model of corporate governance.

9 THE CORPORATE OBJECTIVE IN SOUTH AFRICA

The approach to the corporate objective that is adopted in South African law is considered in this section. A comprehensive discussion of this subject falls outside the scope of this thesis. The traditional approach is considered first. That will be followed by a discussion of the recommendations contained in the Policy Document and the relevant provisions of the Companies Act of 71 of 2008 (the Companies Act of 2008). Finally the approach adopted by the King Code is considered.

⁴²⁴ Kapoor & Dhamija *Taxmann's Company Law* 138-144; Ghosh *Ghosh on Companies Act* 997- 998; Singh *Company Law* 621-622. There are also other remedies that can be invoked for a breach of trust by the directors. The Tribunal may, in the course of the implementation of any scheme or proposal, recover compensation from directors, managers and officers of the company (amongst others), who have been guilty of any misfeasance, malfeasance, non-feasance or breach of trust in relation to the company. Section 266(1) of the *Companies Act 2013*. See also Raju *Company Directors* 376-382; Kapoor & Dhamija *Taxmann's Company Law* 520-521; Ghosh *Ghosh on Companies Act* 285- 307; Singh *Company Law* 526-528. Section 340 further contains a remedy similar to section 242 of the South African Companies Act 71 of 1973 that can be invoked on application to the Tribunal during the course of the winding up of a company by the liquidator, a creditor or a contributory. In terms of this section a director, manager or officer of the company (amongst others) can be held liable for misfeasance, malfeasance, non-feasance or breach of trust in relation to the company. See Raju *Company Directors* 574-577; Kapoor & Dhamija *Taxmann's Company Law* 520-521; Singh *Company Law* 722-727.

⁴²⁵ Singh *Company Law* 278-284.

⁴²⁶ See Ghosh *Ghosh on Companies Act* 719-782.

9.1 The traditional approach

The common law duties of directors in South Africa were mainly derived from the law of the United Kingdom.⁴²⁷ In terms of the common law, directors have a fiduciary duty to act in the interests of the company as a whole.⁴²⁸ The traditional view in South African law has been an identification of the company with the interests of its shareholders. The general meeting of shareholders was regarded as the fundamental and original source of power in the company structure. Shareholders were deemed to be the “owners” of the company and the purpose of the company was to maximize shareholder profits.⁴²⁹ Shareholders received primacy and the interests of other stakeholders mattered little. South African company law was firmly rooted in the contractarian model of a company.⁴³⁰ Our company law was based on *societas* (partnership) rather than *universitas* (corporation).⁴³¹

The interests of creditors and employees received little attention in the Companies Act 61 of 1973 (the Companies Act of 1973). It was accepted that directors do not owe a fiduciary duty to

⁴²⁷ *Fisheries Development Corporation SA Ltd v Jorgensen; Fisheries Development Corporation SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 165; *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (under curatorship), Intervening)* 2001 (2) SA 727 (C) par 37; Cassim FHI “The Duties and Liabilities of Directors” in *Contemporary Company Law* 509.

⁴²⁸ Cilliers & Benade *Korporatiewe Reg* (1987) paras 17.07-17.19; Pretorius, Delport, Havenga & Vermaas *Hahlo’s South African Company Law through the Cases* 5th ed (1991) (hereinafter referred to as “*Hahlo’s South African Company Law*”) 385-393; Cassim FHI “The Duties and Liabilities of Directors” in *Contemporary Company Law* 513-515.

⁴²⁹ See for example *Coronation Syndicate Ltd v Lillienfield and the New Fortuna Company* 1903 TS 489 at 497. See also Katzew (2011) SALJ 686 692; Cassim FHI “The Duties and Liabilities of Directors” in *Contemporary Company Law* 514-515; Keay *The Enlightened Shareholder Value Principle* 273. The focus of the company was financial. See Mongalo *Corporate Law and Corporate Governance* 198.

⁴³⁰ The memorandum and articles of association constituted a contract between the company and its shareholders. See section 65(2) of the Companies Act 61 of 1973 (hereinafter “the Companies Act of 1973”) and *De Villiers v Jacobsdal Saltworks* 1959 (3) SA 873 (O). Cilliers & Benade *Korporatiewe Reg* par 5.35 states that the memorandum and articles of association of the South African company had their historical roots in the deed of settlement of the unincorporated ‘deed of settlement’ companies that were widespread in the United Kingdom by the beginning the 19th century. The deed of settlement was essentially a partnership agreement that mimicked the provisions found in charters of incorporation. When the *Joint Stock Companies Act 1844 (7 & 8 Vict c 110)* made it possible to incorporate companies simply through registration, the deed of settlement was retained as the constitutive document of the company. From 1856 the deed of settlement was divided into the memorandum and articles of association (*Joint Stock Companies Act 1856 (19 & 20 Vict c 47)*).

⁴³¹ Compare De Jongh *Between societas and universitas*.

creditors or potential creditors of the company.⁴³² South African law did not follow the trend to extend the traditional directors' duties to include the interests of creditors when the company is nearing insolvency, which was adopted in Australasia, England and Canada.⁴³³ The directors did not owe a fiduciary duty to the employees of the company either. The Companies Act of 1973 adopted the traditional shareholder-orientated approach.⁴³⁴

Section 266 of the Companies Act of 1973 introduced a statutory derivative action in South African law. It did not displace the common law derivative action (which received little attention). Only the members of a company had standing to initiate derivative proceedings. The action was available if the company had suffered damages or a loss or had been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by a director or officer of the company and the company had not instituted such proceedings.⁴³⁵

A statutory oppression remedy was first introduced in South African Company Law with the adoption of section 111*bis* in terms of an amendment to the Companies Act 46 of 1926 in 1952.⁴³⁶ Only registered members had *locus standi* to apply for relief.⁴³⁷ The statutory oppression remedy was carried over to the Companies Act of 1973. Section 252(1) of the Companies Act of 1973 provided that any member of a company who complained that any particular act or omission of a company was unfairly prejudicial, unjust or inequitable; or that the affairs of the company were being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of

⁴³² Kunst, Delpont & Vorster *Henocheberg on the Companies Act* 5th ed (1994) (Loose-leaf, update June 2011) (hereinafter "Kunst et al *Henocheberg on 1973 Act*") 395.

⁴³³ Lombard 3-4. Although the courts gave some recognition to interests of creditors in *S v Hepker* 1973 (1) SA 472 (W) 484 and *Kerbyn 178 (Pty) Ltd v Van den Heever* 2000 (4) SA 804 (W) 817.

⁴³⁴ Esser 211-213; Davis *Companies and Other Business Structures* 10.

⁴³⁵ Cilliers & Benade *Korporatiewe Reg* paras 27.13-28.20; Cassim MF "Shareholder Remedies and Minority Protection" in *Contemporary Company Law* 775-777; Kunst et al *Henocheberg on 1973 Act* 510-514(1); Davis *Companies and Other Business Structures* 295-297.

⁴³⁶ See Sibanda "The statutory remedy for unfair prejudice in South African company law" 2013 JJS 58 59. As was the case with section 210 of the English Companies Act of 1948, section 111*bis* was introduced as an alternative remedy to winding up the company where a member(s) complained of oppression. See Sibanda 2013 JJS 58 60.

⁴³⁷ *Bader v Weston* 1967 1 SA 134 (CPD) 140A - 143E; *Ex parte Avondzon Trust* 1968 1 SA 340 (TPA) 342H; Sibanda 2013 JJS 58 61.

the members of the company, could approach the court for relief. The remedy was still only available to members.⁴³⁸

An important remedy that was available to creditors was contained in section 424 of the Companies Act of 1973. Section 424 provided that the Master, the liquidator, the judicial manager, any creditors or member or contributory to the company could hold directors or any person who was knowingly a party thereto, liable for fraudulent or reckless conduct of the business of a company.⁴³⁹ Interested persons could also apply for an order that the affairs of a company be investigated in terms of the provisions of section 258.⁴⁴⁰ But fundamentally non-shareholder stakeholders did not have any legal remedies to enforce the corporate objective.

9.2 The Policy Document

The corporate objective received specific attention in the Department of Trade and Industry's policy paper entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*⁴⁴¹ (the Policy Document) that was published in 2004.⁴⁴² The Policy Document accepted the proposition that the law requires directors to exercise their powers for the benefit of the company as a whole and then raised the question: what constitutes the benefit of the company? The Policy Document indicated that the traditional answer to this question in the United Kingdom, the United States and in South Africa had been to equate the benefit of the company with the interests of the shareholders.⁴⁴³ It noted that the corporate objective became the subject of fierce

⁴³⁸ Cilliers & Benade *Korporatiewe Reg* paras 28.21-28.36; Kunst et al *Henocheberg on 1973 Act* 457-484(2); Davis *Companies and Other Business Structures* 299.

⁴³⁹ Cilliers & Benade *Korporatiewe Reg* paras 17.44 and 31.71; Kunst et al *Henocheberg on 1973 Act* 911-920(3); Lombard 57- 71.

⁴⁴⁰ Kunst et al "*Henocheberg on 1973 Act* 494-497. Compare *Buckingham v Combined Holdings & Industries Ltd* 1961 (1) SA 326 (E) 330-331.

⁴⁴¹ Government Gazette 26493 of 3 June 2004.

⁴⁴² Par 3.2 of the Policy Document.

⁴⁴³ Two of the "theoretical underpinnings" of the shareholder primacy model that the Policy Document referred to were that shareholders are the residual risk takers and that it will increase social wealth. The third underpinning that the Policy Document referred to was that it is shareholders who invest their capital in the company and so they are entitled to its profits after other claims are satisfied. How this supports an argument for shareholder primacy is not entirely clear.

debate and disagreements by the early 20th century.⁴⁴⁴ It concluded that ultimately the corporate objective must be assessed within the particular context of South Africa, with its own peculiar social and political history. This context demands that South African company law take account of stakeholders such as the community in which the company operates, its customers, its employees, its suppliers and the environment in certain situations mandated by the Constitution⁴⁴⁵ and related legislation. Consideration must be given not only to economic factors, but also to social and environmental ones.⁴⁴⁶

The Policy Document proposed that “[a] company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies.”⁴⁴⁷ This formulation requires that the interests of shareholders should be balanced with those of other stakeholders when this is appropriate and/or required by the Constitution and related legislation. Unlike the traditional company law position, the interests of non-shareholder stakeholders have an independent value in certain circumstances under the constitutional framework. Directors may in certain situations have a specific duty to promote the interests of other stakeholders as ends in themselves. The Policy Document recognized that the company is an economic and social institution. Pursuit of profit should be constrained by social and environmental imperatives. Company law must acknowledge that companies, as economic agents, have an impact on society and therefore on a broader range of stakeholders. It recognized, however, that the relationship with some of these stakeholders, for example employees, are best regulated through separate legislation. This legislation would then also be applicable to overseas companies operating through a South African branch. It was accordingly concluded that aspects related to company law such as labour law, competition law, environmental law, mining law and other related areas

⁴⁴⁴ Par 3.2.2. Reference is made to the debate between Berle and Dodd, the constituency statutes in the United States and the review of the company law in the United Kingdom.

⁴⁴⁵ Act 108 of 1996.

⁴⁴⁶ The Policy Document endorsed the “triple bottom line approach” that was adopted in the King Report on Governance for South Africa 2002 (the King II Report).

⁴⁴⁷ Par 3.2.3.

should not be part of the proposed new Companies Act but rather continue to be regulated separately.⁴⁴⁸

The Policy Document signified a fundamental shift from the traditional view of shareholder primacy to a more inclusive balancing of interests approach. It also recognized the company as an economic and social institution rather than a nexus of contracts – a policy shift from *societas* to *universitas*.

9.3 The Companies Act of 2008

Certain duties of directors have been partially codified in the Companies Act of 2008.⁴⁴⁹ Section 76(3) of the Act deals with the directors' fiduciary duties and duties of care and skill and provides as follows:

“Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director –

- (a) in good faith and for a proper purpose;
- (b) in the best interests of the company; and
- (c) with the degree of care, skill and diligence that may reasonably be expected of a person -
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director.”

The phraseology of section 76(3) is similar to that of section 122(1) of the *Canada Business Corporations Act*. Both sections require the directors to act in the best interests of the company (or corporation). They differ from section 172(1) of the United Kingdom *Companies Act 2006*

⁴⁴⁸ Par 3.2.3. See also Mongalo “An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008” (2010) AJ xiii xx; Esser “Corporate social responsibility: A company law perspective” (2011) SA Merc LJ 317 323.

⁴⁴⁹ Sections 75 (directors’ personal financial interests) and 76 (standard of directors’ conduct). Section 76(4) introduces the so-called business judgement test into South African Law. See also Davis *Companies and Other Business Structures* 115-127; Cassim FHI “The duties and liabilities of directors” in *Contemporary Company Law* 507-584; Botha (2015) PELJ 1 19-30. This can be contrasted with the position in the United Kingdom, where the statutory duties of directors displaced the common law duties. See Cassim FHI “The Duties and Liabilities of Directors” in *Contemporary Company Law* 508.

and section 166(2) of the Indian *Companies Act 2013* in important respects. First, the best interests of the company or corporation is not qualified by the phrase “for the benefit of its members as a whole”. Thus, in contrast to the position in the United Kingdom and Canada (and the position in South Africa prior to the incorporation of the Companies Act of 2008), the company is not identified with the interests of its members. Secondly, they do not require the directors “to have regard to” or act in the best interests of certain stakeholders. Directors are required to act in the best interests of the company and the company alone. This corresponds with the fact that both the Companies Act of 2008 and the *Canada Business Corporations Act* adopted the real entity theory.⁴⁵⁰ It is also consistent with the EMS model of corporate governance.

Section 77 of the Companies Act of 2008 sets out the liability of the directors, alternate directors, prescribed officers, members of an audit committee, or a committee of the board to the company for any loss, damage or costs sustained by the company for any breach of their statutory duties, any other provision of the Act, any provision of the company’s memorandum of incorporation and certain specific acts or omissions.⁴⁵¹ However, section 77 is supplemented by section 218(2), which extends the liability of the directors, prescribed officers and committee members to any other person who suffers loss or damage as a result of a contravention of the Act.⁴⁵² Section 218(2) provides: “Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.” In *Rabinowitz v Van Graan*⁴⁵³, the first reported case in which this section was considered, it was held that this section would apply not only if a director of a company is guilty of any offence, but also if a director fails to comply with a provision of the Act (for example section 67).⁴⁵⁴ The

⁴⁵⁰ Section 19(1) of the Companies Act of 2008 reinforces that a company is a separate legal person.

⁴⁵¹ Noticeably section 77(3)(c) provides that a director is liable for any loss, damage or costs sustained by the company as a direct or indirect consequence of the director having been party to an act or omission of the company, despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose.

⁴⁵² Cassim FHI “The duties and liabilities of directors” in *Contemporary Company Law* 582.

⁴⁵³ 2013 (5) SA 315 (GSJ).

⁴⁵⁴ See also *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd* [2014] All SA 454 (GJ) par 42; Botha (2015) PELJ 1 27-28; Delpont *Henochsberg* 639-641. This can be compared with the position in Australia where the question has not yet been settled as to whether directors can be held liable for damages under section 1324(1) of the *Corporations Act 2001*. See in this regard *Phoenix Construction (Queensland) Pty Ltd v Coastline Construction*

ambit and scope of this provision is wide. It is also available to other stakeholders such as creditors and employees, who can employ this section to recover any damages that they may suffer as a result of the directors breaching their statutory duties; or also for example if the business of the company is carried on recklessly, with gross negligence, with the intent to defraud any person or for any fraudulent purpose (as contemplated in section 22(1)).⁴⁵⁵

The Companies Act of 2008 grants non-shareholder stakeholders, and specifically creditors and employees, significant rights and remedies.⁴⁵⁶ The Act abolished the common law derivative action.⁴⁵⁷ Section 165 of the Act makes provision for a statutory derivative action. Any shareholder; director or prescribed officer; registered trade union or other representative of the employees of the company; or any person who has been granted leave by the court can institute the statutory derivative action.⁴⁵⁸ This can include a creditor or an employee. Leave will be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that person. This corresponds with the broad standing of the derivative action in Canadian law and leans towards the stakeholder model

A new statutory oppression remedy is contained in section 163 of the Companies Act of 2008. The statutory oppression remedy can be invoked if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; the business of the company, or a related person, is or

(*Aust.*) *Pty Ltd [2011] QSC 167*; Harkin & Altieri “Queensland Court of Appeal overturns decision in Phoenix Construction case” (2012) CBP Lawyers (available at <http://www.cbp.com.au/Publications/Queensland-Court-at-Appeal-overtime-decision-in-P> (accessed 2013-09-27)); Baxt “Do directors owe duties to creditors?” (2012) Australian Institute of Company Directors (available at <http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2012-back-editions/September/Directors-Council-Do> (accessed 2013-09-27)). See also Keay *The Corporate Objective* 257.

⁴⁵⁵ Cassim FHI “The duties and liability of directors” in *Contemporary Company Law* 587; Esser (2011) SA Merc LJ 317 325.

⁴⁵⁶ Katz “Governance under the Companies Act 71 of 2008: Flexibility is the keyword” (2010) 248 261-262; Davis & Le Roux (2012) AJ 306 -315; Davis *Companies and Other Business Structures* 12; Keay *The Enlightened Shareholder Value Principle* 267-271 and 273-275; Botha (2015) PELJ 1 38-43. According to Davies et al *Companies and Other Business Structures* 10-12 the Policy Document and the Companies Act of 2005 granted stakeholders significant rights and remedies which they did not enjoy under the Companies Act of 1973.

⁴⁵⁷ Section 165(1) of the Companies Act of 2008.

⁴⁵⁸ Section 165(2). See also Keay *The Enlightened Shareholder Value Principle* 274.

has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or the powers of a director or a prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant. Relief is not limited to the making of an order against the company. A remedy can also be enforced against individuals, including directors and prescribed officers. Section 163(1) bears a striking resemblance to section 241(2) of the *Canada Business Corporations Act*. Although the Companies Act of 2008 extended the standing to apply for the oppression remedy to directors (in addition to registered shareholders), the list of persons who can apply for the oppression remedy is substantially narrower than is the case with section 241 of the *Canada Business Corporations Act*, where it is also potentially available to other stakeholders such as creditors and employees.⁴⁵⁹

Non-shareholder stakeholders have further legal remedies in terms of the Companies Act of 2008 which can potentially be used to enforce the corporate objective and the fiduciary duties of directors. Certain specified persons, including a trade union representing employees of a company, may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Companies Act of 2008.⁴⁶⁰ A registered trade union or another representative of the employees of a company may also apply to court for an order declaring a director delinquent or under probation.⁴⁶¹ The Commission may also apply for such an order.⁴⁶² This means that a creditor or individual employee may lay a complaint with the Commission which can then indirectly lead to such an application. Section 22(2) and (3) further provides that,

⁴⁵⁹ See generally Abbey (2012); Welling et al *Canadian Corporate Law* 490-525. See also section 238 of the *Canada Business Corporations Act*; Welling et al *Canadian Corporate Law* 399 and 490-540; Welling et al *Canadian Corporate Law* 524-525; Keay *The Corporate Objective* 258; Abbey 96-97; Keay *The Enlightened Shareholder Value Principle* 269-270; McGuinness *Business Corporations* 869-890.

⁴⁶⁰ Section 20(4) read with section 20(5) of the Companies Act of 2008 provides that a shareholder, director or prescribed officer may institute proceedings to restrain a company from performing any action that is in breach of the Act or a specified limitation under the memorandum of incorporation. Section 161 also allows the holder of issued securities to apply to the court for a declaratory order regarding the rights that the person may have in terms of the Act, the memorandum of incorporation, any rules of the company or any applicable debt instrument. These remedies can be compared with section 247 (restraining or compliance order) of the *Canada Business Corporations Act* that allows for shareholders to remedy breaches of the Act, the regulations, articles, by-laws or unanimous shareholder agreement with leave of the court.

⁴⁶¹ Section 162(2) of the Companies Act of 2008.

⁴⁶² Section 162(3).

if the Commission has reason to believe that a company is carrying on business recklessly, with gross negligence, with the intent to defraud any person or for a fraudulent purpose, it may issue a notice to that company to show cause why it should be permitted to continue carrying on business. If the company fails to satisfy the Commission that it is not engaging in such conduct, or that it is able to pay its debts as they become due and payable in the ordinary course of business, the Commission may issue a compliance notice requiring the company to cease carrying on its business or trading - as the case may be. Creditors or employees can initiate this process by laying a complaint with the Commission. Section 168 of the Companies Act of 2008 provides that any person may file a complaint in writing to the Commission or Takeover Regulation Panel (the Panel) if another person has acted in a manner inconsistent with the Act, or if the complainant's rights under the Act, or under a company's memorandum of incorporation or rules, have been infringed. Any person who has a material interest in a hearing before the Tribunal, may participate in those proceedings unless that interest is adequately represented by another participant.⁴⁶³ It is evident that non-shareholder stakeholders such as creditors and employees now have significant rights, protections and remedies under the new Companies Act of 2008 to directly or indirectly enforce the corporate objective and the fiduciary duties of directors.

Some commentators argue that the South African Policy Document and the Companies Act of 2008 adopted the enlightened shareholder value model.⁴⁶⁴ Others have said that the position that was adopted in South Africa is one that "lies somewhere between pluralism and the enlightened shareholder value approach."⁴⁶⁵ The position adopted in Canada and South Africa is probably closer to stakeholderism than most, if not all, other Anglo-American jurisdictions.⁴⁶⁶ What is clear is that the Companies Act of 2008 represents a fundamental shift from the traditional view of shareholder primacy to a more inclusive balancing of interests approach.

⁴⁶³ Section 181.

⁴⁶⁴ King ME "The synergies and interaction between King III and the Companies Act 61 of 2008" (2010) AJ 446 448; Davis & Le Roux (2012) AJ 306 311-312; Davis *Companies and Other Business Structures* 11-12; Botha (2015) PELJ 1 28-29; Botha (2016) THRHR 580 582-583.

⁴⁶⁵ Cassim R & Cassim F "The reform of corporate law in South Africa" (2005) *International Company and Commercial Law Review* 411 412, referred to in Keay *The Enlightened Shareholder Value Principle* 275.

⁴⁶⁶ Keay *The Enlightened Shareholder Value Principle* 275. The Companies Act of 2008 also incorporates the main theme of the director primacy model in that section 66(1) of the Act provides that the business and affairs of a company must be managed by or under the direction of its board.

9.4 The King Report

The King IV Report on Corporate Governance for South Africa 2016 (the King IV Report)⁴⁶⁷ provide guidance for directors as to how they should direct the business of the company and make decisions on behalf of the company, whereas the Companies Act of 2008 sets the framework upon which the company operates. The Companies Act of 2008 and the King IV Report thus complement each other.⁴⁶⁸

The philosophy of the King IV Report revolves around ethical leadership, the company (or other organisation) in society, corporate citizenship, sustainable development, stakeholder inclusivity, integrated thinking and integrated reporting.⁴⁶⁹ The report recognises that companies (and other organisations) operate in a societal context which they affect and by which they are affected. The report states: “This idea of interdependency between organisations and society is supported by the African concept of *Ubuntu* or *Botho*, captured by the expressions *uMuntu ngumuntu ngabantu* or *Motho ke motho ka batho* – I am because you are; you are because we are.”⁴⁷⁰

Corporate citizenship is the recognition that the company is an integral part of the broader society in which it operates, affording it standing as a juristic person in that society with rights, but also responsibilities and obligations.⁴⁷¹ Principle 3 of the King IV Code requires the board of directors to ensure that the company is and is seen to be a responsible corporate citizen.⁴⁷² As a responsible corporate citizen, a company should protect, enhance and invest in the well-being of the workplace, economy, society and natural environment.⁴⁷³

⁴⁶⁷ The King IV Report.

⁴⁶⁸ The King IV Report 20; King (2010) AJ 446.

⁴⁶⁹ King IV Report 4.

⁴⁷⁰ King IV Report 24.

⁴⁷¹ King IV Report 11 and 25. Corporate citizenship has been called “capitalism with a social conscience.” See Naidoo *Corporate Governance An Essential Guide for South African Companies* 2nd ed (2009) (hereinafter “Naidoo *Corporate Governance*”) 241.

⁴⁷² King IV Report 45-46.

⁴⁷³ King IV Report 18, 24, 25 and 45. The “triple context” is defined as the combined context of the economy, society and environment in which the company operates.

The King IV Report specifically adopted the stakeholder model of corporate governance.⁴⁷⁴ The report states:

“Milton Friedman’s epigram, ‘The social responsibility of business is to increase its profits’, must now be interpreted in the light of the view that an organization is part of society in its own right. It can no longer be seen as existing in its own narrow universe (or ‘society’) of internal stakeholders and the resources needed to create value – it also operates in, and forms part of, general society. In this view, the licensor of an organization is not just those individuals and entities within its narrowly defined value chain, but society as a whole.”⁴⁷⁵

Principle 16 provides that the board of directors must adopt a stakeholder inclusive approach in the execution of its governance role and responsibilities that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time.⁴⁷⁶ The report recognises that employment, transformation and provision of financial capital represent only a fraction of the company’s activities. Inclusive capitalism takes into account the employment, transformation and provision of all sources of capital, the so-called “six capitals” consisting of financial; manufactured; intellectual; human; social and relationship; and natural capital on which the company depends.⁴⁷⁷

10 CONCLUSION

Defining the corporate objective is regarded as one of the most important theoretical and practical issues confronting us today. The corporate objective guides directors as to how to carry out their functions and shape the normative contents of their roles.⁴⁷⁸ It determines whose interests are

⁴⁷⁴ King IV Report 4, 17, 25 and 71-73. Compare also Cassim R “Corporate Governance” in *Contemporary Company Law* 495; Cassim FHI “The Duties and Liability of Directors” in *Contemporary Company Law* 521-522.

⁴⁷⁵ King IV Report 4.

⁴⁷⁶ King IV Report 71-73.

⁴⁷⁷ King IV Report 4, 10 and 24.

paramount and how the company should be managed.⁴⁷⁹ However, the corporate objective cannot be determined in isolation. How we define the corporate objective is informed and shaped by the theory of the nature of the company (and also the corporate personhood theory) that we adopt. The theory of the nature of the company that we adopt is in turn determined by our philosophical approach to justice and our underlying systems of belief. The more prominent theories of the nature of the company and three broad philosophical approaches to justice are considered in chapter 3. It is argued that from a normative perspective, the communitarian theory and arguably also the concession theory (more particularly the dual concession theory of Dine) are the most acceptable theories of the nature of the company.

The debate about the corporate objective is often said to have commenced with the exchange between Berle and Dodd in the early 1930s.⁴⁸⁰ The ultimate aim of both Berle and Dodd was to ensure that the company was managed in the interests of society.⁴⁸¹ They however differed in their approach of how this could be achieved. Berle's concern was how directors and managers could be held accountable. He believed that the only workable mechanism to do so (until such time as an alternative mechanism is devised) is to impose a duty on directors and managers to act in the best interests of the shareholders. In other words, he placed his trust in the shareholders to hold directors and managers accountable and believed that this accountability will be eroded if they also have a duty towards other interest groups. Dodd, on the other hand, argued that society should trust the discretion of directors and managers rather than rely on shareholders to safeguard the interests of society. Twenty years after this debate Berle conceded that Dodd's view, that

⁴⁷⁸ Carver (2010) *Corporate Governance: An International Review* 149 at 149-150; Keay *The Corporate Objective* 9-10 and 20-21.

⁴⁷⁹ Esser 32; Keay *The Enlightened Shareholder Value Principle* 14-15; Talbot *Great Debates in Company Law* vii.

⁴⁸⁰ Keay *The Corporate Objective* 10-13.

⁴⁸¹ Dodd seized upon the real entity theory's core idea of the company as a separate legal entity to argue that the company should be a good corporate citizen that should have regard to all its stakeholders, including creditors, employees, consumers and the society in which it operates. See Millon (1990) *Duke Law Journal* 201 203, 217-220 and 224-225; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 102 and 117; Petrin (2013) *Penn State Law Review* 1 23-24. Berle also believed that directors and managers must have regard to the interests of all the stakeholders, including investors, workers, customers and the aggregated community. See Berle (1932) *Harvard Law Review* 1365 1372. The view that Berle supported shareholder primacy is incorrect. It is clear from all his subsequent writing that he was the more socialist of the two. See Talbot *Great Debates in Company Law* ix.

directors and managers owe fiduciary duties to the company as an institution rather to the shareholders alone, had prevailed.⁴⁸²

It was however the seminal work of Berle and Means, *The Modern Corporation & Private Property*,⁴⁸³ originally published in 1932, during the Great Depression, in which they identified the separation of ownership and control of the company, which really stimulated the debate about the purpose and governance of the company. This work led to a reconsideration of the role of business corporations in society and the appreciation of the importance of corporate governance.⁴⁸⁴ Berle and Means conceptualised the company from a communitarian perspective. They believed that powers of the company must be used for the public benefit. They recognised a wide constituency of company interests and responsibilities.⁴⁸⁵

The more prominent models of corporate governance are considered in this chapter. Two diametrically opposed models of corporate governance, the shareholder primacy model and the stakeholder model, dominated the issue of the corporate objective since the nineteenth century. From a historical perspective shareholder primacy is a recent event.⁴⁸⁶ The company served a public purpose through most of its evolution. The expansion of this purpose to include private interests only occurred with the arrival of the general incorporation laws in the nineteenth century.⁴⁸⁷ The prominence of the shareholder primacy model (especially in the United Kingdom and the United States) has been the greatest since the late 1970s and coincided with the emergence of a New Right or neoliberalist pro-market thinking and the law and economics movement. This period saw the deregulation of finance and the rise of financialisation (or finance capitalism),

⁴⁸² Berle *The Twentieth Century Capitalist Revolution* 169. See also Lee (2005) *Canadian Business Law Journal* 212 212.

⁴⁸³ Berle & Means *The Modern Corporation*.

⁴⁸⁴ Bakan *The Corporation* 19-20; Greenfield (2014) *Seattle University Law Review* 749 752.

⁴⁸⁵ Berle & Means *The Modern Corporation* 303-310.

⁴⁸⁶ Greenfield *The Failure of Corporate Law* 126.

⁴⁸⁷ See Micklethwait & Wooldridge *The Company* 181; Bakan *The Corporation* 153; Ripken (2009) *Fordham Journal of Corporate & Finance Law* 97 101 n 1; McBride (2011) *Law and Contemporary Problems* 1 5; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

which sought to replace the productive economy with a finance economy. Financialisation is rooted in the shareholder primacy model of corporate governance.⁴⁸⁸

According to the shareholder primacy model the corporate objective is to maximise shareholder wealth. Directors and managers only have economic goals and responsibilities. In essence, they are required to make as much money as they can for the shareholders.⁴⁸⁹ The interests of other stakeholders such as creditors and employees are protected by contractual and regulatory measures rather than through participation in corporate governance.⁴⁹⁰ The fiduciary duties of directors serve as gap-filling and contract enforcing devices to hold directors and managers accountable. According to this model the legal enforcement of the corporate objective should be focussed on shareholders, who are conceived to be the best group to monitor and hold directors accountable.⁴⁹¹ The shareholder primacy model is based on the contractarian theories.⁴⁹² The contractarian theories emphasise the freedom of the individual, liberty, competition and the limitation of interference in the free-market. Contractarians object to legal rules that redistribute wealth, mandate particular behaviour or prevent people from making bargains that they would otherwise choose to make.⁴⁹³

There are significant arguments against the shareholder primacy model. The normative basis of the shareholder primacy model is questionable and the adoption of this model has led to

⁴⁸⁸ Talbot *Great Debates in Company Law* 142-143 and 146.

⁴⁸⁹ Keay *The Corporate Objective* 41 and 46; Lichner (2009) *European Business Law Review* 889 891; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 286; Keay & Rodoula (2012) *European Business Organization Law Review* 1 6; Keay *The Enlightened Shareholder Value Principle* 16-17.

⁴⁹⁰ Hansmann & Kraakman (2001) *Georgetown Law Journal* 439 440-441; Bainbridge (2003) *Northwestern University Law Review* 547 573. Yet some supporters of the shareholder primacy model recognise that company law must regulate the interests of creditors in certain circumstances. See Hansmann & Kraakman (2001) *Georgetown Law Journal* 439 442; Armour, Hertig & Kanda "Transactions with Creditors" in the *Anatomy of Corporate Law* 115-151.

⁴⁹¹ Esser (2005) *Obiter* 719 721; Moore *Corporate Governance* 76-78; Keay *The Corporate Objective* 62-63, 87-90 and 93; Keay *The Enlightened Shareholder Value Principle* 22.

⁴⁹² Millon (1993) *Washington and Lee Law Review* 1373 1377; Esser 32; Lichner (2009) *European Business Law Review* 889 895; Ripken (2009) *Fordham Journal of Corporate and Financial Law* 97 163-164; Keay *The Corporate Objective* 59-61.

⁴⁹³ Millon (1993) *Washington and Lee Law Review* 1373 1382; Sandel *Justice* 61; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Colombo (2012) *Temple Law Review* 1 8.

undesirable results, such as abusive financial practices and the unequal distribution of benefits.⁴⁹⁴ But, as Keay remarked, the problem is not so much in finding weaknesses in the shareholder primacy model, but in replacing it with something else.⁴⁹⁵ Despite all its weaknesses and a recent swing back towards constituency or multi fiduciary models, the shareholder primacy model is still the prevalent model of corporate governance in the United Kingdom and the United States.⁴⁹⁶

The stakeholder model of corporate governance is the antithesis of the shareholder primacy model. It can be argued that the stakeholder model of corporate governance held sway through most of the company's history before the nineteenth century and again from the 1930s to 1970s. It has again become popular in the past 20 years.⁴⁹⁷ It is now generally accepted that other stakeholders' interests must be taken into account. The stakeholder model operates widely in many continental European and East Asian countries with Germany and Japan regarded as prime examples.⁴⁹⁸ According to the stakeholder model, the economic and social purpose of the company is to create and distribute wealth and value to all its stakeholders, without favouring one group at the expense of another. The directors or managers must give independent value to and balance the interests of all the various stakeholders, including the creditors and employees of the company.⁴⁹⁹ The company must act with economic, social and environmental responsibility.⁵⁰⁰ The stakeholder model is based on the communitarian theories.⁵⁰¹ Communitarians reject the

⁴⁹⁴ Ireland (2009) *Northern Ireland Legal Quarterly* 1 28-33.

⁴⁹⁵ Keay *The Corporate Objective* 133.

⁴⁹⁶ Dine *Corporate Groups* 31-36; Lee (2005) *Canadian Business Law Journal* 212 212-213; Lichner (2009) *European Business Law Review* 889 893-894; Keay *The Corporate Objective* 42 and 109-112; Cassim FHI "The Duties and Liabilities of Directors" in *Contemporary Company Law* 519; Keay *The Enlightened Shareholder Value Principle* 185-202, 211-218 and 284-285.

⁴⁹⁷ Dine *Corporate Groups* 31-36; Shandu (2005) *Obiter* 87 90; Lichner (2009) *European Business Law Review* 889 894; Keay *The Corporate Objective* 115.

⁴⁹⁸ Lichner (2009) *European Business Law Review* 889 892; Keay *The Corporate Objective* 114; Gevurtz (2011) *Pacific McGeorge Global and Development Law Journal* 39 45-46; Keay *The Enlightened Shareholder Value Principle* 42; Ajibo (2014) *Birbeck Law Review* 37 38 n1.

⁴⁹⁹ Keay *The Corporate Objective* 118-120 and 134; Keay *The Enlightened Shareholder Value Principle* 44.

⁵⁰⁰ Davis *Companies and other Business Structures* 9-10; Cassim R "Corporate Governance" in *Contemporary Company Law* 495-497; Esser (2007) *THRHR* 407 410-412.

⁵⁰¹ Keay *The Corporate Objective* 134; Ajibo (2014) *Birbeck Law Review* 37 42.

focus of contractarians on profit and consider a wider array of social and political values, such as respect for human dignity, ethical behaviour, cooperation, trust, justice, fairness, stability, sustainability, civic responsibility and the overall welfare of society.⁵⁰² The stakeholder model also finds support in the real entity theory, specifically Dodd's normative conception of the real entity theory.⁵⁰³

The most attractive feature of the stakeholder model is its strong moral basis.⁵⁰⁴ The central core of the stakeholder model is normative.⁵⁰⁵ It adopts an approach to justice that not only revolves around the ideas of maximising welfare and respecting freedom, but also emphasises the importance of virtue or the common good. However the stakeholder model also has its weaknesses. One of the major criticisms against the stakeholder model is that it has been a difficult concept to define. This is exacerbated by the fact that there are several approaches that may be described as stakeholder in orientation. The enforceability of the stakeholder model has also been questioned. This has led some commentators to conclude that whilst the stakeholder model has attractions, specifically from a normative perspective, it is difficult to see how it can be applied effectively in practice.⁵⁰⁶

The enlightened shareholder value model of corporate governance emerged in the United Kingdom in the last part of the 20th century. It is based on the shareholder primacy model and its theoretical underpinnings.⁵⁰⁷ According to the enlightened shareholder value model, the directors must have regard to the long-term interests of the shareholders and, where appropriate, take into account the interests of other stakeholders such as creditors and employees.⁵⁰⁸ It seeks a more

⁵⁰² Esser 31; Greenfield (2008) *Case Western Law Reserve Review* 1043 1055; Keay *The Corporate Objective* 36-37 and 125-126; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278.

⁵⁰³ The stakeholder model can even find support in the team production theory and economic contractarianism. See Keay *The Corporate Objective* 128.

⁵⁰⁴ Keay *The Corporate Objective* 135-136.

⁵⁰⁵ Keay *The Corporate Objective* 117.

⁵⁰⁶ Keay *The Corporate Objective* 173.

⁵⁰⁷ Keay *The Enlightened Shareholder Value Principle* 13.

⁵⁰⁸ Esser 34; Keay (2007) *Sydney Law Review* 577 592-610; Cassim R "Corporate Governance" in *Contemporary Company Law* 495; Cassim FHI "The Duties and Liability of Directors" in *Contemporary Company Law* 519-520;

long-term approach and attempts to move away from the exclusive focus of the shareholder value model on the short-term financial bottom line.⁵⁰⁹ But, because it is essentially a variant of the shareholder primacy model, many of the criticisms against that model applies *mutatis mutandis*. A further criticism that is raised against the enlightened shareholder value model, is that it is legally unenforceable as it is optional for directors to take the interests of non-shareholder stakeholders into account.⁵¹⁰

Keay's EMS model focuses on the company as an entity or enterprise in its own right. It is rooted in the real entity theory.⁵¹¹ The idea that the directors owe their obligations and duties to the company as a separate legal entity also aligns with the division of power model of corporations. The EMS model has two elements to it. The first is to maximise or foster the wealth of the company as a separate entity. The focus is on the entity and what will enhance its position rather than the investors (stakeholders) and their interests. Any benefits for investors, such as the creditors and employees of the company, flow from the object to maximise or foster the wealth of the company as a separate entity. The wealth of the company as an entity must be maximised for the long term.⁵¹² The EMS model does not focus solely on profit maximisation. The object is to augment not only the company's tangible assets (such as plant, equipment, land and stock) but also its intangible assets (such as goodwill, employment satisfaction and creditor protection).⁵¹³ The idea behind the EMS model is adding value.⁵¹⁴ The second element of the EMS model is sustainability.⁵¹⁵ For Keay, sustainability for purposes of the EMS model simply means for the

Keay *The Enlightened Shareholder Value Principle* 216 and 284; Davis *Companies and Other Business Structures* 10.

⁵⁰⁹ Company Law Review *Modern Company Law for a Competitive Economy: Developing the Framework* paras 2.21 and 3.52; Keay *The Enlightened Shareholder Value Principle* 71 and 238.

⁵¹⁰ Shandu (2005) *Obiter* 87 96; Esser 2007 *TRHR* 407 411-412; Keay *The Enlightened Shareholder Value Principle* 137-141.

⁵¹¹ Keay *The Corporate Objective* 180-183.

⁵¹² Keay (2008) *The Modern Law Review* 663 685; Talbot *Great Debates in Company Law* 13.

⁵¹³ Keay *The Corporate Objective* 202.

⁵¹⁴ Keay *The Corporate Objective* 198-203 and 210-211.

⁵¹⁵ Keay *The Corporate Objective* 175.

most part to sustain the company as a going concern, in other words to ensure its survival. This may, depending on the nature of a company's business and the position it finds itself in at the time, by necessity, involve having regard to the economic, social and environmental sustainability of the company.⁵¹⁶

The EMS model of corporate governance is attractive in a number of respects. The focus is on the company as a separate entity and what will enhance its position rather than on the investors and their interests. Keay argues that the EMS model enables managers to do what they are effectively employed to do namely, to act in the best interests of the company, which is the overarching duty of directors in over 40 jurisdictions around the world.⁵¹⁷ The model can tentatively be criticised on the basis that it does not place sufficient emphasis on the importance of virtue or the common good. This objection can be addressed by adding a third element to the EMS model namely, to require the company to be a good corporate citizen. By adding this third element the company is given a conscience. The EMS model (subject to the modification proposed hereinbefore) and the stakeholder model are, from a normative perspective, the most attractive of the four models of corporate governance considered in this chapter.⁵¹⁸

The United Kingdom adopted the enlightened shareholder value model. Section 172(1) of the *Companies Act of 2006* provides that a director of a company must act in a way that 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 the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of

⁵¹⁶ Keay *The Corporate Objective* 218.

⁵¹⁷ Keay *The Corporate Objective* 209.

⁵¹⁸ Compare Biltchitz "Corporate law and the Constitution: Towards binding human rights responsibilities for corporations" (2008) SALJ 754 781-783. Biltchitz argues, with reference to the Companies Act of 1973, first, that companies should be required to place in their memorandum of association that they recognise that they are bound by the Bill of Rights and are responsible for their realisation to the extent that they bear responsibility for them. Secondly, that a statutory fiduciary duty be placed on directors to act with due care and skill to ensure that companies conform with their obligations to realise the fundamental rights in the Constitution. This can be supported by the recognition that directors may also be held liable (whether civilly or criminally) for violations of human rights, which would ensure that these considerations are taken into account at the heart of corporate decision making. Thirdly, that non-financial reporting be made mandatory – particularly on the human rights impact of a company's activities and how it intends to meet its obligations in this regard.

the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly between the members of the company.⁵¹⁹ Section 178 provides that the civil consequences of breaches of the statutory duties of directors are those that would apply in common law. Only the members of the company have the right to bring a derivative action (which has now been codified in Part 11 of the *Companies Act 2006*). Members require the permission or leave of the court to continue with a derivative action.⁵²⁰ *Locus standi* to invoke the oppression remedy (section 994) is also limited to the members of the company. One of the biggest obstacles in seeing the enlightened shareholder value model in the United Kingdom as a move towards a true stakeholder approach is the fact that no other stakeholder, other than a shareholder, has the right to enforce any breach by the directors of their statutory duties.⁵²¹

Contemporary Canadian corporate law regards the corporate objective completely different than that of the United Kingdom.⁵²² The separate legal personality of a corporation is one of the cornerstones of Canadian corporate law.⁵²³ Directors are required to act in the best interests of the corporation. Section 122(1)(a) of the federal *Canada Business Corporations Act* for example, provides that directors and officers of a corporation must, in exercising their powers and discharging their duties, act honestly and in good faith with a view to the best interests of the corporation. The Canadian Supreme Court has unequivocally rejected the shareholder primacy model and adopted the stakeholder model.⁵²⁴ A feature of the *Canada Business Corporations Act*

⁵¹⁹ Keay believes that, whilst the United Kingdom *Companies Act 2006* adopted the enlightened shareholder value model, little needs to be done from a legislative perspective to adopt the EMS model. Section 170(1) of the Act already provides that directors owe their duties (fiduciary duties and duties of care and skill) to the company. The problem for any change comes from the second part of section 172(1). In order to implement the EMS model section 172(1) could be amended to remove all of the words following "the success of the company". See Keay *The Corporate Objective* 223-225.

⁵²⁰ Sections 261-264 and 266-269 of the *Companies Act 2006*.

⁵²¹ Keay *The Enlightened Shareholder Value Principle* 216.

⁵²² See Welling et al *Canadian Corporate Law* vi and 219-226.

⁵²³ See Welling *Corporate Law in Canada* 57-68; Welling et al *Canadian Corporate Law* 114-118 and 226; McGuinness *Business Corporations* 221-235; Chopra & Arora *Company Law* 222-223.

⁵²⁴ *Peoples Department Stores Inc v Wise* supra; *BCE Inc v 1976 Debentureholders* supra. See also Bradley (2010) *Ottawa Law Review* 326 331-336; Welling et al *Canadian Corporate Law* vi and 226; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 298; Keay *The Enlightened Shareholder Value Principle* 269.

(and most of the other provincial statutes) is the extensive remedies that it provides for shareholders and other complainants.⁵²⁵ Unlike the law in the United Kingdom, Canadian law provides remedies to non-shareholder stakeholders if directors do not comply with their duties.⁵²⁶ One remedy that can be used by stakeholders to enforce the corporate objective is the statutory representative or derivative action.⁵²⁷ A further remedy that can be employed by stakeholders is the oppression remedy.⁵²⁸ The Canadian oppression remedy has been described as the broadest, most comprehensive and most open-ended corporate law remedy in the common law world.⁵²⁹ Canadian law (in contrast with the approach adopted in the United Kingdom) defines “a complainant” who has standing to bring these remedies widely. Section 238 of the *Canada Business Corporations Act* defines “a complainant” to include a registered or beneficial holder, and a former registered or beneficial holder of a security of a corporation or any of its affiliates; a director or an officer, or former director or officer of the corporation; the Director; and any other person who, in the discretion of the court, is a proper person.⁵³⁰ This can include creditors and employees. It has been said that Canadian stakeholder protection law is unique in that it imposes statutory duties on directors and gives the stakeholders of a corporation the benefit of the oppression remedy to protect them against unfairly prejudicial conduct.⁵³¹

Section 166(2) of the *Indian Companies Act 2013* provides that a director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community

⁵²⁵ See part XX of the *Canada Business Corporations Act*. These remedies include a derivative action (sections 239-240), an oppression remedy (section 241), an application to rectify the records of the company (section 243) and a right to apply for a restraining or compliance order (section 247).

⁵²⁶ Keay *The Enlightened Shareholder Value Principle* 269.

⁵²⁷ For example section 239 of the *Canada Business Corporations Act*.

⁵²⁸ For example section 241 of the *Canada Business Corporations Act*.

⁵²⁹ See, for example, Welling *Corporate Law in Canada The Governing Principles* 2nd ed (1991) 563-564; Van Duzer “Who may claim relief from oppression: The complainant in Canadian corporate law” (1993) *Ottawa Law Review* 465 465; Keay *The Enlightened Shareholder Value Principle* 252; Abbey 93.

⁵³⁰ Welling et al *Canadian Corporate Law* 399 and 490-540; Welling et al *Canadian Corporate Law* 524-525; Keay *The Corporate Objective* 258; Abbey 96-97; Keay *The Enlightened Shareholder Value Principle* 269-270; McGuinness *Business Corporations* 869-890.

⁵³¹ Bradley (2010) *Ottawa Law Review* 326 330.

and for the protection of the environment.⁵³² Whilst section 166(2) was seemingly inspired by section 172(1) of the United Kingdom *Companies Act 2006*, there are important differences between them.⁵³³ Section 166(2) of the Indian *Companies Act 2013* appears to lean more towards a stakeholder model. India also has a rich tradition in corporate social responsibility.⁵³⁴ The Supreme Court of India has recognised the social character of the company.⁵³⁵ Section 166(7) of the *Companies Act 2013* provides that any director who contravenes his statutory duties commits an offence which shall be punishable with a fine. Unlike the United Kingdom, Canada and South Africa, India does not have a statutory derivative action but members can institute a common law derivative action. A statutory oppression remedy is available to certain prescribed members.⁵³⁶ Although the corporate governance system that was adopted in the Indian *Companies Act 2013* is still strongly rooted in United Kingdom model (which is essentially still shareholder centric), India appears to have positioned itself nearer to the stakeholder model of corporate governance.

South African company law was initially firmly rooted in the contractarian theory and inherited the shareholder primacy model from the United Kingdom. However, the Policy Document proposed a fundamental shift from the traditional view of shareholder primacy to a more inclusive balancing of interests approach. It proposed that the corporate objective should be to promote the economic success of the company, taking into account, as appropriate, the legitimate interests of other stakeholders. Pursuit of profit should be constrained by social and environmental

⁵³² Deva (2012) *Common Law Review* 299 312-313

⁵³³ First, whereas section 172(1) of the United Kingdom *Companies Act 2006* provides that directors must promote “the success of the company”, section 166(2) of the Indian *Companies Act 2013* provides that they must promote “the objects of the company”. This can probably be attributed to the important role that the objects of the company still play in Indian company law. Secondly, section 172(1) of the United Kingdom *Companies Act 2006* provides that directors must “have regard (amongst other matters) to” the factors listed in section 172(1)(a) to (f) (including the interests of the employees and the impact of the company on the community and the environment) in promoting the success of the company for the benefit of its members as a whole. Section 166(2) of the Indian *Companies Act 2013* on the other hand provides that directors must promote the objects of the company not only for the benefit of its members as a whole, but also “in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.”

⁵³⁴ Sharma “Corporate social responsibility in India: An overview” (2009) *The International Lawyer* 1515; Gowda “The evolution of corporate social responsibility (CSR) in India” (2013) *Indian Streams Journal* 1; Garg K *Bharat’s Corporate Social Responsibility* (2014) 22-26.

⁵³⁵ *Charanjit Lal Chowdhury v Union of India* AIR supra; *National Textile Workers’ Union v PR Ramkrishnan* supra.

⁵³⁶ Section 241(1) of the *Companies Act 2013*.

imperatives. The Policy Document also recognized the company as an economic and social institution rather than a nexus of contracts – a policy shift from *societas* to *universitas*.

Certain duties of directors have been partially codified in the Companies Act of 2008.⁵³⁷ Section 76(3) of the Act provides that a director of a company must exercise the powers and perform the functions of a director in good faith, for a proper purpose and in the best interests of the company. The wording of section 76(3) is similar to that of section 122(1) of the *Canada Business Corporations Act*. Both sections require the directors to act in the best interests of the company (or corporation). This is consistent with the approach adopted by the real entity theory and the EMS model of corporate governance.

Section 77 of the Companies Act of 2008 sets out the liability of the directors to the company for any loss, damage or costs sustained by the company for any breach of their statutory duties, any other provision of the Act, any provision of the company's memorandum of incorporation and certain specific acts or omissions. This section is supplemented by section 218(2), which extends the liability of the directors to any other person who suffers loss or damage as a result of a contravention of the Act.⁵³⁸ The new statutory derivative action is available to any shareholder; director or prescribed officer; registered trade union or other representative of employees of the company; or any person who has been granted leave by the court can institute the statutory derivative action.⁵³⁹ This corresponds with the broad range of stakeholders who can invoke the derivative action in Canadian law. The new statutory oppression remedy contained in section 163 of the Act bears a striking resemblance to section 241 of the *Canada Business Corporations Act*. Although the Companies Act of 2008 extended the standing to apply for the oppression remedy to directors (in addition to registered shareholders), the list of persons who can apply for the oppression remedy is substantially narrower than is the case with section 241 of the *Canada*

⁵³⁷ Sections 75 (directors' personal financial interests) and 76 (standard of directors' conduct) of the Companies Act of 2008. Section 76(4) introduces the so-called business judgement test into South African Law. See also Davis *Companies and Other Business Structures* 115-127; Cassim FHI "The duties and liabilities of directors" in *Contemporary Company Law* 507-584. This can be contrasted with the position in the United Kingdom, where the statutory duties of directors displaced the common law duties. See Cassim FHI "The Duties and Liabilities of Directors" in *Contemporary Company Law* 508.

⁵³⁸ Cassim FHI "The duties and liabilities of directors" in *Contemporary Company Law* 582.

⁵³⁹ Section 165(2) of the Companies Act of 2008. See also Keay *The Enlightened Shareholder Value Principle* 274.

Business Corporations Act, where it is also potentially available to other stakeholders such as creditors and employees.⁵⁴⁰ It is evident that non-shareholder stakeholders such as creditors and employees now have significant rights, protections and remedies under the new Companies Act of 2008 to directly or indirectly enforce the corporate objective and the fiduciary duties of directors. The position adopted in Canada and South Africa is probably closer to stakeholderism than most, if not all, other Anglo-American jurisdictions.⁵⁴¹ The courts should expressly recognise that this fundamental paradigm shift regarding the corporate objective in our company law.

If the company is conceptualised as a separate legal person, its purpose cannot simply be to maximise shareholder wealth and make as much money as it can for its shareholders. Such an approach creates a moral void.⁵⁴² The theory and ultimate underlying value system on which the shareholder primacy model is founded is normatively flawed. Our approach to justice cannot revolve only around the ideas of maximising welfare and respecting freedom. At the most fundamental level we do not judge or measure persons based on their monetary wealth, but rather on their contribution to society and the world.⁵⁴³ Why must companies be measured differently? Berle warned that mere wallowing in consumption would leave great numbers of people unsatisfied - their demand will be for participation.⁵⁴⁴ The Pope has also criticised modern market capitalism, lamenting the “idolatry of money and the dictatorship of an impersonal economy” in which “man is reduced to one of his needs alone: consumption.”⁵⁴⁵ Bakan reasons that the

⁵⁴⁰ See generally Abbey (2012); Welling et al *Canadian Corporate Law* 490-525. See also section 238 of the *Canada Business Corporations Act*; Welling et al *Canadian Corporate Law* 399 and 490-540; Welling et al *Canadian Corporate Law* 524-525; Keay *The Corporate Objective* 258; Abbey 96-97; Keay *The Enlightened Shareholder Value Principle* 269-270; McGuinness *Business Corporations* 869-890.

⁵⁴¹ Keay *The Enlightened Shareholder Value Principle* 275. The Companies Act of 2008 also incorporates the main theme of the director primacy model in that section 66(1) of the Act provides that the business and affairs of a company must be managed by or under the direction of its board.

⁵⁴² Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291.

⁵⁴³ Compare for example Shakespeare, Aristotle, Darwin, Martin Luther, Einstein, Isaac Newton, Mozart, Beethoven, Da Vinci, Ghandi and Kant to name a few. See Skiena & Ward *Who's Bigger? Where Historical Figures Really Rank* (2013).

⁵⁴⁴ Berle 'Property, Production and Revolution' in Berle & Means *The Modern Corporation* xxxix.

⁵⁴⁵ Foroohar *Time* (2016-05-23) 22 25.

corporate rule must be challenged in order to revive the values and practices that it contradicts: democracy, social justice, equality and compassion. He wrote:

“Though individualistic self-interest and consumer desires are core parts of who we are and nothing to be ashamed about, they are not all who we are. We also feel deep ties and commitments to one another, that we share common fates and hopes for a better world. We know that our values, capacities, aesthetics, and sense of meaning and justice are, in part, created and nurtured by our communal attachments. We believe some things are too vulnerable, precious, or important to exploit for profit. ‘We don’t have to see ourselves primarily as rapacious producers and consumers of goods who function in ways that are competitive and self-interested,’ as philosopher Mark Kingwell says. ‘Humans have organized themselves by and large for vast stretches of civilization in other ways.’”⁵⁴⁶

Companies are our creations. They have no lives, no powers and no capacities beyond what we, through our governments, give them.⁵⁴⁷ We determine the corporate objective. It is generally accepted that the ultimate purpose of the company must be to serve society. This is encapsulated by the idea that the company must be a good corporate citizen. The company must be instilled with a conscience, an appreciation of virtue and the good life. Subject to this ultimate and supreme objective, the corporate objective on a narrower level must be to maximise and sustain the company as a separate legal entity.

⁵⁴⁶ Bakan *The Corporation* 166-167. See also Greenfield *The Failure of Corporate Law* 1-5. Talbot also reasons that companies need to be much freer from the constraints of the market and the demands of market players to produce moral outcomes. See Talbot *Great Debates in Company Law* 161.

⁵⁴⁷ Bakan *The Corporation* 164.

CHAPTER 6

THE CONSTITUTIONAL IMPERATIVE

- 1 INTRODUCTION**
 - 2 THE CONSTITUTION**
 - 3 THE BILL OF RIGHTS**
 - 4 THE CONSTITUTIONAL VALUES**
 - 5 THE CONSTITUTIONAL ORDERS IN THE UNITED KINGDOM, CANADA AND INDIA**
 - 6 THE COMPANIES ACT OF 2008**
 - 7 CONCLUSION**
-

1 INTRODUCTION

Prior to the coming into operation of the interim Constitution¹ (the interim Constitution) on the 27th of April 1994, South African constitutional law adopted the British doctrine of parliamentary sovereignty.² Parliament thus reigned supreme. It could basically make any law it wished and no person or institution, including the courts, could challenge those laws. In Britain, the country of origin of this doctrine, the monopoly of the British Parliament can be justified by the fact that it derives its power from and is accountable for its actions to the electorate - the body of citizens who elected it to office. As long as there is accountable government and due observance of the rule of law, deference to the sovereignty of Parliament, as the incarnation of the highest will of

¹ Constitution of the Republic of South Africa Act 200 of 1993.

² Parliamentary supremacy was the defining feature of Westminster constitutionalism. English common law and the commitment to parliamentary sovereignty sit somewhat uncomfortably with a preference for constitutional (as opposed to parliamentary) supremacy to secure democracy and to promote the ideals of the constitutional state. See Du Plessis "Interpretation" in Woolman & Bishop *Constitutional Law of South Africa* 2nd ed (2013) (Loose-leaf, update April 2014) (hereinafter "Woolman & Bishop *Constitutional Law of South Africa*") 32-6; Currie & De Waal *The Bill of Rights Handbook* 6th ed (2015) 2.

the people, is thought to be consistent with safeguarding individual rights and liberties. But in South Africa Parliament represented the white minority while black citizens were governed by the executive. There were no significant constraints on Parliament. Courts could only review Parliamentary legislation on procedural, and not substantive grounds.³ The three South African constitutions that preceded the interim Constitution were furthermore, in most respects, little different from ordinary acts of Parliament. They did not have supreme status and could be amended by Parliament by ordinary procedures. This allowed the members of a Parliament representing the white minority to write and rewrite the law, alter the basic structure of the state and invade human rights without constraint. The common law provided some protection for basic rights but Parliament could pass legislation amending the common law in whatever way it thought fit.⁴ Currie and De Waal maintain: “If ever there was a constitutional mismatch, it was the application of the British doctrine of parliamentary sovereignty to the racially divided South African state.”⁵

The interim Constitution was a result of a lengthy and difficult process of negotiations between the representatives of the apartheid state and its opponents in response to an effective stalemate in the long war between them. The negotiations formally began with the convening of the Conference for a Democratic South Africa (CODESA) on 20 December 1991 and ended with the adoption of the interim Constitution by the Tricameral Parliament on 22 December 1993. The interim Constitution was a transitional constitution. It ensured the legal continuity of the South African state and set out the procedures for the negotiation and drafting of a final Constitution. After the 1994 elections, the new Parliament and a Government of National Unity were established and began to function in accordance with the interim Constitution.⁶

³ *Harris v Minister of Interior* 1952 (2) SA 428 (A); Currie & De Waal *The Bill of Rights Handbook* 3.

⁴ Van Wyk “Introduction to the South African Constitution” in Van Wyk, Dugard, De Villiers & Davis (ed) *Rights and Constitutionalism The New South African Legal Order* (1994) (hereinafter “Van Wyk et al *Rights and Constitutionalism*”) 131-136; Rautenbach “Introduction to the Bill of Rights” in Mokgoro & Tlakula (ed) *Bill of Rights Compendium* (1995) (Loose-leaf, update October 2011) (hereinafter “*Bill of Rights Compendium*”) par 1A1; Currie & De Waal *The Bill of Rights Handbook* 2-3.

⁵ Currie & De Waal *The Bill of Rights Handbook* 3. See also Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 1.

⁶ Sripathi “Constitutionalism in India and South Africa: A comparative study from a human rights perspective” (2007) *Tulane Journal of International & Comparative Law* 49 84-86; Van Wyk “Introduction to the South African

The final Constitution of the Republic of South Africa, 1996 (the Constitution) was drafted and adopted by an elected Constitutional Assembly. To ensure that the Constitution conformed to the 34 constitutional principles⁷ that had been agreed on during the 1991 to 1993 political negotiations, the Constitutional Court was required to certify the draft final constitutional text.⁸ The Constitutional Assembly adopted a final constitutional text on 8 May 1996 and submitted it to the Constitutional Court for certification. The Constitutional Court delivered its judgment in September 1996. It refused to certify the text.⁹ The Constitutional Assembly then reconvened and made several amendments to the text in order to comply with the decision of the Constitutional Court. The amended text was adopted by the Constitutional Assembly on 11 October 1996 and again submitted to the Constitutional Court. This time the Constitutional Court certified the text.¹⁰ The Constitution came into effect on 4 February 1997, bringing to a close a long and bitter struggle to establish a constitutional democracy in South Africa.¹¹

The interim Constitution and the “final” Constitution brought about a constitutional revolution in South Africa.¹² For the first time in South Africa’s history, franchise and civil rights were bestowed upon all citizens without racial qualification. The previous constitutional order of parliamentary sovereignty was replaced by the principle of constitutional supremacy. A Bill of Rights was adopted. The courts were given the power to declare any law or conduct inconsistent with the Bill of Rights and the Constitution invalid. The strong central government of the past was replaced by a system of government in which legislative and executive power was divided

Constitution” in Van Wyk et al *Rights and Constitutionalism* 137-170; Woolman & Swanepoel “Constitutional History” in Woolman & Bishop *Constitutional Law of South Africa* par 2.5(a); Currie & De Waal *The Bill of Rights Handbook* 4-6.

⁷ The constitutional principles are contained in schedule 4 of the interim Constitution.

⁸ Section 72(1) of the interim Constitution. See also Sripathi (2007) *Tulane Journal of International & Comparative Law* 49 83-84; Van Wyk “Introduction to the South African Constitution” in Van Wyk et al *Rights and Constitutionalism* 159-160.

⁹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

¹⁰ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC).

¹¹ Currie & De Waal *The Bill of Rights Handbook* 6-7.

¹² Ackermann “The legal nature of the South African constitutional revolution” (2004) *New Zealand Law Review* 633; Currie & De Waal *The Bill of Rights Handbook* 1-2.

among national, provincial and local spheres of government.¹³ The Constitutional Court described the change which occurred in the early 1990s as follows:

“Then, remarkably and in the course of but a few years, the country’s political leaders managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation. After a long history of ‘deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination’, the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental rights.”¹⁴

The basic principles that underlie the new constitutional order in South Africa are constitutionalism; the rule of law, democracy and accountability; separation of powers and checks and balances; co-operative government and devolution of power. Some of these principles are expressly entrenched in the text of the Constitution¹⁵ while others¹⁶ are implicit in the text.¹⁷

The adoption of the interim Constitution on 22 December 1993 introduced a new era in South African company law. As South Africa is now a constitutional state, the normative values that shape our company law and the manner in which they are interpreted are found in the Constitution. The Companies Act 71 of 2008 (the Companies Act of 2008) gives express recognition to the constitutional imperative of bringing company law within our constitutional

¹³ Currie & De Waal *The Bill of Rights Handbook* 2.

¹⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* supra par [10].

¹⁵ Particularly in section 1 of the Constitution which provides that the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; and the supremacy of the Constitution and the rule of law.

¹⁶ Such as constitutionalism and the separation of powers.

¹⁷ See Currie & De Waal *The Bill of Rights Handbook* 7-22 for a more comprehensive discussion of these principles.

framework. Notwithstanding, company law and constitutional law have continued largely as separate disciplines with a very limited area of overlap.¹⁸

The purpose of this chapter is to establish what the normative values that underpin the Constitution are and to analyse how the provisions of the Constitution (and the normative values that underpin it) affect companies and our company law. Specific consideration is given to the question of whether the Constitution provides a normative basis for the protection of creditors and employees.

This chapter is structured as follows: The more relevant provisions of the Constitution, excluding those contained in chapter 2 (the Bill of Rights), are considered first. This is followed by an analyses of the provisions of the Bill of Rights, with specific emphasis on the operational provisions and the application of the Bill of Rights to companies. Consideration will be given to the question of whether companies are beneficiaries and/or bearers of the rights contained in the Bill of Rights?

The South African Constitution embodies an objective normative value system. The constitutional values and ideologies that underpin the Constitution are considered next. This is followed by a brief consideration of the constitutional orders in the United Kingdom, Canada and India. It is argued that the South African constitutional order has striking similarities with that of Canada and, to a lesser extent, that of India. The constitutional order of the United Kingdom on the other hand is fundamentally different and due regard must be given to this difference in considering and applying the company law of the United Kingdom in the future. This is indicative of the ever widening gap between the company law of South Africa and that of the United Kingdom.

The Companies Act of 2008 was enacted after South Africa became a constitutional state and is expressly aligned with the Constitution. This alignment is considered next. Finally certain conclusions will be drawn.

¹⁸ Bilchitz “Corporate law and the Constitution: Towards binding human rights responsibilities for corporations” (2008) SALJ 754 773-774; 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” (2011) SALJ 686 686.

2 THE CONSTITUTION

2.1 The preamble

The preamble of the Constitution connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicates its fundamental purposes.¹⁹ The preamble finds specific expression in the Bill of Rights and many other provisions of the Constitution.²⁰ It reads as follows:

“We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel’ iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afrurika. Hosi katekisa Africa.”²¹

¹⁹ *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) par 112.

²⁰ Freedman “Constitutional Law: Structures of Government” in Joubert (ed) LAWSA vol 5 part 3 2nd ed (2012) (hereinafter “LAWSA vol 5 part 3”) par 6.

²¹ Preamble, Constitution.

The preamble has four themes that reappear throughout the Constitution. The first is concerned with healing the divisions of the past and establishing a new society based on democratic values, social justice and fundamental rights. The second is concerned with the establishment of an open and democratic society. The third involves improving the quality of life for all citizens. It is concerned with social and economic justice. The fourth is a commitment to build a united and democratic South Africa.²²

Our courts have treated the preamble as an interpretative aid, rather than a source of rights and duties in its own right. This is in line with the usual approach to preambles in the interpretation of statutes and is structurally consistent with the fact that rights are dealt with elsewhere in the Constitution.²³ The classic statement of the preamble's significance comes from *S v Mhlungu*,²⁴ where Sachs J held that it has important interpretative value and sets out the “basic design” and “fundamental purposes” of the Constitution.²⁵ The preamble is understood both to imply a purposive approach to interpretation, and to be an important source for determining what those purposes are (rather than an expression by the founders of what their intention was).²⁶

2.2 The founding provisions

Chapter 1 of the Constitution contains the founding provisions. Sections 1 and 2 are of importance for the purposes of this thesis. Section 1 provides:

²² LAWSA vol 5 part 3 par 5.

²³ Devenish *The South African Constitution* (2005) 27-29; Fowkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* par 13-2.

²⁴ Supra.

²⁵ Supra par 112 where Sachs J held:

“The preamble...should not be dismissed as a mere aspirational throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.”

See also Fowkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* par 13-2.

²⁶ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) par 43; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) par 52; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) paras 72-73; *Van Vuren v Minister of Correctional Services* 2010 (12) BCLR 1233 (CC) par 47; Fowkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* par 13-2.

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

Section 1 thus proclaims the Republic of South Africa to be a sovereign democratic state founded on certain values. The listed values form part of the objective normative values that underpin the Constitution. The Bill of Rights and various other provisions of the Constitution give effect to these values.²⁷

Fowkes argues that the relationship between the preamble and section 1 is that the preamble sets out the purposes that the founders intended the Constitution to achieve, whereas section 1 super-entrenches²⁸ certain aspects of the constitutional mechanisms created to serve those purposes. On this view, the preamble should inform the interpretation of section 1, just like any other provision, but section 1 does not affect the preamble, since the preamble is not an operative part of the constitutional mechanism.²⁹

²⁷ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) par 54; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A33; LAWSA vol 5 part 3 par 7; Currie & De Waal *The Bill of Rights Handbook* 7 n31. These constitutional values are also analysed in section 4 hereinafter.

²⁸ Section 1 of the Constitution is super-entrenched by section 74(1), which provides that sections 1 and 74(1) may only be amended by a bill passed by the National Assembly, with a supporting vote of at least 75 per cent of its members; and the National Council of Provinces, with a supporting vote of at least six provinces. See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A33.

²⁹ Fowkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* par 13-2.

Section 2 provides that the Constitution is the supreme law of the Republic of South Africa; that law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.³⁰

2.3 Other provisions

Section 173 of the Constitution provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. Section 231(5) provides that South Africa is bound by international agreements which were binding when the Constitution took effect. Section 232 stipulates that customary international law is law in South Africa unless it is inconsistent with the Constitution or legislation. Section 233 requires a court, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Section 237 requires all constitutional obligations to be performed diligently and without delay. Finally, section 240 provides that in the event of an inconsistency between different texts of the Constitution, the English text prevails.

3 THE BILL OF RIGHTS

The Bill of Rights³¹ is “a cornerstone of democracy” in South Africa that “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”³² The Bill of Rights contains 33 sections. Six of these sections set out the manner in which the Bill of Rights operates and are known as the operational provisions.³³ The remaining

³⁰ See also section 172(1) which provides that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. See further *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA); [1999] 4 All SA 241 (A); 1999 (11) BCLR 1339 (A) par 14; LAWSA vol 5 part 3 par 6. For the proposition that all law derives its force from the Constitution and all law and all conduct sourced in law must be consistent with the Constitution, see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC),

³¹ Chapter 2 of the Constitution.

³² Section 7(1) of the Constitution.

27 sections list the protected rights themselves.³⁴ This discussion focuses on the operational provisions and their effect on companies and company law. The operational provisions identify the different issues that a court has to consider when it enforces the fundamental rights set out in the Bill of Rights and may be divided into three different stages namely, a procedural stage, a substantive stage and a remedies stage.³⁵

3.1 The procedural stage

During the procedural stage the court must consider whether and how the Bill of Rights apply in a legal dispute. The first of these issues namely, whether the Bill of Rights applies, raises four questions: First, who are the beneficiaries of the Bill of Rights? Secondly, who are the duty-bearers of the Bill of Rights? Thirdly, does the Bill of Rights apply to matters arising before its commencement? Fourthly, does the Bill of Rights only apply in the Republic of South Africa or does it have extra-territorial effect?³⁶ The focus of this discussion will be on the first two questions, more specifically: are companies beneficiaries of rights and are they duty-bearers of rights under the Bill of Rights?³⁷

Apart from these questions, a court must also consider how the Bill of Rights applies in a particular dispute during the procedural phase. This relates to the question of what the relationship between the Bill of Rights and the ordinary principles and rules of law is. A distinction is normally drawn as to whether the Bill of Rights applies directly or indirectly. When the Bill of Rights applies directly, it overrides ordinary law (legislation, common law and customary law) and conduct inconsistent with it. In these cases the Bill of Rights also generates its own set of special remedies, for example declarations of invalidity, declarations of rights, interdictory relief and constitutional damages. When the Bill of Rights applies indirectly, it does

³³ Sections 7-8 and 38-39.

³⁴ Sections 9-35. See Freedman “Constitutional Law: Bill of Rights” in Joubert (ed) LAWSA vol 5 part 4 2nd ed (2012) (hereinafter “LAWSA vol 5 part 4”) paras 1-2; Currie & De Waal *The Bill of Rights Handbook* 23-28.

³⁵ LAWSA vol 5 part 4 par 2; Currie & De Waal *The Bill of Rights Handbook* 24-26.

³⁶ LAWSA vol 5 part 4 par 2; Currie & De Waal *The Bill of Rights Handbook* 24.

³⁷ In broad terms the answers to the last two questions are that the Constitution and Bill of Rights are not retrospective; and that they are territorially bound and have no application beyond the borders of South Africa. For a more detailed discussion see Currie & De Waal *The Bill of Rights Handbook* 51-56.

not override the ordinary law or generate its own remedies. Instead, the law is interpreted and developed to make it conform to the constitutional values.³⁸

3.1.1 Direct application of the Bill of Rights

The Bill of Rights applies directly to a legal dispute when a right of a bearer (or beneficiary) of the Bill of Rights has been infringed by a duty-bearer of that right during the period of operation of the Bill of Rights within the Republic of South Africa.³⁹

3.1.1.1 Beneficiaries of the Bill of Rights

All the rights in the Bill of Rights protect certain conduct and interests of the bearers (or beneficiaries) of the rights. Most of the rights in the Bill of Rights are for the benefit of

³⁸ LAWSA vol 5 part 4 paras 2 and 6; Currie & De Waal *The Bill of Rights Handbook* 24 and 31. Cockrell makes two distinctions in the application of the Bill of Rights. The first distinction involves separating two issues which he argues are often conflated in the course of discussions regarding “the horizontality issue”. He describes these two issues as being two separate “axes” within legal doctrine. The first axis refers to the “source” of the law which is sought to be subjected to constitutional scrutiny: Is it legislation (including delegated legislation); is it common law; or is it customary law? The second axis refers to the institutional nature of the body whose actions are sought to be subjected to constitutional scrutiny: Is it a “public body” which is part of the state, or is it a “private body” which is divorced from any connection with government? The second distinction involves juxtaposing “direct” and “indirect” application of constitutional rights in the private realm. By “direct operation” is meant that a bill of rights could be used to ground a substantive right held by one private person against another private person in the absence of any statute. By “indirect operation” is meant that a bill of rights might only influence a court’s interpretation and development of the common law in the equivalent situation. Cockrell argues that this distinction allows us to frame the following question of principle: can the Bill of Rights be used to bring a case into court and to found the right relied upon by a litigant against a non-governmental agency (“direct operation”), or can it only be used to interpret and develop the common law once the case is before the court quite independently of the Bill of Rights (“indirect operation”)? See Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A3. Cheadle and Haysom argue that a constitution is primarily concerned with the making, content and application of rules and not conduct. Conduct may give rise to the testing or development of a rule under the Bill of Rights but should seldom, itself, be the subject of constitutional enquiry. There are exceptions to this analysis of the application of the Constitution. In certain cases the Constitution applies directly without the benefit of a mediating rule. It may be argued that, because the state is obliged by the Constitution to take reasonable measures to achieve certain rights, particularly socio-economic rights, conduct may be the proper subject of constitutional enquiry. Cheadle and Haysom submit that the proper subject of enquiry is not the measure itself but the standard under which the measure has to be evaluated. See Cheadle & Davis “Structure of the Bill of Rights” in Cheadle, Davis and Haysom *South African Constitutional Law The Bill of Rights* 2nd ed (2005) (Loose-leaf, update October 2014) (hereinafter “Cheadle et al *The Bill of Rights*”) par 1.2.

³⁹ Currie & De Waal *The Bill of Rights Handbook* 31. Van Aswegen “The implications of a bill of rights for the law of contract and delict” (1995) *SAJHR* 50 53 explains direct operation as follows: “Direct horizontal application of the provisions of a bill of rights means that the regulation of private relations is automatically subjected to the provisions of the bill of rights and can never result in the infringement or limitation of any fundamental right protected in such an instrument.”

“everyone”, or negatively phrased, denied to “no one”.⁴⁰ It is generally accepted that every natural person who is physically present within the territory of the Republic of South Africa is a beneficiary of these rights, irrespective of whether he or she is a citizen or not; or whether he or she is here legally or illegally, temporarily or permanently. Foreigners are entitled to all the rights in the Constitution save for those that have been expressly reserved for South African citizens.⁴¹ Other rights are for the benefit of a narrower category of persons only.⁴²

The question whether a company is also a beneficiary of the rights contained in the Bill of Rights is regulated by section 8(4), which provides that “[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”⁴³ In order to decide whether a company is the beneficiary of a right contained in the Bill

⁴⁰ For example sections 10-18, 21(1), 23(1), 24, 25(1), 26, 27, 29, 30 and 32-34 of the Constitution.

⁴¹ *S v Williams* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) par 76; *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC); *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC); *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C); [2007] 1 All SA 97 (C); 2007 (4) BCLR 416 (C); Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A20; LAWSA vol 5 part 4 par 4; Currie & De Waal *The Bill of Rights Handbook* 34-35.

⁴² For example citizens (sections 19-20 and 22 of the Constitution); workers (section 23(1)); employers (section 23(3)); children (section 28); trade unions and employer’s organisations (sections 23(4) and 23(5)); persons belonging to a cultural, religious or linguistic community (section 31); and arrested, detained and accused persons (section 35). See also *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC); *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C) 747F-G; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A20; LAWSA vol 5 part 4 par 4; Currie & De Waal *The Bill of Rights Handbook* 35.

⁴³ The Constitution does not define the term “juristic person”. South African law recognises the following entities as juristic persons: First associations incorporated in terms of general enabling acts, such as companies, banks and co-operatives. Secondly, associations or institutions created or recognised as juristic persons in specific legislation, such as universities and the South African Broadcasting Association (SABC). Thirdly, associations that are in common law recognised as legal subjects, such as churches, political parties and trade unions. See Cronjé “Persons” in Joubert (ed) LAWSA vol 20 part 1 2nd ed (2010) par 439. A distinction can be made between private juristic persons (which would include privately owned companies, churches, trade unions and voluntary associations) and public juristic persons (which would include state enterprises such as Eskom or the SABC, universities, city councils and the state itself). See LAWSA vol 5 part 4 par 5 n1. The Companies Act of 2008 defines a juristic person as including a foreign company and a trust, irrespective of whether it was established within or outside South Africa. Section 8(4) identifies certain bearers of rights; it does not constitutionally protect the establishment, existence and functioning of juristic persons which are covered primarily by the right to freedom of association in section 18. Neither should section 8(4), in identifying certain bearers of rights, be understood as excluding certain other categories. See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A21. Section 7(3) of the Interim Constitution provided that “all juristic persons are entitled to the right entrenched in Chapter 3 where, and to the extent that, the nature of the right permits.” Section 7(3) of the Interim Constitution was based on article 19(3) of the *Basic Law for the Federal Republic of Germany, 1994*. The technical committee was of the opinion that a wording which requires an analyses of the nature of a *right* in question is more restrictive than one requiring an analyses of the *juristic person* itself, as an entity can more readily be “humanized” than a right. Under the final Constitution the court must take into account the nature of both the right asserted and the juristic person claiming its benefits. See Du

of Rights, regard must accordingly be had to two factors namely, the nature of the fundamental right in question and the nature of the company.⁴⁴ This is not an issue of application, but an issue of interpretation.⁴⁵

The fact that juristic persons (including companies) are entitled to claim any fundamental rights at all was challenged in the Constitutional Court when the constitutional text was first submitted for certification.⁴⁶ It was argued that the term “everyone” in constitutional principle II, which provided that “everyone shall enjoy all universally accepted fundamental rights and freedoms”, referred only to natural persons and that, by extending the rights to juristic persons, the rights of natural persons were thereby diminished.⁴⁷ The Constitutional Court rejected this argument and held:

“[M]any ‘universally accepted fundamental rights’ will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of section 8(4) specifically recognises this. The text also recognises that the nature of the juristic person may be taken into account by a court in determining whether a particular right is available to such person or not.”⁴⁸

The first factor that a court must have regard to in deciding whether a company is a beneficiary of a right is accordingly the nature of that right. The nature of most of the rights make them

Plessis “The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa’s transitional Constitution” (1994) TSAR 706 714; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-42 note 99.

⁴⁴ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A22; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-11

⁴⁵ Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-34; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* supra par 45.

⁴⁶ *First Certification Judgment* supra

⁴⁷ *First Certification Judgment* supra par 57

⁴⁸ *First Certification Judgment* supra par 57. See also LAWSA vol 5 part 4 par 5; Currie & De Waal *The Bill of Rights Handbook* 36.

applicable to the protection of companies. This would include the right to equality (section 9);⁴⁹ the right to privacy (section 14);⁵⁰ the right to freedom of expression (section 16)⁵¹; the right to

⁴⁹ *AK Entertainment CC v Minister of Safety and Security* 1995 (1) SA 783 (E) 790; 1994 (4) BCLR 31 (E) 38; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) par 25; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Council* 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) par 24; *Weare v Ndlebele* 2009 (1) SA 600 (CC) paras 48 and 73; *Manong & Associates v City of Cape Town* 2009 (1) SA 644 (EqC) paras 31-35; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A22; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-41 to 31-42. In *Manong & Associates (Pty) Ltd v City of Cape Town* supra the Court held that the right to reputation, good name and fame; the right to privacy; and the right to identity which a juristic person enjoys in terms of the existing law “are distinct from and independent of the right to dignity” and that a juristic person could therefore, in principle, enjoy the right to equality (at par 31). The court also explained that, for example, the racial profile of the company can be determined by the racial profile of its controlling shareholders and that there could be no reason why a company in which women, the disabled, ethnic and religious minorities and other disadvantaged classes of persons hold the controlling interest, cannot be discriminated against (at par 34). In *Standard Bank of South Africa Ltd v Hunkydory Investments (Pty) Ltd (No 1)* 2010 (1) SA 627 (CPD) the defendant company resisted an application for summary judgment on the basis that the fact that juristic persons do not enjoy the protections of certain parts or sections of the National Credit Act 34 of 2005 offends the defendant company’s right to equality contained in section 9 of the Constitution. The court rejected the argument and held that there was a rational connection between the differentiation between natural and juristic persons in the National Credit Act and the legitimate governmental purpose behind its enactment. The court was not persuaded that any differentiation or discrimination, even if it exists, is unfair (at par 25). The court held that in essence the Act attempts to prevent reckless provision of credit by institutions to people who cannot afford credit (at par 20).

⁵⁰ *Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) par 18; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* supra par 45. In *Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra par 18 the Constitutional Court explained, given that privacy is a right which becomes more intense the closer it moves to the intimate and personal sphere of life of human beings, and less intense as it moves further away from that core, a juristic person’s right to privacy could never be as extensive as a natural person’s right to privacy. See also *Sage Holdings v Financial Mail* 1993 (2) SA 451 (A); Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-41. In *obiter* statements in *Bernstein v Bester* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) paras 69 and 85 the Constitutional Court did not display much enthusiasm for the idea that companies could be the bearers of the right to privacy.

⁵¹ Especially in the case of newspapers, radio stations and television networks. See *Government of the Republic of South Africa v Sunday Times Newspaper* 1995 (2) SA 221 (T); *Edmonton Journal v Albertha (AG) [1989] 2 SCR 1326, 64 DLR (4th) 577*; *City of Cape Town v Ad Outpost (Pty) Ltd* supra 749D-F; *Khumalo v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC); *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C) 62-63; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A22; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-40. In *City of Cape Town v Ad Outpost (Pty) Ltd* supra at 749D-F the court questioned whether commercial expression bears less constitutional recognition than political and artistic speech and held as follows:

“The tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully. So much speech is by its very nature directed towards persuading the listener to act in a particular manner that artificially created divisions between the value of different forms of speech requires critical scrutiny. Whatever the role of such speech within deliberative democracy envisaged by our Constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution. To the extent that its value may count for less than other forms of expression, account of this exercise in valuation can only be taken at the limitation enquiry as envisaged in s 36 of the Constitution.”

freedom of association (section 18); the right to freedom of trade, occupation and expression (section 22);⁵² the right to fair labour practices (section 23(1));⁵³ the right to form, join and participate in the activities and programs of an employers' organisation (section 23(3)); the right to engage in collective bargaining (section 23(5)); the property rights (section 25);⁵⁴ the right to access to information (section 32); the right to just administrative action (section 33); and the right to access to court (section 34).⁵⁵

The nature of some of the other rights prevents companies from being beneficiaries thereof. This would include the right to human dignity (section 10);⁵⁶ the right to life (section 11); the right to bodily and psychological integrity (section 12(2)); the right not to be subject to slavery, servitude and forced labour (section 13); the right to freedom of religion, belief and opinion (section 15); the right to assembly, demonstration, picket and petition (section 17); the right to vote (section 19(3)); the right not to be deprived of citizenship (section 20); the right to form, join and participate in the activities of a trade union (section 23(1)); the right to housing (section 26); the

⁵² This right is available only to citizens. See also *City of Cape Town v Ad Outpost (Pty) Ltd* supra 747F-G.

⁵³ In *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) paras 38–39 the Constitutional Court said that nothing in the nature of the right to fair labour practices suggests that employers are not entitled to that right and that section 23(1) must either apply to all employers or to none. It should make no difference whether they are natural or juristic persons.

⁵⁴ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* supra par 45; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-40 to 31-41. In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* supra paras 44-45 the Constitutional Court held that companies are bearers of the right to property, because it “is in today’s world difficult to conceive of meaningful business activity without the institution and utilisation of companies” and “denying companies entitlement to property rights would . . . have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies”. See also *NEHAWU v University of Cape Town* supra paras 36-40; LAWSA vol 5 part 4 par 3; Currie & De Waal *The Bill of Rights Handbook* 35-36.

⁵⁵ Although the court held in *Hallowes v The Yacht Sweet Waters* 1995 (2) SA 270 (D) at 278B-D that section 22 of the Interim Constitution, which provides that every person shall have the right to have justiciable disputes settled by law or, when appropriate, another independent and impartial forum, cannot vest in a juristic person “since it is, by nature, not a right which a juristic person can exercise. In *Lappeman Cutting Works v MIB Group (No 1)* 1997 (4) SA 908 (WLD) at 917G the court however held that section 22 of the Interim Constitution appears to be of application to a juristic person.

⁵⁶ *Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra par 45

right to healthcare, food, water and social security (section 27); the rights of children (section 28); and the right to education (section 29).⁵⁷

The second factor that a court must have regard to in deciding whether a company is a beneficiary of a right, is the nature of the company. Courts are accordingly now forced to deal with the more abstract question: what is the nature of the company? The nature of the company is discussed in chapters 3 and 4. It is argued that our conceptualisation of the company and its position in law is determined by the philosophical approach to justice and the resultant theory of law that we adopt. If our philosophical approach to justice revolves around the ideas of maximising welfare (utilitarianism) and respecting freedom (libertarianism) we will tend to conceptualise the company in contractarian terms (either legal contractarianism or economic contractarianism). If we also see justice as bound up with virtue or the common good we will tend to conceptualise the company in communitarian terms, as a separate legal entity with the rights and corresponding responsibilities of a natural person. It is argued that, from a normative perspective, the communitarian theory and arguably also the concession theory (more particularly the dual concession theory of Dine) are the most acceptable theories of the nature of the company.⁵⁸ This conceptualisation of the company is consistent with the normative value system that underpins the Constitution. A company, especially a large public company, is a public or quasi-public entity and a corporate citizen. It cannot be conceptualised as simply a private contractual arrangement. Even the conceptualisation of a small or closely held company as a private contractual arrangement is problematic. There are, as indicated in chapter 3, a number of provisions in the South African Companies Act of 2008 that are indicative of a communitarian approach. The Act is status and remedy orientated. There has been a fundamental shift in the underlying philosophy and approach to the company constitution away from a contractarian (or English model) company to a division of power corporation. The company is conceptualised as an institution rather than a contractual arrangement (a *universitas* rather than a *societas*).

The most important attribute of the company is its separate legal personality, which it derived from the medieval corporation or *universitas*. There are a number of corporate personhood

⁵⁷ LAWSA vol 5 part 4 par 5; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-40; Currie & De Waal *The Bill of Rights Handbook* 36.

⁵⁸ Berle and Means also conceptualised the company from a communitarian perspective.

theories. The more prominent corporate personhood theories and their normative consequences are considered in chapter 4. In summary, according to the fiction (or artificial entity) theory a company is, through legal fiction, endowed with legal personality (or legal subjectivity) as if it is a human being. The rights, duties and capacities of a company totally depend on how much the law imputes to it by fiction. The aggregate theory conceptualises the company not so much as a legal construct but as a collection or aggregate of its individual human constituents, without whom it would have no identity or ability to function. The original version of the aggregate theory, which has its roots in the *laissez-faire* economic and political policy, essentially treats the company as a partnership. According to the real entity theory (also known as the natural entity or organic theory) the company is a real person and not an artificial or fictional entity. The real entity theory assumes that the subjects of rights need not be human beings. The real entity theory treats a company much like an autonomous natural person. This theory supports two contrasting normative visions of the company. Initially, it formed the theoretical basis to argue that the company should have the same rights and privileges as natural persons. However, in the 1930s Dodd employed the real entity theory to justify a completely different normative vision of the company. On this vision the company, because it is a real person, should have the same legal, social and moral responsibilities as a natural person. The company must be a good corporate citizen. Building on this foundation, other communitarians (or progressives), corporate social responsibility scholars and stakeholder scholars also justified the consideration of broader stakeholder interests by conceptualising the company as a distinct moral organism with social and ethical responsibilities over and above the demands of the law and market forces. A further theory, the juridical reality theory, adopts a utilitarian and positivist approach and conceptualises the company simply as reality in the juridical sense. A juristic person is accorded legal personality insofar as it is legally necessary to answer the needs of society. According to this theory companies have those rights and duties that are conferred on them by legislatures and courts. These rights and duties should in turn be informed by what companies are meant to achieve and how it affects society. The aggregate theory was again revived with the rise of the law and economics movement in the 1980s. The law and economic scholars deny that the company is a separate entity and retain the notion of the contracting and bargaining individual. But, whereas the initial version of the aggregate theory focussed almost exclusively on the company's shareholders, thereby treating the company essentially as a partnership, the nexus of contracts version (or economic contractarian theory) focuses on relationships more broadly. It

deems the web of consensual transactions (or contract based relations) to be not only between the shareholders but between all the rational economic actors. For economic contractarians, individuals are ontologically prior to companies which, as fictions, have significance only because of the freely contracted arrangements of their human constituents. This individualistic view has its roots in classical liberalism which focuses on individual freedom rather than utilitarian social maximization.

It is argued in chapter 4 that, from a normative perspective, the real entity theory as articulated by Dodd is the most acceptable theory about the corporate personhood of the company. The approach of South African law to the corporate personhood of companies has changed fundamentally with the introduction of the Companies Act of 2008. The Act treats the company by analogy to a natural person or an individual. The company is viewed as an entity (corporate person) distinct from its members. This represents the real entity theory's conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*). On this view a company should in principle be a beneficiary of rights which, by their nature, make them applicable to companies.

Currie and De Waal appear to adopt an aggregate approach and place individuals ontologically prior to juristic persons. They argue that it is difficult to see how organs of the state exercising core government functions, such as Parliament, a cabinet minister or the police will ever be able to rely on the rights contained in the Bill of Rights. These organs are not used by individuals for the collective exercise of their fundamental rights, but are instead used by the state for the exercise of their powers. However, state-owned companies such as the South African Broadcasting Corporation or the Post Office or entities such as universities, which are set up by the state for the purpose, amongst other things, of realising certain fundamental rights, are differently situated and can be beneficiaries of certain rights.⁵⁹ They argue that the size and activities of privately owned juristic persons are not necessarily decisive. What is more important is the relationship between the activities of the juristic person and the fundamental rights of the natural persons who stand behind the juristic person. Juristic persons are not themselves worthy of protection, but if the juristic person was established by natural persons for the collective exercise of their fundamental

⁵⁹ Currie & De Waal *The Bill of Rights Handbook* 36-37. See also LAWSA vol 5 part 4 par 5.

rights, it may be a beneficiary of those rights. For example, companies that are established by individuals to conduct business will be beneficiaries of the property rights.⁶⁰ A church or media company which has legal personality may be entitled to claim the right to freedom of religion or the right to freedom of expression, because it was established by natural persons to help them achieve those particular rights. Currie and De Waal conclude that what section 8(4) envisages is that there should be a link between protecting the activity of the juristic person and protecting the fundamental rights of the natural persons that lie behind it.⁶¹ The focus for them is thus on the individual rather than the juristic person.

In practice much of the debate about the meaning of the requirements in section 8(4) is made irrelevant because the courts have adopted a very generous approach towards legal standing in constitutional litigation. Section 38 provides that anyone listed in the section may approach a court, alleging that a right in the Bill of Rights has been infringed or threatened. The persons who may approach a court are anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members. Basically, a person has standing to challenge the constitutionality of laws or conduct provided that person alleges that a fundamental right is infringed or threatened, and that it has in terms of the categories listed in section 38, a sufficient interest in obtaining a remedy.⁶² This means that it will seldom be necessary for a company to invoke section 8(4). The laws and many forms of state and private conduct inevitably affects both natural and juristic persons. For example, a law which prohibits the sale of wine on a Sunday may be challenged by a company on the basis of the right to freedom of religion, provided that the company has sufficient interest in the outcome of the litigation. It is not necessary for the company to show that it is a beneficiary of the right to freedom of religion.⁶³ It is only when a law or conduct impacts solely

⁶⁰ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* supra paras 41-45; *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) par 6.

⁶¹ Currie & De Waal *The Bill of Rights Handbook* 37. See also LAWSA vol 5 part 4 par 5. Bilchitz similarly argues that the attribution of rights to companies is essentially a derivative in that it is necessary in order to protect the rights of natural persons efficiently. See Bilchitz (2008) SALJ 754 775.

⁶² *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

⁶³ Compare for example *Shoprite Checkers v MEC for Economic Development* 2015 (6) SA 125 (CC).

on the activities of the company that it will not be possible to follow this course of action. Then the company will need to show that it is the beneficiary of a particular right. For example, when a special tax levied on companies is challenged based on a fundamental right, the company will have to show that it is the beneficiary of that right.⁶⁴

3.1.1.2 Duty-bearers under the Bill of Rights

Legal rights are a correlative relationship and the Bill of Rights accordingly also imposes duties on those who are bound by the rights (the duty-bearers of the rights). The source of these duties is the Constitution itself.⁶⁵ But not everyone is bound by the Bill of Rights. Traditionally a bill of rights regulates the vertical relationship between the individual and the state. This means that it is intended to protect private persons against state power by conferring rights on private persons and imposing obligations on the state to respect, protect, promote and fulfil the rights in the bill of rights. This is the so-called vertical application of a bill of rights.⁶⁶ On this narrow conception a bill of rights is a “charter of negative liberties”.⁶⁷

The Constitutional Court held in *Du Plessis v De Klerk*⁶⁸ that the interim Constitution corresponded with this traditional model insofar as it had no direct application to so-called “horizontal” disputes, that is to disputes between private litigants governed by the common law.⁶⁹

⁶⁴ Currie & De Waal *The Bill of Rights Handbook* 37-38; LAWSA vol 5 part 4 par 5.

⁶⁵ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A23. Rautenbach states that in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC), the court based its declaratory order that Transnet and Metrorail have a duty to protect rail commuters’ rights to human dignity, life and personal freedom and security on its interpretation, in conformity with the Constitution, of “in the public interest” in provisions of the Legal Succession to the South African Transport Services Act 9 of 1989. The court could have reached the same conclusion by referring to s 7(2) which describes a duty to “protect” rights, which duty exists *always*, not only “at times”, in respect of non-social rights as implied by the court in par 70.

⁶⁶ LAWSA vol 5 part 4 par 6; Currie & De Waal *The Bill of Rights Handbook* 32 and 41.

⁶⁷ Compare *Jackson v City of Joliet* 715 F 2d 1200, 1203 (7th Cir) (1983) 1206 where Posner J held that the United States Constitution is “a charter of negative rather than positive liberties... The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them.”

⁶⁸ 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) par 45.

⁶⁹ This was principally because of the absence of the word “judiciary” in section 7 that dealt with the application of the interim Constitution (now section 8 in the final Constitution). The omission meant that the Bill of Rights in the interim Constitution placed duties to uphold constitutional rights only on legislative and executive organs of the state.

The Court however held that the interim Bill of Rights applied indirectly to horizontal disputes in that the courts had to interpret legislation and to develop the common law so that the ordinary law recognised and protected the rights in the interim Bill of Rights.⁷⁰

The position is different in the final Constitution. Like its predecessor, the final Constitution provides for direct vertical application (in section 8(1)) but, unlike its predecessor it also provides for direct horizontal application (in section 8(2)). In addition, it also provides for indirect vertical and horizontal application (in section 39(2)).⁷¹

Section 8(1) governs the vertical application of the Bill of Rights and provides that it applies to all law (that is, statutory, common and customary law) and binds the legislature, the executive, the judiciary and all organs of state when they exercise their powers and perform their functions.⁷² It is generally accepted that there is one exception to this rule which arose from the judgment of the Constitutional Court in *Khumalo v Holomisa*.⁷³ In this judgement the Court held that, despite the reference to the judiciary in section 8(1), the Bill of Rights does not apply directly to disputes between private parties that are governed by the common law, except those in which the requirements set out in section 8(2) have been satisfied. This means that section 8(1) of the Constitution itself does not provide for the direct application of the Bill of Rights to horizontal

Individuals were not directly bound by the Bill of Rights. Nor was the judiciary, which had the task of adjudicating and enforcing the rights and duties of individuals.

⁷⁰ *Du Plessis v De Klerk* supra par 62. This was because section 35(3) of the interim Constitution provided that “[i]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of ... [the interim Bill of Rights].” See LAWSA vol 5 part 4 par 8; Currie & De Waal *The Bill of Rights Handbook* 32-33 for a discussion of the position under the interim Constitution.

⁷¹ Bilchitz (2008) SALJ 754 775; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A8; LAWSA vol 5 part 4 paras 6 and 8; Currie & De Waal *The Bill of Rights Handbook* 33-34 and 41. Two textual changes were made to provide for direct horizontal application. The first was the addition of the word “judiciary” in section 8(1), missing from the application provisions in the interim Constitution. The second was the imposition of a duty on individuals, in section 8(2).

⁷² Section 7(2) further compels the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights. See Du Plessis “Interpretation of Statutes and the Constitution” in *Bill of Rights Compendium* 2C2.

⁷³ Supra.

disputes between private persons at all. The direct horizontal application of the Bill of Rights is governed entirely by section 8(2).⁷⁴

Whereas section 8(1) is not qualified, section 8(2) provides that a provision of the Bill of Rights binds a natural or a juristic person “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.” Unlike its predecessor, section 8(2) clearly provides for the direct application of the Bill of Rights in horizontal disputes in certain circumstances.⁷⁵ It is noticeable that section 8(2) applies to both natural and juristic persons. It accordingly also applies to companies. Whereas section 8(4) provides that a company may be entitled to the rights in the Bill of Rights (a beneficiary of the Bill of Rights) to the extent required by the nature of the rights and the nature of that company, section 8(2) provides that a company is bound by a provision of the Bill of Rights (a duty-bearer of that provision) if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.⁷⁶

⁷⁴ *Khumalo v Holomisa* supra paras 31-32. See also Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* paras 1A23, 1A30-1A32 and 1A36-1A41; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A8; LAWSA vol 5 part 4 paras 7 and 8; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-11; Currie & De Waal *The Bill of Rights Handbook* 42-45. For a critical discussion of the *Khumalo*-case, see Woolman “The amazing, vanishing Bill of Rights” (2007) SALJ 762. Rautenbach reasons that for the purposes of an analysis of sections 8(1) and 8(2) of the Constitution, it is important to distinguish between the application of the Bill of Rights to legal rules and the application of the Bill of Rights to the actions of organs of state and private institutions executed in terms of those legal rules. Such a distinction was made in *NEHAWU v University of Cape Town* supra par 14. The court distinguished between the constitutionality of a legal norm and the constitutionality of the application of that norm. In a particular case, only the constitutionality of the legal rules or only the action performed in terms of a constitutionally valid legal rule (that is, the application of the rule) may be questioned. Rautenbach argues that it can be said that the first part of section 8(1) (the “Bill of Rights applies to all law”) deals with the application of the Bill of Rights to all legal rules; that the second part of section 8(1) (“the Bill of Rights ... binds the legislature, the executive, the judiciary and all organs of state”) deals with the actions of all organs of state executed in terms of constitutionally valid legal rules; and that section 8(2) (the Bill of Rights “binds a natural and juristic person”) deals with the actions of private persons and institutions executed in terms of constitutionally valid legal rules. See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A37.2. See also *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) 1238C; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC); 1999 (10) BCLR 1059 (CC) par 28 (“the common law . . . is ‘law’ within the meaning of s 8(1)”). See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) paras 15 and 19; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A7.

⁷⁵ Bilchitz (2008) SALJ 754 775; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A8; LAWSA vol 5 part 4 par 9; Currie & De Waal *The Bill of Rights Handbook* 45.

⁷⁶ Examples where the courts have indicated that companies are duty-bearers under the Bill of Rights include the following: In *Bernstein v Bester* supra the Constitutional Court held at par 85:

Bilchitz argues that section 8(2) is poorly drafted in that it does not clarify the circumstances under which the Bill of Rights is applicable to private persons (including juristic persons, such as companies) as “the main determinate as to whether the rights apply is their applicability and this is clearly circular”.⁷⁷ Currie and De Waal reason that five considerations should be born in mind in interpreting section 8(2). First, section 8(2) states that a “provision” (not a “right”) may apply to private conduct. It is therefore possible that some provisions of the Bill of Rights may apply to the conduct of a private natural or juristic person while other provisions in the same section or pertaining to the same right may not apply. Secondly, whether a provision in the Bill of Rights

“The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent to this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders.”

In *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 (3) SA 155 (NPD) at 164E-G the court held that the generation of smoke by the respondent company’s sawmill was not only unlawful in terms of section 9 of the Atmospheric Pollution Prevention Act 45 of 1965, but also an infringement of the respondent’s neighbours right to an environment which is not detrimental to their health or well-being in terms of section 29 of the interim Constitution. In *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) a minor suffering from a lung disease caused by his work at a mine successfully claimed damages from his employer. However the judgment was based on certain occupational injury statutes rather than the Constitution (compare also *Katzew* (2011) SALJ 686 698-699; Gwanyana “The South African Companies Act and the realisation of corporate human rights responsibilities” (2015) PELJ 3101 3116). The case of *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA) concerned an application for the certification of a class action to pursue damages against the respondents for price fixing of certain companies in the bread producing industry in contravention of the Competition Act 89 of 1998. The court dismissed an appeal against the refusal of the one class action and referred the other one back to the court *a quo* to be dealt with on a complete set of papers. The court noted however at par 71:

“It would be a startling departure from principles that have been recognised as compatible with our new constitutional order, for liability to compensate for loss or damage flowing from a prohibited practice to exist in the absence of any duty to prevent such loss. It would eliminate one of the basic principles by which our law prevents liability for acts causing damage from being extended beyond acceptable limits.”

The case of *Nkala v Harmony Gold Mining Company Ltd* 2016 (7) BCLR 881 (GJ) concerned an application to bring a class action against companies operating in the gold mining industry on behalf of current and past underground mineworkers who contracted silicosis or tuberculosis, and on behalf of the dependents of mineworkers who died of silicosis or tuberculosis contracted whilst employed in the gold mines. The mineworkers averred that the mining companies breached their legal duties owed to the members of classes arising from their common law duty of care to take reasonable measures to provide a safe and healthy work environment; the statutory duty owed by mining companies to comply with the Mines and Works Act 12 of 1911 and the Mine Health and Safety Act 29 of 1996 and the regulations made thereunder; and the mining companies’ constitutional obligations to mineworkers based on section 9(4) (the fundamental right against unfair discrimination by private persons), section 10 (fundamental right to human dignity), section 11 (right to life), sections 12(1)(c) and section 12(2) (right to bodily integrity) and section 24 (right to an environment that it is not harmful to the health and well-being of an individual). The mineworkers also indicated that they wanted to claim against the parent companies of the respective companies that employed the mineworkers on the basis that they had authority over, advised and guided their respective employing subsidiary company, and were aware that its subsidiary company would accept its direction, guidance or advice and that direction, guidance or advice materially impacted upon the health of the mineworkers, especially with regard to them contracting silicosis or tuberculosis. The court granted the certification requested.

⁷⁷ Bilchitz (2008) SALJ 754 775.

applies to private conduct also depends on the nature of the private conduct in question and the circumstances of a particular case. Thirdly, the purpose of a provision is also an important consideration in determining whether it is applicable to private conduct or not. Fourthly, the nature of any duty imposed by the right must be taken into account. Lastly, in some instances the text also gives an indication as to whether a particular provision may be applied to private conduct or not.⁷⁸ Liebenberg contends that the direct application of constitutional rights to the relationships between private parties must be a “context-sensitive determination taking into account the appropriateness of imposing the particular duty on the particular private party concerned”.⁷⁹ On the basis of this kind of reasoning, it may be concluded that social-welfare rights will, in general, not impose positive duties on private agencies.⁸⁰ Katzew, on the other hand, argues that positive duties should be imposed on large and powerful companies with resources to do so to advance socio-economic rights.⁸¹

The Constitutional Court first employed section 8(2) in the decision of *Khumalo v Holomiso*.⁸² The Court held that the right to freedom of expression guaranteed in section 16 was of direct horizontal application given the “intensity of the constitutional right in question”.⁸³ In *Juma Misjid Primary School v Essay*⁸⁴ the Constitutional Court held that the right to basic education applied directly to a horizontal dispute governed by the common law, but only in the sense that it

⁷⁸ Currie & De Waal *The Bill of Rights Handbook* 48-50.

⁷⁹ Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2009) 322. See also Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A8.

⁸⁰ See, generally, *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) 473A–B; *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simon* 2001 (1) SA 1017 (LC) 1021C–D; *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T) 137O–H; *Nkosi v Bürhmann* 2002 (1) SA 372 (SCA) 386C–F, 387I–J; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) par 40; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA) par [15]; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A8.

⁸¹ Katzew (2011) SALJ 686 696-697.

⁸² *Supra*.

⁸³ *Khumalo v Holomiso supra* par 33. For a critical discussion of the *Khumalo*-judgment see Bilchitz (2008) SALJ 754 776-777; Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-6 to 31-11.

⁸⁴ 2001 (8) BCLR 761 (CC) par 57.

imposes a negative obligation on private parties not to use their common law powers to interfere with or diminish the enjoyment of that right. It does not impose a positive obligation on private parties to take steps to provide basic education for learners.⁸⁵

In *Barkhuizen v Napier*⁸⁶ the Constitutional Court declined to apply the Bill of Rights directly to a challenge of a time-limitation clause in an insurance contract. Rautenbach⁸⁷ reasons that the Bill of Rights can be applied to the law of contract and contractual relations on three levels. First, the Bill of Rights applies to the common-law, customary law and statutory rules of the law of contract in terms of section 8(1). Secondly, it applies to the contractual clauses concluded through their actions executed in terms of constitutionally valid legal rules in terms of section 8(2).⁸⁸ Thirdly, it applies to the actions that parties execute in terms of constitutionally valid contracts in terms of section 8(2).⁸⁹

⁸⁵ The Constitutional Court held that a trust was not entitled to deal with its land on which a school was situated as it saw fit, as a private owner, because the trust was, in the context of that particular case, under a constitutional duty to respect the relevant learners' right to a basic education.

⁸⁶ 2007 (5) SA 523 (CC); 2007 (7) BCLR 691 (CC). This case dealt with the constitutional validity of a contractual clause (a time bar of 90 days after repudiation for the institution of action in a short term insurance contract) and not with the validity of the common law in terms of which the contract was concluded.

⁸⁷ Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* par 1A37.2.

⁸⁸ The Supreme Court of Appeal have held that an agreement to negotiate in good faith is enforceable if it contains a deadlock breaking mechanism. See *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A); *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA); [2005] 2 All SA 16 (SCA). Whether an agreement to negotiate in good faith is enforceable where there is no deadlock-breaking mechanism remains a grey area in our law. In *Premier of the Free State Provincial Government v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); [2000] 3 All SA 247 (A) par 8 the Supreme Court of Appeal suggested that it is not enforceable. In *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) par 72 the Constitutional Court suggested otherwise. In *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) par 102 the Constitutional Court left the question open and stated that it is undesirable to lay down an objective standard of good faith bargaining which the parties must undertake. What the parties are precluded from doing is to negotiate in bad faith. They are not allowed to enter into these negotiations just to go through the motions. Both sides must enter into negotiations with serious intent to reach consensus.

⁸⁹ The last two levels were distinguished clearly in *Bredenkamp v Standard Bank of SA Ltd* 2010 (9) BCLR 892 (SCA) paras 47-48. The example used by the court to explain the distinction was: "where a lease provides for the sublease with the consent of the landlord ... [such] a term is *prima facie* innocent ... [but] [s]hould the landlord attempt to use it to prevent the property from being sublet in circumstances amounting to discrimination under the equality clause, the term is not enforced".

3.1.2 Indirect application of the Bill of Rights

Indirect application means that the Bill of Rights does not confer rights or impose obligations on persons directly. Instead the Bill of Rights is mediated through statutory or common law.⁹⁰ The Constitution makes provision for the indirect application of the Bill of Rights in section 39(2). Section 39(2) provides that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law. The Courts are thus under a general obligation to interpret legislation and to develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights.⁹¹

The purpose and effect of the direct application of the Bill of Rights differs from that of indirect application. The purpose of a direct application is to determine whether there is, on a proper interpretation of the ordinary law and the Bill of Rights, an inconsistency between the two. The purpose of indirect application is to determine whether it is possible to avoid, in the first place, any inconsistency between the ordinary law and the Bill of Rights by means of a proper interpretation of the two. Direct application of the Bill of Rights generates a constitutional remedy whereas the indirect application thereof does not. Yet, there are few common law cases where the method of application will make a substantive difference in the result. These are cases where the common law does not provide a cause of action to a plaintiff and where it is necessary to invoke a right in the Bill of Rights directly.⁹²

⁹⁰ LAWSA vol 5 part 4 par 10; Currie & De Waal *The Bill of Rights Handbook* 56. See further LAWSA vol 5 part 4 paras 10-13; Currie & De Waal *The Bill of Rights Handbook* 56-65 for a more detailed discussion of the indirect application of the Bill of Rights

⁹¹ *Carmichele v Minister of Safety and Security* supra paras 33-40; *K v Minister of Safety and Security* supra par 17; *Phumelela Gaming and Leisure Ltd v Grundlingh* 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) paras 26-27; LAWSA vol 5 part 4 par 10. In *Phumelela Gaming and Leisure Ltd v Grundlingh* supra par 26 the Constitutional Court held:

“... the provisions of section 39(2) of the Constitution must always be borne in mind by [the] courts. This is particularly so when the [courts are] engaged with applying an open textured normative rule, such as wrongfulness or fairness, to a set of facts. This obligation was described by this Court in the following terms in *K v Minister of Safety and Security* supra:

‘The obligation imposed upon courts by s 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.’”

⁹² Currie & De Waal *The Bill of Rights Handbook* 67.

The Constitutional Court explained in *Masiya v Director of Public Prosecutions, Pretoria (Centre for applied legal studies, amici curiae)*⁹³ that the constitutional power of the courts to develop the common law must be distinguished from their constitutional power to test legislation against the provisions of the Constitution. Whilst the power to test legislation against the provisions of the Constitution has been specifically conferred upon courts by the Constitution, the power to develop the common law has always vested in the superior courts, although the paramount substantive considerations that must be taken into account when determining whether the common law requires development in any particular case are now found in section 39(2) of the Constitution.⁹⁴ In the case of legislation the responsibility and power of a declaration of invalidity resides, not with the courts, but primarily with the legislature.⁹⁵ The common law is different as it is the law of the courts and not the legislature.⁹⁶

The Constitutional Court has indicated on a number of occasions that the indirect application of the Bill of Rights must be considered before its direct application. This is known as the principle of avoidance.⁹⁷ When it comes to statutory law this principle means that a court must first attempt to interpret the legislation in accordance with the values that underlie the Bill of Rights (indirect application) before considering a declaration that the legislation is unconstitutional and invalid (direct application).⁹⁸ When dealing with a common law or a customary law rule, a court must

⁹³ 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) par 31. See also *Carmichele v Minister of Safety and Security* supra par 36.

⁹⁴ *Masiya v Director of Public Prosecutions, Pretoria (Centre for applied legal studies, amici curiae)* supra par 31.

⁹⁵ *S v Thebus* 2003 (6) SA 505 (CC); 2003 (10) BCLR 665 (CC) par 30

⁹⁶ *S v Thebus* supra par 31; LAWSA vol 5 part 4 par 12; Currie & De Waal *The Bill of Rights Handbook* 60-61.

⁹⁷ *S v Mhlungu* supra par 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) paras 2-5; *Ferreira v Levin*; *Vryenhoek v Powell* supra par 199; *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) par 12; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) par 21; *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) par 64; *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) par 149; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) par 73. See also LAWSA vol 5 part 4 par 10; Currie & De Waal *The Bill of Rights Handbook* 25, 45-46 and 68-71.

⁹⁸ *Mazibuko v City of Johannesburg* supra par 73; LAWSA vol 5 part 4 par 10; Currie & De Waal *The Bill of Rights Handbook* 57.

first attempt to develop the rule in conformity with the Bill of Rights (indirect application) before assessing whether the rule is in conflict with the Bill of Rights (direct application).⁹⁹

3.1.2.1 The indirect application of the Bill of Rights to the Companies Act of 2008

Section 39(2) places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting the Companies Act of 2008. This canon of construction cannot be overridden by legislative intent. The intention of the legislature is always subject (and secondary) to the Constitution, and not only when the Companies Act of 2008 is allegedly inconsistent with a provision or provisions of the Constitution. Statutory interpretation of the Act must positively promote the Bill of Rights and other provisions of the Constitution, particularly the fundamental values in section 1.¹⁰⁰

This principle of “reading in conformity” means that the courts must prefer interpretations of the Companies Act of 2008 that fall within constitutional bounds over those who do not, provided that such an interpretation can reasonably be ascribed to the particular section under consideration.¹⁰¹

⁹⁹ *Barkhuizen v Napier* supra 26-30. *Contra Khumalo v Holomisa* supra paras 29-34. See also LAWSA vol 5 part 4 par 10; Currie & De Waal *The Bill of Rights Handbook* 57.

¹⁰⁰ *Du Plessis v De Klerk* supra par 137 in respect of s 35(3) of the interim Constitution; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*; *in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra paras 21-24; *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) par 18; *Steenkamp v Edcon Ltd* 2016 (3) BCLR 311 (CC) par 100; *Makate v Vodacom (Pty) Ltd* supra paras 87-89; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A19; LAWSA vol 5 part 4 par 12; Du Plessis “Interpretation” in Woolman & Bishop *Constitutional Law of South Africa* 32-43; Currie & De Waal *The Bill of Rights Handbook* 57. In *Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd*; *in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra par 21 the Constitutional Court described the canon of statutory interpretation derived from section 39(2) as follows in par 21:

“All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.”

Because the Constitution is the supreme law of the land and all legislation must be read subject to it, it is unnecessary for legislation expressly to incorporate terms of the Constitution. Constitutional provisions or values or principles are, in other words, part of the implied contents of statutes. See *Harksen v President of the Republic of South Africa* supra par 18.

¹⁰¹ *Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd*; *in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra par 23.

Such an interpretation should not, however, be unduly strained.¹⁰² Only if it is not possible to interpret a provision in the Companies Act of 2008 in such a manner that it does not conform to the Constitution should it be declared constitutionally invalid in terms of section 172(1)(a) of the Constitution.¹⁰³

3.1.2.2 The indirect application of the Bill of Rights to the common law of companies

Section 39(2) requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when developing the common law of companies. In *Carmichele v Minister of Safety and Security*¹⁰⁴ the Constitutional Court held that the constitutional obligation to develop the common law is not discretionary but is rather a “general obligation” to consider whether the common law is deficient and, if so, to develop it to promote the objectives of the Bill of Rights.¹⁰⁵

Although section 39(2) is often regarded as the main source of the so-called indirect application of the Bill of Rights to the common law, it is important to note that it is not the main source, and certainly not the only source. Section 8(1) provides that all common law must be consistent with the Bill of Rights. The determination of such consistency requires the full and direct application

¹⁰²*Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra par 24.

¹⁰³ *Investigating Directorate: Series Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit* supra paras 25-26. See also *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC); [1996] 1 All SA 11 (CC); 1995 (12) BCLR 1579 (CC) par 28; *De Lange v Smuts* 1998 (3) SA 785 (CC); 1998 (7) BCLR 770 (CC) par 85; *Mistry v Interim Medical & Dental Council of South Africa* 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) par 32; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra paras 23-24; *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) paras 47-48; *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA); 2001 (11) BCLR 1197 (SCA) par 11; *Minister of Safety and Security v Sekholo* 2011 (5) SA 367 (SCA); [2011] 2 All SA 157 (SCA) par 15; LAWSA vol 5 part 4 par 5; Currie & De Waal *The Bill of Rights Handbook* 57-60.

¹⁰⁴ Supra par 39.

¹⁰⁵ See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) par 5; *Mighty Solutions CC v Engen Petroleum Ltd* 2016 (1) BCLR 28 (CC) par 36; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A19.2. In *Mighty Solutions CC v Engen Petroleum Ltd* supra par 36 Van der Westhuizen J remarked:

“Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights.”

not only of the general objectives set out in section 39(2) but primarily of all the provisions of the Bill of Rights that regulate the protection and limitation of the rights.¹⁰⁶

In *S v Thebus*¹⁰⁷ the Constitutional Court held that the Constitution embodies an “objective normative value system” and that it is within this objective normative value system that the common law must be developed. The Court explained that the need to develop the common law under section 39(2) could arise in two circumstances. The first is if a rule of the common law is inconsistent with the Constitution. In this case, the common law must be adapted to remove the inconsistency. The second is when a rule of the common law is not inconsistent with the specific constitutional provision but may fall short of its spirit, purport and objects. In this case the common law must be developed so as to conform to the objective normative value system found in the Constitution.¹⁰⁸

Although the courts have far more scope to develop the common law of companies by way of an indirect application than when they interpret the Companies Act of 2008, there are limits on the power of the courts to develop a common law.¹⁰⁹ First, the common law must be developed incrementally and on a case by case basis.¹¹⁰ The second limitation is the doctrine of *stare decisis*. The effect of the doctrine of *stare decisis* under the Constitution may be summarised as follows: Post-constitutional decisions of the higher courts are binding on lower courts whether they deal with constitutional issues or not. Pre-constitutional decisions of higher courts are also binding on lower courts, except in cases of direct conflict with the Constitution or those cases based on open-ended considerations, such as *boni mores* or public interest, which no longer reflect

¹⁰⁶ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A19.2.

¹⁰⁷ *Supra* par 28. See also *Carmichele v Minister of Safety and Security* *supra* par 56.

¹⁰⁸ *S v Thebus* *supra* par 28. See also LAWSA vol 5 part 4 par 12; Currie & De Waal *The Bill of Rights Handbook* 61-63. The courts have been less inclined to reform the principles of the law of contract in a similar manner to the law of delict.

¹⁰⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173(C); 1999 (3) BCLR 280 (C) 289; Currie & De Waal *The Bill of Rights Handbook* 63.

¹¹⁰ *Du Plessis v De Klerk* *supra* par 63; *Carmichele v Minister of Safety and Security* *supra* par 36; *Masiya v Director of Public Prosecutions, Pretoria Centre for applied legal studies, amici curiae* *supra* par 31; Currie & De Waal *The Bill of Rights Handbook* 63.

the values of the Constitution.¹¹¹ Van der Westhuizen J explained in *Mighty Solutions CC v Engen Petroleum Ltd*¹¹² that the duty of the courts to develop the common law does not mean that all the principles of law which have hitherto governed all our courts are to be ignored. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral test of time.¹¹³ Furthermore, legal certainty is essential for the rule of law – a constitutional value.¹¹⁴ Van der Westhuizen said:

“Before a court proceeds to develop the common law, it must: (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on the area of the law.”¹¹⁵

3.2 The substantive stage

During the substantive stage, a court must assess the substance of an alleged infringement of a right contained in the Bill of Rights. Two important questions must be answered: Does the impugned law or conduct infringe the fundamental right in question and, if it does, is the infringement a justifiable limitation?¹¹⁶

¹¹¹ *Ex Parte Minister of Safety and Security: In re S v Walters* supra par 61; *Afrox Healthcare v Strydom* supra par 61; *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) par 39; *Daniels v Campbell* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) paras 94-95; *Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) paras 58-62; Mighty Solutions CC v Engen Petroleum Ltd* supra par 37; LAWSA vol 5 part 4 par 13; *Currie & De Waal The Bill of Rights Handbook* 63-65. In *Bookworks (Pty) Ltd v Greater Johannesburg Council* 1999 (4) SA 799 (WLD) at 810H-J, an appeal to the Full Bench dealing with section 13 of the Companies Act 61 of 1973, the Court held that while the while the Constitution required that its provisions and values be given primacy over the rules of the common law, even when these rules have been invested with the highest **statue** of pre-constitutional judicial authority, where a superior Court had directed what the effect of the Constitution as established law was, whether substantive or procedural, a lower court had to follow that decision, notwithstanding the supremacy of the Constitution.

¹¹² Supra par 37, with reference to *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) par 17.

¹¹³ *Mighty Solutions CC v Engen Petroleum Ltd* supra par 37 with reference to *S v Zuma* supra par 17.

¹¹⁴ *Mighty Solutions CC v Engen Petroleum Ltd* supra par 37.

¹¹⁵ *Mighty Solutions CC v Engen Petroleum Ltd* supra par 38.

¹¹⁶ LAWSA vol 5 part 4 paras 2 and 14; *Currie & De Waal The Bill of Rights Handbook* 26.

3.2.1 Infringement

In assessing whether the law or conduct in question infringes a fundamental right, a court has to perform two tasks. First, it has to determine the scope and ambit of the particular right in question. Secondly, it has to determine the meaning and effect of the law or conduct in question and whether it infringes that right.¹¹⁷ This assessment primarily involves the interpretation of the provisions of the Constitution in general and the Bill of Rights in particular.

Section 39 of the Constitution deals with the interpretation of the Bill of Rights.¹¹⁸ Section 39(1) provides that, when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. The values that underlie an open and democratic society based on human dignity, equality and freedom are discussed in section 4 hereafter. The reference to international law includes binding and non-binding international law.¹¹⁹ Whilst section 39(1) requires that courts “must” promote the values that underlie an open and democratic society based on human dignity, equality and freedom and “must” consider international law, it provides that they “may” consider foreign law. The Constitutional Court has often referred to foreign law.¹²⁰ However, the use of foreign law must be

¹¹⁷ *S v Makwanyane* supra par 100; *S v Thebus* supra par 29; *Ex parte Minister of Safety and Security: In re S v Walters* supra par 26; LAWSA vol 5 part 4 par 14; Currie & De Waal *The Bill of Rights Handbook* 133-134.

¹¹⁸ The instructions contained in section 39 are sufficiently abstract to require interpretation by themselves. See Currie & De Waal *The Bill of Rights Handbook* 134-135.

¹¹⁹ *S v Makwanyane* supra par 35. See also *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) par 87 where the Constitutional Court explained that the Constitution reveals a clear determination to ensure that the Constitution and legislation is interpreted in a manner that complies with international law. First, section 233 of the Constitution requires the courts, when interpreting legislation, to prefer an interpretation that is consistent with international law. Secondly, section 39(1) requires courts to consider international law when interpreting the Bill of Rights. Finally, section 37(4)(b)(i) requires legislation enacted in consequence of a state of emergency to derogate from the Bill of Rights only to the extent that is consistent with South Africa’s obligations under international law. See also LAWSA vol 5 part 4 par 21; Currie & De Waal *The Bill of Rights Handbook* 146-148.

¹²⁰ Compare *S v Makwanyane* supra par 37; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC); *President of the Republic of South Africa v M & G Media Ltd* 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) par 16; LAWSA vol 5 part 4 par 22; Currie & De Waal *The Bill of Rights Handbook* 147-148.

approached with circumspection and with due regard to our legal system, our history and circumstances, and the structure and language of our Constitution.¹²¹

Section 39(2), which deals with the interpretation of legislation and the development of the common and customary law, is discussed hereinbefore. Read with section 8, it provides for the indirect application of the Bill of Rights.¹²² Section 39(3) simply confirms that the Bill of Rights does not prevent a person from relying on rights conferred by legislation, the common law or customary law, but subject thereto that the rights are consistent with the Bill of Rights.¹²³ Except for section 39 (which deals with the interpretation of the Bill of Rights specifically), the Constitution itself does not prescribe how it should be interpreted.¹²⁴

Because the interpretation, application and limitation of the fundamental rights are not regulated completely by the text of the Constitution, the Constitutional Court has laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted. Currie and De Waal state that in summary these judgments hold that the language of the constitutional text must be interpreted generously, purposively and in context.¹²⁵ The starting point for determining the meaning of a provision in the Bill of Rights is the text itself.¹²⁶ The individual

¹²¹ *S v Makwanyane* supra par 37; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) par 26; *President of the Republic of South Africa v M & G Media Ltd* supra par 16; LAWSA vol 5 part 4 par 22; Currie & De Waal *The Bill of Rights Handbook* 147-148.

¹²² See Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* 31-11 to 31-13 for the interrelation between sections 8(1), 8(2) and 39(2). See also Currie & De Waal *The Bill of Rights Handbook* 148.

¹²³ Currie & De Waal *The Bill of Rights Handbook* 148.

¹²⁴ Section 239 contains certain definitions which apply to the interpretation of the Constitution as a whole. However only three terms are defined namely, “national legislation”, “organ of state” and “provincial legislation”.

¹²⁵ Currie & De Waal *The Bill of Rights Handbook* 135. See also *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC); LAWSA vol 5 part 4 par 14. See further Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* paras 1A9-1A19; Du Plessis “Interpretation of Statutes and the Constitution” in *Bill of Rights Compendium*; Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.3; Du Plessis “Interpretation” in Woolman & Bishop *Constitutional Law of South Africa*; Currie & De Waal *The Bill of Rights Handbook* 134-149 for a more comprehensive discussion of constitutional interpretation.

¹²⁶ *S v Zuma* supra par 17; *S v Mhlungu* supra par 78; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) par 23; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) par 53; *South African Police Service v Public Servants Association* [2007] 5 BLLR 838 (CC) par 20; *Bertie Van Zyl (Pty) Ltd v Minister of Safety and*

textual provisions must not be considered and construed in isolation. They must be interpreted contextually in light of the Constitution as a whole.¹²⁷

But constitutional disputes can seldom be resolved with reference to the literal meaning of the Constitution's provisions alone. Furthermore, while the literal meaning of the Constitution's provisions must be taken into account it is not necessarily conclusive. The Constitutional Court has consistently held that the Constitution and the Bill of Rights should be interpreted in a "purposive" or "generous" manner.¹²⁸ In *S v Makwanyane*¹²⁹ the Constitutional Court for example held that "whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give... expression to the underlying values of the Constitution'" A purposive interpretation is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values.¹³⁰ It seeks to ascertain the meaning of the fundamental rights

Security 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) par 21; LAWSA vol 5 part 4 par 16; Currie & De Waal *The Bill of Rights Handbook* 135-136.

¹²⁷ *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) par 36; *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (2) SA 554 (SCA) par 39; LAWSA vol 5 part 4 par 16; Currie & De Waal *The Bill of Rights Handbook* 135.

¹²⁸ *S v Zuma and Others* supra paras 14,15 and 18; *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) paras 9,10 and 325; *S v Mhlungu* supra par 8; *Bernstein v Bester* supra par 148; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) par 21; *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC); [1998] 1 All SA 268 (CC); 1997 (12) BCLR 1696 (CC) par 16; *South African National Defence Force Union v Minister of Defence* supra par 28; *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) par 47; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amici curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) par 232; *Matatiele Municipality v President of the Republic of South Africa* supra par 36; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* supra par 5; *Du Toit v Minister of Safety and Security* 2009 (12) BCLR 1171 (CC) par 9; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* supra par 49; *Justice Alliance of South Africa v President of the Republic of South Africa* 2010 (10) BCLR 1017 (CC) par 95; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 (3) BCLR 265 (CC) paras 84-86; *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC) par 28; *Steenkamp v Edcon Ltd* supra par 101; Albertyn & Kentridge "Introducing the right to equality in the interim constitution" (1994) SAJHR 149 151-152; Davis, Chaskalson & De Waal "Democracy and Constitutionalism: The Role of Constitutional Interpretation" in Van Wyk et al *Rights and Constitutionalism* 122-126; Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* par 1A9; Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights* par 1.3; LAWSA vol 5 part 4 paras 15-18 and 20; Du Plessis "Interpretation" in Woolman & Bishop *Constitutional Law of South Africa* 32-35 to 32-37; Currie & De Waal *The Bill of Rights Handbook* 136-140.

¹²⁹ *S v Makwanyane* supra par 9

¹³⁰ Currie & De Waal *The Bill of Rights Handbook* 136-137.

by an analysis of its purpose.¹³¹ A purposive approach is one in which a provision of the Bill of Rights is not construed in isolation, but rather in its context, which includes the language of the provision in question; the history and background to the adoption of the Constitution; the other provisions of the Constitution and, in particular, the Bill of Rights; and the principles and values that underlie the Constitution, particularly the Bill of Rights.¹³² Purposive interpretation has been developed in Canada mainly to determine the protective ambit of entrenched rights. According to the often quoted statement of this approach in the Canadian decision, *R v Big M Mart Ltd*,¹³³ the language of the text, the character and larger objects of a bill of rights, the historical origins of the concept and, where applicable, the meaning and purpose of other rights must be taken into account to identify the purpose of a right (the interest which it is meant to protect).¹³⁴

The nature of rights interpretation in a constitutional order is therefore distinctive in a number of respects. First, in contrast with conventional statutory interpretation it is overtly value-laden. Secondly, it requires the interpreter of the constitutional rights to pass value judgments on a text couched in inclusive and open-ended language. In contrast with constitutional systems committed to parliamentary sovereignty, courts have law-making authority in systems based on constitutional supremacy. Thirdly, rights interpretation is thought of as characteristically “purposive”. Finally, (purposive) rights interpretation is “generous” (or “liberal”) in that it seeks to optimise safeguards

¹³¹ *S v Zuma* supra par 15; LAWSA vol 5 part 4 par 15; Currie & De Waal *The Bill of Rights Handbook* 137.

¹³² LAWSA vol 5 part 4 paras 15-22; Currie & De Waal *The Bill of Rights Handbook* 138-145.

¹³³ (1985) 18 DLR (4th) 321; [1985] 1 SCR 295.

¹³⁴ In *R v Big M Mart Ltd* supra 395–396 the Court held:

“The meaning of a right or freedom guaranteed by the Charter must be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger object of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter”

See also *S v Zuma* supra par 15; *S v Makwanyane* supra paras 9 and 10; *Steenkamp v Edcon Ltd* supra par 101; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* supra paras 84-86; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* supra par 5; *Cool Ideas v Hubbard* supra par 28; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A9.

against interference with constitutionally entrenched rights.¹³⁵ A constitutional order calls for a departure from the inclination to read the text in a strictly literal and technical manner.¹³⁶

A discussion of all the protected rights listed in the Bill of Rights falls outside the ambit of this thesis, however, three of the listed rights will be referred to briefly. First, section 25 contains the right to property.¹³⁷ Section 25(1) provides that no-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Except for stating that property is not limited to land,¹³⁸ the Bill of Rights does not define “property”. Subject to the possibility that the right may be limited (which, in the South African Bill of Rights, represents the social dimension of the right)¹³⁹ an extensive meaning is attached to property in all democratic systems.¹⁴⁰ A company can be the bearer of the right to property.¹⁴¹

Secondly, section 18 provides that everyone has the right to freedom of association. This right is of particular importance to company law. It protects the right to form any organisation (including

¹³⁵ *Matatiele Municipality v President of the Republic of South Africa* supra par 36; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11; Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.3; Du Plessis “Interpretation” in Woolman & Bishop *Constitutional Law of South Africa* 32-2, 32-9 to 32-10.

¹³⁶ Du Plessis “Interpretation” in Woolman & Bishop *Constitutional Law of South Africa* 32-7.

¹³⁷ See generally Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A73; Mostert & Badenhorst “Property and the Bill of Rights” in *Bill of Rights Compendium*.

¹³⁸ Section 25(4)(b) of Constitution.

¹³⁹ Rautenbach argues that the suggestion in *First National Bank v CIR; First National Bank v Minister of Finance* 2002 4 SA 768 (CC); 2002 (7) BCLR 702 (CC) par 52 that the “definition” of property must reflect a balance between property rights and societal interests is not correct. He states that this may very well be necessary in systems without a general limitation clause, but concerns about the right to property as a so-called absolute right are unfounded as the right may be limited in terms of limitation clauses. Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A73.1.

¹⁴⁰ Kleyn “The constitutional protection of property: A comparison between the German and the South African approach” (1996) SAPL 402 419–424; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A73.1. Property includes immovable tangible property and land-use rights based on contract, court orders or legislation; movable tangible property; immaterial property (copyright, patents, trademarks, confidential commercial information); rights based on contract (debts, claims, goodwill, company shares, rights in partnerships); welfare rights against the state (pensions, medical benefits, subsidies); certain licences, quotas and permits issued by the state, and other rights against the state and based on legislation (especially land-use and water-use rights in terms of land reform and similar initiatives).

¹⁴¹ Compare *First National Bank v CIR; First National Bank v Minister of Finance* supra paras 43-45. See also Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A73.1. Mostert & Badenhorst “Property and the Bill of Rights” in *Bill of Rights Compendium* par 3FB3.3.

a company), to join an organisation, to remain a member and to participate in the activities of an organisation.¹⁴² The extent of the protection of the great variety of associations covered by this right is determined by the application of the general limitation clause and not by their inclusion or exclusion “by definition” during the first stage of an inquiry.¹⁴³

Lastly section 23 of the Constitution protects various interests and conduct within the framework of employment relations. The purpose of the right is to ensure that the relationship between an employee and an employer is fair to both.¹⁴⁴ Employees are specifically protected in the Constitution.¹⁴⁵

3.2.2 Limitations¹⁴⁶

The liberal conception of rights is that it may not be overridden by ordinary considerations of policy.¹⁴⁷ Communitarians (or progressives), on the other hand, believe that rights and freedoms are never absolute. They can be limited by the rights of others and by important social concerns such as public order, safety, health and other democratic values. Communitarians postulate that the conflict between rights and between rights and other constitutionally recognised principles requires balancing.¹⁴⁸

¹⁴² *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T) 1077. Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A66.1

¹⁴³ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A66.1.

¹⁴⁴ *NEHAWU v University of Cape Town supra* par 42. Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A71.

¹⁴⁵ Compare sections 13 (prohibition of slavery, servitude and forced labour) and 23(2) (the rights of workers) of the Constitution.

¹⁴⁶ See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* paras 1A43- 1A55; LAWSA vol 5 part 4 paras 23-38; Woolman & Botha “Limitations” in Woolman & Bishop *Constitutional Law of South Africa*; Currie & De Waal *The Bill of Rights Handbook* 150-175 for a more comprehensive discussion of the limitations of the rights contained in the Bill of Rights.

¹⁴⁷ This view unites Dworkin’s conception of rights as “trumps” (to be meaningful, individual rights must trump or outweigh collective goals), Rawl’s notion of the priority of the right over the good and Habermas’s conception of rights having a deontological character that withdraws them from the participation in a cost-benefit analysis. See Kumm “Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement” in Pavlakos (ed) *Law Rights and Discourse: The Legal Philosophy of Robert Alexy* 131 referred to in Currie & De Waal *The Bill of Rights Handbook* 151 n2.

The South African Bill of Rights adopted the communitarian or progressive approach. It appears to be modelled on the *Canadian Charter of Rights and Freedoms*¹⁴⁹ (“the *Canadian Charter of Rights and Freedoms*”), which contains a list of rights and a general limitation clause governing the limitation of those rights.¹⁵⁰ Section 7(3) of the South African Constitution provides that “[the] rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.” Section 7(3) constitutionalises both the principle that the rights protected in the Bill of Rights may be limited and the principle that all limitations must comply with the requirements in the Constitution.¹⁵¹

The general limitation clause, section 36 of the Constitution, provides as follows:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”¹⁵²

¹⁴⁸ Currie & De Waal *The Bill of Rights Handbook* 150. The theoretical case for reconciling the permissibility of justifiable limitation with the idea of the overriding importance of constitutional rights is made out by Alexy. According to Alexy, conflict between rights and other rights and between rights and other constitutionally recognised principles requires balancing. Balancing is an unavoidable and defensible practice of constitutional adjudication. See Alexy *A Theory of Constitutional Rights* (2002), referred to in Currie & De Waal *The Bill of Rights Handbook* 151 n2.

¹⁴⁹ Part I of the *Constitution Act, 1982* and enacted by the *Canada Act, 1982 (UK) c11*.

¹⁵⁰ LAWSA vol 5 part 4 par 23 n3; Currie & De Waal *The Bill of Rights Handbook* 152. As opposed to this approach, the United States Constitution does not contain a limitation clause at all. The German and Indian constitutions also do not have general limitation clauses. Instead, they attach specific limitation provisions to many of the fundamental rights.

¹⁵¹ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A43.

¹⁵² Currie and De Waal argue that the existence of section 36 of the Constitution (the general limitation clause) does not mean that the Bill of Rights can be limited for any reason. It is not simply a question of determining whether the

One of the consequences of the inclusion of a general limitation clause in the Bill of Rights is that the process of considering the limitation of the rights must be distinguished from the interpretation of the rights. This is the two-stage analysis of identifying an infringement of the right and evaluating the justification of the infringement.¹⁵³ In the first stage (discussed in section 3.2.1), the court must determine the scope of the right in question by a process of interpretation and ascertain whether the right has been infringed by the challenged law or conduct.¹⁵⁴ If there is indeed a limitation, the second stage or limitations exercise ensues. During the second stage, the justification for a limitation is investigated by the application of limitation clauses. In essence this stage requires that the nature and importance of the right that is limited together with the extent of the limitation be weighed against the importance and purpose of the limiting enactment. Section 36(1) provides which factors have to be considered in this balancing exercise.¹⁵⁵ This second part often involves a far more factual enquiry than a question of interpretation.¹⁵⁶ The Constitutional

benefits of a limitation to others or the public interest will outweigh the cost of the beneficiary of that right. If rights can be overridden simply on the basis that general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of the rights. The reasons for limiting the right need to be exceptionally strong. See Currie & De Waal *The Bill of Rights Handbook* 151

¹⁵³ *S v Williams* supra par 54; *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) par 9; *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) par 7; *Ferreira v Levin*; *Vryenhoek v Powell* supra par 44; *Ex Parte Minister of Safety and Security: In re S v Walters* supra paras 26-27; *Johncom Media Investments Ltd v M* 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) par 22; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) par 41; LAWSA vol 5 part 4 par 24; Currie & De Waal *The Bill of Rights Handbook* 153-155.

¹⁵⁴ *Ferreira v Levin*; *Vryenhoek v Powell* supra par 44; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A43; LAWSA vol 5 part 4 par 25; Currie & De Waal *The Bill of Rights Handbook* 153. The two-stage approach permits a “generous” interpretation to be given to the rights in the first stage of the analysis. See Currie & De Waal *The Bill of Rights Handbook* 153 n10.

¹⁵⁵ *Ex Parte Minister of Safety and Security: In re S v Walters* supra par 27; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A43; LAWSA vol 5 part 4 par 24; Currie & De Waal *The Bill of Rights Handbook* 152-155.

¹⁵⁶ *Moise v Greater Germiston Transitional Council* supra par 19; *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) par 20; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) paras 34-36; *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) par 37; *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) par 66; LAWSA vol 5 part 4 par 25; Currie & De Waal *The Bill of Rights Handbook* 145-155.

Court has, on occasion, demonstrated that it is willing to depart from this two-stage approach in order to avoid the difficulty of deciding whether a right has been infringed.¹⁵⁷

Section 36(2) provides that rights can also be justifiably limited in terms of any other provision of the Constitution.¹⁵⁸ Whilst most of the rights contained in the Bill of Rights are textually unlimited, some contain what may be referred to as special demarcations (or internal modifiers) and special limitations.¹⁵⁹ A special demarcation (or internal modifier) is a provision that demarcates the scope and ambit of a specific right.¹⁶⁰ It is part of the first stage of the two-stage analysis. A special limitation is a provision in terms of which a specific right may be justified. It operates in much the same way as the general limitations clause, except that it applies only to the right in question.¹⁶¹

As indicated hereinbefore the protection of the great variety of associations (including companies) covered by the right to freedom of association is determined by the second stage of the two-stage analysis (in other words the application of the general limitation clause) rather than the first stage of the inquiry. Woolman and De Waal reason that the justifications for banning or interference in membership policies or regulating the internal affairs of associations will vary substantially from associational context to associational context. They argue that, in general, the more public the functions of the association is, the more likely it is to be subject to state intervention.¹⁶² In most jurisdictions state action which aims to limit political association is normally subjected to higher levels of judicial scrutiny than state action that limits other forms of association.¹⁶³ Intimate and cultural associations normally receive the strong constitutional protection which flow from

¹⁵⁷ See for example *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC). See also LAWSA vol 5 part 4 par 25; Currie & De Waal *The Bill of Rights Handbook* 153-154.

¹⁵⁸ See also LAWSA vol 5 part 4 paras 35 and 37; Currie & De Waal *The Bill of Rights Handbook* 172-173.

¹⁵⁹ LAWSA vol 5 part 4 par 36; Currie & De Waal *The Bill of Rights Handbook* 173-175.

¹⁶⁰ For example sections 16(2), 17, 31(2) and 32(1)(b) of the Constitution.

¹⁶¹ For example sections 15(3), 22, 23(5) and 29(4).

¹⁶² Woolman & De Waal "Freedom of Association: The Rights to be We" in Van Wyk et al *Rights and Constitutionalism* 382.

¹⁶³ Woolman & De Waal "Freedom of Association: The Rights to be We" in Van Wyk et al *Rights and Constitutionalism* 382-384.

privacy rights or human dignity rights.¹⁶⁴ Associations which aim to empower historically disadvantaged groups support the Constitution's commitment to affirmative action and real equality and the state will be hard pressed to show that it has an interest in regulating the membership policies of such associations.¹⁶⁵ Small associations are unlikely targets for state interference.¹⁶⁶ Economic associations such as business companies may be subject to substantial limitations. Woolman and De Waal argue that this is so because these associations control the distribution of important social or public goods and must be subject to rules of fair play. As indicated in chapter 3, it is generally accepted that the overall objective of company law is to serve the interests of society as a whole.¹⁶⁷ A company is a public or quasi-public entity and a corporate citizen. It cannot be conceptualised simply as a private contractual arrangement.¹⁶⁸ As such, legal constraints are necessary to ensure that companies are accountable to the society in which they operate.¹⁶⁹ This philosophy forms the basis of the discipline of corporate social responsibility.¹⁷⁰

Where regulations are deemed to strike too far into the heart of the association's membership policies or internal affairs, the constitutional attack on the regulations is more likely to rely on the taking of property rights argument than it is on the infringement of associational rights argument. For example, in some jurisdictions shareholders in juristic persons often enjoy little freedom of

¹⁶⁴ Woolman & De Waal "Freedom of Association: The Rights to be We" in Van Wyk et al *Rights and Constitutionalism* 384-385.

¹⁶⁵ Woolman & De Waal "Freedom of Association: The Rights to be We" in Van Wyk et al *Rights and Constitutionalism* 385.

¹⁶⁶ Woolman & De Waal "Freedom of Association: The Rights to be We" in Van Wyk et al *Rights and Constitutionalism* 385-386.

¹⁶⁷ Even contractarians accept this.

¹⁶⁸ Keye argues that in some ways a closely held company may be seen as an aggregate of individuals carrying on business together as the shareholders have far more involvement than do shareholders in public companies. But even so the individual shareholders or a group cannot, save through or for the company, do certain things, such as concluding contracts or holding property. The membership of these companies may well also not remain the same, yet the company continues to exist. See Keye *The Corporate Objective* (2011) 190. See also Pollman "Reconceiving corporate personhood" (2011) *Utah Law Review* 1629 1662. Members can further contract with the company. It is also the company that takes and defends legal proceedings. Thus even closely held companies are separate legal persons. Wolff also uses the example of a number of corporations that have the same five shareholders. Each of these companies has its own property and creditors of one of them has no claim against the property of a second. See Wolff (1938) *Law Quarterly Review* 495 497.

¹⁶⁹ Bone "Legal perspectives on corporate responsibility: Contractarian or communitarian thought?" (2011) *Canadian Journal of Law and Jurisprudence* 277 292 n 95 and 293.

¹⁷⁰ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292-294.

associational protection. In such jurisdictions the shareholder's meeting is seen as the means of exercising shareholder's property rights. The protection for the shareholder's associations, if recognised, is then derived almost entirely from the right to property.¹⁷¹

3.3 The remedy stage

A comprehensive discussion of the remedy stage falls outside the scope of this thesis.¹⁷² In general terms it can be said that the types of remedies that a court may employ depends on whether the Bill of Rights applies directly or indirectly and also whether it applies vertically or horizontally.¹⁷³

In those cases where the Bill of Rights applies directly and vertically, section 172(1)(a) of the Constitution provides that, when deciding a constitutional matter, a court “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”. This obligation flows from the fact that the Constitution is supreme and that any law or conduct that is inconsistent with it is automatically invalid.¹⁷⁴ Section 172(1)(b) furthermore provides that a court “may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”¹⁷⁵ Section 38 of the Constitution further provides that a court may grant “appropriate relief, including a declaration of rights”. The Constitutional Court has used this power to develop a number of constitutional remedies, including a declaration of rights, an interdict, constitutional damages and meaningful engagement.¹⁷⁶

¹⁷¹ Woolman & De Waal “Freedom of Association: The Rights to be We” in Van Wyk et al *Rights and Constitutionalism* 385.

¹⁷² See LAWSA vol 5 part 4 paras 49-62; Currie & De Waal *The Bill of Rights Handbook* 176-208 for a more comprehensive discussion of the remedy stage.

¹⁷³ LAWSA vol 5 part 4 par 49(a).

¹⁷⁴ Section 2 of the Constitution.

¹⁷⁵ See generally LAWSA vol 5 part 4 paras 51-57; Currie & De Waal *The Bill of Rights Handbook* 183-195.

¹⁷⁶ See generally LAWSA vol 5 part 4 paras 58-61; Currie & De Waal *The Bill of Rights Handbook* 195-205.

In those cases where the Bill of Rights applies directly and horizontally, section 8(3) provides that a court “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1).”¹⁷⁷ In other words, the court must first seek a constitutional remedy for the private infringement of a fundamental right in legislation, failing which the court must seek the remedy in the existing common law, failing which the court must develop the common law to give effect to the right.¹⁷⁸ Section 8(3) is reinforced by section 39(2) of the Constitution which provides that when a court develops the common law, it must “promote the spirit, purport and objects of the Bill of Rights”.¹⁷⁹

¹⁷⁷ Section 8(3) does not contain the principle that the Bill of Rights applies to all law regulating private relations and that it binds private persons. That is done in the first part of section 8(1) and in section 8(2) discussed in section 3.1.1.2 hereinbefore. Section 8(3) becomes operative only *after* a decision has been made in terms of section 8(2) that a right in the Bill of Rights is capable of being applied to the *particular* private relations being considered; and the relevant provisions of the Bill of Rights, including the general or special limitation clauses, have been applied to the *particular* case at hand; and a conclusion has been reached that the existing statutory law and common law do not afford sufficient protection to a constitutional right in that *particular* situation. See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A42. Cockrell states that section 8(3) of the Constitution is parasitic on section 8(2), for it is triggered only at the stage when a court seeks to apply a provision of the Bill of Rights to a natural or juristic person in terms of section 8(2). See Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A9.

¹⁷⁸ See generally Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A42; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A9; Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.2; LAWSA vol 5 part 4 par 49(c); Currie & De Waal *The Bill of Rights Handbook* 207-208. See also *Ex parte Critchfield* 1999 (3) SA 132 (W) 142F–143D; *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C) 326F. In *Khumalo v Holomisa* supra par 31, O’Regan J explained that “[o]nce it has been determined that a natural person is bound by a particular provision of the Bill of Rights, s 8(3) then provides that a court may apply and, if necessary, develop the common law to the extent that legislation does not give effect to the right”.

¹⁷⁹ On the implications of s 39(2) of the Constitution, see *Fedics Group (Pty) Ltd v Matus* 1998 (2) SA 617 (C); 1997 (9) BCLR 1199 (C) 1218; *Hofer v Kevitt* 1998 (1) SA 382 (SCA) 387C; *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) par 31 (where Chaskalson JP left open the issue regarding the relationship between sections 8(2) and 8(3), and section 39(2) of the Constitution); *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) 316G–H; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173(C); 1999 (3) BCLR 280 (C) 182I–183A (where Davis J stated that s 39(2) of the Constitution requires that a common-law rule may have to be subjected to a “far-reaching development . . . in order to render it compatible with the Bill of Rights”); *Janse van Rensburg v Grieve Trust* CC supra 326H; *Mthembu v Letsela* 2000 (3) SA 867(SCA) 881H–883I; *Carmichele v Minister of Safety and Security* supra par 33; *Afrox Healthcare Bpk v Strydom* supra par 29; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) paras 18-20; *S v Thebus* supra paras 26-32; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) paras 35-37; *K v Minister of Safety and Security* supra paras 16-17; *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) paras 42-61; *Lee v Minister for Correctional Services* 2013 (2) BCLR 129 (CC). See also Woolman “Defamation, application and the interim Constitution: An unqualified and direct analysis of *Holomisa v Argus Newspapers Ltd*” (1996) SALJ 428 452; Wolhuter S “Horizontality and the interim and final Constitution” (1996) SAPL 512 526-527; Woolman (2007) SALJ 762 794. Section 173 of the Constitution may also be relevant in this context. See *Vista University, Bloemfontein Campus v Student Representative Council, Vista University* 1998 (4) SA 102 (O) 104H-I (where the court relied on section 173 of the

Lastly, in those cases where the Bill of Rights applies indirectly, the Courts must apply ordinary remedies to give effect to the fundamental values in the Bill of Rights.¹⁸⁰

4 THE CONSTITUTIONAL VALUES

4.1 Modern democratic constitutions

Modern democratic constitutions apportion power and circumscribe limits on the basis of values and principles.¹⁸¹ These values and principles are the normative foundation on which most modern democratic constitutions are based. They are at their most intense in a bill of rights. Bills of rights are a feature of modern democratic constitutions. Their functions are to ensure the perpetuation of democratic governance and to serve as guidelines for the three branches of government in the realisation of the kind of society contemplated by the constitution.¹⁸²

Because a constitution is premised on a range of values and principles, these values and principles can pull in different directions. Any one person will emphasize one value over another depending on that person's foundational system of belief and philosophical approach to justice.¹⁸³ For

Constitution in order to develop the common-law rules regarding representation of minors in civil litigation) and *Janse van Rensburg v Grieve Trust CC* supra 326I. In *Amod v Multilateral Motor Vehicle Accidents Fund* supra par 30, Chaskalson JP left open the question whether the inherent power of a court to develop the common law in terms of section 173 of the Constitution is more extensive than the power under the interim Constitution which was recognised in *Du Plessis v De Klerk* supra. See also Cockrell "Private Law and the Bill of Rights: A Threshold Issue of 'Horizontally'" in *Bill of Rights Compendium* par 3A9.

¹⁸⁰ See generally LAWSA vol 5 part 4 par 49(d); Currie & De Waal *The Bill of Rights Handbook* 56-67 and 177.

¹⁸¹ This represents the holistic approach of the coherence constitutional theory. See Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights* par 1.3.

¹⁸² Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights* par 1.1.

¹⁸³ Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights*. Three distinct horizontal levels in the structure of legal discourse are discussed in chapter 3. The upper-most of these three levels contains our discussions and disagreements about rules, doctrine and particular legal outcomes - the practical application of the law. The middle level is comprised of the various and conflicting theories of law. The theory that we adopt on this level depends our system of belief. Each system of belief corresponds to a distinct community, each is governed by its own set of rules and each is, in important ways inconsistent and incompatible with the others. The systems of belief in this middle level rests in turn upon a distinctive set of underlying assumptions and beliefs, prime values and projects, centres of attention, intellectual affiliations, and styles of interpretation and arguments that comprise the third and most basic level of legal discourse. The differences in these foundational systems of belief account for most of the dysfunctionality of the arguments and explanations that go on at the upper-most level of rules, doctrine and policy. See Wetlaufer "Systems of belief in modern American law: A view from century's end" (1999) *American University Law Journal* 1 3-8. The three broad philosophical approaches to justice that Sandel identified are also discussed in chapter 3. These philosophical approaches are situated at the foundational or most basic level of legal

example, a libertarian would contend that dignity is best protected when individual freedom is given the greatest possible protection from both individual interference and state intervention.¹⁸⁴ Within this vision of the world, dignity takes on a rather different meaning to that which it may have within the context of a social democracy. Social democrats would contend that dignity is best protected in a society where freedom is tempered by the social good.¹⁸⁵ The role that the company plays in the political system depends on the normative vision that is adopted of the ideal political state.

Generally speaking, Western constitutional theory, which derives from political liberalism, focusses on first generation human rights namely, the civil and political rights of the individual, such as freedom of speech, press, religion, assembly and association. Liberalism is focused on the individual's concerns as opposed to those of the family, community, company or the state.¹⁸⁶ The moral basis of liberalism is self-ownership.¹⁸⁷ Individualism aims to prevent the state from interfering with individual rights, a concept known as negative rights.¹⁸⁸

discourse. The first approach connects justice to the idea of maximizing welfare. The doctrine of utilitarianism is the most influential within this approach. The second approach connects justice to freedom. It emphasizes respect for individual rights. There are two rival camps within this group namely, the *laissez-faire* camp led by the free-market libertarians and the fairness camp consisting of theorists with a more egalitarian approach. The last approach sees justice as bound up with virtue and the good life. See Sandel *Justice What's the Right Thing to Do?* (2009) (hereinafter "Sandel *Justice*") 6 and 19-20. Just as there are various theories about the nature of the company (refer to chapter 3), there are also various constitutional theories. Originalism, for example, is based on the idea that the will of the majority is sacrosanct in a democracy. The doctrine of parliamentary sovereignty is founded in this theory. Process theory is based on the view that constitutional rights are the necessary conditions of the process of democratic will-formation. The rights guaranteed by the constitution create the framework within which democratic politics can take place. The role of the judicial interpreter is to safeguard this constitutional framework from erosion, even when that stems from the will of a democratically elected legislature. A further example of a constitutional theory is the coherence theory, exemplified by the work of Ronald Dworkin. For Dworkin, the task of the interpreter is to make the best of the interpreted object; that is, the interpretation must discover the purposive structure of the text and thereby ensure that the meaning of each component of the text promotes the overall integrity of the text. See Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights* par 1.3.

¹⁸⁴ Ackermann J adopted a similar approach in his judgment in *Ferreira v Levin; Vryenhoek v Powell* supra par 54 when, by employing a reading of Kant and Isaiah Berlin, he concluded that the right to freedom is the negative right of individuals not to have possible choices and activities placed in their way by the state.

¹⁸⁵ Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights* par 1.3.

¹⁸⁶ Wing "Communitarianism vs individualism: Constitutionalism in Namibia and South Africa" (1992) *Wisconsin International Law Journal* 295 297-298.

¹⁸⁷ The idea that I own my body, my life and my person and should be free to do whatever I want to do with them, as long as I do not hurt others. See Sandel *Justice* 70. According to the prominent liberal theorist John Rawls, the individual is the only "self-originating source of valid claims". See Rawls "Kantian construction in moral theory" (1980) *Journal of Philosophy* 515 543 cited in Wing (1992) *Wisconsin International Law Journal* 295 298.

From a liberal political individualistic point of view there are only two entities of significance in the political structure namely, the government on the one hand and isolated individual natural persons on the other. The state is seen as an all-powerful entity with the potential ability to threaten the rights and liberties of the individual. As a result it is necessary to establish laws to protect individual rights.¹⁸⁹ Companies as independent entities do not play a significant social or political role.¹⁹⁰ They are conceptualised as either creatures or concessions of the state, or as aggregates of their individual members.¹⁹¹ There is little concern that companies can grow so powerful that they can also violate human rights. To the contrary, as aggregates of their individual members they should also be protected against the all-powerful state.¹⁹²

In contrast to the liberal political individualistic vision, the political pluralist vision postulates that society consists of more than just an all-powerful state and isolated individuals.¹⁹³ Political pluralism advances two opposing views of the large company. The one view is that companies, especially the large companies, are centres of political and economic power comparable to the power of the state. Individuals must not only be protected against state oppression, but also against oppression by companies. It has even been suggested that basic human rights should be extended to protect individuals from corporate power.¹⁹⁴ This is even more so if companies have

¹⁸⁸ Wing (1992) *Wisconsin International Law Journal* 295 298.

¹⁸⁹ Dan-Cohen *Rights, Persons and Organization: A Legal Theory for Bureaucratic Society* (1986) 164-165; Ripken “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle” (2009) *Fordham Journal of Corporate & Financial Law* 97 140-141.

¹⁹⁰ Dan-Cohen *Rights, Persons and Organization: A Legal Theory for Bureaucratic Society* 164, referred to in Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 141 n 163. Dan-Cohen notes that liberal thinkers such as Bruce Ackerman, Ronald Dworkin, Robert Nozick and John Rawls do not seriously deal with the role of organizations as separate entities. To the extent that they deal with them at all, they are subsumed in the category of individuals.

¹⁹¹ This echoes the conceptualization of the company according to the fiction theory and the aggregate theory.

¹⁹² Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 141.

¹⁹³ Tsuk “From pluralism to individualism: Berle and Means and 20th century American legal thought” (2005) *Law & Social Inquiry* 179 189-191; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 141-142.

¹⁹⁴ Berle “The developing law of corporate concentration” (1952) *University of Chicago Law Review* 639 643; Berle “Constitutional limitations on corporate activity – protection of personal rights from invasion through economic power” (1952) *University of Pennsylvania Law Review* 933 944; Tsuk (2005) *Law & Social Inquiry* 179 180-181; Greenwood “Essential speech: Why corporate speech is not free” (1998) *Iowa Law Review* 995 1007; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 142-143.

significant political influence. Some large companies spend vast amounts of money in lobbying efforts to impact government policies. The obvious purpose of these companies is either to avoid or reduce the regulation of companies, or to achieve their selfish aims. On this view corporate power threatens democratic politics and ideals. The state, as the only countervailing source, must protect individuals from the economic and political power of companies.¹⁹⁵ A natural corollary of this view is that companies should not be entitled to the same fundamental rights as humans.¹⁹⁶

The opposing view is that the company is a critical instrument of freedom and democracy. The all-powerful state is too abstract an entity to win the loyalty of individual citizens, who are far more likely to identify themselves with the diverse groups and entities they, as social beings, established. These entities serve as a buffer between individuals and the state and form an essential means of democratic self-rule.¹⁹⁷ As indicated in the historical analyses, this is the role that ecclesiastical associations, towns, universities and guilds played in medieval Europe.¹⁹⁸ In political discourse, mediating structures are typically associated with the family, religious organisations, neighbourhoods and voluntary associations. Business ethicists have suggested that companies can today serve as mediating institutions in society.¹⁹⁹ On this view companies are constitutive elements of society that allow individuals to define their own way of life rather than

¹⁹⁵ Martin “The Corporation and Antitrust Law Policy: Double Standards” in Samuels & Miller (ed) *Corporations and Society: Power and Responsibility* (1987) 193 & 214; Berk “Corporate power and its discontents” (2006) *Buffalo Law Review* 1419 1423; Fish “The ‘bad man’ goes to Washington: The effect of political influence on corporate duty” (2006) *Fordham Law Review* 1593 1605-1607; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 144.

¹⁹⁶ Dan-Cohen *Rights, Persons and Organization: A Legal Theory for Bureaucratic Society* 176, referred to in Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 145 n 181.

¹⁹⁷ Dan-Cohen *Rights, Persons and Organization: A Legal Theory for Bureaucratic Society* 177; Bainbridge “Community and statism: A conservative contractarian critique of progressive corporate law scholarship” (1997) *Cornell Law Review* 856 833; Tsuk “Corporations without labor: The politics of progressive corporate law” (2003) *University of Pennsylvania Law Review* 1861 1876; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 142 and 145-148.

¹⁹⁸ Micklethwait & Wooldridge *The Company a Short History of a Revolutionary Idea* (2003) 12; Kuran “The absence of the corporation in Islamic Law: Origins and persistence” (2005) *The American Journal of Comparative Law* 785 791-793; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 146; Pollman (2011) *Utah Law Review* 1629 1631; Blair “Corporate personhood and the corporate persona” (2013) *University of Illinois Law Review* 785 789.

¹⁹⁹ Long “The Corporation, its Satellites, and the Local Community” in Mason (ed) *The Corporation in Modern Society* (1959) 202; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97 146-147.

having these decisions made by an all-powerful state that should be encouraged and freed from state regulation.²⁰⁰

The common denominator of these opposing views in the political pluralist camp is the recognition that companies and the state are socially and politically significant and have the power to affect society in dramatic ways. Ripken argues that the collective centres of power of companies and the state must be balanced in ways that do not inhibit the productive activities of both. That balance must consistently be readjusted as our society and companies evolve.²⁰¹

Communitarians (also known as progressives) criticise liberals' focus on individualism. They argue that, whilst the notion of self-ownership is appealing, especially to those who seek a strong foundation for individual rights, it has undesirable consequences, like an unrestricted market in which the disadvantaged are left vulnerable and unprotected; minimal regulation that excludes most measures to lessen inequality and promote the common good and a celebration of consent so complete that it permits self-inflicted violations of human dignity such as prostitution or selling oneself into slavery.²⁰² Communitarians reason that the liberal conception of freedom does not explain a range of moral and political obligations that we commonly recognise, or even treasure. These include obligations of solidarity and loyalty, historic memory and religion.²⁰³ A major communitarian criticism of individualism is that it makes no provision for civil society, the collection of groups that exist between the individual and the state. These groups can include the family, clans, companies, labour unions, religious and ethnic groups, language groups and the like.²⁰⁴

²⁰⁰ Schneiderman "Harold Laski, Viscount Haldane, and the law of the Canadian Constitution in the early twentieth century" (1998) *University of Toronto Law Journal* 521-529; Bainbridge (1997) *Cornell Law Review* 856-897; referred to in Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97-147-148.

²⁰¹ Berle & Means *The Modern Corporation & Private Property* (1991) (hereinafter "Berle & Means *The Modern Corporation*") 3-4 and 309-310; Ripken (2009) *Fordham Journal of Corporate & Financial Law* 97-148-149.

²⁰² Sandel *Justice* 65, 69-74 and 103-105.

²⁰³ Wing (1992) *Wisconsin International Law Journal* 295-301; Sandel *Justice* 220-221.

²⁰⁴ Wing (1992) *Wisconsin International Law Journal* 295-300-301.

Communitarians emphasise the social arena in which individual activity occurs. By virtue of membership of a shared community, individuals are interdependent and owe obligations to each other.²⁰⁵ According to communitarians individuals not only have rights, but also concomitant responsibilities or duties to the various communities of which each person is a part.²⁰⁶ Communitarians' vision of liberty is one that includes a positive component. For them, liberty is empty without taking into account those primary needs upon which adequate conceptions of human dignity and human flourishing depend.²⁰⁷

Communitarians support second generation human rights in economic, social and cultural areas, including the right to health, work and education.²⁰⁸ Whereas the first generation rights focus on the individual, the second generation economic and social rights have a decidedly collective touch by safeguarding the rights of the individual within the confines of apolitical group entities.²⁰⁹ Communitarians also support the third generation of human rights, the so-called solidarity rights which include, among others, the right to peace, development of disadvantaged sectors of a country or a developing country, a clean environment and the like. The third generation rights are also sometimes called "green rights" and include "peoples' rights" that benefit current and future generations of the global community.²¹⁰

²⁰⁵ Millon "New directions in corporate law: Communitarians, contractarians and the crises in corporate law" (1993) *Washington and Lee Law Review* 1373 1382; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 291. For Aristotle justice is rooted in a community whose primary bond is a shared understanding that what is good for both the individual and the community. See Gutmann "Communitarian critics of liberalism" (1985) *Philosophy and Public Affairs* 308 309; Wing (1992) *Wisconsin International Law Journal* 295 299.

²⁰⁶ Wing (1992) *Wisconsin International Law Journal* 295 298-299.

²⁰⁷ Millon (1993) *Washington and Lee Law Review* 1373 1382-1383.

²⁰⁸ Wing (1992) *Wisconsin International Law Journal* 295 302.

²⁰⁹ Van der Vyver "Constitutional options for post-apartheid South Africa" (1991) *Emory Law Journal* 745 779; Wing (1992) *Wisconsin International Law Journal* 295 302-303; Kende "The South African Constitutional Court's construction of socio-economic rights: A response to critics" (2003) *Connecticut Journal of International Law* 617 718. Siegel states: "[s]ocio-economic rights have rather deep roots, in addition to be socialist, also feudal, mercantilist, Methodist, utilitarian, radical, conservative, Roman-Catholic – and even liberal." See Siegel "Socio-economic human rights: Past and future" (1985) *Human Rights Quarterly* 257 260, cited in Boshoff "Geregtigheid en sosio-ekonomiese regte in Suid-Afrika" (1991) *TSAR* 446 447-448.

²¹⁰ Karl Wasak first conceptualised the notion of third generation rights. Wasak "Droits de l'Homme et l'Afrique" (1967) *Revue Belge de Trait International* 459; Van der Vyver (1991) *Emory Law Journal* 745 780-781; Wing (1992) *Wisconsin International Law Journal* 295 303.

Communitarianism has deep roots in African culture. Duty towards family, clan, tribe or other ethnic groups intensely influences African citizens.²¹¹ Very influential African politicians and scholars articulated a particular form of communitarianism and labelled it socialism, but it is a particular form of socialism based upon Afrocentric reality opposed to free market capitalism and doctrinaire Marxist-Leninism.²¹² The first president of Tanzania, Julius Nyerere, enunciated the concept of *Ujaama* (familyhood) socialism as follows:

“The foundation and objective of African socialism is the extended family... Ujaama ... or ‘Familyhood’ describes our socialism. It is opposed to capitalism which seeks to build a happy society on the basis of the exploitation of man by man, and is equally opposed to doctrinaire socialism which seeks to build its happy society on a philosophy of conflict between man and man. We, in Africa, have no more need of being ‘converted to socialism’ that we have in being ‘taught’ democracy. Both are rooted in our past – the traditional society that produces us.”²¹³

The communitarian approach also finds support in the philosophy of *ubuntu*: A person is only a person because of other people.²¹⁴

4.2 The South African Constitution

The South African Constitution is a modern constitution. It embodies an objective normative value system that acts as a guiding principle and stimulus for the legislature, executive and judiciary.²¹⁵ In *De Lange v Presiding Bishop of the Methodist Church*²¹⁶ the Constitutional Court remarked that the Constitution is more than a law. It is the legal and moral framework within

²¹¹ Boshoff (1991) TSAR 446 447; Wing (1992) Wisconsin International Law Journal 295 311.

²¹² Wing (1992) Wisconsin International Law Journal 295 311.

²¹³ Nyerere “Ujaama, the Basis of African Socialism” in Nyerere *Ujaama: Essays on Socialism* (1968) 11 cited in Wing (1992) Wisconsin International Law Journal 295 311.

²¹⁴ Boon *The African Way The Power of Interactive Leadership* (2001) 31. See also Keevy “The Constitutional Court and ubuntu’s ‘inseparable trinity’” (2009) JJS 61; Mokgoro “Ubuntu, the Constitution and the Rights of Non-Citizens” (2010) Stell LR 221; Church J “Sustainable development and the culture of uBuntu” (2012) DJ 511; *S v Makwanyane* supra par 365; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 86; *South Africa Broadcasting Corporation v Mpofo* [2009] 4 All SA 169 (GSJ) paras 62-66; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* supra par 23.

²¹⁵ *Carmichele v Minister of Safety and Security* supra par 54; Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 2.1.3.

²¹⁶ 2016 (1) BCLR 1 (CC) par 83.

which we agreed to live. The Constitutional Court has often invoked the German Federal Constitutional Court’s notion of an “objective normative value system”.²¹⁷

The South African Constitution expressly articulates certain values.²¹⁸ The preamble decrees that the Constitution was adopted to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.²¹⁹ Section 1, which contains the founding values and is super-entrenched,²²⁰ proclaims the Republic to be one, sovereign, democratic state founded on certain values. The listed values constitute, to a large extent, the essence of the provisions of the Bill of Rights: human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. The Bill of Rights and various other provisions of the Constitution give effect to these values.²²¹ The founding values have an important place in our Constitution.

²¹⁷ *Carmichele v Minister of Safety and Security* supra paras 54-55; *S v Thebus* supra par 27; *Phumelela Gaming and Leisure Ltd v Gründlingh* supra paras 25-29; Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-47.

²¹⁸ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11; Currie & De Waal *The Bill of Rights Handbook* 7-22.

²¹⁹ See also Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11.

²²⁰ By section 74(1), which provides that sections 1 and 74(1) may only be amended by a Bill passed by the National Assembly, with a supporting vote of at least 75 per cent of its members; and the National Council of Provinces, with a supporting vote of at least six provinces. See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A33.

²²¹ For example “human dignity” in the right to human dignity in section 10 of the Constitution; “the achievement of equality” and “non-racialism and non-sexism” in the right to equality in section 9; the “advancement of human rights and freedoms” in all the provisions of the Bill of Rights in chapter 2; “supremacy of the Constitution” in the supremacy clause in section 2; “universal adult suffrage” and “regular elections” in the political rights in section 19(2); “multi-party system democratic government” in section 19(1); and the participation of minority parties in all legislative proceedings in sections 57(2), 116(2) and 160(8). The principle of legality which the Constitutional Court considers to form part of the rule of law referred to in section 1(c) is given effect to in the supremacy clause in section 2 (law or conduct inconsistent with the Constitution is invalid), the Bill of Rights and all other provisions with requirements in respect of the contents of actions and measures that may be taken, the procedural requirements for legislative, executive and judicial action, and the division of powers amongst organs of state and amongst spheres of government. See Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11; LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19. In *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) par 1 Mogoeng CJ held that we adopted accountability, the rule of law and supremacy of the Constitution as values of our constitutional democracy. For further authority that the South African Constitution is founded on the rule of law see *Qozeleni v Minister of Law*

They not only inform the interpretation of the Constitution and other law, but also set positive standards within which all law must comply in order to be valid.²²² The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution.²²³

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO*²²⁴ the Constitutional Court held that “[t]he purport and objects” of the Constitution “find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve”. In one of its few fuller comments on section 1, the Constitutional Court explained in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*²²⁵ that the values enunciated in section 1 inform and give substance to all the provisions of the Constitution but that they do not, however, give rise to discrete and enforceable rights in themselves. On this view, the rights in the Bill of Rights give “effect to the values and must be construed consistently with them.” The founding values themselves are only applied indirectly, via other parts of the text. Their role is to be some sort of subsidiary interpretative aid.²²⁶

By contrast, one possible reading of several other cases is that section 1 has a stand-alone legal effect such that one could be said to violate a founding value, as one might violate a right or a mandatory provision.²²⁷ The Constitutional Court has for example used the foundational values in

and Order 1994 (3) SA 625 (E); 1994 (1) BCLR 75 (E) 633H; *S v Zuma* supra par 17; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* supra par 58; *President of the Republic of South Africa v South African Rugby Football Union* supra par 148; *Affordable Medicines Trust v Minister of Health* 2006 (2) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 48-49; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) par 49; *Mighty Solutions CC v Engen Petroleum Ltd* supra par 37.

²²² *United Democratic Movement v President of the Republic of South Africa* (2) 2003 (1) SA 495 (CC); 2002 (11) BCLR 1213 (CC) par 19.

²²³ *Carmichele v Minister of Safety and Security* supra para 54.

²²⁴ Supra par 29.

²²⁵ Supra par 23.

²²⁶ Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-9; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11.

²²⁷ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of*

section 1 to develop a legality or rule of law doctrine.²²⁸ Fawkes argues that there is a middle way, which permits the cases to be reconciled. On this understanding, the founding values are not just a subsidiary interpretative resource, like the preamble. They are descriptive principles of particularly important aspects of what other parts of the Constitution already protect and uphold. The obligation that section 1 imposes is that this description must be borne out when the Constitution is implemented.²²⁹ Fawkes concludes however that there is plenty of uncertainty about the details of section 1's function and that the Constitutional Court has not given a firm answer to the concrete question of exactly when and where it must be used.²³⁰ As a whole, the section's most important substantive message is that the founders of the Constitution chose to rest it on values.²³¹

Section 7 of the Constitution provides that the Bill of Rights is the cornerstone of democracy in South Africa which enshrines the rights of all people in the country and “affirms the democratic values of human dignity, equality and freedom.” Section 36 provides that the rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in a particular kind of society namely, “an open and democratic society based on human dignity, equality and freedom”, and not in a closed, undemocratic society in which human dignity is not cherished and people are not treated as free and equal human

South Africa supra; *United Democratic Movement v President of the Republic of South Africa (No. 2)* supra; Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-12.

²²⁸ According to this doctrine a rational relationship must exist between any exercise of government power and a legitimate government purpose. See *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) paras 19 and 20; *President of the Republic of South Africa v South African Rugby Football Union* supra; *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* supra; *Affordable Medicines Trust v Minister of Health of the Republic of South Africa* supra par 100; *Albutt v Centre for the Study of Violence and Reconciliation* supra paras 69 and 72; Rautenbach “Means-end rationality in Constitutional Court judgments” (2011) TSAR 768; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* paras 1A11, 1A32, 1A51 and 1A79.2; Currie & De Waal *The Bill of Rights Handbook* 10-14.

²²⁹ Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-12.

²³⁰ Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-11.

²³¹ Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-47. See also, for example, *Carmichele v Minister of Safety and Security* supra paras 54-55. For a critical assessment of the notion of an “objective normative value order”, see Woolman “Application” in Woolman & Bishop *Constitutional Law of South Africa* chapter 31.

beings.²³² Section 39(1)(a) further provides that, when interpreting the Bill of Rights, a court, tribunal or forum “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. The Constitution accordingly demands that a value-based approach be followed in the interpretation of the Bill of Rights.²³³ Fawkes argues that sections 7, 36 and 39 contain the Bill of Rights’ own internal value provisions. They focus on five ideas namely, human dignity, equality, freedom, democracy and openness. In some respects, these values are broader than those set out in section 1, and in some respects, narrower.²³⁴

Other provisions of the Constitution also describe specific values, some of which overlap with each other and the values defined in section 1.²³⁵ Section 41 sets out the principles of cooperative and inter-governmental government relations and provides that all spheres of government and all organs of state must, amongst others, secure the well-being of the people of South Africa; provide effective, transparent, accountable and coherent government; and be loyal to the Constitution, the Republic of South Africa and its people. Section 152 provides that the objects of local government include to provide democratic and accountable government, to promote social and economic development and to promote a safe and healthy environment. Section 195 deals with the basic values and principles governing public administration and provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. This includes the principles of professional ethics, efficient, economic and effective use of resources; development-orientated administration; and providing services impartially, fairly, equitably and without bias. Section 198 deals with the principles that govern national security and *inter alia* provides that national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want to seek a better life. It also provides that national security must be preserved in compliance with the law, including international law.

²³² Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A46.

²³³ *Matatiele Municipality v President of the Republic of South Africa* supra par 36; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11.

²³⁴ Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* par 13.4 (c).

²³⁵ Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11.

The Constitutional Court has referred to a number of other founding values that are not expressly referred to in the Constitution. Amongst these are: constitutionalism,²³⁶ the separation of powers,²³⁷ co-operative government, transformation²³⁸ and *ubuntu*.²³⁹ *Ubuntu* was an express grundnorm of the interim Constitution.²⁴⁰ Whilst the term *ubuntu* is no longer specifically referred to in the final Constitution, it is still regarded as a founding value.²⁴¹ Fawkes argues that, if the opening words of section 1 are read as expressing the importance of sovereignty and democracy, it may not be too much of a stretch to read them as also expressing the importance of “oneness”. The idea of being one state has a natural resonance in the South African context with its history of divisions and its transitional emphasis on reconciliation and nation-building.

²³⁶ Currie & De Waal *The Bill of Rights Handbook* 7-10.

²³⁷ *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T); *Glenister v President of the RSA* supra; LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19; Currie & De Waal *The Bill of Rights Handbook* 7 and 18-22.

²³⁸ *S v Makwanyane* supra par 262; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* supra par 73; LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19.

²³⁹ *S v Makwanyane* supra paras 224-225; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC); LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19.

²⁴⁰ The post-amble of the Interim Constitution provides:

“This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex... these can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *Ubuntu* but not for victimisation.”

²⁴¹ *S v Makwanyane* supra paras 224, 225, 263, 307, 308 and 365; *Hoffman v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) par 38; *Port Elizabeth Municipality v Various Occupiers* supra par 37; *Pharmaceutical Society of South Africa v Minister of Health*; *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang* 2005 (6) BCLR 576 (SCA) par 39; *Dikoko v Mokhatla* supra par 68-69 and 112-116; *Union of Refugee Women v Director*; *Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) par 145; *Barkhuizen v Napier* supra par 51; *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) par 238; *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* supra par 77; *Van Vuuren v Minister of Correctional Services* 2011 (10) BCLR 1051 (CC) par 51; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* supra paras 23-24; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) par 38; Mqoke “Customary law and human rights” (1996) SALJ 364; Keevy (2009) JJS 61; Mokgoro (2010) Stell LR 221; Church J (2012) DJ 511; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A11; Davis & Youens “Life” in Cheadle et al *The Bill of Rights* par 6.4; Haysom “Freedom of Association” in Cheadle et al *The Bill of Rights* par 13.1; LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19; Woolman & Swanepoel “Constitutional History” in Woolman & Bishop *Constitutional Law of South Africa* par 2.2; Currie & De Waal *The Bill of Rights Handbook* 259 and 590.

Read as such, the wording also offers a potential textual hook for the idea of *ubuntu* as a founding value. *Ubuntu* is, after all, a sophisticated account of our being one and of what that implies for ethics. Its links to reconciliation and nation-building are very strong, both historically and philosophically.²⁴² In *S v Makwanyane*²⁴³ Mokgoro J explained:

“Generally, *ubuntu* translate to humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.”

Earlier in the same judgement Langa J comments:

“[*Ubuntu*] recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”²⁴⁴

Given the historical origins of the South African text, it is not surprising that there are different and conflicting visions of the text. Our final Constitution is a negotiated and largely consensus-based text. The negotiators represented a range of ideological viewpoints. Compromises were made for the purpose of consensus and there is accordingly textual support for differing visions of the Constitution.²⁴⁵ For example, during the negotiation process deep-seated differences surfaced

²⁴² Fawkes “Founding Provisions” in Woolman & Bishop *Constitutional Law of South Africa* 13-48. However, Fawkes could find no case among the existing judicial discussions of *ubuntu* that traces it to section 1.

²⁴³ *Supra* par 307.

²⁴⁴ *S v Makwanyane* *supra* par 224.

²⁴⁵ The characterisation of a constitutional text as promoting a particular form of government is not unique. Thus, article 20 of the German Basic Law declares Germany to be a democratic and social federal state. Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.1.

between libertarians and liberationist egalitarians. Libertarians focus on individual freedom as a core value rather than on equality. Libertarianism is rooted in the classical liberalist ideology. Liberationists, on the other hand, focus more on equality and are prepared to tolerate an interventionist state to an extent necessary to ensure optimum equality in the distribution of means and equal opportunities for all. Liberationism is based on ideologies ranging from social democracy to democratic socialism but cannot really be described as being “socialist” or “collectivist” by nature in the true sense of the word. In South Africa liberationism goes beyond egalitarianism – it nurtures a spirit of “freedom fighting” which requires the struggle against oppression, prejudice and discrimination to grow through the acquisition and exercise of political power.²⁴⁶

Klare describes the Constitution as “post-liberal”, in that it is “[s]ocial, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.”²⁴⁷

The erstwhile Judge President of the Constitutional Court, Judge Chaskalson wrote:

“The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another.”²⁴⁸

The Constitution has one of the most comprehensive Bills of Rights in the world, encompassing first-, second- and third generation human rights.²⁴⁹ While entrenching the rights and freedoms

²⁴⁶ Du Plessis (1994) TSAR 706 708; Mostert “South African constitutional property protection between libertarianism and liberationism: Challenges for the judiciary” (1994) *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 295 298-299.

²⁴⁷ Klare “Legal culture and transformative constitutionalism” (1988) SAJHR 146 154-155; Pieterse “Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa” (2003) *Stell LR* 3 11.

²⁴⁸ Chaskalson “Human dignity as a foundational value of our constitutional order: The third Bram Fischer lecture” (2000) SAJHR 193 205; Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.3.

²⁴⁹ Wing (1992) *Wisconsin International Law Journal* 295 323; Kende (2003) *Connecticut Journal of International Law* 617 718.

associated with liberal democratic constitutionalism, it is equally (if not more) focussed on social transformation. It does not only envisage the political transformation of the South African society, but also its social and economic transformation. Pieterse argues that the Constitution departs significantly from traditional, liberal models of constitutionalism in at least three respects. First, the Bill of Rights can also be enforced against private parties. Secondly, it embraces the concept of substantive equality and is transformative in nature. Lastly, it also incorporates social and economic rights.²⁵⁰ According to Pieterse the Constitution demands a social-democratic political vision.²⁵¹

Cheadle and Davis also view the constitutional text, read as a whole, as presenting a vision for a social democratic society.²⁵² They base their view on a number of provisions of the Constitution for example, the express introduction of horizontal application in section 8, thereby doing away with the division between the exercise of public and private power; the emphasis on substantive equality in section 9, especially the right to equal benefits; the range of protections afforded by section 23 to organised labour, including the right to engage in collective bargaining and the right to strike; a range of socio-economic rights which impose obligations, albeit qualified, upon the state to provide basic amenities of life to the population, including housing, health care, food, water, social security and education, in terms of sections 26, 27 and 29; a right to an environment which is not harmful to health or well-being; and the pronouncement in section 7(1) that the text enshrines the values of human dignity, equality and freedom within a democracy; and the obligations imposed upon the state in terms of section 7(2) to respect, protect, promote and fulfil the rights in the Bill of Rights.²⁵³

²⁵⁰ Pieterse (2003) Stell LR 3 9-10.

²⁵¹ Pieterse (2003) Stell LR 3 12 and 27.

²⁵² Cheadle and Davis prefer the term “social democratic”. For them it fits more comfortably into South African political discourse. They contrast their view to that of Karl Klare, who refers to the Constitution as post-liberal, eschewing the social democratic label “because none of the traditional political rubrics quite fit and most carry at least some distracting sectarian baggage” (Klare “Legal Culture and Transformation Constitutionalism” (1998) SAJHR 146 151). See Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.3.

²⁵³ See also *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) par 32 as well as the authorities collected at n 11. Cheadle and Davis test their claim that the Constitution encompasses a social democratic vision for South Africa by considering the constitutional consequences of a hypothetical introduction of Thatcherite policies by a newly elected government. Assume such a government repealed all labour legislation and sought to reintroduce a dispensation based on the common law of master and

Davis²⁵⁴ maintains that the Constitution is not reflective of a *laissez faire* model of economy in which commercial autonomy is an unqualified good. Instead, it encompasses a social democratic vision for South Africa in which commercial autonomy must be tempered by way of the flexibility inherent in the value of good faith.²⁵⁵ Whilst the Constitution recognises and protects existing rights, it simultaneously restricts them within the boundaries of the same constitutional framework that demands and enables significant reforms.²⁵⁶ This approach is embodied in the concept of “transformative constitutionalism”.²⁵⁷ The Constitution was adopted against the background of a history characterized by inequality and injustice and must be seen as an explicit attempt to transform legal and social institutions and power relationships towards greater equality and justice. The concept of transformative constitutionalism has found support in South African jurisprudence.²⁵⁸

servant. Assume further that it halted all public health programmes by privatising public health facilities, curbed all public housing programmes and repealed all legislation that promoted substantive equality. They argue that the present constitutional text cannot be construed as being supportive of such a set of programmes. In short, the Constitution would be at war with such legislative and executive developments. See Cheadle & Davis “Structure of the Bill of Rights” in Cheadle et al *The Bill of Rights* par 1.3.

²⁵⁴ Davis “Interpretation of the Bill of Rights” in Cheadle et al *South Africa Constitutional Law* par 33.3.

²⁵⁵ Or in Sandel’s terminology, virtue or the common good. See Sandel *Justice* 20 and chapters 8-10.

²⁵⁶ See also Van Der Walt *Property in the Margins* (2009) 8.

²⁵⁷ A phrase coined by Klare (1988) SAJHR 146 166-167. See also Botha “Metaphoric reasoning and transformative constitutionalism (part 1)” (2002) TSAR 612; Botha “Metaphoric reasoning and transformative constitutionalism (part 2)” (2003) TSAR 20; Moseneke “The fourth Bram Fischer memorial lecture: Transformative adjudication” (2002) SAJHR 309; Botha “Freedom and constraint in constitutional adjudication” (2004) SAJHR 249; Le Roux “Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism” (2004) SAPL 629; Roux “Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law” (2004) SALJ 466; Van der Walt “Transformative constitutionalism and the development of South African property law (part 1)” (2005) TSAR 655; Van der Walt “Transformative constitutionalism and the development of South African property law (part 2)” (2006) TSAR 1; Pieterse “What do we mean when we talk about transformative constitutionalism?” (2005) SAPL 155; Liebenberg “Needs, rights and transformation: Adjudicating social rights” (2006) Stell LR 5; Langa “Transformative constitutionalism” (2006) Stell LR 351; Froneman “Enforcing socio-economic rights under a transformative Constitution. The role of the courts” (2007) ESR Review: Economic and Social Rights in South Africa 20; Roux “Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference” (2009) Stell LR 258; Davis and Klare “Transformative constitutionalism and the common and customary law” (2010) SAJHR 403; Sibanda “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) Stell LR 482; Michelman “Liberal constitutionalism, property rights, and the assault of poverty” (2011) Stell LR 706.

²⁵⁸ *S v Mhlungu* supra paras 9 and 301-302; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) SA 1125 (CC) par 142; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amici curiae)* supra par 232; *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T); *Hassam v Jacobs* 2009 (5) SA 572 (CC) par 28; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) paras 33 and 106; *Print Media South Africa v Minister of Home Affairs*

Freedman postulates that South Africa has forged for itself a new political morality that finds expression in a Constitution reflecting values that are a synthesis of libertarian and egalitarian characteristics.²⁵⁹ Du Plessis is of the view that the Constitution embraces strands of libertarian and egalitarian liberalism, modernism and three kinds of traditionalism (African communitarianism, religious conventionalism, and Afrikaner nationalism).²⁶⁰

In sum, the South African Constitution is a modern democratic constitution that embodies an objective normative value system. The preamble decrees that the Constitution was adopted to heal the divisions of the past and establish a new society based on democratic values, social justice and fundamental rights; to establish an open and democratic society in which government is based on the will of the people and every citizen is equally protected by the law; to improve the quality of life for all citizens and free the potential of each person; and to build a united and democratic South Africa. The foundational values²⁶¹ on which the one, sovereign, democratic South Africa is founded are human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Sections 7, 36 and 39 of the Constitution focus on five ideas namely, human dignity, equality, freedom, democracy and openness. The Constitutional Court has further referred to a number of other founding values that are not expressly referred to in the Constitution. Amongst these are constitutionalism, the separation of powers, co-operative government, transformation and *ubuntu*.

The Constitution adopted a political pluralist vision in which the right to associate is enshrined. Within this vision, companies are an integral part of and play a significant role in society. Companies are not only beneficiaries but also duty-bearers under the Bill of Rights – at least

2012 (6) SA 443 (CC) par 97; *Afriforum v Minister of Trade and Industry* [2013] 3 All SA 52 (GNP) paras 35 and 46-47.

²⁵⁹ LAWSA vol 5 part 3 par 28.

²⁶⁰ Du Plessis “Constitutional construction and the contradictions of social transformation in South Africa” (2000) *Scriptura* 31; cited in Kende (2003) *Connecticut Journal of International Law* 617 618

²⁶¹ Listed in section 1 of the Constitution.

under certain circumstances. The Constitution is distinctly communitarian in nature. It emphasises group solidarity, social justice, economic justice and virtue. It entrenches the rights and freedoms traditionally associated with liberal democratic constitutions, but is equally (if not more) focussed on political, social and economic transformation. The South African Constitution has one of the most comprehensive Bills of Rights in the world, encompassing first, second, and third generation human rights. It departs significantly from traditional, liberal models of constitutionalism and is not reflective of a *laissez faire* model of economy in which our company law was originally rooted.

5 THE CONSTITUTIONAL ORDERS IN THE UNITED KINGDOM, CANADA AND INDIA

Some of the salient features of the constitutional orders in the United Kingdom, Canada and India are considered briefly in this section. Specific emphasis is given to the nature of the constitutional order of each of the three jurisdictions. The values and principles that underpin each constitution are also considered with specific reference to the preamble, the nature of any fundamental rights contained in a bill of rights, the limitation of those rights and their application to companies. A comprehensive discussion of this topic falls outside the scope of this thesis.

5.1 United Kingdom

Unlike most modern states, Britain does not have a codified constitution. The British constitution is characterised as “unwritten” because it is not contained in one comprehensive constitutional document. It exists in an abstract sense, comprising of several statutes which define some constitutional principles, core decisions, common law principles, conventions and usages. The doctrine of parliamentary sovereignty dominates British constitutional law. According to this doctrine, parliament can make or unmake any law and no distinction is drawn between ordinary law and constitutional law. No person or institution, including the courts, can challenge the laws of parliament.²⁶²

²⁶² Jain *Indian Constitutional Law* 7th ed (2014) 4 and 114; Currie & De Waal *The Bill of Rights Handbook* 2.

Britain enacted the *Human Rights Act, 1998*²⁶³ on the 9th of November 1998. The purpose of the Act is to give effect to the rights and freedoms guaranteed under the European Convention on Human Rights.²⁶⁴ Section 1(1) of the Act defines “the Convention Rights” as the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the Convention,²⁶⁵ articles 1 to 3 of the First Protocol,²⁶⁶ and articles 1 and 2 of the Sixth Protocol.²⁶⁷ All the protected rights and freedoms, with the exception of the right to education, are first generation human rights. The Act protects freedom of assembly and association.²⁶⁸ It also protects property rights.²⁶⁹ It prohibits slavery and forced labour²⁷⁰ and guarantees the right to form and join trade unions.²⁷¹ The rights and freedoms are generally afforded to “everyone” or denied to “no one”.²⁷² The protection of

²⁶³ C.42.

²⁶⁴ Preamble of *Human Rights Act, 1998*. “Convention” refers to the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on the 4th of November 1950.

²⁶⁵ These rights and freedoms are the right to life (article 2), the prohibition of torture (article 3), the prohibition of slavery and forced labour (article 4), the right to liberty and security (article 5), the right to a fair trial (article 6), no punishment without law (article 7), the right to respect for private and family life (article 8), freedom of thought, conscience and religion (article 9), freedom of expression (article 10), freedom assembly and association (article 11), the right to marry (article 12), the prohibition of discrimination (article 14), restrictions on political activity of aliens (article 16), the prohibition of abuse of rights (article 17) and the limitation on restrictions of rights (article 18).

²⁶⁶ These rights are the protection of property (article 1), the right to education (article 2) and the right to free elections (article 3).

²⁶⁷ These rights and freedoms are the abolition of the death penalty (article 1) and death penalty in time of war (article 2).

²⁶⁸ Article 11.1 of the Convention provides that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” Article 11.1 is specifically limited or demarcated by article 11.2, which provides that “[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” It also does not “prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

²⁶⁹ Article 1 of the First Protocol provides that “[e]very natural and legal person is entitled to the peaceful enjoyment of his possessions.” It furthermore provides that “[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” The article contains its own special limitation or demarcation namely, that it “shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or secure the payment of taxes or other contributions or penalties.”

²⁷⁰ Article 4 of the Convention.

²⁷¹ Article 11 of the Convention.

²⁷² Except article 12 of the Convention (the right to marry), which applies to men and women of marriageable age.

property is specifically afforded to “[e]very natural or legal person”.²⁷³ Article 18 of the Convention provides that the special limitations or demarcations of the rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. The Act is thus very much rooted in the liberalist tradition of the protection of individual or negative rights.

Section 4 of the Act provides that a court can make a declaration that an act is incompatible with a Convention right. Section 6(1) stipulates that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. However, a court cannot strike down an act if it is incompatible with the Convention rights.²⁷⁴

The British constitutional dispensation differs fundamentally from that of Canada, India and South Africa. Canada, India and South Africa all have supreme-law constitutions with fully-fledged bills of rights that give the courts the power to declare legislation incompatible with a particular right or rights.²⁷⁵

5.2 Canada

Canada is a federal state that is constitutionally set up under a statute of the United Kingdom of Great Britain and Northern Ireland, the *British North American Act, 1867*,²⁷⁶ now known as the *Constitution Act, 1867* (“*the Constitution Act 1867*”).²⁷⁷

²⁷³ Article 1 of the First Protocol.

²⁷⁴ See also Seedorf “Jurisdiction” in Woolman & Bishop *Constitutional Law of South Africa* par 4.1; Jain *Indian Constitutional Law* 848-849. The comprehensive review powers distinguish the Constitutional Court of South Africa (and the Supreme Courts of Canada and India) from the House of Lords in the United Kingdom, where Parliament is supreme and statutes may not be struck down for inconsistency with the Human Rights Act. See Seedorf “Jurisdiction” in Woolman & Bishop *Constitutional Law of South Africa* par 4.2.

²⁷⁵ Seedorf “Jurisdiction” in Woolman & Bishop *Constitutional Law of South Africa* par 4.1.

²⁷⁶ 30 & 31 Vict., c3.

²⁷⁷ Welling *Corporate Law in Canada The Governing Principles* 3rd ed (2006) (hereinafter “*Welling Corporate Law in Canada*”) 1; Welling, Smith & Rotman *Canadian Corporate Law Cases, Notes & Materials* 4th ed (2010) (hereinafter “*Welling et al Canadian Corporate Law*”) 59; McGuinness “Business Corporations” in Brecher *Halsbury’s Laws of Canada* 1st ed (2013) (hereinafter “*McGuinness Business Corporations*”) 275.

On 17 April 1982 the *Canadian Charter of Rights and Freedoms* became law, thereby ushering in a new era in Canadian constitutional history. It replaced the Westminster model of parliamentary sovereignty (which Canada inherited from Great Britain) with a constitutional federal state. The *Canadian Charter of Rights and Freedoms* is a modern constitutional document.²⁷⁸ The drafters of the South African Bill of Rights borrowed from the *Canadian Charter of Rights and Freedoms* on a large scale in its formulation.²⁷⁹

The preamble of the *Canadian Charter of Rights and Freedoms* declares that “Canada is founded upon principles that recognise the supremacy of God and the rule of law.” Section 1 contains the general limitations clause and provides that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁸⁰ The limitations clause in the South African Bill of Rights is modelled on the Canadian limitations clause and is very similar in content.²⁸¹

Section 2 sets out the fundamental freedoms and provides:

“Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

²⁷⁸ Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 26-27; Welling *Corporate Law in Canada* 29-30; Welling et al *Canadian Corporate Law* 83; McGuinness *Business Corporations* 275.

²⁷⁹ Davis “Equality and Equal Protection” in Van Wyk et al *Rights and Constitutionalism* 204.

²⁸⁰ The Canadian Supreme Court first fleshed out the meaning of the limitations clause in *R v Oakes* (1986) 26 DLR (4th) 200 227-228. See also Woolman “Riding the push me pull you: Constructing a test that reconciles the conflicting interests which animate the limitation clause” (1994) SAJHR 60 63-67; Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 27-30.

²⁸¹ De Ville “Interpretation of the general interpretation clause in the chapter on fundamental rights” (1994) SAPL 287 288; Woolman (1994) SAJHR 60 63-67; Woolman & Botha “Limitations” in Woolman & Bishop *Constitutional Law of South Africa* par 34.2. The general test is the same: the limitation must be reasonable and justifiable in a democratic society. There are differences between the Canadian and South Africa texts – the values in the South African Constitution include not just democracy and freedom, but equality and dignity too. However, the Canadian courts have held that the values of freedom and democracy embody the “inherent dignity of the human person, commitment to social justice and equality”. See *R v Oakes* supra. The South African Constitution spells out the factors to be taken into account, while the Canadian does not. But this is a difference in form only. See Cheadle “Limitation of Rights” in Cheadle et al *The Bill of Rights* par 30.4.2.

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.”

Litigation concerning freedom of association has almost entirely concerned labour relations rather than corporation law. Other than guaranteeing freedom of association, the *Canadian Charter of Rights and Freedoms* does not contain an express provision on employees’ freedoms or rights.²⁸²

Various fundamental rights are set out in sections 3 to 23.²⁸³ The *Canadian Charter of Rights and Freedoms* does not contain an explicit guarantee of property rights. That does however not mean that property owners enjoy no protection. Provinces and the federal government acquire the right to expropriate property from the Constitution,²⁸⁴ but in each case there are explicit procedural provisions which guarantee due process of law.²⁸⁵ The fundamental rights contained in sections 3 to 23 of the *Canadian Charter of Rights and Freedoms* are all first generation rights. However, specific provision is made for affirmative action programmes.²⁸⁶ Section 27 further provides that the *Canadian Charter of Rights and Freedoms* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Section 36 provides that Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparities in opportunities; and providing essential public services of reasonable quality to all Canadians. The *Canadian Charter of Rights and*

²⁸² Woolman & De Waal “Freedom of Association: The Right to be We” in Van Wyk et al *Rights and Constitutionalism* 355-358. In *Lavigne v Ontario Public Service Employees (1991) 81 DLR (4th) 545 (SCC)* the majority of the Supreme Court of Canada accepted that the freedom to associate also entails the freedom not to associate. See also Davis “Constitutionalization of Labour Rights” in Van Wyk et al *Rights and Constitutionalism* 441-443; Cooper “Labour Relations” in Woolman & Bishop *Constitutional Law of South Africa* par 53.3.

²⁸³ Democratic rights (sections 3-5 of the *Constitution Act, 1982*), mobility rights (section 6), legal rights (sections 7-14), equality rights (section 15), official languages (sections 16-22) and minority language educational rights (section 23).

²⁸⁴ Section 92(13) and 91.

²⁸⁵ Van der Walt AJ in Van Wyk et al *Rights and Constitutionalism* 472-473.

²⁸⁶ For example sections 6(4) and 15(2) of the *Constitution Act, 1982*.

Freedoms therefore makes provision for second and third generation rights. It adopted a communitarian rather than a liberalist individualistic approach.

Section 32(1) provides that the *Canadian Charter of Rights and Freedoms* applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament...; and to the legislature and government of each province in respect of all matters within the authority of the legislature and each province.” Section 52(1) provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

The federal Parliament and each provincial Legislature has the power to create corporations and to regulate them.²⁸⁷ As indicated in chapter 4, the legal personality of a corporation is one of the major principles on which Canadian corporate law is built. A corporation is treated as far as possible by analogy to a natural person.²⁸⁸ Section 15(1) of the *Canada Business Corporations Act*²⁸⁹ (the *Canada Business Corporations Act*) provides that “[a] corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” That does not mean that a corporation will be entitled to all the rights in the *Canada Charter of Rights and Freedoms*. Certain of the rights are available to an “individual”.²⁹⁰ It seems safe to say that this term does not include corporations. Other rights are available to “citizens”.²⁹¹ It appears that these rights are also not available to corporations.²⁹² Other rights are available to “everyone”,²⁹³

²⁸⁷ The provincial power is derived from section 92 of the *Constitution Act, 1982* and the federal power is implied from section 91.

²⁸⁸ Welling *Corporate Law in Canada* 57-68 and 84; Welling et al *Canadian Corporate Law* 114-118; McGuiness *Business Corporations* 221-235.

²⁸⁹ R.S.C., 1985, C-44.

²⁹⁰ For example section 15 (equality rights) of the *Constitution Act, 1982*.

²⁹¹ For example section 3 (democratic rights of citizens), section 6 (mobility of citizens) and section 23 (minority language education rights).

²⁹² See Welling *Corporate Law in Canada* 30-31, 34 and 37; Welling et al *Canadian Corporate Law* 33; McGuiness *Business Corporations* 291.

²⁹³ For example section 2 (fundamental freedoms) of the *Constitution Act, 1982*, section 7 (life, liberty and security of person), section 8 (search or seizure), section 9 (detention or imprisonment), section 10 (arrest or detention), section 12 (treatment or punishment) and section 17 (proceedings of Parliament).

“any person”,²⁹⁴ “any member of the public”,²⁹⁵ and “anyone”.²⁹⁶ The implication is that not only individual persons are protected.²⁹⁷ But despite the wording, the Canadian courts have resisted the suggestion that all of these rights are available to corporations. In deciding whether a corporation can invoke a right, the courts have considered what constitutional value a given provision protects; and then considered whether this value requires that the right be available to corporations.²⁹⁸ In addition, a corporation can raise, in its defence, constitutional defects in the law in question, even if the defects are based on constitutional rights that are only available to individuals.²⁹⁹ The Canadian courts have also opted for a purposive interpretation. Legislation must be interpreted in a manner consistent with the foundational values of human dignity, equality and freedom.³⁰⁰

The South African Bill of Rights appears to be modelled on the *Canadian Charter of Rights and Freedoms*. In addition, both the *Canada Business Corporations Act* and the South African Companies Act of 2008 treat the corporation or company by analogy to a natural person or an individual. The corporation or company is viewed as an entity (corporate person) distinct from its members which has all of the legal powers and capacity of an individual, except to the extent that

²⁹⁴ For example section 11 (proceedings in criminal and penal matters) and section 19 (proceedings in courts established by Parliament).

²⁹⁵ For example section 20 (communications by public with federal institutions).

²⁹⁶ For example section 24 (enforcement of guaranteed rights and freedoms).

²⁹⁷ Welling *Corporate Law in Canada* 30-31; Welling et al *Canadian Corporate Law* 83.

²⁹⁸ *Irvin Toy Ltd v Quebec (Attorney General)* [1989] S.C.J. No 36; [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577; *R v C.I.P. Inc* [1992] 1 S.C.R. 843 (S.C.C.) 852; *R v Agat Laboratories Ltd* [1998] A.J. No 304, 17 CR (5th) 147 (Prov. Ct); Welling et al *Canadian Corporate Law* 84-88; Hogg *Constitutional Law of Canada* 5th ed (2007) 683-688; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* par 1A21 n2.

²⁹⁹ *R v Big M Drug Mart* supra; *Canadian Egg Marketing Agency v Pineview Poultry Products Ltd* [1988] S.C.J. No 78, 166 D.L.R. (4th) 1; *Charlottetown (City) v Prince Edward Island* [1998] P.E.I.J. No 88, 167 D.L.R. (4th) 268 (P.E.I.C.A.); Welling *Corporate Law in Canada* 32; Welling et al *Canadian Corporate Law* 88-89; McGuiness *Business Corporations* 291-292.

³⁰⁰ *Attorney-General of Quebec v Blaikie* [1979] 2 S.C.R. 1016 1029-1030; *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143, 56 D.L.R. 4th 1, 10 SHRR D/5197; *Hunter v Southam* [1984] 2 S.C.R. 145; *R v Big M Drug Mart Ltd* supra 344. See also Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 30-35; Van Zyl “Gender Issues and the Bill of Rights” in *Bill of Rights Compendium* par 311; Haysom & Cachalia “Language and Culture” in Cheadle et al *The Bill of Rights* par 25.3.1 at n 55.

a juristic person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise.³⁰¹ This represents the real entity theory's conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*). The constitutional conceptualisation of the corporation or company in Canada and South Africa are thus similar.

5.3 India

As is the case with Canada, India is a federal constitutional state.³⁰² The *Constitution of India* became effective on 26 January 1950.³⁰³ It is the fundamental law of India and all legislation must be consistent with it.³⁰⁴ A striking feature of the *Constitution of India* is that it has been amended no less than 100 times since it came into force.³⁰⁵

The drafters of the *Constitution of India* appreciated that in a poor country like India, political democracy would be useless without economic democracy. They accordingly created a welfare state that seeks to promote prosperity and the well-being of the people of India.³⁰⁶ The freedom struggle in India centred not only on achieving political independence from Great Britain, but also on social equality and justice, and freedom from economic exploitation.³⁰⁷

The preamble of the *Constitution of India* declares as follows:

³⁰¹ Section 15(1) of the *Canada Business Corporations Act*; section 19(1) of the South African Companies Act of 2008.

³⁰² India has 28 states and seven union territories. See Jain *Indian Constitutional Law* 297. Indian federalism is influenced by the American, Canadian and Australian federalism. The fundamental rights in India owe a great deal to the American Bill of Rights. Jain *Indian Constitutional Law* 10; Jain *Outlines of Indian Legal and Constitutional History* 7th ed (2014) 683.

³⁰³ Jain *Indian Constitutional Law* 9.

³⁰⁴ Article 245(1) of the *Indian Constitution*; Jain *Indian Constitutional Law* 21 and 115-117.

³⁰⁵ See Jain *Indian Constitutional Law* 1700-1751 for a discussion of these amendments.

³⁰⁶ Sripathi (2007) *Tulane Journal of International & Comparative Law* 49 63; Jain *Indian Constitutional Law* 1406-1407.

³⁰⁷ Sripathi (2007) *Tulane Journal of International & Comparative Law* 49 69.

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status of opportunity;

and to promote them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation.

... HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

The preamble is not a source of rights and duties, but gives direction and purpose to the *Constitution of India*. It outlines its objects and contains its fundamental values.³⁰⁸ It declares India to be a sovereign socialist secular democratic republic. The term ‘socialist’ does not envisage doctrinaire socialism in the sense of insistence on state ownership as a matter of policy. Democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. The Indian courts have derived the concept of social justice and of an economically egalitarian society from the concept of socialism.³⁰⁹ Democratic socialism demands a process of redistributive justice so that the distribution of material resources serve the common good.³¹⁰ The preamble decrees that the grand objectives and socio-economic goals that the people of India seek to achieve are to secure for all its citizens social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them fraternity so as to secure the dignity of the individual and the unity and integrity of the nation. The values of liberty, equality and fraternity form a union of trinity.³¹¹

³⁰⁸ Jain *Indian Constitutional Law* 11-14; Jain *Outlines of Indian Legal and Constitutional History* 684-686.

³⁰⁹ *Minerva Mills v Union of India* AIR 1980 SC 1789; (1980) 2 SCC 591; *D.S Nakaru v Union of India* AIR 1983 SC 130; (1983) 1 SCC 305; *Randhir v Union of India* AIR 1982 SC 879; (1982) 1 SCC 618; *S.R. Bommai v Union of India* AIR 1994 SC 1918; (1994) 3 SCC 1; Jain *Indian Constitutional Law* 14.

³¹⁰ Jain *Indian Constitutional Law* 14.

³¹¹ Jain *Indian Constitutional Law* 11-14; Jain *Outlines of Indian Legal and Constitutional History* 684-687.

Part III of the *Constitution of India* contains the fundamental rights. Article 13(1) provides that “[a]ll laws in force in the territory of India immediately before the Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.” Article 13(2) provides that “[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

The fundamental rights are arranged under seven headings namely, the right to equality (articles 14 to 18); the right to freedom (articles 19 to 22); the right against exploitation (articles 23 and 24); the right to freedom of religion (articles 25 to 28); cultural and educational rights (articles 29 and 30); a very much diluted right to property (articles 30(1A), 31A, 31B, 31C and 300A)³¹²; and the right to constitutional remedies (articles 32 to 35).³¹³ The fundamental rights include first-, second-³¹⁴ and third³¹⁵ generation rights.

Some of the fundamental rights apply generally,³¹⁶ some are afforded to “any person”, “all persons” or denied to “no person”;³¹⁷ some are available to “any citizen”, “all citizens” or denied

³¹² The sub-heading “Right to property” in Part III was omitted by the *Constitution (Forty-fourth Amendment) Act, 1987* and a new Chapter IV “RIGHT TO PROPERTY” was inserted in Part XII. Chapter IV contains only one article namely, article 300A (persons not to be deprived of property save by authority of law).

³¹³ Jain *Indian Constitutional Law* 851.s

³¹⁴ For example article 21A (right to education) of the *Constitution of India*.

³¹⁵ For example article 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), article 16 (equality of opportunity in matters of public employment), article 29 (protection of interests of minorities) and article 30 (right of minorities to establish and administer educational institutions).

³¹⁶ For example article 17 (abolition of untouchability), article 18(1) (abolition of titles) and articles 28(1) and (2) (freedom as to attendance at religious instruction or religious worship in certain educational institutions).

³¹⁷ For example article 14 (equality before the law), article 20 (protection in respect of conviction for offences), article 21 (protection of life and liberty), article 22 (protection against arrest and detention in certain cases), article 25 (freedom of conscience and free profession, practice and propagation of religion), article 27 (freedom as to payment of taxes for the promotion of any particular religion) and article 28(3) (freedom as to attendance at religious instruction or religious worship in certain educational institutions).

to “no citizen”;³¹⁸ some apply to “all children” or are denied to “no child”;³¹⁹ some apply to “human beings”;³²⁰ some apply to “religious dominations”;³²¹ and others apply to “minorities”.³²²

Unlike the *Canadian Charter of Rights and Freedoms* and the South African Constitution, the *Constitution of India* does not contain a general limitations clause. A number of the fundamental rights contain their own special demarcation (or internal modifier) or special limitation.³²³ Articles 31A, 31B, 31C, 33 and 34 also limit some or all of the fundamental rights to an extent.

Section 19(1)(c) provides that all citizens shall have the right to form associations, unions or co-operative societies. The Supreme Court of India interpreted the constitutional right to form associations or unions as not incorporating any right to engage in collective bargaining or strike action.³²⁴ Originally the *Constitution of India* contained a property clause³²⁵ and an expropriation clause³²⁶ which drew upon the United States example. However after 33 years of controversy about land reform and agricultural reform, the *Constitution (Forty-fourth Amendment) Act, 1987* repealed both these provisions, which left private property defenceless against legislative onslaught.³²⁷ After 1987, there are only four constitutional provisions dealing with property rights

³¹⁸ For example article 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), article 16 (equality of opportunity in matters of public employment), article 18(2) (abolition of titles), article 19 (protection of certain rights regarding freedom of speech, etcetera) and article 29 (protection of interests of minorities).

³¹⁹ For example article 21A (right to education) and article 24 (prohibition of employment of children in factories).

³²⁰ For example article 23 (prohibition of traffic in human beings and forced labour).

³²¹ For example article 26 (freedom to manage religious affairs).

³²² For example article 30 (right of minorities to establish and administer educational institutions).

³²³ For example articles 15(3)-(5), articles 16(3)-(5), articles 19(2)-(6), articles 22(3) - (4) and (6) - (7), article 23(2), article 25(2), article 26 and article 28(2).

³²⁴ *All India Bank Employee's Association v National Industrial Tribunal AIR 1962 SC 171; (1962) 3 SCR 269*; Davis “Constitutionalization of Labour Rights” in Van Wyk et al *Rights and Constitutionalism* 444; Jain *Outlines of Indian Legal and Constitutional History* 1055-1060.

³²⁵ Article 19(1)(f) of the *Constitution of India*.

³²⁶ Article 31.

³²⁷ Van der Walt “Property Rights, Land Rights and Environmental Rights” in Van Wyk et al *Rights and Constitutionalism* 474; Jain *Indian Constitutional Law* 1298. See further Jain *Indian Constitutional Law* 1298-1324 for a discussion of the right to property in India prior to 1987. See also Davis, Chaskalson & De Waal “Democracy

namely, articles 31A, 31B, 31C and 300A. Although articles 31A, 31B and 31C are included in Part III of the *Constitution of India* (which deals with the fundamental rights), they do not confer any rights, but instead impose drastic restrictions on the right to property. Article 300A³²⁸ provides some semblance of protection of the right to property, but does not enjoy the status of a fundamental right.³²⁹ There are a number of provisions in the *Constitution of India* that protect employees.³³⁰

On the whole, the Supreme Court of Appeal of India has taken the position that the fundamental rights should be interpreted broadly and liberally and not narrowly. The Court observed in *Maneka Gandhi v Union of India*.³³¹

“The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction.”

Part IV of the *Constitution of India* contains the Directive Principles of State Policy (the directive principles). The idea of directive principles was borrowed from the Irish Constitution. These directive principles serve as guidelines for the government. They are not justiciable, but it is the duty of the government to give effect to it.³³² The directive principles include the duty to secure a social order for the promotion of the welfare of the people;³³³ to direct its policies to secure certain

and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 36-45 for a discussion of the struggle between the Indian Parliament and the courts over property rights.

³²⁸ Article 300A of the *Constitution of India* provides that “[n]o person shall be deprived of his property save by authority of law.”

³²⁹ Jain *Indian Constitutional Law* 1325. Article 300A is a human right and a constitutional right, but not a fundamental right. See Jain *Indian Constitutional Law* 1343-1344. See also Jain *Indian Constitutional Law* 1325-1351 for a more comprehensive discussion of the right to property in India after 1987.

³³⁰ For example article 16 of the *Constitution of India* (equality of opportunity in matters of public employment), article 23 (prohibition of traffic in human beings and forced labour) and article 24 (prohibition of employment of children in factories).

³³¹ AIR 1978 SC 597; (1978) 1 SCC 248; Jain *Indian Constitutional Law* 16-17; Jain *Outlines of Indian Legal and Constitutional History* 689-696.

³³² Article 37 of the *Constitution of India* provides that “[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

goals;³³⁴ to secure equal justice and free legal aid;³³⁵ to organise village panchayats;³³⁶ to make effective provision to secure a right to work, to education and to public assistance in certain cases;³³⁷ to secure just and humane conditions of work and maternity leave;³³⁸ to endeavour to secure a living wage for workers;³³⁹ to secure the participation of workers in the management of industries;³⁴⁰ to endeavour to promote co-operative societies;³⁴¹ to endeavour to secure a uniform civil code for citizens;³⁴² to endeavour to provide early childhood care and education to children below the age of six years;³⁴³ to promote the educational and economic interests of the weaker sections of people;³⁴⁴ to raise the level of nutrition and the standard of living and to improve public health;³⁴⁵ to endeavour to organise agriculture and animal husbandry on modern and scientific lines;³⁴⁶ to endeavour to protect and improve the environment and to safeguard the

³³³ Article 38.

³³⁴ Article 39. These goals include that citizens, men and women equally, have the right to adequate means of livelihood; that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; that there is equal pay for equal work for both men and women; that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength; and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. See also Van der Walt “Property Rights, Land Rights and Environmental Rights” in Van Wyk et al *Rights and Constitutionalism* 474.

³³⁵ Article 39A.

³³⁶ Article 40.

³³⁷ Article 41.

³³⁸ Article 42.

³³⁹ Article 43.

³⁴⁰ Article 43A.

³⁴¹ Article 43B.

³⁴² Article 44.

³⁴³ Article 45.

³⁴⁴ Article 46.

³⁴⁵ Article 47.

³⁴⁶ Article 48.

forests and wild life of the country;³⁴⁷ to protect monuments and objects of national importance;³⁴⁸ to separate the judiciary from the executive;³⁴⁹ and to promote international peace and security.³⁵⁰

The question of the relative force of the directive principles and the fundamental rights has caused some difficulty. This struggle between the fundamental rights and the directive principles embodies the Indian effort to reconcile the protection of individual rights with the promotion of socio-economic reform and restructuring. Initially the courts held that in the case of a conflict, a fundamental right trumps a directive principle. However in the course of time the approach of the courts have undergone a transformation to the extent that they now seek to harmonise the two. It can now be said that the directive principles are the goals which have to be attained and achieved while the fundamental rights are the means to achieve these goals. The fundamental rights must be construed in light of, and so as to promote, the values underlying the directive principles.³⁵¹ In *Ashoka Kumar Thakur v Union of India*³⁵² the Supreme Court held that the fundamental rights represent the civil and political rights and the directive principles embody social and economic rights. The preamble, fundamental rights and the directive principles have been described as “the conscience” of the *Constitution of India*.³⁵³

Apart from article 13, there is no general provision dealing with the application of the fundamental rights. Initially the courts sought to draw an inflexible distinction between private

³⁴⁷ Article 48A.

³⁴⁸ Article 49.

³⁴⁹ Article 50.

³⁵⁰ Article 51. See Jain *Indian Constitutional Law* 1416 – 1441 for a discussion of the directive principles and their application.

³⁵¹ De Villiers “The socio-economic consequences of directive principles of state policy: Limitations on fundamental rights” (1992) SAJHR 188; Sripathi (2007) *Tulane Journal of International & Comparative Law* 49 95-96; Van der Walt “Property Rights, Land Rights and Environmental Rights” in Van Wyk et al *Rights and Constitutionalism* 474; Jain *Indian Constitutional Law* 1411-1416; Jain *Outlines of Indian Legal and Constitutional History* 690-691.

³⁵² (2008) 6 SCC 1 515. See also *Pathumma v State of Kerala AIR 1978 SC 771*; (1978) 2 SCC 1; Jain *Indian Constitutional Law* 1412.

³⁵³ *Minerva Mills v Union of India* supra 1806-1807; *Dalmia Cement (Bharat) v Union of India* (1996) 10 SCC 104; Jain *Indian Constitutional Law* 1412-1413.

and public law in respect of the fundamental rights. However, this rigid distinction between state infringement of rights and private infringement of rights was broken down significantly in *People's Union for Democratic Rights v Union of India*.³⁵⁴ The court held that certain fundamental rights are automatically enforceable against private individuals. Where the fundamental right is not automatically protected from private infringement, a private-law victim has a constitutional law action against the state to ensure that there is compliance with the legislation that protects fundamental rights.³⁵⁵

The courts have also relied on the preamble and the directive principles to hold that established private-law rules should yield to the imperatives of the *Constitution of India*.³⁵⁶ The case of *National Textile Workers Union v Ramkrishnan*³⁵⁷ is illustrative in this regard. It was an established principle adopted from English company law that no one other than members and creditors have a right to be heard in applications for winding up.³⁵⁸ The Supreme Court however held that a court cannot exercise its discretion to wind up a company without taking the needs of the workers into account and that they have a right to be heard. The court held:

“Unlike the shareholders, to most of whom the shares they hold represent mere investments and to some of whom, the means to control the affairs of the company, to the workers, the life of the company is their own and its welfare is theirs. They are so intimately tied up that their interest in the survival and well-being of the company is much more than the interest of any shareholder – be he an investor, a ‘corporate commander’ or a corporate manipulator.”³⁵⁹

³⁵⁴ *AIR 1982 SC 1473; (1982) 3 SCC 235*. See also Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 52-54.

³⁵⁵ *People's Union for Democratic Rights v Union of India* supra paras 10 and 11. See also *Vishaka v State of Rajasthan AIR 1997 SC 3011; (1997) 6 SCC 241*; Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 54-55; Jain *Indian Constitutional Law* 1364 (who states that fundamental rights such as under articles 17 (abolition of untouchability), 21 (protection of life and personal liberty), 23 (prohibition of traffic in human beings and forced labour) or 24 (prohibition of employment of children in factories) are also available against individuals).

³⁵⁶ Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 54-55.

³⁵⁷ *AIR 1983 SC 75*

³⁵⁸ This rule was established since *Re Bradford Navigation Company (1870) 5 Ch App 600*.

³⁵⁹ *National Textile Workers Union v Ramkrishnan* supra 89.

The Court relied particularly on the preamble, that states that India should be a “sovereign socialist secular republic, and article 43A that provides that “[t]he state shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry.”³⁶⁰

The post-emergency Supreme Court in India developed a purposive rights jurisprudence based on a set of values that are central to the *Constitution of India*. Judge Bhagwati, who sat on the Supreme Court Bench for ten years from 1976, the last two of which were as Chief Justice, was the architect of Indian public interest litigation, which involved the most creative judicial developments of constitutional law in Indian history.³⁶¹ The Supreme Court adopted a social-justice-based interpretation. The starting point of the Court is the fact that the Indian Constitution is designed to create a democratic welfare state and that all constitutional interpretation has to be consistent with this primary goal.³⁶² The values of social and political justice, substantive equality, and human dignity were identified from an overall reading of the *Constitution of India*, with particular reference on the preamble and the directive principles. The result was a body of constitutional law which differs significantly from the United States constitutional law, which developed under a bill of rights structured around the core values of liberty and property.³⁶³

³⁶⁰ *National Textile Workers Union v Ramakrishnan* supra 83-84.

³⁶¹ Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 45-47.

³⁶² Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 47; *ABSK Sangh (Railway) v Union of India* AIR 1981 SC 298 335; *People’s Union for Democratic Rights v Union of India* supra 1490. Social justice rejects the traditional way of treating fundamental rights as superior to directive principles. Rights are not seen as the protected domain of individual autonomy into which the state cannot encroach. Fundamental rights serve to protect political democracy and are enforced by the courts. Directive principles serve to advance social and economic democracy. The *Constitution of India* provides that they are enforceable, but this does not make them less important than the fundamental rights. In a country like India with limited resources the legislature must decide on the allocation of these resources and not the courts. However, the *Constitution of India* instructs all organs of state to treat the directive principles as fundamental in the governance of the country. The directive principles should serve as a code of interpretation for the courts and should be read into the fundamental rights wherever possible. The courts should be extremely reluctant to invalidate state action which is performed in performance of directive principles but which infringes fundamental rights. A striking feature of Indian public interest litigation is the way in which the court has recognised that rights involve relationships between state and individual. In doing so it has been able to expand the range of fundamental rights so that they serve a social rather than an individual function. See Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 47-52.

Jain states it is the task of the courts in India, in interpreting the fundamental rights, to achieve a proper balance between the rights of the individual and those of the state or the society as a whole, between liberty and social control. Generally speaking, the rights of the individual hold sway in non-economic matters. But in economic matters, partly by judicial interpretation, and partly by constitutional amendments, the emphasis is on social control, leading to the emergence of a regulated (as opposed to a *laissez-faire*) economy.³⁶⁴

Mandela said: “The freedom of India started in South Africa; and [India’s] freedom will not be complete till South Africa is free.”³⁶⁵ India and South Africa share certain constitutional features. Both were trying to escape a bitter past and adopted written constitutions that are transformative in nature. Both have entrenched bills of rights and embraced the doctrine of constitutional supremacy. Both countries share a common law tradition and are ethnically and culturally diverse nations.³⁶⁶ Both countries share a commitment to social and economic rights. But whereas India adopted socio-economic directive principles, South Africa endorsed judicially enforceable socio-economic rights.³⁶⁷

6 THE COMPANIES ACT OF 2008

6.1 The Policy Document

The policy paper of the Department of Trade and Industry, *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*³⁶⁸ (the Policy Document), that was published in 2004, records that the Companies Act 61 of 1973 (the Companies Act of 1973), although hailed

³⁶³ Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 62.

³⁶⁴ Jain *Indian Constitutional Law* 851-852.

³⁶⁵ Nelson Mandela, Rajiv Gandhi Foundation Lecture on 2 January 1995 (quoting India’s Prime Minister, the late Rajiv Gandhi) referred to in Sripati (2007) *Tulane Journal of International & Comparative Law* 49 52.

³⁶⁶ Sripati (2007) *Tulane Journal of International & Comparative Law* 49 56-57.

³⁶⁷ Sripati (2007) *Tulane Journal of International & Comparative Law* 49 112-113. Yet Davis, Chaskalson and De Waal warn that a South African court should not follow any individual Indian decision because our Constitution differs significantly from the Indian Constitution. See Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 63-64.

³⁶⁸ Government Gazette 26493 of 3 June 2004.

as cutting the umbilical cord between the South African and English company law, adopted many of the principles and provisions of the Companies Act 46 of 1926 (the Companies Act of 1926) and was therefore essentially still built on the foundations that were put in place by the British in the middle of the nineteenth century.³⁶⁹ The Policy Document recognised that there was a need for a comprehensive company law review as a result of the fundamental changes in the environment in which companies operate.³⁷⁰ The most important of these changes was the adoption of the Constitution in 1996. The Policy Document states:

“No area of South African law can be analysed or evaluated without recourse to the Constitution, which is the supreme law of the country. The Bill of Rights, as provided for in Chapter 2 of the Constitution, constitutes a cornerstone of democracy of South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. It also regulates the economic relationship between economic citizens and thus may have fundamental implications for company law.”³⁷¹

The Policy Document concluded that the new company law had to be consistent not only with the Constitution and the principles of equality and fairness that it enshrines, but also with all other Acts that reflect these constitutional principles.³⁷²

6.2 The Companies Act 2008

The Companies Act of 2008 gives express recognition to bring company law within our constitutional framework. The constitutional values are given expression in the Act.³⁷³ Section 5 of the Companies Act of 2008 provides that the Act “must be interpreted and applied in a manner that gives effect to the purposes set out in section 7”. This lays the foundation for a purposive interpretation of the Act that will attribute meaning to the Act in accordance with its normative purposes set out in section 7.³⁷⁴

³⁶⁹ Par 2.1 of the Policy Document.

³⁷⁰ Par 2.2.1.

³⁷¹ Par 2.2.2.

³⁷² Par 2.2.2.

³⁷³ Katzew (2011) SALJ 686 686

Section 5 is reinforced by section 6(1) which provides that a court may, on application by the Companies and Intellectual Property Commission, an exchange in respect of a company listed on that exchange or the Takeover Regulations Panel, declare any agreement, transaction, scheme, resolution or provision of a company's memorandum of incorporation or rules to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act and can void it to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act.³⁷⁵

Section 7 sets out the purposes of the Companies Act of 2008. Noticeably the first expressly stated purpose is to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law”.³⁷⁶ This is consistent with section 8(1) of the Constitution, which provides that the Bill of Rights applies to all law (the direct vertical application of the Bill of Rights); section 8(2) which provides that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (the direct horizontal application of the Bill of Rights); section 8(4) which provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person; and section 39(2) which provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (the indirect application of the Bill of Rights).³⁷⁷ It is interesting to note that whilst section 8(2) of the Constitution qualifies the binding effect of the Bill of Rights to a natural or juristic person, section 7(a) of the Companies Act of

³⁷⁴ Katzew (2011) SALJ 686 689; Davis (ed) *Companies and Other Business Structures in South Africa* 3rd ed (2013) (hereinafter “Davis *Companies and Other Business Structures*”) 14; Gwanyanya “The South African Companies Act and the realisation of corporate human rights responsibilities” (2015) PELJ 3101 3108-3109; *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* 2013 (1) SA 191 (WCC) par 22.

³⁷⁵ Delpont *Henocheberg on the Companies Act 71 of 2008* vol 1 (2011) (Loose-leaf, update May 2016) (hereinafter “Delpont *Henocheberg* vol 1”) 36.

³⁷⁶ Section 7(a) of the Companies Act of 2008.

³⁷⁷ Olson “South Africa moves to a global model of corporate governance but with important national variations” (2010) AJ 219 225; Katzew (2011) SALJ 686 690; Gwanyanya (2015) PELJ 3101 3107-3108.

2008 does not have a similar provision.³⁷⁸ It may therefore be argued that the purpose of section 7(a) of the Companies Act of 2008, in promoting compliance with the Bill of Rights, is more comprehensive than section 8(2) of the Constitution.³⁷⁹

A number of the other purposes listed in section 7 corresponds with the more traditional functions of the company. These purposes include the promotion of the development of the South African economy by encouraging entrepreneurship, enterprise efficiency, flexibility, simplicity and high standards of corporate governance;³⁸⁰ the promotion of innovation and investment in the South African markets;³⁸¹ creating optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;³⁸² and encouraging the efficient and responsible management of companies.³⁸³

However the Act crosses the corporate Rubicon in extending the purposes of the company beyond those traditionally associated with the company.³⁸⁴ In addition to the purpose to promote compliance with the Bill of Rights already referred to, these other listed purposes include promoting the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the “significant role of enterprises within the social and economic life of the nation”;³⁸⁵ reaffirming the concept of the company as a means of achieving economic and social benefits;³⁸⁶ providing for the creation and use of companies, in a

³⁷⁸ The Bill of Rights is only applicable taking into account the nature of the right and the nature of the duty imposed by the right. Bilchitz argues that section 8(2) is poorly drafted as the main determinate as to whether the rights apply to private persons is their applicability and this is clearly circular. See Bilchitz (2008) SALJ 754 775.

³⁷⁹ Katzew (2011) SALJ 686 690

³⁸⁰ Section 7(b) of the Companies Act of 2008.

³⁸¹ Section 7(c).

³⁸² Section 7(g).

³⁸³ Section 7(j). See also Katzew (2011) SALJ 686 690.

³⁸⁴ Katzew (2011) SALJ 686 691, paraphrasing a comment made by Professor Mervyn King at a workshop he presented at the University of the Witwatersrand on 8 March 2010.

³⁸⁵ Section 7(b)(iii) of the Companies Act of 2008.

³⁸⁶ Section 7(d).

manner that enhances the economic welfare of South Africa as a partner within the global economy;³⁸⁷ and encouraging active participation in economic organisation, management and productivity.³⁸⁸

These other listed purposes question the very core of the idea that the corporate objective is to maximise shareholder wealth (the shareholder primacy model of corporate governance).³⁸⁹ They buttress the conclusions that are reached in chapter 5 regarding the corporate objective. Whilst South African company law was initially firmly rooted in the contractarian theory and inherited the shareholder primacy model from the United Kingdom,³⁹⁰ there has been a fundamental shift from the shareholder primacy model to a more inclusive balancing of interests approach. The separate legal personality of a company lies at the very core of its human rights obligations.³⁹¹ If the company is conceptualised as a separate legal person, its purpose cannot simply be to maximise shareholder wealth and make as much money as it can for its shareholders.³⁹² The ultimate underlying value system on which the shareholder primacy model is founded is normatively flawed and incompatible with the objective normative value system manifested in the South African Constitution. It is implicit in the constitutional values that our approach to justice cannot revolve only around the ideas of maximising welfare and respecting freedom. The ultimate purpose of the company must be to serve the society. This is encapsulated by the idea

³⁸⁷ Section 7(e).

³⁸⁸ Section 7(f).

³⁸⁹ Katzew (2011) SALJ 686 691. As pointed out in chapter 5, the company served a public purpose through most of its evolution. The idea that the corporate objective is to maximise shareholder wealth (the shareholder primacy model of corporate governance) is historically a recent event. This idea coincided with the emergence of a New Right or neoliberalist pro-market thinking and the law and economics movement since the late 1970s.

³⁹⁰ As pointed out in chapter 5, the shareholder primacy model is based on the contractarian theories. The contractarian theories emphasise the freedom of the individual, liberty, competition and the limitation of interference in the free-market. Contractarians object to legal rules that redistribute wealth, mandate particular behaviour or prevent people from making bargains that they would otherwise choose to make. See Millon (1993) Washington and Lee Law Review 1373 1377 and 1382; Esser *Recognition of Various Stakeholder Interests in Company Management* LLD thesis (2008) University of South Africa 32; Lichner "Should shareholders' interests be the mainstay of corporate governance?" (2009) European Business Law Review 889 895; Ripken (2009) Fordham Journal of Corporate and Financial Law 97 163-164; Sandel *Justice* 61; Bone (2011) Canadian Journal of Law and Jurisprudence 277 278; Keay *The Corporate Objective* 59-61; Colombo "The corporation as a Toquevillian enterprise" (2012) Temple Law Review 1 8.

³⁹¹ Katzew (2011) SALJ 686 695-696.

³⁹² Bone (2011) Canadian Journal of Law and Jurisprudence 277 291.

that the company must be a good corporate citizen. The company must be instilled with a conscience, an appreciation of virtue and the good life. Subject to this ultimate and supreme objective, the corporate objective on a narrower level must be to maximise and sustain the company as a separate legal entity.

The approach that Canada and South Africa adopt to the corporate purpose is probably closer to the stakeholder model of corporate governance than most, if not all, other Anglo-American jurisdictions.³⁹³ According to the stakeholder model, the economic and social purpose of the company is to create and distribute wealth and value to all its stakeholders, without favouring one group at the expense of another.³⁹⁴ The directors or managers must give independent value to and balance the interests of all the various stakeholders, including the creditors and employees of the company.³⁹⁵ The company must act with economic, social and environmental responsibility. This approach corresponds with the objective normative value system embodied in the South African Constitution.

Directors are now required to take cognisance of the purposes of the Companies Act of 2008. They are required not only to act in the best interests of the company but also to have regard to the Bill of Rights in managing the business and affairs of the company.³⁹⁶ Section 76(3)(a) requires directors to exercise their powers in good faith and for a proper purpose. Sections 76(3)(b) and (c) further require that this be done in the best interests of the company and with a reasonable degree of care and skill. In considering the best interests of the company directors must now

³⁹³ Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) (hereinafter “Keay *The Enlightened Shareholder Value Principle*”) 275.

³⁹⁴ As indicated in chapter 5, the stakeholder model is based on the communitarian theories. Communitarians reject the focus of contractarians on profit and consider a wider array of social and political values, such as respect for human dignity, ethical behaviour, cooperation, trust, justice, fairness, stability, sustainability, civic responsibility and the overall welfare of society. See Esser 31; Greenfield “Defending stakeholder governance” (2008) *Case Western Reserve Law Review* 1043 1055; Keay *The Corporate Objective* 36-37, 125-126 and 134; Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 278; Ajibo “A critique of enlightened shareholder value: Revisiting the shareholder primacy theory” (2014) *Birbeck Law Review* 37 42. The stakeholder model also finds support in the real entity theory, specifically Dodd’s normative conception of the real entity theory. The stakeholder model can even find support in the team production theory and economic contractarianism. See Keay *The Corporate Objective* 128.

³⁹⁵ Keay *The Corporate Objective* 118-120 and 134; Keay *The Enlightened Shareholder Value Principle* 44.

³⁹⁶ Katzew (2011) *SALJ* 686 694; Gwanyana (2016) *PELJ* 3101 3109-3111.

have regard to the constitutional values and the Bill of Rights.³⁹⁷ They must lead the company on a path that is in line with the goals set out in section 7 of the Act.³⁹⁸ If directors fail to do so they may be held liable in terms of section 218(2) of the Companies Act of 2008.³⁹⁹

The effect of the constitutional principles on the director's duties was considered in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*.⁴⁰⁰ The case involved the mining company's infringement of certain environmental obligations. The court found the directors personally liable. It referred to the principles of good governance as set out in the King Code and held that the court should be prepared to assist the state by providing mechanisms for the enforcement of the constitutional right to be protected from environmental harm.⁴⁰¹

Section 13 of the Companies Act of 2008 recognises the right of any person to incorporate a company. Section 15 provides that each provision of a company's memorandum of incorporation must be consistent with the Act; and is void to the extent that it contravenes, or is inconsistent with the Act, subject to section 6(15). It may be argued that this section, read with section 15(6) (the statutory contract provision) obliges shareholders, directors, prescribed officers and any other person serving the company as an audit committee or board committee member to promote compliance with the Bill of Rights in exercising their functions.⁴⁰²

Section 20(4) allows shareholders, directors, prescribed officers of a company or a trade union representing employees of the company, to apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Act.⁴⁰³ This remedy can be invoked if the company fails to comply with the provisions of the Bill of Rights. Bilchitz and

³⁹⁷ Katzew (2011) SALJ 686 704-706.

³⁹⁸ Katzew (2011) SALJ 686 707.

³⁹⁹ Katzew (2011) SALJ 686 706-707.

⁴⁰⁰ 2006 (5) SA 333 (W).

⁴⁰¹ Katzew (2011) 686 707. The case was overturned on appeal, but on factors relating to the contempt of the court order. See *Kebble v Minister of Water Affairs and Forestry* [2007] ZASCA 111.

⁴⁰² Katzew (2011) SALJ 686 693.

⁴⁰³ See also Olson (2010) AJ 219 225.

Katzew argue that, if used properly, the lifting or piercing of the corporate veil can also be used in certain circumstances to hold those making unacceptable decisions in respect of the company's adherence to human rights principles responsible.⁴⁰⁴ Section 158 of the Act furthermore provides that when determining a matter brought before it in terms of the Act, or making an order contemplated in the Act:

- “(a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and
- (b) the Commission, the Panel, the Company's Tribunal or a court –
 - (i) must promote the spirit, purpose and objects of this Act; and
 - (ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.”

7. CONCLUSION

The Constitution introduced a new era in South African company law. As South Africa is now a constitutional state, the normative values that shape our company law and the manner in which it is interpreted are found in the Constitution. The Constitution is the supreme law, and all law, including the Companies Act of 2008 and the common law, derives its force from the Constitution and is subject to constitutional control. Law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.⁴⁰⁵

The South African Bill of Rights is not only a charter of negative liberties that protects private persons against state power by conferring rights on private persons and imposing obligations on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Whilst the Constitution provides for the direct vertical application of the Bill of Rights (in section 8(1)), it

⁴⁰⁴ Bilchitz (2008) SALJ 754 782; Katzew (2011) SALJ 686 699-704

⁴⁰⁵ Section 2 of the Constitution. See also section 172(1) which provides that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

also provides for its direct horizontal application in disputes between private persons (in section 8(2)). In addition, it provides for the indirect vertical and horizontal application of the Bill of Rights in section 39(2).⁴⁰⁶

The Bill of Rights applies directly to a legal dispute when a right of a bearer (or beneficiary) of the Bill of Rights has been infringed by a duty-bearer of that right during the period of operation of the Bill of Rights within the Republic of South Africa.⁴⁰⁷ The question whether a company (or any other legal person) is a bearer (or beneficiary) of a particular right contained in the Bill of Rights is regulated by section 8(4) of the Constitution. Section 8(4) stipulates that two factors must be considered in answering this question namely, the nature of the fundamental right in question and the nature of the company (or other legal person). The nature of most of the rights make them applicable to the protection of companies. The second factor (the nature of the legal person) compels the courts to deal with the more abstract question as to what the nature of the company is. The nature of the company is discussed in more detail in chapters 4 and 5. It is argued in chapter 4 that the communitarian conceptualisation of the company is the most acceptable from a normative perspective.⁴⁰⁸ This conceptualisation also corresponds with the normative value system that underpins the Constitution. In addition, it is argued in chapter 5 that the real entity theory, as articulated by Dodd, is the most acceptable theory about the corporate personhood of the company. The real entity theory is firmly based on the concept of the corporation (*universitas*). Because a company is a real person, it should have the same legal, social and moral rights and responsibilities as a natural person. On this view a company should, in principle, be a beneficiary of rights which, by their nature, make them applicable to companies. In practice much of the debate about the meaning of the requirements in section 8(4) is made irrelevant because the courts have adopted a very generous approach towards legal standing in constitutional litigation.⁴⁰⁹

⁴⁰⁶ Bilchitz (2008) SALJ 754 775; Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontally’” in *Bill of Rights Compendium* par 3A8; LAWSA vol 5 part 4 paras 6 and 8; Currie & De Waal *The Bill of Rights Handbook* 33-34 and 41.

⁴⁰⁷ Currie & De Waal *The Bill of Rights Handbook* 31.

⁴⁰⁸ Berle and Means also conceptualised the company from a communitarian perspective.

⁴⁰⁹ Section 38 of the Constitution provides that anyone listed in the section may approach a court, alleging that a right in the Bill of Rights has been infringed or threatened.

The question whether a company is a duty-bearer (or rights-bearer) of a particular right contained in the Bill of Rights is regulated by section 8(2) of the Constitution. Section 8(2) provides for the direct horizontal application of the Bill of Rights to private disputes in certain circumstances. In terms of this section, a company (and in fact any natural or juristic person) is bound by a provision of the Bill of Rights if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

The Constitution also makes provision for the indirect application of The Bill of Rights to company law. Section 39(2) provides that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation (including the Companies Act of 2008) and when developing the common law or customary law. The Constitutional Court has indicated on a number of occasions that the indirect application of the Bill of Rights must be considered before direct application. This is known as the principle of avoidance.⁴¹⁰

Section 18 of the Constitution provides that everyone has the right to freedom of association. This section protects the right of persons to incorporate a company, to become a securities holder or member of a company, and to participate in the activities of the company.⁴¹¹ The ambit of the protection covered by this right is determined by the second stage of the two-stage analysis (in other words the application of the general limitation clause) rather than the first stage of the inquiry (the identification of an infringement of the right). Insofar as the limitation of the right to associate is concerned, it is necessary to emphasise that it is generally accepted that the overall objective of company law is to serve the interests of society as a whole. A company is a public or quasi-public entity and a corporate citizen. It cannot be conceptualised simply as a private contractual arrangement.⁴¹² This means that legal constraints are necessary to limit the right to

⁴¹⁰ *S v Mhlungu* supra par 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) paras 2-5; *Ferreira v Levin; Vryenhoek v Powell* supra par 199; *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) par 12; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) par 21; *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) par 64; *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) par 149; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) par 73. See also LAWSA vol 5 part 4 par 10; Currie & De Waal *The Bill of Rights Handbook* 25, 45-46 and 68-71.

⁴¹¹ Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* par 1A66.1

associate in order to ensure that companies are accountable to the society in which they operate.⁴¹³ This philosophy forms the basis of the discipline of corporate social responsibility.⁴¹⁴ In certain instances shareholders may also rely on their right to property in respect of their shares to protect their interests.⁴¹⁵ It is important to emphasise that shareholders do not own the company. Employees are specifically protected in the Constitution.⁴¹⁶ Whilst creditors are not specifically mentioned in the Constitution they can also be beneficiaries of the Bill of Rights.⁴¹⁷

The South African Constitution embodies an objective normative value system. Certain values are expressly articulated in the Constitution.⁴¹⁸ The preamble of the Constitution emphasises the commitment to heal the divisions of the past and to establish a new society based on democratic values, social justice and fundamental rights; to establish an open and democratic society; to improve the quality of life for all citizens; and to build a united and democratic South Africa.⁴¹⁹ Section 1 proclaims the Republic of South Africa to be one, sovereign, democratic state founded on certain values namely, human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the

⁴¹² Keay argues that in some ways a closely held company may be seen as an aggregate of individuals carrying on business together as the shareholders have far more involvement than do shareholders in public companies. But even so the individual shareholders or a group cannot, save through or for the company, do certain things, such as concluding contracts or holding property. The membership of these companies may well also not remain the same, yet the company continues to exist. See Keay *The Corporate Objective* (2011) 190. See also Pollman "Reconceiving corporate personhood" (2011) *Utah Law Review* 1629 1662. Members can further contract with the company. It is also the company that takes and defends legal proceedings. Thus even closely held companies are separate legal persons. Wolff also uses the example of a number of corporations that have the same five shareholders. Each of these companies has its own property and creditors of one of them has no claim against the property of a second. See Wolff (1938) *Law Quarterly Review* 495 497.

⁴¹³ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292 n 95 and 293.

⁴¹⁴ Bone (2011) *Canadian Journal of Law and Jurisprudence* 277 292-294.

⁴¹⁵ Woolman & De Waal "Freedom of Association: The Rights to be We" in Van Wyk et al *Rights and Constitutionalism* 385.

⁴¹⁶ Compare sections 13 (prohibition of slavery, servitude and forced labour) and 23(2) (the rights of workers) of the Constitution.

⁴¹⁷ Compare also for example the protection that creditors receive under the Competition Act 89 of 1998, the Prevention and Combating of Corrupt Activities Act 12 of 2004, Promotion of Access to Information Act 2 of 2000, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.

⁴¹⁸ Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* par 1A11; Currie & De Waal *The Bill of Rights Handbook* 7-22.

⁴¹⁹ LAWSA vol 5 part 3 par 5.

rule of law; and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Sections 7, 36 and 39 contain the Bill of Rights' own internal value provisions. They focus on five ideas namely, human dignity, equality, freedom, democracy and openness. Other provisions of the Constitution also describe specific values. In addition, the Constitutional Court has referred to a number of other founding values that are not expressly referred to in the Constitution. Amongst these are constitutionalism,⁴²⁰ the separation of powers,⁴²¹ co-operative government, transformation⁴²² and *ubuntu*.⁴²³

The Constitution adopted a political pluralist vision in which the right to associate is enshrined. Within this vision companies are an integral part of and play a significant role in society. Companies can be beneficiaries and duty-bearers of the Bill of Rights. The Constitution is distinctly communitarian in nature. It emphasises group solidarity, social justice, economic justice and virtue. The South African Constitution has one of the most comprehensive Bills of Rights in the world. While it entrenches the first generation rights and freedoms traditionally associated with liberal democratic constitutionalism, it is equally (if not more) focussed on political, social and economic transformation and also includes second and third generation human rights. It departs significantly from traditional, liberal models of constitutionalism and is not reflective of a *laissez faire* model of economy in which our company law was originally rooted. Instead, it encompasses a social democratic vision for South Africa in which commercial autonomy must be tempered by virtue, dignity and social and economic equality.⁴²⁴

⁴²⁰ Currie & De Waal *The Bill of Rights Handbook* 7-10.

⁴²¹ *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T); *Glenister v President of the RSA* supra; LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19; Currie & De Waal *The Bill of Rights Handbook* 7 and 18-22.

⁴²² *S v Makwanyane* supra par 262; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* supra par 73; LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19.

⁴²³ *S v Makwanyane* supra paras 224-225; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC); LAWSA vol 5 part 3 par 7; LAWSA vol 5 part 4 par 19.

⁴²⁴ Pieterse (2003) Stell LR 3 12 and 27; Cheadle & Davis "Structure of the Bill of Rights" in Cheadle et al *The Bill of Rights* par 1.3; Davis "Interpretation of the Bill of Rights" in Cheadle et al *South Africa Constitutional Law* par 33.3.

The British constitutional dispensation differs fundamentally from that of Canada, India and South Africa. Britain does not have a codified constitution. The doctrine of parliamentary sovereignty still dominates British constitutional law. Canada, India and South Africa all have supreme-law constitutions with fully-fledged bills of rights that give the courts the power to declare legislation incompatible with a particular right or rights.⁴²⁵

Canada discarded the Westminster model of parliamentary sovereignty and became a federal constitutional state with the adoption of the *Canadian Charter of Rights and Freedoms* on 17 April 1982, thereby ushering in a new era in Canadian constitutional history. The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁴²⁶ The *Canadian Charter of Rights and Freedoms* is a modern constitutional document.⁴²⁷ It makes provision for first-, second- and third generation rights. It adopted a communitarian rather than a liberalist individualistic approach. The South African Bill of Rights appears to be modelled on the *Canadian Charter of Rights and Freedoms*.⁴²⁸ The constitutional conceptualisation of the corporation or company in Canada and South Africa are also similar. Both the *Canada Business Corporations Act* and the South African Companies Act of 2008 treat the corporation or company by analogy to a natural person or an individual. This represents the real entity theory's conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*).⁴²⁹

⁴²⁵ Seedorf "Jurisdiction" in Woolman & Bishop *Constitutional Law of South Africa* par 4.1.

⁴²⁶ Section 52(1) of the *Constitution Act, 1982*.

⁴²⁷ Davis, Chaskalson & De Waal "Democracy and Constitutionalism: The Role of Constitutional Interpretation" in Van Wyk et al *Rights and Constitutionalism* 26-27; Welling *Corporate Law in Canada* 29-30; Welling et al *Canadian Corporate Law* 83; McGuinness *Business Corporations* 275.

⁴²⁸ Davis "Equality and Equal Protection" in Van Wyk et al *Rights and Constitutionalism* 204.

⁴²⁹ Section 15(1) of the *Canada Business Corporations Act*; section 19(1) of the South African Companies Act of 2008.

As is the case with Canada, India is a federal constitutional state. The *Constitution of India* became effective on 26 January 1950.⁴³⁰ It is the fundamental law of India and all legislation must be consistent with it.⁴³¹ The preamble of the *Constitution of India* declares India to be a sovereign socialist secular democratic republic. The fundamental rights contained in Part III of the *Constitution of India* include first-, second- and third generation rights. Unlike the *Canadian Charter of Rights and Freedoms* and the South African Constitution, the *Constitution of India* does not contain a general limitations clause. Over and above the fundamental rights, the *Constitution of India* also contains directive principles that serve as guidelines for the government. It can be said that the directive principles are the goals which have to be attained and achieved while the fundamental rights are the means to achieve these goals. The fundamental rights must be construed in the light of, and so as to promote, the values underlying the directive principles.⁴³² The preamble, fundamental rights and the directive principles have been described as “the conscience” of the *Constitution of India*.⁴³³ It is the task of the courts, in interpreting the fundamental rights, to achieve a proper balance between the rights of the individual and those of the state or the society as a whole, in other words between liberty and social control. Generally speaking, the rights of the individual hold sway in non-economic matters. But in economic matters, partly by judicial interpretation, and partly by constitutional amendments, the emphasis is on social control, leading to the emergence of a regulated (as opposed to a *laissez-faire*) economy.⁴³⁴ India and South Africa share certain constitutional features. Both were trying to escape a bitter past and adopted written constitutions that are transformative in nature. Both have entrenched bills of rights and embraced the doctrine of constitutional supremacy. Both countries share a common law tradition and are ethnically and culturally diverse nations.⁴³⁵ Both countries

⁴³⁰ Jain *Indian Constitutional Law* 9.

⁴³¹ Article 245(1) of the *Indian Constitution*; Jain *Indian Constitutional Law* 21 and 115-117.

⁴³² De Villiers (1992) SAJHR 188; Sripathi (2007) Tulane Journal of International & Comparative Law 49 95-96; Van der Walt “Property Rights, Land Rights and Environmental Rights” in Van Wyk et al *Rights and Constitutionalism* 474; Jain *Indian Constitutional Law* 1411-1416; Jain *Outlines of Indian Legal and Constitutional History* 690-691.

⁴³³ *Minerva Mills v Union of India* supra 1806-1807; *Dalmia Cement (Bharat) v Union of India* (1996) 10 SCC 104; Jain *Indian Constitutional Law* 1412-1413.

⁴³⁴ Jain *Indian Constitutional Law* 851-852.

⁴³⁵ Sripathi (2007) Tulane Journal of International & Comparative Law 49 56-57.

share a commitment to social and economic rights. But, whereas India adopted socio-economic directive principles, South Africa endorsed judicially enforceable socio-economic rights.⁴³⁶

The Companies Act of 2008 gives express recognition to the constitutional imperative to bring company law within our constitutional framework. Despite this, company law and constitutional law have continued largely as separate disciplines with a very limited area of overlap.⁴³⁷ The constitutional values are given expression in the Companies Act of 2008.⁴³⁸ Section 5 of the Act provides that the Act must be interpreted and applied in a manner that gives effect to the normative purposes set out in section 7. The first purpose listed in section 7 is to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law”.⁴³⁹ This is consistent with section 8(1) of the Constitution, which provides that the Bill of Rights applies to all law (the direct vertical application of the Bill of Rights); section 8(2) which provides that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (the direct horizontal application of the Bill of Rights); section 8(4) which provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person; and section 39(2) which provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (the indirect application of the Bill of Rights).⁴⁴⁰

A number of the other purposes listed in section 7 corresponds with the more traditional functions of the company. However, the Act crosses the corporate Rubicon in extending the purposes of the

⁴³⁶ Sripati (2007) *Tulane Journal of International & Comparative Law* 49 112-113. Yet Davis, Chaskalson and De Waal warn that a South African court should not follow any individual Indian decision because our Constitution differs significantly from the Indian Constitution. See Davis, Chaskalson & De Waal “Democracy and Constitutionalism: The Role of Constitutional Interpretation” in Van Wyk et al *Rights and Constitutionalism* 63-64.

⁴³⁷ Bilchitz (2008) *SALJ* 754 773-774; Katzew (2011) *SALJ* 686 686.

⁴³⁸ Katzew (2011) *SALJ* 686 686

⁴³⁹ Section 7(a) of the Companies Act of 2008.

⁴⁴⁰ Olson “South Africa moves to a global model of corporate governance but with important national variations” (2010) *AJ* 219 225; Katzew (2011) *SALJ* 686 690; Gwanyana (2015) *PELJ* 3101 3107-3108.

company beyond those traditionally associated with the company.⁴⁴¹ These other listed purposes question the very core of the shareholder primacy model of corporate governance.⁴⁴² They support the conclusions that are reached in chapter 5 regarding the corporate objective. Whilst South African company law was initially firmly rooted in the contractarian theory and inherited the shareholder primacy model from the United Kingdom, there has been a fundamental shift from the shareholder primacy model to a more inclusive balancing of interests approach. The separate legal personality of a company lies at the very core of its human rights obligations.⁴⁴³ If the company is conceptualised as a separate legal person, its purpose cannot simply be to maximise shareholder wealth and make as much money as it can for its shareholders.⁴⁴⁴ It is implicit in the constitutional values that our approach to justice cannot revolve only around the ideas of maximising welfare and respecting freedom. The ultimate purpose of the company must be to serve the society. This is encapsulated by the idea that the company must be a good corporate citizen. The company must be instilled with a conscience, an appreciation of virtue and the good life. The approach that Canada and South Africa adopt to the corporate purpose is probably closer to stakeholder model of corporate governance than most, if not all, other Anglo-American jurisdictions.⁴⁴⁵ According to the stakeholder model, the economic and social purpose of the company is to create and distribute wealth and value to all its stakeholders, without favouring one group at the expense of another.⁴⁴⁶ The directors or managers must give independent value to, and balance the interests of all the various stakeholders, including the creditors and employees of the company.⁴⁴⁷ The company must act with economic, social and environmental responsibility.

⁴⁴¹ Katzew (2011) SALJ 686 691, paraphrasing a comment made by Professor Mervyn King at a workshop he presented at the University of the Witwatersrand on 8 March 2010.

⁴⁴² Katzew (2011) SALJ 686 691.

⁴⁴³ Katzew (2011) SALJ 686 695-696.

⁴⁴⁴ Bone (2011) Canadian Journal of Law and Jurisprudence 277 291.

⁴⁴⁵ Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) (hereinafter “Keay *The Enlightened Shareholder Value Principle*”) 275.

⁴⁴⁶ The stakeholder model is based on the communitarian theories. Communitarians reject the focus of contractarians on profit and consider a wider array of social and political values, such as respect for human dignity, ethical behaviour, cooperation, trust, justice, fairness, stability, sustainability, civic responsibility and the overall welfare of society. See Esser 31; Greenfield (2008) Case Western Reserve Law Review 1043 1055; Keay *The Corporate Objective* 36-37, 125-126 and 134; Bone (2011) Canadian Journal of Law and Jurisprudence 277 278; Ajibo (2014) Birbeck Law Review 37 42.

This approach corresponds with the objective normative value system embodied in the South African Constitution.

Traditionally there was a tension between fundamental rights and corporate concerns. Fundamental rights concerns were viewed as an obstacle to the realisation of the economic goals of a company. Proponents of fundamental rights (such as human right activists), on the other hand, have been suspicious of the company as the free enterprise mechanism which became the dominant institution of modern capitalist societies. The Constitution now however requires the structures established by the Companies Act of 2008 to comply with the constitutional requirements. As a result, the notion of creating a structure which pursues profit at the expense of fundamental rights is no longer legal tenable. The fact that companies are duty-bearers under the Bill of Rights goes beyond purely imposing obligations upon them – it changes the very nature of companies in South Africa.⁴⁴⁸

The company is now situated within our constitutional framework. The values of our Constitution are integrated into the core operation of companies. They underpin the very purpose and object of the company, and consequently also corporate governance. The values impact on the relationship between the company and its creditors and employees. The South African landscape is now shaped by the Constitution. Company law must reflect the ideals, goals and responsibilities of this landscape by ensuring that companies operate in a manner that complies with the Bill of Rights.⁴⁴⁹ The courts should expressly recognise the pivotal role played by this normative value system when they exercise judicial discretion. It is also important to appreciate that there has been a fundamental paradigm shift and that our company law is no longer underpinned by the classical liberal theories of Anglo-American company law of the 18th and 19th century.⁴⁵⁰

⁴⁴⁷ Key *The Corporate Objective* 118-120 and 134; Key *The Enlightened Shareholder Value Principle* 44.

⁴⁴⁸ Bilchitz (2008) SALJ 754 781; Katzew (2011) SALJ 686 687

⁴⁴⁹ Katzew (2011) SALJ 686 693.

⁴⁵⁰ Katzew (2011) SALJ 686 703.

CHAPTER 7

CONCLUSION

- 1 REVIEW OF RESEARCH
 - 2 THE PROTECTION OF CREDITORS AND EMPLOYEES
 - 3 CONCLUDING REMARKS
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1 REVIEW OF RESEARCH

The company is potentially (if not yet actually) the dominant institution of the modern world. It has been prodigiously successful. But the company also has its pathologies and failures. The question arises as to whether it is possible to correct or at least limit these pathologies and failures and, in so doing, unlock the potential of this dominant institution even further, to the benefit of society as a whole. In order to answer this question we need to consider and analyse the fundamental principles underlying the company and company law, more particularly what exactly is a company and what is its *raison d'être*?¹

A central argument of this thesis is that our conceptualisation of the company and its position in law is determined by our philosophical approach to justice (our underlying system of belief), the resultant theory of law that we adopt and the underlying economic, political and social environment in which the company operates. The underlying normative value system that underpins the Companies Act 71 of 2008 (the Companies Act of 2008) determines how we conceptualise the nature of the company, what we regard as the *raison d'être* of the company and if, to what extent and how the interests of creditors and employees of a company are protected in South African law.²

¹ Chapter 1 par 1.

² Chapter 1 par 1; chapter 2 par 1; chapter 3 par 1; chapter 5 par 1.

The aim of this research is to establish what the underlying normative value system that underpins the Companies Act of 2008 is. A further but related aim is to establish what the nature and purpose of a company is. Specific reference is made to the protection of creditors and employees of the company.³

The research is approached from a historical, theoretical, comparative and constitutional perspective. Chapter 2 traces the history of the company. The nature of the company is analysed in chapter 3, the corporate personhood of the company in chapter 4 and the corporate objective in chapter 5. Chapter 6 considers the effect of the Constitution of the Republic of South Africa, 1996 (the Constitution) on the company and company law. The jurisdictions of the United Kingdom, Canada and India are considered from a comparative perspective.

1.1 The history of the company

A historical analyses of the company helps us to understand what the underlying values and objectives, as well as the socio-economic and political circumstances are that shaped the company. It also reveals some of the core features, strengths and weaknesses of the company and company law. The historical analyses of the company in chapter 2 reveals the following:

- a) The company developed through an evolutionary process. Over the years a variety of social or economic organisations were developed, tried and tested and the successful forms were retained and replicated. The company evolved from these organisations. This evolutionary nature of the company means that it changes and adapts with time.
- b) In this evolutionary process the company developed certain legal attributes or characteristics that distinguishes it from other organisations. The most important attribute of the company is its separate legal personality, which it derived from the medieval corporation or *universitas*. The characteristics of perpetual succession and asset partitioning (including limited liability) are consequences of the company's separate legal personality. Interestingly, limited liability was not initially the feature that attracted business people to the company as an organizational form. The positive effect of asset partitioning, specifically limited liability, is that it stimulates growth and investment. Another important line in the development of the company was the adoption of the

³ Chapter 1 par 2.

partnership (*societas*) principle of trading on joint account. Through this development, the legal concept of *universitas* was paired with the financial tool of equity investment. Consequently a further important characteristic of the modern company is that its shares are transferrable. Not all these attributes were present in the earlier forms of social and economic organisations. These characteristics were developed to deal with the multi-disciplinary problems that the company faced, such as the agency, asset partitioning and team production challenges.

- c) These attributes or legal characteristics makes the company immensely successful. The company is integral to society, particularly as a creator of wealth and employment.
- d) There have however been some spectacular corporate failures and some form of regulation appears necessary to protect the stakeholders of the company, including its shareholders, creditors and employees. Corporate governance plays an important role in this regard.
- e) The historical analyses corroborates that the concept of the company and the consequences that the law ascribes to incorporation is a function of the underlying economic, political and social environment in which it operates. The underlying normative value system in which the company operates determines its *raison d'être* and also if, to what extent and how the interests of creditors and employees of the company should be protected.
- f) The law more often responds to the evolution of the company rather than shape it. Company laws essentially perform two functions. The first is a facilitative function. It provides the legal norms which promote the accumulation of equity capital. One of the major advantages of the company is its ability to attract capital to fund large scale economic ventures. The second is a regulatory function. It imposes controls to protect certain stakeholders or interests.
- g) The nature and extent of the regulation of the company is a function of the prevailing economic, political and social environment in which it operates. Corporate failures, recessions and the adoption of certain political and economic policies (for example imperialism, democratic socialism and welfare state capitalism) have often resulted in stricter regulation. On the other hand, rapid economic growth or industrialisation and the adoption of political and economic policies such as *laissez-faire* capitalism, liberalism, neoliberalism and globalism have tended to lead to deregulation.
- h) The company and its predecessors served a public purpose through most of its evolution until at least the nineteenth century. The expansion of this purpose to include private

interests only occurred with the arrival of the general incorporation laws in the nineteenth century. With the appearance of general incorporation laws the corporate mechanism evolved from an arrangement in which an association of owners controlled their property under close state supervision to an arrangement in which they surrendered control of their capital to those in control of the company. Historically though, the company was a public institution with public purposes. From a historical perspective, shareholder primacy is a recent event.⁴

- i) The history of the comparative jurisdictions reveals the fundamentally different paths that the corporation or company concept followed in the United States and England. The United States moved rapidly towards corporations on the one hand, and partnerships on the other. In contrast, the development in England was towards an intermediate form namely, a company acting under a deed (a cross between a partnership and a trust) and a contractarian approach. Corporate law in Canada developed from English and American law. The letter of patents form of incorporation dominated Canadian corporate law for a long period. However, after 1970 the federal government and the majority of provinces in Canada adopted the American model which invokes a statutory division of powers amongst the internal stakeholders of the company. Indian company law is still rooted in that of the United Kingdom, although it has its own unique features. South African company law started to part with English company law since 1973 and the gap between the two systems has since widened substantially. The present Companies Act of 2008 is more aligned with the corporate law of Canada.⁵

1.2 The nature of the company

1.2.1 Defining the company

The modern company is an elusive concept to define. This is exacerbated by the fact that what we call “companies” or “corporations” encompasses a wide range of entities that differ dramatically from one another. The focus in this thesis is primarily on companies engaged in commerce and more particularly the large public companies.

⁴ Chapter 2 paras 1-7.

⁵ Chapter 2 paras 2.2, 3-6 and 7.

The statutory definitions of the company in South Africa, United Kingdom, Canada and India are all indeterminate. They essentially define the company as a company incorporated under or recognized by the enabling Act. A definition of the modern company, based on its attributes, is ventured in this thesis namely, that a company is a separate legal person (which encompasses the characteristics of perpetual succession and asset partitioning) managed under a centralised (board) structure and having a liquid and transferable equity (or interest) structure.⁶

As indicated hereinbefore, our normative conceptualisation of the nature of the company and its position in law is determined by the philosophical approach to justice (the underlying system of belief) and the resultant theory of law that we adopt.⁷

1.2.2 Philosophical approaches to justice

Three broad philosophical approaches to justice are identified in this thesis. The first approach revolves around the idea of maximizing welfare. The most influential doctrine within this approach is utilitarianism. The second approach revolves around the idea of respecting freedom. This approach accentuates respect for individual rights. Two rival camps can be identified within this group namely, the *laissez-faire* camp led by the free-market libertarians and the fairness camp consisting of theorists with a more egalitarian approach. The case for free markets is typically rooted in a libertarian as well as a utilitarian approach. The last approach sees justice as bound up with virtue and the good life.⁸ It is argued in this thesis that we cannot detach arguments about justice and rights from arguments about virtue and the good life.

Sandel makes some important suggestions as to what a just society based on the common good may look like that are very appropriate in the South African context. First, a just society requires a strong sense of community. Secondly, it is important to understand the moral limits of markets. Markets are not the only or even the most important norm in society. Important non-market norms must be protected from market intrusion. Thirdly, we need to address the increasing disparity between rich and poor as it undermines the solidarity that democratic citizenship

⁶ Chapter 3 par 2.

⁷ Chapter 3 par 1.

⁸ Chapter 3 par 1; Sandel *Justice What's the Right Thing to Do?* (2009) (hereinafter "Sandel *Justice*") 6 and 19-20.

requires. Economic scarcity, perceived inequalities and the deep resentment that accompany these challenges leave the foundations of a democratic system fragile. If pushed too far it can lead to industrial and social protest action. Fourthly, we need a more robust public engagement with our moral disagreements.⁹

1.2.3 Theories of the company

Our approach to justice (system of belief) determines which theory of the company we adopt. This theory, in turn, influences the model of corporate governance that we embrace. The theory of the company that we adopt ultimately shapes the relationship that companies have with their stakeholders, including their creditors and employees. The theories of the company also provide a standard for evaluating actual or proposed legal rules.¹⁰

Four prominent theories about the nature of the company are considered in this thesis:

- a) The normative or philosophical foundation of the contractarian theories (which can in turn be divided into legal contractarianism and economic contractarianism) revolve around two ideas namely, maximising welfare (utilitarianism) and respecting freedom (libertarianism). The contractarian theories are functional theories in that they are more concerned about what companies do, rather than what they are. The economic contractarian theories conceptualise the company (or “firm” as proponents of these theories prefer to refer to all business forms) as a nexus *of* contracts between rational economic actors, including shareholders, managers, creditors, employees and customers. The interests of shareholders are elevated above the other economic actors because they are deemed to be the residual risk bearers. Creditors and employees must protect themselves contractually. The resultant norm is one of shareholder primacy, which holds that the company is to be governed in the best interests of its shareholders, within the extraneous law. Legal contractarians, on the other hand, conceptualise the company as a nexus *for* contracts. The company is a private contractual creation and is regarded as an association or aggregation of individuals. For them, a core element of the firm as a nexus for contracts is its separate legal personality in the eyes of the law. As a normative matter they acknowledge that the

⁹ Chapter 3 par 12; Sandel *Justice* 263-269; Anstey “Marikana – and the push for a new South Africa pact” (2013) SAJLR 133 141.

¹⁰ Chapter 3 par 1.

overall objective of company law is to serve the interests of society as a whole. Whilst company law largely refrains from regulating transactions with creditors, it does so in two instances namely, in relation to companies that are financially distressed and creditors who are unable to adjust the terms of their exposure to the risk that they bear (for example victims of delicts). The shareholder-creditor agency cost problem also becomes a central concern for company law if the system is shareholder-centric rather than manager-centric. The reason for this is that shareholders have an incentive to externalize risk unto creditors and other fixed claimants. Employees are the principal non-shareholder constituency to enjoy governance protection as a matter of right in some jurisdictions.¹¹

- b) The normative view of communitarians to society contrasts sharply with that of the contractarians. Whereas the contractarian approach to justice revolves around the ideas of maximising welfare (utilitarianism) and respecting freedom (libertarianism), the communitarian (also known as progressive) approach to justice emphasises the importance of virtue or the common good. Communitarians see companies as separate legal entities with the rights and corresponding responsibilities of a natural person. As such, legal constraints are necessary to ensure that corporations are accountable to the society in which they operate. This philosophy forms the basis of the discipline of corporate social responsibility. Communitarians require corporations to be good corporate citizens. The communitarian approach also finds support in the philosophy of *ubuntu*. In contrast to contractarians, communitarians believe that large companies are public rather than private institutions. Communitarians believe that the grant of company status is not only a concession by the state, but that it is also an instrument that the state can utilise. The communitarian view of the company thus supports an argument for the protection of creditors and employees.¹²
- c) The concession theory focuses on the company's dependence on the state. According to this theory the existence and operation of the company is a concession, grant or privilege bestowed by the state, thereby justifying government interference. In contrast to the communitarian theories, the concession theory does not adhere to the proposition that the company should realign its aim to reflect the social aspirations of the state. The

¹¹ Chapter 3 par 4.

¹² Chapter 3 par 5.

concession theorists accept only that the state has a role to play to ensure that corporate governance structures are fair and democratic. It is easy to argue for corporate social responsibility and the protection of the interests of creditors and employees on the basis of the concession theory. The company is a creation of state and as a public body it owes duties to all stakeholders.¹³

- d) Blair and Stout¹⁴ believe that their team production theory is consistent with economic contractarianism. The team production theory revolves around the idea of maximising welfare (utilitarianism), although Blair and Stout also emphasise the importance of virtue or the common good to a certain extent. This theory applies primarily to public companies with dispersed shareholders where the directors are free from the direct control of the team members. Blair and Stout conceptualize the modern public company as an internal governance structure they call a “mediating hierarchy” that serves to coordinate the activities of the “team members”, allocates the resulting production and mediates disputes among team members. The board of directors must protect the firm-specific investments of the whole corporate team including shareholders, managers, employees, and possibly other groups, such as creditors. As a result, directors owe their fiduciary duties to the company rather than to its shareholders. Directors can therefore properly take actions that benefit other stakeholders. The team production theory therefore supports an argument for the protection of creditors and employees. In this sense the team production theory appears to adopt a communitarian approach. However, where communitarians argue that company law should be reformed to make directors more accountable to stakeholders, Blair and Stout argue that directors should not be under direct control of either shareholders or other stakeholders.¹⁵

It is not possible to devise a grand theory of the nature of the company. Each theory seeks to explain the nature of the company from a different perspective. Each theory can be criticised on a number of grounds. But from a normative perspective, the communitarian theory and arguably also the concession theory (more particularly the dual concession theory of Dine) are the most

¹³ Chapter 3 par 6.

¹⁴ Blair & Stout “A team production theory of corporate law” (1999) Virginia Law Review 247.

¹⁵ Chapter 3 par 7.

acceptable theories of the nature of the company. A company, especially a large public company, is a public or quasi-public entity and a corporate citizen. It cannot be conceptualised as a private contractual arrangement. Even the conceptualisation of a small or closely held company as a private contractual arrangement is problematic.¹⁶

1.2.4 Berle and Means

In the seminal study of Berle and Means, *The Modern Corporation & Private Property*,¹⁷ which was first published in 1932, the authors drew attention to the growing separation of ownership and control in the modern company. They adopted a communitarian approach and described the company as a social organisation whose size enables it to dictate the shape of the market and renders it a quasi-public institution, despite its legal conception as a private institution. They argued that the powers of the company must be used for the public benefit.¹⁸

1.2.5 Models of company constitutions

Companies can also be classified according to their models or types of company constitutions. The important distinction, from a South African perspective, is between contractarian companies and division of power corporations:

- a) Contractarian companies (also referred to as “English model companies” or “memorandum and article companies”) derive from the old English deed of settlement companies. A statutory contract regulates the internal affairs of the company, including the division of powers. Contractarian companies are rights orientated. They are based on *societas* (partnership) rather than *universitas* (corporation). There are a number of difficulties in the application of the statutory contract.
- b) Division of power corporations derive from the United States model and were created to try to rationalise corporate law and remove some of the difficulties that had developed in interpreting the contractarian model. They are called division of power corporations because the legislation expressly divides powers within the corporate constitution among

¹⁶ Chapter 3 paras 1 and 12.

¹⁷ Berle & Means *The Modern Corporation & Private Property* (1991) (hereinafter “Berle & Means *The Modern Corporation*”).

¹⁸ Chapter 3 par 8.

the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. This model is status and remedy orientated. Every person attaining a specific status (for example director, officer, shareholder, creditor or employee), is assigned statutory powers, obligations and remedies. The corporate constitution is not a contract among the participants. As opposed to contractarian companies, division of power corporations are based on *universitas* (corporation).¹⁹

1.2.6 Comparative analyses

The company law of the United Kingdom is relatively unique in providing express quasi-contractual status and effect to a company's constitution. The basic contractarian notion of private ordering lies at the very heart of company law in the United Kingdom. The subscribers or members of the company are deemed to be the body corporate. Shareholders are positioned 'inside' the company from a governance perspective, and, correspondingly, non-shareholder stakeholders, such as creditors and employees, deal with the company-member contractual nexus 'from the outside' only. A further remarkable feature of company law in the United Kingdom is the extent to which it leaves regulation of the internal affairs of a company, such as the division of powers between the organs of the company (the general meeting of the shareholders and the board of directors), to the company itself in its constitution. In the United Kingdom the shareholders constitute the ultimate source of managerial authority within the company. The directors obtain their powers by a process of delegation from the shareholders through the constitution. The contractarian model or type of company constitution originated in the United Kingdom. Company law in the United Kingdom is based on *societas* (partnership) rather than *universitas* (corporation).²⁰

Canadian corporation law adopts a fundamentally different approach. Canadian law follows a communitarian approach. In Canadian law the corporation is viewed as an entity distinct from its shareholders. The corporate constitution is not deemed to be a statutory contract between the

¹⁹ Chapter 3 par 9.

²⁰ Chapter 3 par 10.1.

participants.²¹ Canadian corporation law is firmly based on *universitas* (corporation). The corporation has the rights, powers and privileges of a natural person. The division of power model or type of company constitution is the dominant model in Canada. The *Canada Business Corporations Act*²² (the *Canada Business Corporations Act*) invokes a statutory division of powers amongst the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. The directors are granted the power to manage, or supervise the management of, the business and affairs of the corporation. The Act is status and remedy orientated. The Act creates extensive remedies for shareholders and other complainants. The remedies are about standing, not about substantive rights.²³

A feature of the Indian *Companies Act 2013*²⁴ (the *Companies Act 2013*) is its strong emphasis on corporate social responsibility. Corporate social responsibility is mandatory in India. This mandatory approach towards corporate social responsibility is worth examining, particularly as it illustrates the problem of making companies moral when the market imperatives are strong, even when political will and pressure to address corporate morality is itself also strong. The Indian approach has a very definite communitarian bias in this respect. It is further worth noting the similarities in the socio-economic and political circumstances in India and South Africa. Both countries have colonial pasts. Inequalities remain deeply ingrained in both societies. The governments of both countries have to respond to demands for social justice and economic equality, whilst simultaneously attempting to stimulate investment and economic growth. India and South Africa are both developing nations and members of the BRICS²⁵ association of emerging national economies. Both countries are constitutional states with bills of rights. Despite this strong communitarian approach, the Indian *Companies Act 2013* is an anomaly in that it still remains rooted in the legal contractarian approach that it inherited from the United Kingdom. The

²¹ Except in British Columbia and Nova Scotia.

²² *R.S.C., 1985, c. C-44.*

²³ Chapter 3 par 10.2.

²⁴ *Act 18 of 2013.*

²⁵ Brazil, Russia, India, China and South Africa.

subscribers and members of the company are deemed to be the body corporate. In contrast with the position in the United Kingdom, the powers of the board are derived directly from the *Companies Act 2013* in India. But although the powers of the directors are original and not delegated from the shareholders through the articles of association, they are subject to material limitations. The ultimate power in the company still vests with the shareholders and not the board of directors.²⁶

1.2.7 The Companies Act of 2008

There are a number of provisions in the South African Companies Act of 2008 that are indicative of a communitarian approach. The Act provides that the company is a separate juristic person which has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity; or the memorandum of incorporation provides otherwise. The powers of the directors to manage the business and affairs of the company are original and not delegated from the shareholders through the memorandum of incorporation as it was in the Companies Act of 1973²⁷ (the Companies Act of 1973), through the articles of association. The powers and duties of the directors thus have a constitutional (or statutory) and not a contractual base. The ultimate power in the company now vests with the board of directors and not the shareholders. Unless the qualifications of section 66(1) of the Companies Act of 2008 applies, the board of directors is the ultimate organ of the company. The Act is status and remedy orientated. This signifies a fundamental shift in the underlying philosophy and approach to the company constitution away from a contractarian (or English model) company to a division of power corporation. The company is an institution rather than a contractual arrangement (a *universitas* rather than a *societas*). The King IV Report emphasises the corporate social responsibility of the company and adopts a decidedly communitarian approach. The approach of South African law to the nature of the company is now closely aligned to that of Canadian corporation law.

²⁶ Chapter 3 par 10.3.

²⁷ Act 69 of 1973

However, the Companies Act of 2008 retained a statutory contract provision. Thus certain elements of the contractarian model company were retained. In this respect the theoretical approach adopted in the Act is unfortunately not entirely clear or consistent. It is difficult to understand why the legislature deemed it necessary to retain the statutory contract in the Act, despite the fact that the statutory contract has been questioned in the country where it originated and is strained in its application. It is recommended that the statutory contract provision (section 15(6)) be deleted and that provision rather be made for a restraining or compliance remedy similar to section 247 of the *Canada Business Corporations Act*. Such a remedy should allow prescribed persons (for example a shareholder, or a person entitled to be registered as a shareholder; a director or a prescribed officer; any member of a committee of the board; a registered trade union that represents the employees or another representative of the employees of the company; or any person who, in the discretion of the court, is a proper person to do so) to apply to court for an order directing shareholders, directors, prescribed officers or members of board committees to comply with the memorandum of incorporation or any rules of the company, if they failed to do so. The Companies Act of 2008 already makes provision for certain restraining or compliance remedies, although they arguably do not go far enough.²⁸

1.3 The corporate personhood of the company

The most important attribute of the company is its separate legal personality. The characteristics of perpetual succession and asset partitioning (including limited liability) are consequences of the company's separate legal personality.²⁹

1.3.1 The corporate personhood theories

Four prominent corporate personhood theories (one consisting of two variants) are considered in this thesis:

- a) The first is the fiction (or artificial entity) theory. This theory was the dominant theory until the first half of the nineteenth century. Until then, companies were mostly incorporated by charter or special act on a case by case basis. The state played a decisive role in the incorporation and operation of companies - including the protection of non-

²⁸ Chapter 3 paras 11 and 12.

²⁹ Chapter 4 par 1.

shareholder stakeholders. The fiction theory contains a fictional and a dependence component. Its fictional component emphasises that the company is, through legal fiction, endowed with legal personality (or legal subjectivity) as if it is a human being. Whilst the company is real, it is not by nature endowed with legal personality. The dependence component of the fiction theory emphasises the company's dependence on the law to endow it with legal personality. The rights, duties and capacities of a company thus totally depend on how much the law imputes to it by fiction. As a result of this dependence component, the fiction theory is often equated with the concession theory. According to the fiction theory the company, like a person who is incapable to act (for example a person who is mentally ill or an infant), can only act through an authorised representative. Directors and managers are perceived to be representatives of the company. The fiction theory is normatively supportive of a public orientated view of companies and company law. As a creation of the state, the company serves a public purpose and as a vehicle to pursue public policy objectives. The fiction theory provides a theoretical basis for the statutory regulation of the relationship between the company and its stakeholders, including its creditors and employees. It can be argued that the fiction theory and the concession theory are incompatible with an important basic fundamental right namely, the right to associate.³⁰

- b) The second corporate personhood theory is the aggregate (contractual or associational) theory. With the appearance of general incorporation laws from the beginning of the nineteenth century, the idea that the company existed only because of a concession of the state became less convincing. This led to the deterioration of the dominance of the fiction theory. After the 1880s three corporate personhood theories competed for dominance namely, the fiction theory, the aggregate theory and the real entity theory. The aggregate theory provided a counter-argument against state regulation in response to the fiction theory's public orientated view of companies. According to the aggregate theory, the company is not so much a legal construct but a collection or aggregate of its individual human constituents. The original version of the aggregate theory essentially treats the company as a partnership. The company is not recognised as an entity distinct from its individual constituents. Directors and managers act as trustees or agents of the

³⁰ Chapter 4 par 2.

shareholders and not the company. They have a fiduciary duty to further the interests of the shareholders. Normatively this theory takes a private-orientated view of the company and company law. It promotes an anti-regulatory approach to companies. The role of company law is to support and protect the rights of the consenting parties and to enforce or regulate the agreements between them. This ideology has its roots in the *laissez-faire* economic and political policy. The aggregate theory is not normatively supportive of compulsory social responsibility or the protection of creditors and employees.³¹

- c) The third corporate personhood theory is the real entity theory (also known as the natural entity or organic theory). This theory was developed in Germany in the late nineteenth century in response to the fiction theory. It gained popularity at the turn of the 20th century. According to the real entity theory, the company is an independent reality that exists as an objective fact. It is not a creation of the law or the state. The law merely grants it official recognition and permission to operate. The real entity theory assumes that the subjects of rights need not be human beings. Anything that possesses a will and life of its own may be the subject of rights. By assuming that the company is a separate legal person, the real entity theory allows it to be treated much like an autonomous natural person. Directors are perceived to be organs of the company and not its representatives. The real entity theory supports two contrasting normative visions of the company. Initially it formed the theoretical basis to argue that the company is a private rather than a public institution and should not be subject to undue regulation. As a real and natural entity, a company should have the same rights and privileges as natural persons. However in the 1930s Dodd³² employed the real entity theory to justify a completely different normative vision of the company. On this vision the company, because it is a real person, should have the same legal, social and moral responsibilities as a natural person. The company must be a good corporate citizen. As articulated by Dodd, the real entity theory challenged the purely private conception of company law based on shareholder primacy. On this view the company should have regard to not only its shareholders, but also its other stakeholders such as its creditors, employees, consumers and the society in which it operates. The company must be regulated to ensure that it does so. This view supports a public view of

³¹ Chapter 4 par 3.

³² Dodd "For whom are corporate managers trustees?" (1932) Harvard Law Review 1145.

companies. Building on this foundation, other communitarians (or progressives), corporate social responsibility scholars and stakeholder scholars also justified the consideration of broader stakeholder interests by conceptualising the company as a distinct moral organism with social and ethical responsibilities over and above the demands of the law and market forces. The real entity theory is the most recent genuine philosophical conceptualisation of the company to precede the economic contractarian (or nexus of contracts) theory.³³

- d) The fourth corporate personhood theory is the juridical reality theory. During the period of roughly between the late 1920s and the 1970s, the theories of the company were largely ignored by legal scholars and the courts. The real entity theorists' conceptualisation of the company as a real living thing that exists as an objective fact in the extra-judicial sense of the world was questioned. This led to the emergence of the juridical reality theory. The juridical reality theory conceptualises the company simply as reality in the juridical sense. A juristic person is accorded legal personality insofar as it is legally necessary to answer the needs of society. Companies have those rights and duties that are conferred on them by legislatures and courts. These rights and duties should, in turn, be informed by what companies are meant to achieve and how it affects society. According to this theory, the term "person" can signify whatever we want the law to make it signify. The juridical reality theory (insofar as it can be considered to be a theory) is a functional theory. It adopts a utilitarian approach. Company law is not deduced from a larger theoretical construct but rather driven by consequential concerns. The juridical reality theory lacks a strong normative or philosophical basis. It takes a pragmatic and positivist approach to the corporate personhood question.³⁴
- e) The aggregate theory was again revived with the rise of the law and economics movement in the 1980s. The law and economic scholars deny that the company is a separate entity and retain the notion of the contracting and bargaining individual. For them, the company is an aggregation of persons. But whereas the initial version of the aggregate theory focussed almost exclusively on the company's shareholders, thereby treating the company

³³ Chapter 4 par 4.

³⁴ Chapter 4 par 5.

essentially as a partnership, the nexus of contracts version (or economic contractarian theory) focuses on relationships more broadly. It deems the web of consensual transactions (or contract based relations) to be between not only the shareholders but between all the rational economic actors, including creditors and employees. Directors and managers are nevertheless perceived to be the agents of the shareholders because they are deemed to be the residual risk bearers. For economic contractarians the basic unit of analysis for any economic, political or legal theory is always the individual, never the group. Individuals are ontologically prior to companies which, as fictions, have significance only because of the freely contracted arrangements of their human constituents. This individualistic view has its roots in classical liberalism which focuses on individual freedom rather than utilitarian social maximization. It presumes that people are and should be free to make their own choices about how to live their lives and achieve their goals.³⁵

It is argued that, from a normative perspective, the real entity theory, specifically the real entity theory as articulated by Dodd, is the most acceptable theory of the corporate personhood of the company. Dodd's normative conception of the real entity theory corresponds with that of the communitarian theory. The real entity theory also perhaps encapsulates our modern conception of the company the best. We do not conceive companies as creatures of the state or as simply aggregates of people. Large modern companies in particular are viewed neither as groups of individuals nor as part of the government, but as organisations falling in their own category. It must however be stated that the role of companies in our lives is extremely complex. As a result, not one of the corporate personhood theories, standing alone, is perhaps sufficient to give us a completely satisfactory picture of companies and their place in society. The concept of a company depends on a collection of legal and non-legal considerations: philosophical, moral, metaphysical, political, historical, sociological, psychological, theological and economic. These disciplines do not necessarily conceptualise the company in the same manner. The law, in order to balance the private rights of individuals with the legitimate public concerns of society, should be sensitive to the multi-dimensional nature of the company and the different ways in which it can be viewed.³⁶

³⁵ Chapter 4 par 3.

1.3.2 Comparative evaluation

A comparative evaluation reveals that the *Companies Act 2006*³⁷ (the *Companies Act 2006*) of the United Kingdom, the Indian *Companies Act 2013* and the old South African Companies Act of 1973 all provide that the subscribers to the memorandum of a company and all other persons who may become members of that company are a body corporate. All three these Acts also contain a statutory contract clause which provides that the memorandum and articles of the company constitute a statutory contract between the company and each member of the company. These provisions represent the aggregate theory's conceptualisation of the company (although in contrast with the aggregate theory a company is specifically determined to be "a body corporate") and can be traced to the partnership (*societas*) and contractual principles on which British company law is based.³⁸ In contrast to this, the *Canada Business Corporations Act* and the South African Companies Act of 2008 treat the corporation or company, by analogy, to a natural person or an individual. The corporation or company is viewed as an entity (corporate person) distinct from its members. This represents the real entity theory's conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*).³⁹

The courts in all four of the jurisdictions of the United Kingdom, Canada, India and South Africa are prepared to pierce or lift the corporate veil in terms of the common law, although they do so sparingly. The practice of piercing or lifting the corporate veil has been subject to criticism. The question can be asked how the separate legal personality of the company that is regarded as the company's most fundamental attribute on the one hand, can simply be ignored on the other. A compelling argument can be made out that the courts do not have the authority to pretend that a company does not exist unless the relevant statute gives them such power. The piercing or lifting of the corporate veil is among the least understood and most confused areas of company law. The theoretical justification for the piercing of the corporate veil is founded in the fiction theory (and perhaps to a lesser extent the aggregate and juridical reality theories). The company law statutes of all four jurisdictions make provision for the lifting of the corporate veil to hold mostly directors

³⁶ Chapter 4 par 8.

³⁷ C 46.

³⁸ Chapter 4 paras 6.2.1, 6.4.1 and 7.1.1.

³⁹ Chapter 4 paras 6.3.1 and 7.1.2.

and those in control of the company personally liable under certain circumstances. South African company law is unique amongst the four jurisdictions in that the courts are given a general statutory power to disregard the separate personality of the company if the incorporation or use of the company constitutes an unconscionable abuse of the juristic personality of a company as a separate entity.⁴⁰

Historically the objects clause of a company played an important role in the United Kingdom. A company was required to state its objects in its memorandum. According to the *ultra vires* doctrine, a company existed in law only for the purpose of its objects and any objects that were reasonably incidental or ancillary thereto. In other words, the legal capacity of the company was determined by its objects clause. The *ultra vires* doctrine is rooted in the fiction theory. The *Companies Act of 2006* of the United Kingdom no longer requires a company to have an objects clause. Unless a company's articles specifically restrict the objects of the company, its objects are unrestricted. The *ultra vires* doctrine still has internal effect but no external effect. This approach signifies a move away from the fiction theory and is more in line with the real entity theory's conceptualisation of the company.⁴¹ The approach of the *Companies Act of 1973* to the capacity of the company was very similar to that of the current *Companies Act 2006* of the United Kingdom.⁴² The Indian *Companies Act 2013* is unique in that it still requires the objects of the company to be set out in the company's memorandum of association. The *ultra vires* doctrine is therefore still part of Indian company law. Any act beyond or outside the objects of a company is void. In this respect, Indian company law still clings to the fiction theory's conceptualisation of the company.⁴³

The approach of the South African *Companies Act of 2008* with regards to the capacity of a company differs fundamentally from that of its predecessor, the *Companies Act of 1973*. Section 19(1) of the *Companies Act of 2008* provides that a company has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any

⁴⁰ Chapter 4 paras 6.2.1, 6.3.1, 6.4.1 and 7.1.

⁴¹ Chapter 4 par 6.2.2.

⁴² Chapter 4 par 7.2.1.

⁴³ Chapter 4 par 6.4.2.

such power, or having any such capacity; or the memorandum of incorporation provides otherwise. This provision is similar to section 15(1) of the *Canada Business Corporations Act* and is based on the real entity theory's conceptualisation of the company. Under the Companies Act of 2008 the company is no longer required to have an objects clause in its memorandum of association.⁴⁴ The *ultra vires* doctrine has no external effect in either Canadian or South African company law.⁴⁵

In the United Kingdom the shareholders constitute the ultimate source of managerial authority within the company. The directors obtain their powers by a process of delegation from the shareholders through the constitution of the company and not from the *Companies Act 2006*.⁴⁶ The position was the same under the South African Companies Act of 1973.⁴⁷ Whilst the directors in Indian company law obtain their powers from the *Companies Act 2013*, they are subject to material limitations. As is the case in the United Kingdom, the ultimate power in the Indian company still vests in the shareholders and not the board of directors.⁴⁸

In modern Canadian corporate law, persons attaining the status of director are assigned statutory powers and obligations to manage the business and affairs of the corporation. Section 66(1) of the South African Companies Act of 2008 similarly provides that the business and affairs of a company must be managed by or under the direction of its board. In contrast to the position in the United Kingdom and under the Companies Act of 1973, the directors' powers are now original and not delegated. This statutory source of the directors' powers and obligations distinguishes South African and Canadian company law from that of the United Kingdom. It corresponds with the real entity theory's conceptualisation of the legal position of directors. Section 66(1) of the Companies Act of 2008 signifies a fundamental shift in the underlying philosophy and approach

⁴⁴ A non-profit company however has to set out at least one object in its memorandum of incorporation.

⁴⁵ Chapter 4 paras 6.3.2 and 7.2.3.

⁴⁶ Chapter 4 par 6.2.3.

⁴⁷ Chapter 4 par 7.3.1.

⁴⁸ Chapter 4 par 6.4.3.

to the company constitution, away from a contractarian (or English model) company to a division of power corporation.⁴⁹

The Nigerian *Companies and Allied Matters Act, 1990*⁵⁰ defines directors as follows: “Directors of a company registered under this Act are persons duly appointed by the company to direct and manage the business of the company.” This definition encapsulates the true essence of a director. It makes it clear, first, that directors are appointed by the company, not by or on behalf of the shareholders. Secondly, their function is to direct and manage the business of the company. Section 1 of the South African Companies Act of 2008 defines a director as: “a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.” Section 66(1) in turn provides that the business and affairs of a company must be managed by or under the direction of its board. A definition of directors that encapsulates their legal position more accurately under the Companies Act of 2008 can be as follows: Directors are persons duly appointed by the company, in terms of the Act, to manage and direct the business and affairs of the company, including alternate directors and all persons occupying the position of a director or alternate director, by whatever name designated.

It is not clear whether the words “except to the extent that ... the company’s Memorandum of Incorporation provides otherwise” in section 66(1) of the South African Companies Act of 2008 extends to the management of the business or affairs of the company or whether it only applies to the authority to “exercise all of the powers and perform any of the functions of the company”. This uncertainty can be removed by rewording the subsection as follows: The business and affairs of a company must be managed by or under the direction of its board. The board has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.

The approach of South African law to the corporate personhood of companies has changed fundamentally with the introduction of the Companies Act 71 of 2008. The approach of South

⁴⁹ Chapter 4 paras 6.3.3 and 7.3.2.

⁵⁰ *Chapter 59 Laws of the Federal Republic of Nigeria.*

African law to the corporate personhood of companies is now aligned with Canadian company law rather than that of the United Kingdom.⁵¹

1.4 The Corporate Objective

One of the most important theoretical and practical issues confronting us today is to identify the purpose of the company (the corporate objective). The corporate objective determines how directors should manage the company, shapes the normative contents of their roles and determines which stakeholders' interests are paramount. How we define the corporate objective is, in turn, informed and shaped by the theory about the nature of the company (and also the corporate personhood theory) that we adopt.⁵²

1.4.1 The Berle Dodd debate and *The Modern Corporation & Private Property*

It is often contended that the debate about the corporate objective commenced in the early 1930s with the exchange between Berle and Dodd in the Harvard Law Review.⁵³ The ultimate aim of both Berle and Dodd was to ensure that the company was managed in the interests of society. They however differed in their approach of how this could be achieved. Berle's concern was how directors and managers could be held accountable. He placed his trust in the shareholders to hold directors and managers accountable and believed that this accountability would be compromised if directors also had a duty towards other interest groups. He argued that, until a clear and reasonably enforceable scheme of responsibility to someone else is devised, the only mechanism to hold directors and managers accountable is to require them to manage the company in the interests of its shareholders. In other words, directors and managers owe fiduciary duties to the shareholders. Dodd, on the other hand, placed his trust to safeguard the interests of society in the directors. Directors and managers owe fiduciary duties to the company as an institution rather to the shareholders alone. Twenty years after this debate, Berle conceded that Dodd's view had prevailed.⁵⁴

⁵¹ Chapter 4 par 8.

⁵² Chapter 5 par 1.

⁵³ Berle "Corporate powers in trust" (1931) Harvard Law Review 1049; Dodd (1932) Harvard Law Review 1145; Berle "For whom corporate managers are trustees: A note" (1932) Harvard Law Review 1365.

⁵⁴ Chapter 5 par 2.

It was however the seminal work of Berle and Means, *The Modern Corporation & Private Property*,⁵⁵ in which they identified the separation of ownership and control of the company, which really stimulated the debate about the purpose and governance of the company. Berle and Means believed that powers of the company must be used for the public benefit. They recognised a wide constituency of company interests and responsibilities.⁵⁶

1.4.2 The models of corporate governance

Four prominent models of corporate governance are considered in this thesis:

- a) The first is the shareholder primacy model of corporate governance. As indicated hereinbefore, shareholder primacy is a fairly recent concept. The company served a public purpose through most of its evolution. This purpose was only expanded to include private interests with the arrival of the general incorporation laws in the nineteenth century. The prominence of the shareholder primacy model (especially in the United Kingdom and the United States) has been the greatest since the late 1970s and coincided with the emergence of a New Right or neoliberalist pro-market thinking and the law and economics movement. This was an era of deregulation and the emergence of financialisation (or finance capitalism), which sought to replace the productive economy with a finance economy. Financialisation is rooted in the shareholder primacy model of corporate governance. According to the shareholder primacy model, the corporate objective is to maximise shareholder wealth, which is measured purely in monetary terms. The interests of other stakeholders such as creditors and employees are protected by contractual and regulatory measures rather than through participation in corporate governance. According to this model, the legal enforcement of the corporate objective should be focussed on shareholders, who are conceived to be the best group to monitor and hold directors accountable. The shareholder primacy model is based on the contractarian theories of the company. There are significant arguments against the shareholder primacy model. The normative basis of the shareholder primacy model is questionable and the adoption of this model has led to undesirable results. But despite all its weaknesses and a recent swing back towards constituency or multi fiduciary models, the shareholder primacy model is

⁵⁵ Berle & Means *The Modern Corporation*.

⁵⁶ Chapter 5 par 3.

arguably still the prevalent model of corporate governance in the United Kingdom and the United States.⁵⁷

- b) The second is the stakeholder model of corporate governance. This model is the antithesis of the shareholder primacy model of corporate governance. It can be argued that the stakeholder model of corporate governance held sway through most of the company's history before the nineteenth century and again from the 1930s to 1970s. It has again become popular in the past 20 years. It is now generally accepted that other stakeholders' interests must be taken into account. The stakeholder model operates widely in many continental European and East Asian countries with Germany and Japan regarded as prime examples. According to the stakeholder model, the economic and social purpose of the company is to create and distribute wealth and value to all its stakeholders, without favouring one group at the expense of another. The directors or managers must give independent value to and balance the interests of all the various stakeholders, including the creditors and employees of the company. A company must act with economic, social and environmental responsibility. The stakeholder model is based on the communitarian theories. It also finds support in the real entity theory, specifically Dodd's normative conception of the real entity theory. The most attractive feature of the stakeholder model is its strong moral basis. It adopts an approach to justice that not only revolves around the ideas of maximising welfare and respecting freedom, but also emphasises the importance of virtue or the common good. However the stakeholder model also has its weaknesses. One of the major criticisms against the stakeholder model is that it has been a difficult concept to define. This is exacerbated by the fact that there are several approaches that may be described as stakeholder in orientation. The enforceability of the stakeholder model has also been questioned. This has led some commentators to conclude that whilst the stakeholder model has attractions, specifically from a normative perspective, it is difficult to see how it can be applied effectively in practice.⁵⁸
- c) The third is the enlightened shareholder value model of corporate governance. This model emerged in the United Kingdom in the last part of the 20th century. It is based on the shareholder primacy model and its theoretical underpinnings. According to the

⁵⁷ Chapter 5 par 4.

⁵⁸ Chapter 5 par 5.

enlightened shareholder value model, the directors must have regard to the long-term interests of the shareholders and, where appropriate, take into account the interests of other stakeholders such as creditors and employees. Because it is essentially a variant of the shareholder primacy model, many of the criticisms against the shareholder primacy model applies *mutatis mutandis* to the enlightened shareholder value model. A further criticism that is raised against the enlightened shareholder value model, is that it is legally unenforceable as it is optional for directors to take the interests of non-shareholder stakeholders into account.⁵⁹

- d) The last model of corporate governance that is considered in this thesis is Keay's entity maximisation and sustainability model (EMS model).⁶⁰ The EMS model focuses on the company as an entity or enterprise in its own right. It is rooted in the real entity theory. The idea that the directors owe their obligations and duties to the company as a separate legal entity also aligns with the division of power model of corporations. The EMS model has two elements to it. The first is to maximise or foster the wealth of the company as a separate entity. The wealth of the company as an entity must be maximised for the long term. The EMS model does not focus solely on profit maximisation. The idea behind the EMS model is adding value. The second element of the EMS model is sustainability. For Keay, sustainability for purposes of the EMS model simply means for the most part to sustain the company as a going concern, in other words to ensure its survival. The EMS model of corporate governance is attractive in a number of respects. The focus is on the company as a separate entity, and what will enhance its position, rather than on the stakeholders (or investors as Keay refers to them) and their interests. The model can tentatively be criticised on the basis that it does not place sufficient emphasis on the importance of virtue or the common good. This objection can be addressed by adding a third element to the EMS model namely, to require the company to be a good corporate citizen. By adding this third element the company is given a conscience.⁶¹

⁵⁹ Chapter 5 par 6.

⁶⁰ Keay "Ascertaining the corporate objective: An entity maximisation and sustainability model" (2008) *The Modern Law Review* 633; Keay "The ultimate objective of the company and the enforcement of the entity maximisation and sustainability model" (2010) *Journal of Corporate Law Studies* 35; Keay *The Corporate Objective* (2011) 173-319.

⁶¹ Chapter 5 par 7.

The EMS model (subject to the modification proposed hereinbefore) and the stakeholder model are, from a normative perspective, the most attractive of the four models of corporate governance.⁶²

1.4.3 Comparative law

The United Kingdom adopted the enlightened shareholder value model. One of the biggest obstacles in seeing the enlightened shareholder value model in the United Kingdom as a move towards a true stakeholder approach is the fact that no other stakeholder, other than a shareholder, has the right to enforce any breach by the directors of their statutory duties.⁶³

Contemporary Canadian corporate law regards the corporate objective completely different than that of the United Kingdom. Directors are required to act in the best interests of the corporation as a separate legal entity. The Canadian Supreme Court has unequivocally rejected the shareholder primacy model and adopted the stakeholder model. Unlike the law in the United Kingdom, Canadian law provides remedies to non-shareholder stakeholders if directors do not comply with their duties.⁶⁴

Section 166(2) of the Indian *Companies Act 2013* provides that a director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole; and in the best interests of the company, its employees, shareholders, the community and for the protection of the environment. Whilst section 166(2) was seemingly inspired by section 172(1) of the United Kingdom *Companies Act 2006*, there are important differences between them. India appears to have positioned itself nearer to the stakeholder model of corporate governance. India has a rich tradition in corporate social responsibility and the Supreme Court of India has recognised the social character of the company.⁶⁵

⁶² Chapter 5 par 10.

⁶³ Chapter 5 par 8.1.

⁶⁴ Chapter 5 par 8.2.

⁶⁵ Chapter 5 par 8.3.

1.4.4 South African law

South African company law was initially firmly rooted in the contractarian theory and inherited the shareholder primacy model from the United Kingdom. However, the Policy Document proposed a fundamental shift from the traditional view of shareholder primacy to a more inclusive balancing of interests approach. It proposed that the corporate objective should be to promote the economic success of the company, taking into account, as appropriate, the legitimate interests of other stakeholders. Pursuit of profit should be constrained by social and environmental imperatives.

Certain duties of directors have been partially codified in the Companies Act of 2008. Section 76(3) of the Act provides that a director of a company must exercise the powers and perform the functions of a director in good faith, for a proper purpose and in the best interests of the company. The wording of section 76(3) is similar to that of section 122(1) of the *Canada Business Corporations Act*. Both sections require the directors to act in the best interests of the company (or corporation). This is consistent with the approach adopted by the real entity theory and the EMS model of corporate governance. Non-shareholder stakeholders such as creditors and employees now have significant rights, protections and remedies under the new Companies Act of 2008 to directly or indirectly enforce the corporate objective and the fiduciary duties of directors. The position adopted in Canada and South Africa is probably closer to stakeholderism than most, if not all, other Anglo-American jurisdictions.⁶⁶

It is argued in this thesis that if the company is conceptualised as a separate legal person, its purpose cannot simply be to maximise shareholder wealth and make as much money as it can for its shareholders. Such an approach creates a moral void. The theory and underlying value system on which the shareholder primacy model is founded is normatively flawed. Our approach to justice cannot revolve only around the ideas of maximising welfare and respecting freedom. At the most fundamental level we do not judge or measure persons based on their monetary wealth, but rather on their contribution to society and the world. Why must companies be measured differently? Companies are our creations. They have no lives, no powers and no capacities beyond what we, through our governments, give them. We determine the corporate objective. It

⁶⁶ Chapter 5 par 9.

is generally accepted that the ultimate purpose of the company must be to serve society. This is encapsulated by the idea that the company must be a good corporate citizen. The company must be instilled with a conscience, an appreciation of virtue and the good life. Subject to this ultimate and supreme objective, the corporate objective on a narrower level must be to maximise and sustain the company as a separate legal entity.⁶⁷

1.5 The constitutional imperative

The interim Constitution⁶⁸ (the interim Constitution), which came into effect on the 27th of April 1994, and the final Constitution, which came into effect on 4 February 1997, not only brought about a constitutional revolution in South Africa but also introduced a new era in our company law. As South Africa is now a constitutional state, the normative values that shape our company law and the manner in which it is interpreted are found in the Constitution. The Constitution is the supreme law, and all law, including the Companies Act of 2008 and the common law, derives its force from the Constitution and is subject to constitutional control.⁶⁹

1.5.1 The application of the Bill of Rights to companies

The South African Bill of Rights is not only a charter of negative liberties that protects private persons against state power. Whilst the Constitution provides for the direct vertical application of the Bill of Rights between the state and private persons (by conferring rights on private persons and imposing obligations on the state to respect, protect, promote and fulfil the rights), it also provides for its direct horizontal application in disputes between private persons. The Bill of Rights applies directly to a legal dispute when a right of a bearer (or beneficiary) of the Bill of Rights has been infringed by a duty-bearer of that right during the period of operation of the Bill of Rights within the Republic of South Africa.⁷⁰

Section 8(4) of the Constitution provides that two factors must be considered in determining whether a company is a bearer (or beneficiary) of a particular right contained in the Bill of Rights

⁶⁷ Chapter 5 par 10.

⁶⁸ Constitution of the Republic of South Africa Act 200 of 1993.

⁶⁹ Chapter 6 par 1.

⁷⁰ Chapter 6 paras 3.1.1 and 7.

namely, the nature of the fundamental right in question and the nature of the company. The nature of most of the rights contained in the Bill of Rights make them applicable to the protection of companies. The second factor namely, the nature of the legal person, now constrains the courts to deal with the more abstract question as to what the nature of the company is. As indicated hereinbefore, it is argued in this thesis that, from a normative perspective, the communitarian conceptualisation of the nature of the company is the most acceptable. This conceptualisation of the company also corresponds with the normative value system that underpins the Constitution. It is further argued that the real entity theory, as articulated by Dodd, is the most acceptable theory regarding the corporate personhood of the company. According to this theory the company should have the same legal, social and moral rights and responsibilities as a natural person. This means that a company should therefore, in principle, be a beneficiary of those rights which, by their nature, make them applicable to companies.⁷¹

The question whether a company is a duty-bearer of a particular right contained in the Bill of Rights is regulated by section 8(2) of the Constitution. Section 8(2) provides for the direct horizontal application of the Bill of Rights to private disputes in certain circumstances. In terms of this section, a company (and in fact any natural or juristic person) is bound by a provision of the Bill of Rights if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.⁷²

The Constitution also makes provision for the indirect application of the Bill of Rights to company law. Section 39(2) provides that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation (including the Companies Act of 2008) and when developing the common law or customary law.⁷³

⁷¹ Chapter 6 par 3.1.1.1. In practice much of the debate about the meaning of the requirements in section 8(4) is made irrelevant because the courts have adopted a very generous approach towards legal standing in constitutional litigation. Section 38 of the Constitution provides that anyone listed in the section may approach a court, alleging that a right in the Bill of Rights has been infringed or threatened.

⁷² Chapter 6 par 3.1.1.2.

⁷³ Chapter 6 par 3.1.2. The Constitutional Court has indicated on a number of occasions that the indirect application of the Bill of Rights must be considered before direct application. This is known as the principle of avoidance.

1.5.2 The constitutional values

One of the aims of this research is to establish what the underlying normative value system that underpins the Companies Act of 2008 is. As South Africa is now a constitutional state, the normative values that shape our conceptualisation of the company, our company law and the manner in which it is interpreted are found in the Constitution.

The South African Constitution embodies an objective normative value system. Certain values are expressly articulated in the Constitution. The preamble of the Constitution emphasises the commitment to heal the divisions of the past and to establish a new society based on democratic values, social justice and fundamental rights; to establish an open and democratic society; to improve the quality of life for all citizens; and to build a united and democratic South Africa. Section 1 of the Constitution proclaims the Republic of South Africa to be one, sovereign, democratic state founded on certain values namely, human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Sections 7, 36 and 39 contain the Bill of Rights' own internal value provisions. They focus on five ideas namely, human dignity, equality, freedom, democracy and openness. Other provisions of the Constitution also describe specific values. In addition, the Constitutional Court has referred to a number of other founding values that are not expressly referred to in the Constitution. Amongst these are constitutionalism, the separation of powers, co-operative government, transformation and *ubuntu*.

Because a constitution is premised on a range of values and principles, these values and principles can pull in different directions. Any one person will emphasize one value over another depending on that person's foundational system of belief and philosophical approach to justice. Given the historical origins of the South African text, it is not surprising that there are different and conflicting visions of the text. Our final Constitution is a negotiated and largely consensus-based text.

The Constitution adopted a political pluralist vision in which the right to associate is enshrined. Section 18 of the Constitution provides that everyone has the right to freedom of association.⁷⁴ This section protects the right of persons to incorporate a company, to become a securities holder or member of a company, and to participate in the activities of the company. The ambit of the protection covered by this right is determined by the second stage of the two-stage analysis (in other words the application of the general limitation clause) of a constitutional enquiry, rather than the first stage of the inquiry (the identification of an infringement of the right). Insofar as the limitation of the right to associate is concerned, it is necessary to emphasise that it is generally accepted that the overall objective of the company is to serve the interests of society as a whole. A company is a public or quasi-public entity, a corporate citizen and not simply a private contractual arrangement. This means that legal constraints are necessary to limit the right to associate in order to ensure that companies are accountable to the society in which they operate. This philosophy forms the basis of the discipline of corporate social responsibility. Within this vision companies are an integral part of and play a significant role in society. Companies can be beneficiaries and duty-bearers of the rights contained in the Bill of Rights.

The Constitution is distinctly communitarian in nature. It emphasises group solidarity, social justice, economic justice and virtue. The South African Constitution has one of the most comprehensive Bills of Rights in the world. While it entrenches the first generation rights and freedoms traditionally associated with liberal democratic constitutionalism, it is equally (if not more) focussed on political, social and economic transformation and also includes second and third generation human rights. It departs significantly from traditional, liberal models of constitutionalism and is not reflective of a *laissez faire* model of economy in which our company law was originally rooted. Instead, it encompasses a social democratic vision for South Africa in which commercial autonomy must be tempered by virtue, dignity and social and economic equality. Democratic socialism demands a process of redistributive justice so that the distribution of material resources serve the common good. This approach is embodied in the concept of “transformative constitutionalism”. The Constitution was adopted against the background of a history characterized by inequality and injustice and must be seen as an explicit attempt to

⁷⁴ In certain instances shareholders may also rely on their right to property in respect of their shares to protect their interests. It is however important to emphasise that shareholders do not own the company.

transform legal and social institutions and power relationships towards greater equality and justice. The concept of transformative constitutionalism has found support in South African jurisprudence.⁷⁵

1.5.3 Comparative law

The British constitutional dispensation differs fundamentally from that of Canada, India and South Africa. Britain does not have a codified constitution. The doctrine of parliamentary sovereignty still dominates British constitutional law. Canada, India and South Africa all have supreme-law constitutions with fully-fledged bills of rights that give the courts the power to declare legislation incompatible with a particular right or rights.⁷⁶

Canada is a federal state that is constitutionally set up under a statute of the United Kingdom of Great Britain and Northern Ireland, the *British North American Act, 1867*,⁷⁷ now known as the *Constitution Act, 1867* (“the *Constitution Act 1867*”). Canada discarded the Westminster model of parliamentary sovereignty and became a federal constitutional state with the adoption of the *Canadian Charter of Rights and Freedoms*⁷⁸ (“the *Canadian Charter of Rights and Freedoms*”) on 17 April 1982, thereby ushering in a new era in Canadian constitutional history. The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The *Canadian Charter of Rights and Freedoms* is a modern constitutional document. It makes provision for first-, second- and third generation rights. It adopted a communitarian rather than a liberalist individualistic approach. The South African Bill of Rights appears to be modelled on the *Canadian Charter of Rights and Freedoms*. The constitutional conceptualisation of the corporation or company in Canada and South Africa are also similar. Both the *Canada Business Corporations Act* and the South African Companies Act of 2008 treat the corporation or company by analogy to a natural person or an individual. This represents the real entity theory’s

⁷⁵ Chapter 6 paras 3.2.2,

⁷⁶ Chapter 6 par 5.1.

⁷⁷ 30 & 31 Vict. c 3.

⁷⁸ Part I of the *Constitution Act, 1982* and enacted by the *Canada Act, 1982 (UK) c 11*.

conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*).⁷⁹

As is the case with Canada, India is a federal constitutional state. The *Constitution of India* became effective on 26 January 1950. It is the fundamental law of India and all legislation must be consistent with it. The preamble of the *Constitution of India* declares India to be a sovereign socialist secular democratic republic. The fundamental rights contained in Part III of the *Constitution of India* include first-, second- and third generation rights. Unlike the *Canadian Charter of Rights and Freedoms* and the South African Constitution, the *Constitution of India* does not contain a general limitations clause. Over and above the fundamental rights, the *Constitution of India* contains directive principles that serve as guidelines for the government. It can be said that the directive principles are the goals which have to be attained and achieved while the fundamental rights are the means to achieve these goals. The fundamental rights must be construed in the light of, and so as to promote, the values underlying the directive principles. The preamble, fundamental rights and the directive principles have been described as “the conscience” of the *Constitution of India*. It is the task of the courts, in interpreting the fundamental rights, to achieve a proper balance between the rights of the individual and those of the state or the society as a whole, in other words between liberty and social control. Generally speaking, the rights of the individual hold sway in non-economic matters. But in economic matters, partly by judicial interpretation, and partly by constitutional amendments, the emphasis is on social control, leading to the emergence of a regulated (as opposed to a *laissez-faire*) economy. India and South Africa share certain constitutional features. Both were trying to escape a bitter past and adopted written constitutions that are transformative in nature. Both have entrenched bills of rights and embraced the doctrine of constitutional supremacy. Both countries share a common law tradition and are ethnically and culturally diverse nations. Both countries share a commitment to social and economic rights. But, whereas India adopted socio-economic directive principles, South Africa endorsed judicially enforceable socio-economic rights.⁸⁰

⁷⁹ Chapter 6 par 5.2.

⁸⁰ Chapter 6 par 5.3.

1.5.4 The Companies Act of 2008

The Companies Act of 2008 gives express recognition to the constitutional imperative to bring company law within our constitutional framework. The constitutional values are given expression in the Companies Act of 2008. Section 5 of the Act provides that the Act must be interpreted and applied in a manner that gives effect to the normative purposes set out in section 7. The first purpose listed in section 7 is to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law”. This is consistent with section 8(1) of the Constitution, which provides that the Bill of Rights applies to all law (the direct vertical application of the Bill of Rights); section 8(2) which provides that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (the direct horizontal application of the Bill of Rights); section 8(4) which provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person; and section 39(2) which provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (the indirect application of the Bill of Rights).

A number of the other purposes listed in section 7 corresponds with the more traditional functions of the company. However, the Act crosses the corporate Rubicon in extending the purposes of the company beyond those traditionally associated with the company. These other listed purposes question the very core of the shareholder primacy model of corporate governance. They support the conclusions reached in this thesis regarding the corporate objective. Whilst South African company law was initially firmly rooted in the contractarian theory and inherited the shareholder primacy model from the United Kingdom, there has been a fundamental shift from the shareholder primacy model to a more inclusive balancing of interests approach.

The separate legal personality of a company lies at the very core of its human rights obligations. The Constitution requires the structures established by the Companies Act of 2008 to comply with the constitutional requirements. As a result, the notion of creating a structure which pursues profit at the expense of fundamental rights is no longer legal tenable. The fact that companies are duty-bearers under the Bill of Rights goes beyond purely imposing obligations upon them – it changes the very nature of companies in South Africa.

The company is now situated within our constitutional framework. The values of our Constitution are integrated into the core operation of companies. They underpin the very purpose and object of the company, and consequently also corporate governance. The values impact on the relationship between the company and its creditors and employees. The South African landscape is now shaped by the Constitution. Company law must reflect the ideals, goals and responsibilities of this landscape by ensuring that companies operate in a manner that complies with the Bill of Rights.

The courts should expressly recognise the pivotal role played by this normative value system when they exercise judicial discretion. It is important to appreciate that there has been a fundamental paradigm shift and that our company law is no longer underpinned by the classical liberal theories of Anglo-American company law of the eighteenth and nineteenth centuries.⁸¹

2 THE PROTECTION OF CREDITORS AND EMPLOYEES

The interests of creditors and employees received little attention in the Companies Act of 1973. It was accepted that directors do not owe a fiduciary duty to creditors or potential creditors of the company.⁸² Neither did they owe such a duty to the employees of the company. The Companies Act of 1973 adopted a shareholder-orientated approach.

Some instances where the interests of creditors and employees were acknowledged include the following:

- a) The Companies Act of 1973 adopted the capital maintenance rule. Whilst the Act did not prescribe a minimum capital for a company, a statement of the opinion of each director to the effect that the capital of the company is adequate for the purpose of the company and its business had to be lodged before the registrar would issue a certificate to commence business.⁸³ A company could not purchase its own shares.⁸⁴ Subject to certain exceptions,

⁸¹ Chapter 6 par 6.

⁸² Kunst, Delpont & Vorster *Henochsberg on the Companies Act* 5th ed (1994) (Loose-leaf, update June 2011) (hereinafter Kunst et al “*Henochsberg on 1973 Act*”) 395.

⁸³ Section 172(3) of the Companies Act of 1973.

⁸⁴ Sections 73-74.

shares could not be issued at a discount.⁸⁵ In terms of the common law dividends could not be paid out of capital.⁸⁶ The prohibition of financial assistance to purchase shares contained in section 38 was meant to ensure that the resources of a company should not be applied to the prejudice or potential prejudice of its minority shareholders and its creditors.⁸⁷ The same motivation applied to section 37 (loans made and security provided by a subsidiary). Directors or officers of a company could be held personally liable for losses sustained by persons as a result of certain loans to directors or managers.⁸⁸

- b) Directors or officers of a company could be held personally liable under certain circumstances relating to the use and publication of the company name.⁸⁹
- c) Creditors and employees were able to inspect and obtain copies of any documents lodged with the companies registration office,⁹⁰ the register of members,⁹¹ the register of pledges, cessions and bonds, and the register of debenture holders.⁹² A judgment creditor or debenture holder of a company who received a *nulla bona* return was entitled to a copy of the latest annual financial statements and the last interim report of the company.⁹³
- d) Creditors could hold directors or any person who was knowingly a party thereto, liable for fraudulent or reckless conduct of the business of a company.⁹⁴
- e) Creditors could apply for a company to be placed under judicial management.⁹⁵

⁸⁵ Sections 80-82.

⁸⁶ *Cohen v Segal* 1970 (3) SA 702 (W). Section 79 of the Companies Act of 1973 contained a statutory exception to this rule.

⁸⁷ Kunst et al *Henochsberg on 1973 Act* 74.

⁸⁸ Sections 226 and 37 of the Companies Act of 1973.

⁸⁹ Section 50. Sections 41-52 dealt with the use of company names.

⁹⁰ Section 9.

⁹¹ Section 113.

⁹² Section 130.

⁹³ Section 309.

⁹⁴ Section 424.

⁹⁵ Section 427.

- f) Creditors could apply for the winding-up of a company.⁹⁶ This was often the preferred remedy of creditors.
- g) Interested persons could apply for an order that the affairs of a company be investigated in terms of the provisions of section 258.⁹⁷
- h) Interested persons could apply for the dissolution of a company to be declared void.⁹⁸

Application could also be made in terms of the common law to lift the corporate veil and ignore the separate juristic existence of a company.⁹⁹

The interests of creditors and employees receive significantly more attention in the Companies Act of 2008. The protections and remedies granted to creditors and employees by the Companies Act of 2008 can conveniently be ordered as follows:

a) Indirect protections

(i) Capital and asset protection

This includes the new solvency and liquidity provisions that replaced the rigid capital maintenance regime,¹⁰⁰ corporate capital regulations,¹⁰¹ the approval of certain fundamental transactions¹⁰² and the consequences of the removal of a company from the register.¹⁰³

⁹⁶ Section 346.

⁹⁷ Compare *Buckingham v Combined Holdings & Industries Ltd* 1961 (1) SA 326 (E) 330-331.

⁹⁸ Section 420 of the Companies Act of 1973.

⁹⁹ In *Ex parte Gore* 2013 (3) SA 382 (WCC); [2013] 2 All SA 437 (WCC) par 19 Binns-Ward remarked that:
 “It is evident on a consideration of South African, English and Australian jurisprudence that the readiness of courts to pierce, lift or look behind the corporate veil has varied quite considerably with the facts of given cases. It is impossible to categorise the results premised on any finitely definable principles.”
 This emphasises the need for a normative value based system that is advocated in this study.

¹⁰⁰ See, for example, sections 4 (solvency and liquidity test), 44 (financial assistance for subscription of securities), 45 (loans and other financial assistance to directors), 46 (distributions must be authorised by the boards), 47 (capitalization of shares), 48 (company or subsidiary acquiring a company’s shares), 113 (proposals for amalgamation or merger) and 116 (implementation of amalgamation or merger) of the Companies Act of 2008.

¹⁰¹ See, for example, sections 44 (financial assistance for subscription of securities), 45 (loans and other financial assistance to directors), 46 (distributions to be authorised by the board), 47 (capitalisation shares) and 48 (company or subsidiary acquiring company’s shares).

(ii) Use of company name

The aim of these provisions is to eliminate or avoid the use of a company's name in a manner that can, for example, confuse, mislead or create a false impression.¹⁰⁴

b) Access to information, disclosure and reporting

The Companies Act of 2008 grants rights to creditors and employees to obtain access to information in addition to the rights and remedies that they have in terms of the Promotion of Access to Information Act 2 of 2000.¹⁰⁵ It also makes provision for certain disclosures and reporting. These include the following:

- (i) Section 6(4) requires that all notices, disclosures and documents must be in the prescribed form and in plain language.
- (ii) An entire section of the Companies Act of 2008 namely, chapter 2 part C, deals with transparency, accountability and integrity of companies. A creditor or employee of a company will, for example, be entitled to inspect that company's securities register and register of members.¹⁰⁶ The financial statements of a company may not be false, misleading or incomplete,¹⁰⁷ and must include the remuneration and benefits of directors and prescribed officers.¹⁰⁸ A judgment creditor who receives a *nulla bona* return is entitled to receive a copy of the most recent financial statements of the company.¹⁰⁹ Trade unions can obtain access to the financial statements of the company through the

¹⁰² See, for example, sections 112 (proposals to dispose of all or greater part of assets or undertaking), 113 (proposals for amalgamation or merger), 114 (proposals for scheme of arrangement), 115 (required approval for transactions contemplated in part A), 116 (implementation of amalgamation or merger) and parts B (authority of panel and takeover regulations) and C (regulation of affected transactions) of chapter 4.

¹⁰³ Section 83.

¹⁰⁴ See, for example, sections 11 (criteria for names of companies) and 32 (use of company name and registration number).

¹⁰⁵ For a more detailed discussion see Ncube "Transparency and Accountability under the new Company Law" (2010) AJ 43.

¹⁰⁶ Section 26(2) of the Companies Act of 2008.

¹⁰⁷ Section 29(2).

¹⁰⁸ Section 30(4).

¹⁰⁹ Section 31(2).

Companies and Intellectual Property Commission (the Commission) for purposes of initiating business rescue proceedings.¹¹⁰

- (iii) If a board authorizes financial assistance to directors, it must provide written notice of the resolution to any trade union representing its employees.¹¹¹
- (iv) Chapter 3 deals with enhanced accountability and transparency of public companies, state-owned companies and certain private companies. These companies are required to appoint a company secretary, an auditor and an audit committee.
- (v) If a board of a company has reasonable grounds to believe that the company is financially distressed, but elects not to adopt a resolution to begin business rescue proceedings, it must deliver written notice to each affected person setting out certain prescribed criteria and its reasons for not adopting such resolution.¹¹² An affected person includes a creditor, any registered trade union representing employees of the company and, if any of the employees of the company are not represented by a registered trade union, each of these employees or their respective representatives.¹¹³ The purpose of this provision is evidently to warn creditors and employees timeously so that they can take appropriate steps to protect their interests.
- (vi) All creditors must receive notice of a proposed compromise.¹¹⁴

c) Remedies

(i) Order restraining company from doing anything inconsistent with the Act.

Certain specified persons, including a trade union representing employees of a company, may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Companies Act of 2008.¹¹⁵

¹¹⁰ Section 31(3).

¹¹¹ Section 45(5).

¹¹² Section 129(7).

¹¹³ Section 128(1)(a).

¹¹⁴ Section 155(2).

¹¹⁵ Section 20(4).

(ii) Abuse of separate juristic personality of a company

Section 20(9) now provides for a statutory lifting of the corporate veil. This remedy is supplemental to the common law, rather than substitutive.¹¹⁶ It appears to broaden the bases upon which the courts in South Africa, and certainly those in England, have hitherto been prepared to grant relief that entails disregarding corporate personality.¹¹⁷ Any interested person can, in any proceedings, apply for relief in terms of section 20(9) if the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity.¹¹⁸

(iii) Disputes concerning reservation or registration of company names

Any person with an interest in the name of the company may apply to the Companies Tribunal (the Tribunal) for a determination of whether the name, reservation, registration or use of the name satisfies the requirements of the Companies Act of 2008.¹¹⁹

(iv) Application to declare director delinquent or under probation

A registered trade union or another representative of the employees of a company may apply to court for an order declaring a director delinquent or under probation.¹²⁰ The Commission may also apply for such an order.¹²¹ This means that a creditor or individual employee may lay a complaint with the Commission which can then indirectly lead to such an application.

¹¹⁶ *Ex parte Gore supra* paras 31-34.

¹¹⁷ *Ex parte Gore supra* par 28.

¹¹⁸ For a discussion of section 20(9) see Davis (ed) *Companies and Other Business Structures in South Africa* 3rd ed (2013) (hereinafter “*Davis Companies and Other Business Structures*”) 30-33; Cassim FHI “Introduction to the New Companies Act: General overview of the Act” in Cassim R “Corporate Governance” in Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2nd ed (2012) (hereinafter “*Contemporary Company Law*”) 57-63; Delpont *Henochsberg on the Companies Act 71 of 2008* vol 1 (2011) (Loose-leaf, update Oct 2016) (hereinafter “*Delpont Henochsberg*”) 100(3)-100(4); Cassim “Hiding behind the Veil” (2013) DR 35.

¹¹⁹ Section 160 of the Companies Act of 2008.

¹²⁰ Section 162(2).

¹²¹ Section 162(3).

v) Derivative action

A derivative action is brought by a person on behalf of a company to protect the interests of the company. The Companies Act of 2008 abolished the common law derivative action.¹²² It extended the persons who have *locus standi* to institute a derivative action to include a registered trade union or another representative of employees of the company and any person who has been granted leave by the court.¹²³ This can include a creditor or an employee. Leave will be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that person.

(vi) The general non-compliance remedy: section 218(2)

Section 218(2) provides as follows:

“Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.”

In *Rabinowitz v Van Graan*¹²⁴, the first reported case in which this section was considered, it was held that this section would apply not only if a director of a company is guilty of any offence (for example section 214), but also if a director fails to comply with a provision of the Act (for example section 22 (reckless trading)).¹²⁵ The ambit and scope of this provision is wide and creditors, in particular, will be entitled to redress from a company or its directors for fraudulent or reckless trading.¹²⁶ It may also conceivably, for example, be used where directors fail to comply

¹²² Section 165(1).

¹²³ Section 165(2).

¹²⁴ 2013 (5) SA 315 (GSJ).

¹²⁵ See also *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd* [2014] All SA 454 (GJ) par 42; Delpont *Henochsberg* 639-641. This can be compared with the position in Australia where the question has not yet been settled as to whether directors can be held liable for damages under section 1324(1) of the *Corporations Act* 2001. See in this regard *Phoenix Construction (Queensland) Pty Ltd v Coastline Construction (Aust.) Pty Ltd* [2011] QSC 167; *Phoenix Construction (Queensland) Pty Ltd v McCracken* [2012] QSA 129; Harkin & Altieri “Queensland Court of Appeal overturns decision in Phoenix Construction case” (2012) CBP Lawyers (available at <http://www.cbp.com.au/Publications/Queensland-Court-at-Appeal-overtime-decision-in-P> (accessed 2013-09-27)); Baxt “Do directors owe duties to creditors?” (2012) Australian Institute of Company Directors (available at <http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2012-back-editions/September/Directors-Council-Do> (accessed 2013-09-27)).

¹²⁶ Cassim FHI “The duties and liability of directors” in *Contemporary Company Law* 587; Esser “Corporate Social Responsibility: A Company Law Perspective” (2011) 23 SA Merc LJ 317 325.

with the provisions of section 44 (financial assistance for the subscription of securities), section 45 (loans or other financial assistance to directors), section 46 (distribution to be authorised by the board) and section 129(7) (notice to affected persons if company is in financial distress).

(vii) Remedies aimed at the conduct of directors

An innovation of the Companies Act of 2008 is that certain duties of directors have been partially codified in the Act.¹²⁷ Section 77 sets out the liability of the directors, alternate directors, prescribed officers, members of an audit committee, or a committee of the board to the company. However, it is supplemented by section 218(2) discussed before, which extends the liability of the directors, prescribed officers and committee members to any other person who suffers loss or damage as a result of that contravention.¹²⁸

Section 75(8) provides that any interested person can apply to court for an order declaring a transaction or agreement that had been approved by the board or shareholders, as the case may be, valid despite a failure by a director to satisfy the disclosure requirements of section 75.

(viii) Reckless trading or conduct

Item 9 of schedule 5 of the Companies Act of 2008 provides that chapter XIV of the Companies Act of 1973 will continue to apply with respect to the winding-up and liquidation of insolvent companies until a date determined by the Minister. It follows that section 424 (liability of directors or other for fraudulent conduct of business) of the Companies Act of 1973 will continue to apply in the winding-up and liquidation of insolvent companies.¹²⁹ Section 424 of the Companies Act of 1973 has traditionally been an important remedy in the arsenal of creditors.

¹²⁷ Sections 75 (directors' personal financial interests) and 76 (standard of directors' conduct) of the Companies Act of 2008. Section 76(4) introduces the so-called business judgement test into South African Law. See also Davis *Companies and Other Business Structures* 115-127; Cassim FHI "The duties and liabilities of directors" in *Contemporary Company Law* 507-584.

¹²⁸ Cassim FHI "The duties and liabilities of directors" in *Contemporary Company Law* 582.

¹²⁹ Delport *Henochsberg* 104. Section 424 of the Companies Act of 1973 applied "in a winding-up, judicial management and otherwise". It will presumably now only apply in a winding-up.

Section 22(1) of the Companies Act of 2008 prohibits a company from carrying on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Any person who contravenes this section can, as indicated before, be held liable for damages in terms of section 218(2) by any other person who suffers loss or damage as a result of that contravention.

Section 22(2) and (3) further provides that, if the Commission has reason to believe that a company is carrying on business recklessly, with gross negligence, with the intent to defraud any person or for a fraudulent purpose, it may issue a notice to that company to show cause why it should be permitted to continue carrying on business. If the company fails to satisfy the Commission that it is not engaging in such conduct, or that it is able to pay its debts as they become due and payable in the ordinary course of business, the Commission may issue a compliance notice requiring the company to cease carrying on its business or trading as the case may be. Creditors or employees can initiate this process by laying a complaint with the Commission.

d) Protection and remedies during business rescue proceedings

An “affected person”, for purposes of business rescue proceedings, includes a creditor of the company, any registered trade union representing employees of a company and any employees who are not represented by a trade union or their representatives.¹³⁰ Affected persons can, *inter alia*, apply to set aside a resolution of directors to commence business rescue proceedings or the appointment of a business rescue practitioner.¹³¹ They can also apply to court to commence business rescue proceedings.¹³²

The aim of the Companies Act of 2008 is to protect the rights of employees as much as possible during business rescue proceedings.¹³³ Employees essentially continue to be employed by the

¹³⁰ Section 128(a) of the Companies Act of 2008.

¹³¹ Section 130.

¹³² Section 131.

¹³³ Davis *Companies and other Business Structures* 250.

company on the same terms and conditions as before.¹³⁴ They may also form a committee of employees' representatives.¹³⁵ Section 144 specifically deals with the rights of employees during business rescue proceedings.

Creditors have the right to be notified of, and formally and informally participate in all stages of the proceedings. They play a fundamental role in the approval or rejection of the business rescue plan.¹³⁶ The participation of creditors in the business rescue process is specifically dealt with in section 145 of the Companies Act of 2008.

e) Protection and remedies in liquidation proceedings

As indicated before, the Companies Act of 1973 will continue to apply with respect to the winding-up and liquidation of insolvent companies. A creditor has *locus standi* to apply for the liquidation of a company.¹³⁷ Creditors play an important role in the liquidation process, which is conducted through a series of prescribed meetings of creditors and members to ascertain their wishes. Employees receive far less protection than they do under business rescue proceedings.

Solvent companies are wound up in terms of the provisions of the Companies Act of 2008. The role of creditors in the liquidation of solvent companies will of course be far more limited.

f) Complaints to Commission or Panel

Section 168 of the Companies Act of 2008 provides that any person may file a complaint in writing to the Commission or Takeover Regulation Panel (the Panel) if another person has acted in a manner inconsistent with the Act, or if the complainant's rights under the Act, or under a company's memorandum of incorporation or rules, have been infringed.

¹³⁴ Section 136 of the Companies Act of 2008.

¹³⁵ Section 144(3).

¹³⁶ Sections 150 – 153.

¹³⁷ Section 346(1)(b) of the Companies Act of 1973.

g) Right to participate in hearings

Any person who has a material interest in a hearing before the Tribunal, may participate in those proceedings unless that interest is adequately represented by another participant.¹³⁸

It is thus evident that creditors and employees now have significantly more rights, protections and remedies under the new Companies Act of 2008.

In addition to the Companies Act of 2008, which focuses on the core company law issues, there is also other legislation that imposes broader checks and balances on companies, for example the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Competition Act 89 of 1998, the Unemployment Insurance Contributions Act 4 of 2002, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Promotion of Access to Information Act 2 of 2000, the Auditing Profession Act 26 of 2005, the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008 and the Financial Markets Act 19 of 2012.

3 CONCLUDING REMARKS

The underlying normative value system that underpins our company law is not static. We have come a long way since liberalism and *laissez-faire* reigned supreme when the modern company was born in the eighteenth and nineteenth century Great Britain, the country from where our company law originated. The Companies Act of 1973 effectively cut the umbilical cord between English and South African company law. Although the Companies Act of 1973 was amended on a regular basis in an attempt to ensure that South African company law remained in tune with changing business trends and developments, the whole underlying philosophy behind company law changed dramatically during the period that the Act was in force. Socio-economic and political change in South Africa underscored the need for a complete revamp of our company law.

Significantly too, South Africa adopted a new Constitution. Since South Africa became a constitutional state, the normative values that shape our company laws and the manner in which

¹³⁸ Section 181 of the Companies Act of 2008.

they are interpreted are found in the Constitution. The Constitution is not reflective of a *laissez faire* model of economy in which commercial autonomy is an unqualified good, but encompasses a social democratic vision for South Africa. Democratic socialism demands a process of redistributive justice so that the distribution of material resources serve the common good. The Constitution adopts a distinctly communitarian approach. Communitarianism has deep roots in African culture. The communitarian approach also finds support in the philosophy of *ubuntu*: A person is only a person because of other people. The Constitution is now the supreme law, and all law, including the Companies Act of 2008 and the common law, derives its force from the Constitution and is subject to constitutional control. Structures established by the Companies Act of 2008 must conform to these requirements. In other words, the values of the Constitution now underpin how we conceptualise the company, the corporate objective and consequently also the relationship between the company and its creditors and employees. The values of the Constitution are now integrated into the core operation of companies.

The Companies Act of 2008 gives express recognition to the constitutional imperative to bring company law within our constitutional framework. The Company is conceptualised from a communitarian rather than a contractarian perspective. There has been a fundamental shift in the underlying philosophy and approach to the company constitution away from a contractarian (or English model) company to a division of power corporation. The company is conceptualised as an institution rather than a contractual arrangement (a *universitas* rather than a *societas*). The Act treats the company by analogy to a natural person or an individual. The company is viewed as an entity (corporate person) distinct from its members. This represents the real entity theory's conceptualisation of the company and is firmly based on the concept of the corporation (*universitas*). As a result the chasm that separates South African company law and that of the United Kingdom has widened even further. The underlying philosophy and approach of South African constitutional and company law is now more aligned with that of Canada.

The provisions of the Companies Act of 2008 and the rights, protections and remedies that it provides to creditors and employees must be measured and assessed against the normative value system that underpins our modern company law. The fundamental paradigm shift that occurred in this normative value system since classical liberalism and *laissez-faire* reigned supreme must be

appreciated when our courts exercise judicial discretion. Clearly a new era has dawned for creditors and employees of companies.

SUMMARY

**THE NORMATIVE VALUE SYSTEM UNDERPINNING
THE COMPANIES ACT 71 OF 2008
with specific reference to the protection of creditors and employees**

by

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The company developed through an evolutionary process. Our conceptualization of the company and its position in law is determined by our philosophical approach to justice (our underlying system of belief), the resultant theory of law that we adopt and the underlying economic, political and social environment in which the company operates.

Three broad philosophical approaches to justice are identified in this study. The first revolves around the idea of maximizing welfare, the second around the idea of respecting freedom and the third approach sees justice as bound up with virtue and the good life. It is argued in this thesis that we cannot detach arguments about justice and rights from arguments about virtue and the good life.

It is not possible to devise a grand theory of the nature of the company. But from a normative perspective the communitarian theory and arguably the concession theory (more particularly the dual concession theory of Dine) is the most acceptable theory of the nature of the company. The real entity theory, as articulated by Dodd, is the preferred theory of the corporate personhood of the company. A company, especially a large company, is a public or quasi-public entity and a corporate

citizen that should have the same legal, social and moral rights and responsibilities as a natural person.

From a normative perspective the entity maximization and sustainability model (EMS model) and the stakeholder model are the most attractive models of corporate governance. It is generally accepted that the ultimate purpose of the company must be to serve society. Subject to this ultimate and supreme objective, the corporate objective on a narrower level must be to maximize and sustain the company as a separate legal entity.

The aforesaid conceptualization of the company corresponds with the normative value system that underpins the Constitution of the Republic of South Africa, 1996 (the Constitution), and therefore also the Companies Act 71 of 2008 (the Companies Act of 2008). The Constitution encompasses a social democratic vision for South Africa in which commercial autonomy must be tempered by virtue, dignity and social and economic equality. The Companies Act of 2008 gives express recognition to bring company law within our constitutional framework.

There has been a fundamental paradigm shift in the normative value system that underpins our company law since liberalism and *laissez-faire* reigned supreme in the eighteenth and nineteenth century Great Britain, from which country our company law originates. The underlying philosophy and approach of our company law is now more aligned with that of Canada. This also has an important effect on the rights, protections and remedies of creditors and employees of the company.

Keywords: philosophical approach to justice; the nature of the company; *universitas* versus *societas*; contractarian companies versus division of power corporations; the corporate personhood of a company; the corporate objective; corporate social responsibility; the company as rights and duty bearer under the Bill of Rights; the constitutional values; the protection of creditors and employees of the company.

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