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The political economy of corporate governance reform in South Africa

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ABSTRACT

This study explored the political-economic dimension of corporate governance reform in South Africa. Such reform in South Africa is especially significant in view of the history of South African society. This study investigated the relationship between corporate governance institutions and systems on the one hand and the political, economic and historical context of South African society that produced these corporate governance institutions and systems on the other.

The purpose of the study was to establish the political, economic and historical determinants of corporate governance reform, as they evolved in the course of South African corporate history. A literature review was done in order to provide a backdrop for the study, after which a number of documents in the public domain were observed, in particular, a number of historical sources, newspaper reports, internet resources, and analyses of selected statutes and South African case law.

The study concluded that South African corporate governance reform and such reform in the Commonwealth economic systems have a lot in common in terms of their historical evolution. The outcome of the political process in South Africa, for very specific reasons, was that a specific shareholder model of corporate governance became the corporate governance system in South Africa.

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DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Business Administration at the Gordon Institute of Business Science, University of Pretoria. It has not been submitted before for any degree or examination in any other university. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

13/11/2008

George Johannes Diamond Date

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Contents

CHAPTER 1: INTRODUCTION TO THE RESEARCH PROBLEM

1.1 BACKGROUND

In his opening remarks on Sunday 19 October 2008 at the 2008 National Association of Corporate Directors (NACD) Conference held in Washington, DC, in the United States of America (USA), NACD Chief Executive Officer Ken Daly said: “This is a time of great change… The confluence of recent events is presenting the opportunity to mold corporate governance forever” (NACD, 2008, n.p.). This conference took place in the midst of the unprecedented global credit meltdown that affected global credit markets, especially during the second half of 2008.

Surprisingly, a decade ago, Berglöf (1997) already declared that corporate governance reform was on the public agenda. Despite this awareness, corporate governance reform measures instituted during the intervening decade were unable to meet and avert the credit crisis.

A number of explanations are offered in the academic literature on corporate governance for why corporate governance reform has been a central theme on the global economic and financial reform agenda for more than a decade, such as the following:

- The most important reason for the interest in corporate governance is undoubtedly the corporate governance scandals that occurred in the United States of America and in the United Kingdom (Allen, 2005). A number of large firm names occur frequently in the literature, including Enron, WorldCom, Tyco, Adelphia, Ahold (a Dutch firm), Hollinger, Vivendi (a

French firm) and Parmalat (Gourevitch and Shinn, 2005). These names appear very often in the literature, largely in discussions of Anglo-Saxon legal and economic systems. Corporate scandals are, however, not confined to the Anglo-Saxon legal and economic sphere. In this regard, Berglöf (1997) refers to scandals such as the Bremer Vulkan and Metallgesellschaft fiasco in Germany, Banesto and Seat in Spain, Ferruzzi in Italy and Navigation Mixte and Suez in France, all of which are examples from Continental Europe. Calls for corporate governance reform are consequently being made in virtually all quarters of the developed world.

- Ongoing globalisation, the global integration of capital markets and the perception that differences in corporate governance patterns would inhibit capital flows are further reasons why corporate governance patterns are being studied with great interest (Berglöf, 1997; Soederberg, 2003).
- Although corporate governance reforms are occurring around the globe, corporate governance reforms in developing countries often take place with a view to promoting “development”. This context has resulted in the gravitation of developing countries towards an Anglo-American model of corporate governance (Allen, 2005; Reed, 2002).

Against the above background, scholars have begun to study possible links between finance, management and industrial relations, as well as politics and law (Jackson, 2005). Since 1932, when the classic book by Adolph Berle and Gardiner Means, *The Modern Corporation and Private Property*, appeared, corporate governance has mainly been studied from the perspective of the separation of ownership and management in the firm. Consequently, there is a wealth of “managerialist” corporate governance literature (La Porta, Lopez-de-

Silanes and Shleifer, 1999, p. 471). Recently, studies have started to move beyond this static view of the firm and have begun to analyse a wide variety of variables to try to explain corporate governance reforms and differences in corporate governance systems (La Porta *et al*., 1999).

One subject that is increasingly attracting attention from academics is the relationship between corporate governance structures on the one hand, and the political context within which such structures are devised and eventually reformed on the other (Markus, 2003). A number of textbooks have been published on this subject recently, including those by Roe (2006) and Gourevitch and Shinn (2005). Scrutiny of the bibliographies of these two books reveals a wealth of literature on the subject. It therefore comes as no surprise that corporate governance reform in South Africa would attract attention from academics both inside South Africa and internationally (Goldstein, 2000; Malherbe and Segal, 2001; Webster and Adler, 1999; West, 2006).

The aim of this study is exploratory research in order to describe the political economy of corporate governance reform in South Africa.

1.2 RESEARCH PROBLEM

Because the study of corporate governance within the context of political and economic factors is, generally speaking, a recent phenomenon, and because the political and economic landscape of South Africa has changed dramatically since 1994, the political and economic determinants of corporate governance reform in South Africa are currently still poorly described and consequently poorly understood.

Webster and Adler (1999) describe South Africa's transition as a class compromise reached between collective actors. They argue that, in 1994, a political compromise was reached between these political actors. They add that a second compromise, and this time, an economic compromise, will have to be reached. They claim that the alternatives to such a compromise are a continued economic stalemate between the current social, political and economic forces in South Africa, increased disorder and even a descent into decentralised collective violence in South African society.

In view of such dire predictions, corporate governance within the firm is one of the areas that will have to be urgently reformed in the process of redesigning the South African economic landscape.

In an article exclusively devoted to an analysis of corporate governance against the backdrop of the political transition in South Africa, Malherbe and Segal (2001, p. 3) drew the following conclusions:

- the *context* of South African corporate business until 1994 had a decisive impact on economic developments in South Africa;
- the issue of *access to capital markets*, as well as the *efficient use of capital* by firms in the economy is central;
- the *structure* of the corporate firm has an impact on corporate governance;
- the definition of the term corporate governance should mean *quality of corporate monitoring and decision-making*; and
- the reform of legislation and regulations, listing rules and accounting standards play an important role in corporate governance reform.

It is not only in the academic literature that the subject of corporate governance reform is receiving attention. In a personal interview, an Executive Head of the Institute of Directors of South Africa, Ms Lindie Engelbrecht (Brand, 2008a) indicated that when the Institute of Directors revisited the second King Report on Corporate Governance for South Africa (King II), the Institute realised that the second King Report was completely outdated, due to the fact that the entire context with regard to corporate governance has changed since 2002, when the second King Report was written. Consequently, she said, the Institute was busy drafting a third King Report. She indicated in this interview that this third King Report would, for the first time, emphasise the concept of sustainability. The focus of the third King Report would be on reporting how the firm generated income and not so much on how the income was spent. She illustrated this by means of an example, suggesting that, in future, corporate governance requirements would rather require a report on the fact that the company was deriving income from child labour than on the fact that the same company was spending substantial amounts on child welfare.

On 15 July 2008, Professor Mervyn King, the Chairperson of the Corporate Governance Work Group of the Institute of Directors of South Africa, told the International Society of Business, Economics and Ethics in Cape Town that the 21st century was a very interesting period in the 150-year long history of the company as a phenomenon, in that, for the first time, politicians have begun to display an interest in the corporate governance of companies (Brand, 2008b). At the same conference, Professor Bob Garrett, chairperson of the working group on corporate governance of the Business School of the University of Stellenbosch, predicted that, once workers realised that they were the true

owners of companies, the debate regarding the structure of companies would change fundamentally (Brand, 2008c). Also at this conference, Dr Ralph Hamman of the University of Stellenbosch suggested that it was still uncertain whether the current form and structure of companies would be able to deliver the sustainable economic growth that would be necessary to eradicate the problems of inequality and environmental decay in South Africa. He added that initiatives such as the third King Report, as well as the report of the United Nations entitled *Protect, respect and remedy: a framework for business and human rights* are both examples of a new approach to trying to change the thinking about businesses and companies in general (Brand, 2008c).

Given the long history of South African isolation from the international community, and the very specific characteristics of South African political economy, as discussed above (Malherbe and Segal, 2001), it should come as no surprise that corporate governance as a phenomenon in political economy has thus far been poorly researched and debated in the academic literature in South Africa. It is also clear from the *Proceedings* of the International Society of Business, Economics and Ethics Conference discussed above that corporate governance as a phenomenon is undergoing a paradigm shift, not only in South Africa, but worldwide.

The aim of this study is therefore to contribute to the process of exploring and describing political and economic determinants of corporate governance reform in South Africa. This study consequently endeavours to define central concepts, such as the terms “corporate governance” and “political economy”. It then explores the landscape of corporate governance reform in South Africa and, in

doing so, hopes to make a contribution to the corporate governance reform debate in South Africa.

1.3 PURPOSE OF THIS RESEARCH

The purpose of this research is threefold.

Firstly, in general, it hopes to contribute to the body of academic literature which deals with corporate governance reform in South Africa. In particular, the aim is to

- describe the dynamics of the corporate governance reform debate;
- describe the impact of the political context on the corporate governance reform debate; and
- describe the actors active in the corporate governance reform debate.

Secondly, since corporate governance arrangements in society ultimately lead to legislation and judicial processes, and since legislation has to be interpreted in the light of the imperatives of the Constitution of the Republic of South Africa of 1996 (Act 106 of 1996), and in particular section 39 thereof, which states, amongst other things, that, in interpreting legislation, any court or tribunal shall promote the values that underlie an open and democratic society, based on human dignity, equality and freedom, it stands to reason that the political and economic context of corporate governance legislation will have a profound impact on the interpretation of such legislation. Therefore, the purpose of this study is to contribute to this process of judicial interpretation of corporate governance legislation interpretation.

Thirdly, the study aims to identify and describe possible trajectories of corporate governance reform in South Africa in future.

CHAPTER 2: THEORETICAL BASIS AND LITERATURE REVIEW

2.1 INTRODUCTION

This chapter starts by defining two concepts which are central to this study, namely **political economy** and **corporate governance**. The definition of these two concepts serves to help define the scope of the research. Then, the chapter explores the global corporate governance debate. The research questions set out in Chapter 3 are derived from this literature review.

2.2 DEFINITION OF CONCEPTS

2.2.1 Political economy

The term “political economy” is extensively used in corporate governance literature and the related economic literature, for example, in the work of Goldstein (2000), Malherbe and Segal (2000), Pieterse (1997), Reed (2002) and Soederberg (2003). However, no attempts are made to define the term “political economy” in this literature.

In general, the question as to the exact meaning of the term “political economy” has received some attention in the literature, but without reaching a satisfactory conclusion (Abbott, 1985/1986; Crouch and Streeck, 1997; Dewan and Shepsale 2008; Wisman and Whynes 1986).

It is not the purpose of this study to become involved an academic discussion regarding the exact meaning of the term “political economy”. There is a

sufficient consensus in literature that the term " political economy" refers at least to the following:

- interdisciplinary studies, drawing on not only economics, but also politics, law and culture, in discussing how economic institutions and behaviour are explained; and
- political economic studies in which the primary emphasis is placed on the interrelationship between politics on the one hand, and economics on the other – both fields of study are also influenced by a number of other fields of study, notably
    - history;
    - law; and
    - sociology.

The term "political economy" in this study is consequently used in the sense of this consensus meaning, as described above.

2.2.2 Corporate governance

Markus (2003, p. 1) states that corporate governance is "defined as a set of institutions, i.e. formal and informal constraints on behaviour, determining the capacities of firm stakeholders to control the decisions and that cash flows in a given corporation". It is immediately clear that this definition focuses on institutions. One can rightly ask whether or not such a definition should include more dimensions of the firm, for instance, procedures and regulations. This focus on institutions has led some to declare that, in the past, corporate governance was largely been the domain of taxonomists, intent on cataloguing

the central characteristics of national corporate governance systems and then classifying different systems based on the specified attributes (Gilson, 2001).

Gilson (2001) observes, however, that due to the decompression of trade barriers, more emphasis should now be placed on the various **functions** of corporate governance, rather than on the institutions involved in corporate governance.

Pound (1995) suggests that the essence of corporate governance is the ability of a corporation to employ a proper corporate decision-making process. He argues that the debate over corporate governance has always centred around power; that is, the goal was always to tighten control over wayward managers. For him, the answer lies in creating a model of corporate governance in which the focus is not on monitoring managers, but on improving decision-making. He emphasises processes rather than structures.

Useem (2006) takes this emphasis on processes a step further by declaring that the kind of interventions which the world saw after the Enron and WorldCom debacles were all public and visible interventions and changes to structures and processes. He argues, however, that, unlike the outward trappings of good governance, the inner workings of the boardroom have not faced widespread investor or regulatory review. He has devised a model to explain the inner workings of good governance.

Lorsch and Clark (2008) remark that the emphasis of the corporate governance debate has shifted to compliance with the ever-evolving set of regulations. They argue that this situation has come about as a result of legislation in general, and

the Sarbanes-Oxley Act in the United States of America in particular. He states that this shift was to the detriment of various other functions of directors, that is, *inter alia*, to provide leadership with long-range planning horizons which would necessarily also involve some risk-taking.

The above short exposition highlights various dimensions of the phenomenon of corporate governance. An article by Zingales (1997) provides further conceptual insight into the phenomenon of corporate governance. He asks the specific question "**what is corporate governance?**" A summary of his argument is presented below in order to provide a conceptual framework to demarcate the boundaries of the phenomemon of corporate governance.

Zingales (1997) asks why we need a system called the "corporate governance" system. According to neo-classical microeconomics, the invisible hand of the market postulated by Adam Smith is supposed to take care of an efficient allocation of resources without intervention by any authority.

To explain the need for such a system, Zingales (1997) argues that we should consider, for instance, the purchase of a commodity such as wheat. There are many producers of the same quality of wheat and, simultaneously, many purchasers. In this context, Adam Smith's invisible hand of the market ensures that the wheat is provided efficiently without the need for any form of authority.

However, all transactions are not like the above-mentioned wheat transaction. Zingales (1997) considers, for instance, the purchase of a customised machine. After a lengthy process in the open market place, a contract is signed between the supplier and the purchaser. Unlike with the wheat transaction, however, the

signing of the contract does not end the relationship between the purchaser and the supplier, since it takes time to produce the machine. Once production has begun, the purchaser and supplier are trapped in the situation of bilateral monopoly. By the time the machine is produced, the custom-made machine probably has a higher value to the buyer then to the market and the contracted manufacturer has the lowest cost to finish the machine. The difference between what the two parties **generate together** and what they can obtain in the market place represents a **quasi-economic rent** (as opposed to the concept of **economic rent**, which is in turn defined in general as the income derived by the owner of a production factor, resepresenting that portion of the market price of the production factor that exceeds the costs of bringing the production factor into the market (Montanye, 2006). Since this quasi-economic rent is produced bilaterally (and there is consequently no market for this quasi-economic rent), Adam Smith's invisible hand of the market is of no assistance when it comes to the bargaining over and allocation of this quasi-economic rent.

On the basis of the aforegoing, Zingales (1997) defines “corporate governance” as the complex set of constraints that shape the *ex post* bargaining over the quasi-rents generated in the course of a relationship. He argues that the initial contract between the parties takes centre stage in this definition, since at the time of the conclusion of the contract investment, decisions are made, **and they are consequently immediately sunk**, and an after-contract division of surpluses brought about by contingencies is not considered and agreed upon. This creates a distinction between decisions made *ex ante* and decisions made *ex post* the transaction.

It is this distinction that a proper system of “corporate governance” is meant to manage. It is within this context that most of the phenomena in corporate governance literature can be understood, for instance, investors in the company, the shareholders, need some kind of a mechanism to guard the investment they have already sunk in the company shares. Hence, the existence of a board of directors and rules are needed to regulate the conduct of such a board of directors. Likewise, once the workforce of a company has entered into a contract, a myriad circumstances could change; and therefore corporate governance structures and systems are necessary to address the bargaining concerns of employees.

It is also important to note that one can talk about the governance of a transaction, a club, a price and of any organisation. Corporate governance in particular, however, refers to the governance of **a firm**. Zingales (1997) defines the concept “firm” as a nexus of specific investments: a combination of mutually specialised assets and people which results in a complex structure that cannot be replicated instantaneously.

Another important aspect regarding the approach Zingales (1997) takes is that, according to him, the purpose of any system of “corporate governance” should be to bring all the participants in a corporate governance transaction within the ambit of a bargaining space which will ensure that each participant can strive for optimum utility and consequently value maximisation. This being the case, there is, in principle, no difference between the purpose of **market governance** on the one hand and that of **corporate governance** on the other. In this way, both market governance and corporate governance are anchored in neoclassical

microeconomic theory. This definition of corporate governance is important, since this criterion can be used to distinguish between corporate governance reform which is **desirable,** as opposed to **undesirable corporate governance reform** (for instance, reform aimed only at the implementation of some or other ideology).

2.2.3 Conclusion

The following integrated definition of the scope of this study is based on the above discussion: this study aims to explore the broad political, historical and legal imperatives that affect economic variables in South Africa (political economy) with a view to describing the impact of such imperatives on the process of reform of governance institutions and structures in firms (corporate governance) in South Africa.

2.3 EXPLORING THE GLOBAL CORPORATE GOVERNANCE DEBATE

2.3.1 Introduction

Firstly, a broad overview of the progression of the corporate governance debate is presented. The purpose of this overview is to illustrate how the debate on corporate governance has progressed from a very narrow focus to becoming a broadly focused subject, including an ever-increasing horizon of corporate issues. In fact, this broadening of the scope of the corporate governance debate has attracted attention from various writers, indicating that perhaps a number of issues currently included under the heading of corporate governance are in fact nothing but government regulations, the law, the Law of Delict, and so on (Child and Marcoux, 1999).

Secondly, an overview is presented of the various institutions that are often referred to and described in the literature.

Thirdly, each of the previously mentioned institutions normally displays some policy preference within the public corporate governance debate. It is, for instance, commonly believed that trade unions and left-wing political parties normally favour Continental corporate governance systems (that is, systems dominated by banks and shareholders and not by the dictates of capital markets).

Fourthly, a number of forces that operate in various contexts have an impact on the corporate governance reform debate within a society.

This overview was used to formulate a number of research questions (see Chapter 3), all of which are aimed at contributing to a better understanding of the initial research purpose discussed in Section 1.3 above. The structure of this literature discussion was consequently designed to fit the purposes of the study.

2.3.2 Broad overview of the corporate governance debate

Change is ubiquitous in present-day society. In the field of corporate governance reform, change is inevitable in the operations of large-scale public corporations. Such changes are taking place as a result of the transformations in eastern and central Europe, the demise of the Soviet Union, economic changes in South East Asia brought about by the economic crisis of 1997 and 1998 and the fact that the battle between capitalism and communism has largely been resolved in favour of capitalism (Bradley, Schipani, Sundaram and

Walsh, 1999). The latter authors argue that reform questions are now increasingly centred around the transition from one form of capitalism to another. The form of capitalism that will eventually rise to the top is predicated on the institutions that will arise from the social changes and organisational structures that will evolve for the provision of goods and services. According to these authors, understanding this process requires an understanding of the nature of the changes and also the assessment of the paradigms of corporate governance and its ability to inform, respond to and shape change.

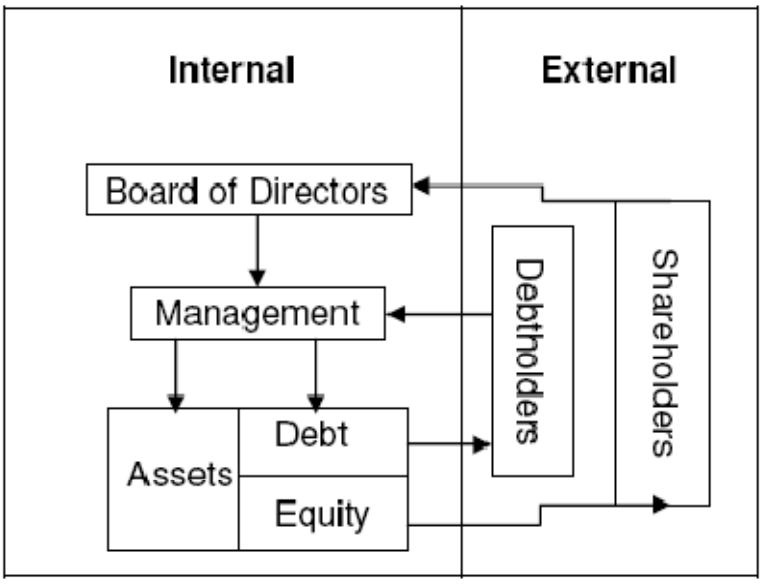
Bradley *et al.* (1999) claim that, traditionally, the phrase “corporate governance” evokes a narrow interpretation of the relationship between the firm's capital providers and top managers, as mediated by its board of directors. As an example of this narrowly focused approach to corporate governance, reference can be made to Shleifer and Vishny (1997). These two authors are prolific writers on corporate governance, as is clear from the references used in their 1997 article cited here. In the abstract of the article, the writers state that the article discusses corporate governance paying special attention to the importance of the legal protection of investors and ownership concentration in corporate governance systems. This question largely entails questions regarding the so-called agency problem. This problem revolves around ways and means for providers of capital to a firm to get managers (the agents managing the capital) to return dividends to the providers of capital. This problem was initially seen as **the** corporate governance problem – and the authors even declare bluntly that corporate governance deals with the ways in which suppliers of finance to corporations ensure a return on their investments.

If corporate governance were to be confined to this question, then the subject would encompass a very narrow focus.

Seen from the above perspective, corporate governance is almost exclusively concerned with the providers of capital to the firm, and their interests. Over time, however, consensus has developed that this narrow definition of corporate governance should be expanded to include the various constituencies that define a business enterprise.

Gillan (2006) explores the various stages that the study of corporate governance has gone through and suggests that, initially, the sample balance-sheet model of the firm, namely, the **internal** and **external** role players in the firm, was used as a basis to study corporate governance. These role players are depicted in Figure 1.

Figure 1: Internal and external role players



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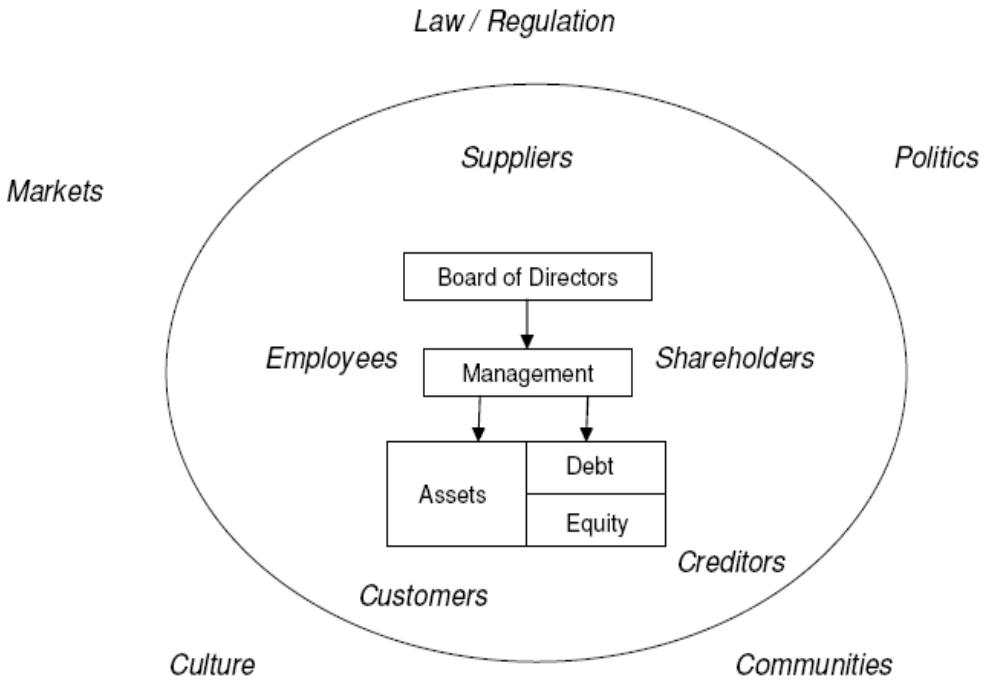
Source: Gillan (2006, p. 382)

He adds that the above viewpoint of the firm defines corporate governance as the procedures put in place to ensure that suppliers of finance will get a return on their investment. He argues that this is too narrow a perspective. He expands this viewpoint further into a broader **stakeholder** model of the firm as opposed to the above-mentioned **shareholder** model of the firm. According to Gillan (2006, p. 383), the stakeholder model can be presented as set out in Figure 2.

Figure 2: The stakeholder model



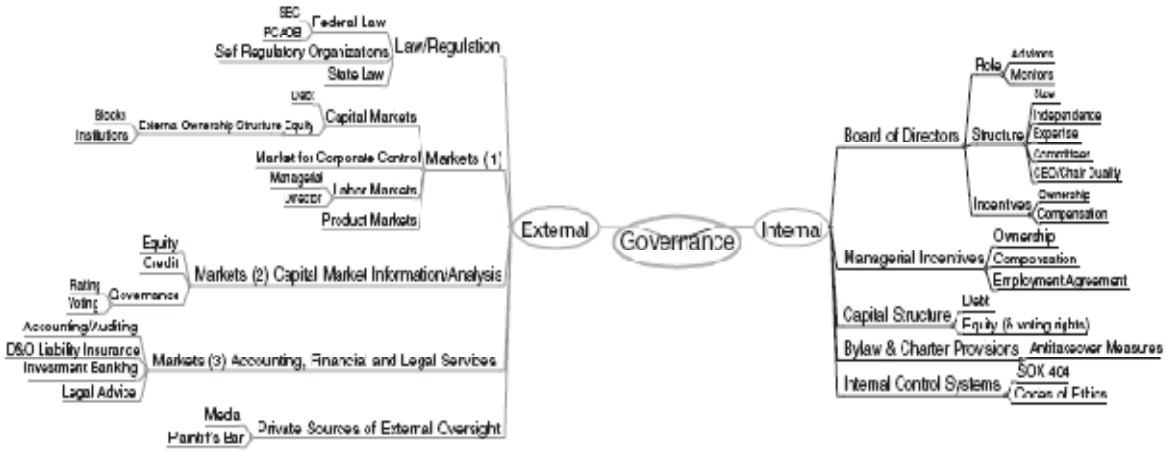
Source: Gillan (2006, p. 383)

The basic feature of the above view of the firm is that of a **nexus of contracts**. Environmental factors have an impact on this nexus of contracts.

Gillan (2006) states that this view coincides with the **stakeholder** view of the firm. He states, however, that this view of the firm should be expanded even further to include all aspects of the environment that affect corporate

governance. If this is done, a broad framework of corporate governance could be posited, as set out in Figure 3.

Figure 3: Broad framework of corporate governance



Source: Gillan (2006, p. 384)

The above exposition testifies to the fact that the scope of the phenomenon of corporate governance has expanded considerably over time to include an increasing number of considerations.

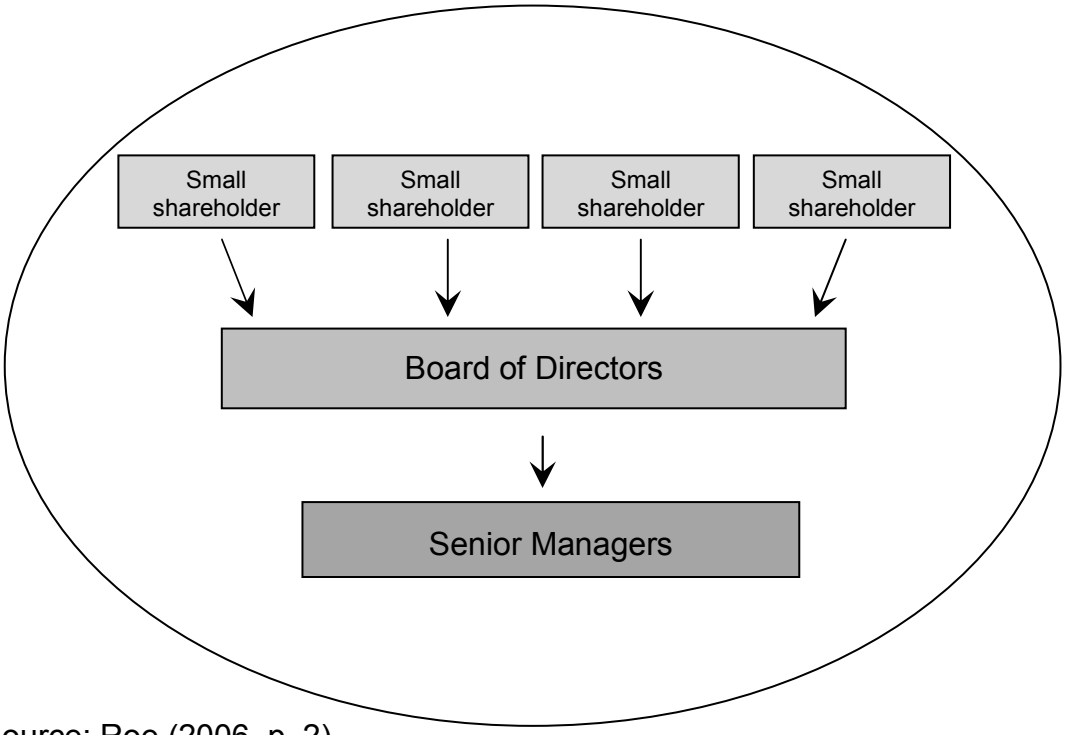
It is not primarily the purpose of this study to contribute to the academic debate on the scope of the phenomenon of corporate governance. What is important for the purposes of this research is that one of the aspects increasingly relevant in research on the corporate governance debate is the question of the political determinants of the corporate governance structure of a country.

Roe (2006) states that politics can affect a firm in many ways, for instance, it determines who owns the firm (compare, for instance, the comments by Professor Bob Garrett, as reported in Section 1.2 above, who postulates that

once workers discover they are the real owners – not necessarily in the strict legal sense of the word, but in an economic sense of the word – of the company, the corporate governance debate will take on a completely new complexion). Politics also affects how big a firm can grow, what it can produce profitably and how it raises its capital, amongst other things.

One key variable which politics has influenced in the past and continues to influence is the degree to which ownership of the firm is separated from control in the firm. Roe (2006) maintains that in the United States of America large, publicly held, diffusely owned firms dominate business. In this kind of corporate governance structure, the managers' agendas can differ from shareholders' agendas, but they are tightly tied to the shareholders' goals as a result of corporate governance systems. The goals of shareholders are inevitably centred around profit maximisation, which entails that, if a company is not profitable, the company must be realigned and possibly downsized in order to maximise profit. Roe (2006) has created a schematic exposition of the diffuse ownership model, as set out in Figure 4 (overleaf).

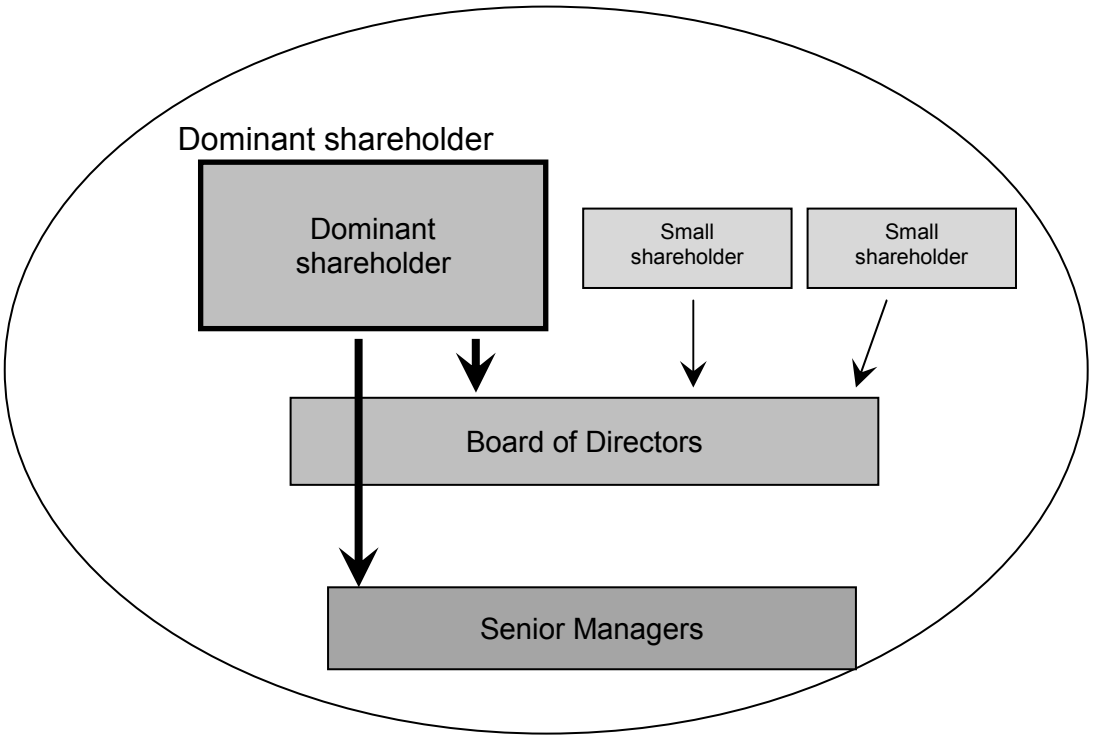
Figure 4: The diffuse ownership model



Source: Roe (2006, p. 2)

Roe (2006) claims that this is not the case in other economically advanced nations in which ownership of a firm is not diffused, but concentrated in the hands of a very small number of equity holders, as depicted in Figure 5 (overleaf).

Figure 5: Equity holders



Source: Roe (2006, p.3)

In such nations (normally in social democracies, very often with discernable centre-left political orientations), the political context exerts pressure on managers to stabilise employment and, in the process of doing so, to forego some profit-maximising but risky opportunities for the firm. Managers are also encouraged to keep capital in place rather than to downsize when markets are no longer aligned with the firm's production capabilities.

One distinction between the two systems is self-evident from the above schematic expositions: in the concentrated owner model, the dominant shareholder takes direct control of management, bypassing a board, which is normally co-determined by a group of shareholder directors and a group of employee directors (Roe, 2006). In the instance of a diffusely held company,

there is only indirect control by shareholders over management, leading to the "agency" phenomenon, where managers are deemed to be the agents of the shareholders and directors representing the shareholders.

The above distinction by Roe (2006) is articulated further by Andreasson (2008a), who indicates that the kind of capitalism that Roe (2006) calls the "diffusely held firm" is also "stockmarket capitalism" or "Anglo-Saxon" capitalism. Andreasson (2008a) points out that Anglo-Saxon capitalism is the kind of capitalism found in the United States of America, the United Kingdom and, broadly speaking, in the Commonwealth countries. The concentrated ownership model of capitalism is also called "welfare capitalism", "stakeholder capitalism" or "Rhineland capitalism". Corporate governance literature therefore distinguishes between an Anglo-American "outsider" model of corporate governance (shareholder capitalism) and a Continental "insider" model of corporate governance (stakeholder capitalism).

Within the Anglo-American corporate governance family, divergent approaches have recently become apparent. In the United States of America, since the inception of the Sarbanes-Oxley Act, corporate governance practice has evolved into a legalistic, compliance-based approach. The approach in the United Kingdom has always been much less legalistic and compliance-based and more strategic and voluntary in nature. This United Kingdom approach has been referred to as the so-called "light touch" (Andreasson, 2008a, p. 8) approach. This divergence in approach has widened in recent years and the two systems have increasingly developed different trajectories as far as this aspect is concerned (Toms, 2005).

Once one aspect of the context within which firms have to operate, namely politics, entered the arena of corporate governance analysis, other contextual determinants of corporate governance also began to feature in the literature. Two more contextual institutions, namely **culture** and **law**, have also received attention. In a thorough article analysing the impact of culture and law on corporate governance, Licht, Goldschmidt and Schwartz (2005) argue that corporate governance is the framework that defines the division of wealth and power in the corporation. This framework is comprised of laws; and the legal rules that shape this division are found scattered in various parts of the laws of countries, including specific corporate laws, general commercial codes, bankruptcy codes and financial institution regulations.

The above types of analysis have resulted in the compilation of quanitative indices. One such an example is the work of La Porta, Lopez-de-Silanes, Shleifer and Vishny (1998), who devised a statistical model resulting in a regression analysis from which they conclude that common law countries generally have the strongest, and French civil law countries the weakest, legal protection for investors, with German and Scandinavian civil law countries positioned somewhere inbetween. They also found that the concentration of ownership in the largest public companies is negatively related to investor protection, consistent with the hypothesis that small, diversified shareholders are unlikely to be important in countries that fail to protect their rights. Licht *et al*. (2005) have refined this approach and conclude that legal families provide only a partial picture of the universe of corporate governance regimes. A discussion of the details of these two analyses falls beyond the scope of this study, which is exploratory in nature and only attempts to describe the landscape of

corporate governance reform in **South Africa** accurately. However, it is important to note the contentions of these two articles that societal institutions, namely law and culture, have an impact on corporate governance regimes and they are consequently studied in this regard.

In conclusion, therefore, the study of corporate governance as a phenomenon was initially regarded as the study of a very simple question (namely how investors can ensure that they get a return on the investment), but the field of study has progressed beyond that aspect to the study of a variety of factors that affect corporate governance structures and procedures, as is set out above.

2.3.3 Actors in the global corporate governance reform debate

It is immediately apparent from the above that the various interest groups in society could conceivably have different agendas with regard to corporate governance reform.

Cioffi and Höpner (2006) argue that, contrary to what one would expect, centre-left political parties have pushed for pro-shareholder corporate governance reforms (centre-left political parties are normally associated with corporate governance systems that do not allow diffuse shareholder structures). By contrast, historically pro-business right-wing parties have generally resisted such reforms. Cioffi and Höpner (2006) explain this by referring to case studies in Germany, France and Italy and the United States, pointing out that centre-left parties have tended to use corporate governance reform to attack the legitimacy of existing political economic elites, to present themselves as pro-growth and

pro-modernisation, to build political alliances with segments of the financial sector and to appeal to middle-class voters.

Jackson (2005) suggests that, when national business systems compete with one another, important links between finance, management and industrial relations as well as politics and law can be identified. He indicates that there is a diversity of corporate governance systems. Despite this, corporate governance reform has spread across the Organisation for Economic Co-operation and Development (OECD) countries since the mid-1990s. He claims that the European Union (EU) has pushed member countries towards financial market liberalisation and explains that, as a result of this, stock markets are now more important. Reform has strengthened investor protection and accounting standards. At the same time, in Germany and Japan, the influence of the banks in corporate finance has declined.

From the above, it is clear that a number of role players can be identified, namely

- political parties;
- financial institutions;
- transnational institutions such as the European Union;
- the vested interests of the existing economic elite;
- national governments; and
- trade unions.

2.3.4 Preferences of actors in the corporate governance reform debate

It is not only the particular actors that participate in corporate governance reform that will determine the outcome of the corporate governance reform debate. It is also their preferences within the context of the debate.

Gourevitch and Shinn (2007) claim that political coalitions take control of the policy machinery to set the rules of corporate governance. Which coalitions form, and which of the coalitions win the political contest, depends on the interaction between the various actors and, more particularly, the preferences of these actors with regard to their preferred corporate governance outcomes. The research of Cioffi and Höpner (2006) again deserves attention in this regard. They undertook a close analysis of the preferences expressed by political parties in various democracies. On an intuitive level, one might expect that centre-left political parties and trade unions would support the Continental model of corporate governance, since such a model is perceived to be most sensitive to workers' rights and is least aligned with aggressive demands for yield on capital by investors. However, Cioffi and Höpner (2006) were surprised to find that in a significant number of instances, centre-left political parties and trade unions opted for the diffuse shareholder model as described by Roe (2006), because these parties and trade unions could strike political alliances with other economic role players to change the vested interests of the existing political elite.

This study explores the theme of preferences in the corporate governance reform process in South Africa, in order to describe corporate governance preferences by economic actors. However, because this study involves

exploratory research (see Chapter 4), no attempt is made in this study to explore any causal relationships between various preferences – this is a very complicated subject, as is quite clear from the research of Gourevitch and Shinn (2007) – or to move beyond a description of the nature of preferences expressed by corporate governance debate actors.

2.3.5 Forces that affect corporate governance reform

Various forces are operative within the corporate governance reform debate.

Access to, and the movement of capital is one such a force (Jackson, 2005; Roe, 2006; Soederberg, 2003). All three these authors state that the free movement of capital and liberalised capital markets tend to push corporate governance reform into the direction of corporate governance systems which are based on the United States model. There is, however, some disagreement between academics about whether the United States of America's corporate governance model necessarily facilitates optimum capital flows (Porter, 1992). Gilson (2001) remarks that German and Japanese corporate governance tends to be long-term oriented, so that managers can ignore short-term swings in share prices and accounting profits in choosing projects. He adds that the long-term multi-dimensional relationship between banks and corporations in Germany and Japan may provide the suppliers of capital with better information concerning corporate performance than stock prices and accounting measures. Thus far, it is unclear whether this assessment is necessarily true. It would only be true if the metric models used by stock market intermediaries in diffuse ownership systems (for instance, in the United States of America) ignore long-term variables or seriously underestimate them.

Gilson (2001) comments in this regard that while there has been little formal convergence (that is convergence of structure) in corporate governance systems across countries, there has been functional convergence, in the sense that the more short-term oriented corporate governance systems (like the one in the United States of America) have devised ways and means to focus on long-term objectives. Likewise, the long-term oriented systems (like the ones in Germany and Japan) have in turn devised ways and means to optimise short-term efficiency and profitability.

A further theme in the literature is the “development” theme (Soederberg, 2003). Soederberg (2003, p. 7) explains that

> the East Asian crisis of 1997-98 engendered a fierce debate over what should be done to quell the growing volatility in the international financial system. The US government and the US-dominated international financial institutions (IFIs) quickly monopolised the terms of the debate by steering attention away from policies that either threatened the principle of free capital mobility or reduced the power of the International Monetary Fund (IMF or Fund). Indeed the only proposals that found their way to the negotiation table were those that sought to strengthen, as opposed to radically reform, the existing system.

In her paper she proceeds to argue that this system, which she calls the “Anglo-American” system (Soederberg, 2003, p. 7), is imposed on the developing countries of the southern hemisphere in order to ensure that the emerging markets adhere to the principles of the neo-liberal open market economy. Secondly, placing great emphasis on shareholder value, as opposed to other types of corporate governance, protects the interests of institutional investors based in market-centric systems such as that in the United States of America.

A counter-argument is articulated by Allen (2005), who suggests that there are two views of corporate governance. The first is the **narrow view** that corporate governance is concerned with ensuring that firms are run in the interests of shareholders. The second is the **broad view** that corporate governance is concerned with ensuring that firms are run in such a way that society's resources are used efficiently. He states that proponents of the narrow view rely on the underlying notion of Adam Smith's invisible hand of the market as the key principle on which the organisation of the economy is based.

Allen (2005) argues that the modern version of this idea is the Arrow-Debreu model (a model named after an American economist and a French mathematician). This model consists of two basic theorems regarding welfare economies. The first theorem states that it is the objective of the firm to maximise the wealth of its shareholders, and of individuals to pursue their own interests. Under such circumstances, capital allocation is efficient. The second theorem states that once capital allocation is efficient, lump-sum taxes can bring about a competitive equilibrium in society. Allen (2005) criticises this narrow view, because, in his opinion, this model is based on many strong assumptions. These assumptions include perfect and complete markets, symmetric information, perfect competition and so on. He suggests that, despite this criticism, much of the existing analysis of corporate governance in emerging economies takes it as a given that this narrow view is the appropriate one.

A further prominent theme in corporate governance literature is articulated by Bebchuk and Roe (1999). In a wide-ranging analysis of various corporate governance structures, they deduce that the corporate structures in an

economy at any point in time depend in part on those that the economy had in earlier times. They identified and analysed two sources of path dependency, namely structure governance and rule-driven governance. They conclude that the corporate structure of the economy depends on the structures with which the economy started. There is a logical reason for this, since the initial ownership structures have a strong effect – they affect the identity of the structure that would be efficient for a given company, because they can give some parties both incentives and power to impede changes in such structures. This theory of path dependency explains why advanced economies, despite reasons to converge, still vary in their ownership structures; and it goes some way toward explaining why differences in corporate governance structures might persist.

The analysis of the South African corporate governance landscape and reform imperatives focuses on the themes identified in the literature and discussed above. It is on the basis of this literature review that the research questions set out in Chapter 3 were formulated.

CHAPTER 3: RESEARCH QUESTIONS

3.1 INTRODUCTION

In the broader global corporate governance context, and on the basis of an exploration of corporate governance and corporate governance reform literature (set out in Chapter 2), five research questions were formulated.

3.2 RESEARCH QUESTION 1

What is the historical trajectory of corporate governance developments in South Africa thus far?

3.3 RESEARCH QUESTION 2

Who are the actors in the corporate governance reform debate in South Africa, and what are their characteristics?

3.4 RESEARCH QUESTION 3

What are the corporate governance preferences of the actors identified in Research Question 2?

3.5 RESEARCH QUESTION 4

What forces operate in corporate governance reform in South Africa?

3.6 RESEARCH QUESTION 5

What are the possible trajectories, given the results to Research Questions 1, 2, 3 and 4, for future corporate governance reform in South Africa?

3.7 LIMITATIONS

It is important to take note of what this research is **not** about: this research is not a causal study. This study focuses on exploratory research with a view to describing the factors referred to in Sections 3.2 to 3.6 above.

CHAPTER 4: RESEARCH METHODOLOGY

4.1 INTRODUCTION

The research process, in general, can be described as follows (Zikmund, 2003):

- problem discovery;
- selection of a research technique from the following options:
  - exploratory research (this is the research type selected for this study, for the reasons discussed below);
  - descriptive research; and
  - causal research;
- formulation of the research questions (as set out in Chapter 3);
- selection of the basic research method (which, in the case of exploratory research, would entail one of the following:
  - a survey;
  - an experiment;
  - a secondary data study; or
  - an observational study;
- collection of data;
- data processing and analysis;
- interpretation of findings; and
- writing a report.

This process was implemented in this study as set out below.

4.2 PROBLEM DISCOVERY

The research problem and the justification for doing research on the problem was set out in Chapter 1.

4.3 SELECTION OF A RESEARCH TECHNIQUE

This study involves exploratory research.

Zikmund (2003) describes three types of research:

- exploratory research (this type of research is conducted to clarify dimensions of an ambiguous phenomenon);
- descriptive research (the main purpose of this type of research is to describe the characteristics of a population or phenomenon); and
- causal research (the purpose of this type of research is to identify cause and effect relationships among variables; thorough exploratory and descriptive research must precede the causal research).

Andreasson (2008b) undertook extensive research with regard to the influence of the Sarbanes-Oxley Act on the King Reports of South Africa, *inter alia* by conducting personal interviews with a number of individuals normally involved in the corporate governance debate in South Africa. He concluded that extensive research is necessary to enable South Africa to maintain and build on its reputation as an emerging market country with a well-developed corporate governance system. It is suggested that the research activities within the fields of all three types of research referred to above (exploratory, descriptive and causal research) will eventually be necessary to comprehend the full scope of corporate governance as a phenomenon in the South African economy.

The current study is an attempt to contribute to this first level of research, namely an exploratory understanding. In other words, it focuses on discovering the dimensions of corporate governance and its reform in South Africa. In this way, the study hopes to contribute to the debate, as suggested by Andreasson (2008b). Once enough of such exploratory research has been done, descriptive and eventually causal research will have to follow in order to gain a full and wide-ranging understanding of corporate governance reform in South Africa.

It is suggested that the approach of Gourevitch and Shinn (2007) provides a sensible point of departure for such an exploratory study: they conclude that, as far as corporate governance is concerned, interest groups within the corporate governance debate have preferences. These preferences are then aggregated by political institutions into corporate governance systems and structures. This exploratory study consequently attempted to

- discover the various interest groups currently participating in the corporate governance reform debate in South Africa, and furthermore to provide descriptions of the basic political economic characteristics of the various interest groups active in the debate;
- identify the preferences of the various interest groups described above and categorise such preferences in terms of the groups' political-economic orientations; and
- describe how these various sets of preferences are aggregated by institutions into corporate governance structures and systems in South Africa.

4.4 BASIC RESEARCH METHOD

The basic research method used in this study was observational research. Observational research can be defined as the "systematic process of recording the behavioural patterns of people, objects, and occurrences as they are witnessed" (Zikmund, 2003, p. 235).

The study isolated the so-called "unit of analysis" (Zikmund, 2003, p. 96) as the corporate governance reform process in South Africa. This process can be described as a behavioural pattern of people, more particularly South African society, attempting to design and implement corporate governance systems and structures. In the process of designing and implementing corporate governance systems and structures, public debate takes place and various organs of society aggregate the various preferences of the different interest groups into corporate governance structures and systems. This public debate and aggregation process is documented in the public domain, making it very suitable for observational study.

4.5 DATA AND DATA COLLECTION

The following data sources were used:

- motivational memoranda and position papers submitted by role players to the South African Parliament in the course of all relevant corporate governance lawmaking and law amendment procedures;
- newspaper and magazine reports on corporate governance reform activities, for instance, conventions and debates by individuals and role players participating in the corporate governance reform process;

- public speeches made by Ministers and other public officials of the Republic of South Africa, as reported in both the printed and electronic media;
- policy documents by political parties and other institutions of civil society which relate to corporate governance and corporate governance reform; and
- secondary sources, for instance, reports written in the course of political, legal and social research.

4.6 DATA ANALYSIS

The data was analysed in the following way:

- the scope of corporate governance in South Africa was explored by tracing the history of corporate governance structures and systems in South Africa, extracting a list of issues which South African business regards as corporate governance issues;
- a list of participants in the current corporate governance debate was compiled;
- background information regarding participants was analysed in an attempt to categorise the various role players into political-economic categories, given their social, economic and political origin and functioning;
- the preferences of the participants were analysed, particularly with regard to the following:
    - the specific aspect/s that each listed participant chose to address in this public debate and aggregation process; and
    - the content of such a contribution; and
- the structures and systems that can currently be described as South Africa's corporate governance structures and systems were identified.

The results of this data analysis are reported in Chapter 5 below.

4.7 DISCUSSION OF THE RESULTS OF THE DATA ANALYSIS

The results reported in Chapter 5 below were analysed with regard to the political, social and economic significance of the results, particularly in the light of the research questions in Chapter 3 and the literature study in Chapter 2. The results of this evaluation and discussion are reported in Chapter 6 below. This research report concludes with a summary of the main findings of the research and recommendations to stakeholders and recommendations for further research on the subject of corporate governance reform. This summary and recommendations are presented in Chapter 7.

CHAPTER 5: RESULTS

5.1 INTRODUCTION

This chapter reports on the results of the data analysis that was done. It consists, firstly, of this introductory paragraph, which provides a road map to the rest of the chapter. It then proceeds, secondly, to report on the analysis of the history of corporate governance as a phenomenon in South African corporate society and in this regard also outlines briefly the international historical perspective and a South African historical perspective of corporate governance. Thirdly, corporate governance in South African legislation is analysed. Fourthly, corporate governance in South African litigation is examined. Fifthly, the current corporate governance reform debate is analysed and, lastly, summaries of the data in terms of the various research questions are provided.

5.2 HISTORY OF CORPORATE GOVERNANCE AS A PHENOMENON IN SOUTH AFRICAN CORPORATE SOCIETY

5.2.1 International dimension

The concept of corporate governance gained an increasingly high profile in corporate life during the last decade of the previous century (Mallin, 2006). Prior to this period, various aspects that were later labelled part of the phenomenon of corporate governance were indeed already reformed, researched and debated, in fact, since the early 20th century (Sanford, 2005). In May 1991, the Committee on the Financial Aspects of Corporate Governance was established

in the United Kingdom. This move followed on the failures of two prominent companies, Coloroll and Polly Peck. The Chairperson of the Committee was Sir Adrian Cadbury. The report of this Committee became widely known as the Cadbury Report. In essence, according to Mallin (2006), the Cadbury Report recommended that companies should

- appoint independent non-executive directors;
- separate the roles of the chairperson and the chief executive officer (CEO);
- have an audit committee;
- have a remuneration committee; and
- ensure that non-executive directors bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments and standards of conduct.

This report is widely recognized as having laid the foundations for the best practice system of corporate governance, both in the United Kingdom and subsequently in many countries across the world which have incorporated some aspects of the Cadbury Report's recommendations into their national corporate governance codes (Mallin, 2006). South Africa is one of the countries that have done so, as described below. Corporate governance in the United Kingdom developed rapidly; and a number of reports were drafted and implemented, namely the Greenbury Report (1995), the Hampel Report (1998), the Combined Code (1998), Turnbull (1999), Higgs (2003), Smith (2003), the United Kingdom Directors' Remuneration Report Regulation (2002), the Revised Combined Code (2003), the Revised Turnbull Guidance (2005) and the Company Law

Reform Bill (2005) (eventually becoming the Companies Act 2006, receiving Royal Assent on 8 November 2006) (cited in Mallin, 2006).

The second significant corporate governance development on the international scene was the promulgation of the Public Company Accounting Reform and Investor Protection Act 2002 in the United States of America. Its official short title is the Sarbanes-Oxley Act – named after the two sponsors of the Act, Senator Paul Sarbanes and Representative Michael G. Oxley (www.news.findlaw.com). The significance of this piece of legislation is that Congress concluded in 2002 by way of the Sarbanes-Oxley Act that public confidence in the integrity of corporate governance could only be restored through greater government involvement in corporate governance structures and systems (Andreasson, 2008b).

As will become clear in the discussion below, South African corporate governance and regulation took a different turn in the same year (2002) and will be elaborated on in this chapter and the next chapter. What is relevant at this stage, however, is that the Sarbanes-Oxley Act imposed very stringent mandatory measures dealing with various aspects of corporate governance reform in the United States of America.

5.2.2 The South African historical dimension

5.2.2.1 Introduction

Van der Merwe, Geach, Havenga and Lombard ([1995] 2004) claim that the concept of “corporate governance” was first introduced into South Africa in 1994 with the publication of the first King Report on corporate governance. They

explain that this first report in 1994 recommended standards of conduct for directors of companies and emphasised the need for responsible corporate activities, with due regard for the society in which the company operates.

A wide variety of sources indicate that corporate governance has developed into a coherent phenomenon in South Africa since the establishment of the King Committee on Corporate Governance in 1992 (Andreasson, 2008b; Malherbe and Segal, 2001; Van der Merwe *et al.*, [1995] 2004). The very concept of "corporate governance" in South Africa is closely linked with the King Report's code(s) of corporate governance. The chairperson of the King Committee on Corporate Governance, Mervyn King, is described in the literature as the *doyen* of South African corporate governance (Andreasson, 2008b). Mallin (2006) states clearly that the starting point for corporate governance as a separate identifiable phenomenon of corporate life can be traced back to 1992 and the impetus for the King Committee given by the Institute of Directors of Southern Africa. She adds that the establishment of the King Committee was not stimulated by any significant crisis in the corporate sector at the time (as was the case in many other countries, including the United Kingdom, as set out above), but it was instigated in response to the desire of the South African private sector to become competitive in the international business arena following the re-admission of South Africa to the global economy after the country's transition to a fully fledged democracy after the collapse of apartheid.

5.2.2.2 The King Committee and the King codes of conduct

As is clear from the discussion in the introduction in Section 5.2.2.1 above, the King Committee on Corporate Governance was established in 1992. It is

important to see this year in its proper context and to plot the date accurately on a timeline of South Africa's political transformation from apartheid to democracy. The following timeline can be extracted from the literature (Murray and Luiz, 2007; Terreblanche, 2002):

- In the period between 1652 and 1994, South Africa went through various systemic periods, or power shifts. During this period, the interdependence of political and economic power runs as a common thread throughout these power shifts. Initially, the Dutch East India company, essentially a commercial company, brought a mercantilist mentality to South Africa, and this evolved through various phases into a situation where, eventually, an alliance between British and local corporations and government enforced an ideology of territorial, political, educational and workplace segregation between the races in South Africa.
- In 1976, the Soweto youth uprising ushered in a period of political instability. This instability had a profound influence on business. Various actors in South African society realised that the then current social, economic and political dispensation in South Africa at that stage was not sustainable.
- From early in the 20th century, the African National Congress (ANC) developed as a political movement representing the interests of the South African black majority. As the 20th century progressed, hostility between the ANC and the complex social and political structures inside South Africa intensified to the point at which the ANC formally began to pursue a policy of armed struggle for the liberation of the black majority of South Africa.

- During the period from 1985 to 1990, however, there were a number of attempts by role players in South Africa to bridge the gap between the South African government and the ANC:
    - In September 1985, the Anglo-American Corporation sent a delegation of Anglo-American Corporation businessmen to meet with ANC leaders in Zambia. This meeting precipitated four years of secret talks between white political, corporate, academic and religious leaders. This meeting is described by Terreblanche (2002, p. 73) as a meeting that "struck a clever blow for capitalism".
    - In June 1986, the chairman of the Afrikaner Broederbond, Professor de Lange, the then rector of the Randse Afrikaanse Universiteit, met secretly with the ANC in New York and indicated to the ANC that the prevailing political order at that time in South Africa could not prevail.
- It is important, however, to bear in mind that, throughout this period, the ANC embraced an economic policy of socialism, even favouring the nationalisation of mines and banks in South Africa. In addition, the ANC had a specific policy that stated that there was no need for negotiation between the various role players in South Africa, and that political power should simply be transferred to the ANC because it was representative of the majority of the people in South Africa.
- The contact between institutions in South Africa and the ANC increased. In July 1989, the first formal contact between the South African government and the ANC took place when the then State President, P.W. Botha, met with Nelson Mandela, the leader of the ANC, who was, at that stage, still in prison.

- In August of the same year, the ANC indicated, by way of the Organisation of African Unity's Harare Declaration, that it was willing to change its policy of a simple transfer of power and to start to negotiate in order to set parameters for negotiation for a political solution in South Africa that would be acceptable to all South Africans.
- In September 1989, F.W. de Klerk replaced the ailing P.W. Botha as South Africa's president.
- In February 1990, the ANC and the South African Communist Party were unbanned and Mr Nelson Mandela was released from prison.
- Protracted negotiations between all South Africans started in 1990, eventually leading to the high profile Congress for a Democratic South Africa (CODESA) negotiations in Kempton Park. This phase in the political history of South Africa was concluded on 10 May 1994, when Mr Nelson Mandela was inaugurated as South Africa's first popularly elected president. This period (1990 to 1994) is referred to in this research report as the "negotiation phase".
- It is important to realise the following regarding this negotiation phase:
    - The ANC, as a political party, has long embraced elements of socialism and nationalisation, although the party was forced by international realities to make ambiguous policy statements, to confirm that, in terms of ANC policy, the private sector had a central and pivotal role to play within the context of the mixed economy in South Africa.
    - This statement sparked a fierce ideological debate between the ANC and a trade union, the Congress of South African Trade Unions (COSATU).

- This was a period of intense uncertainty as to the future not only of the political but also of the economic order in South Africa.
- During this period, interest groups lobbied intensively and participated actively in the broad political process in order to ensure the greatest possible influence in the final outcome of the constitutional and political transformation that was underway.

Viewed against the above backdrop, the following aspects are significant regarding the King Committee:

- The King Committee was established in 1992, in the midst of the negotiation phase described above. All of this took place contemporaneously with the formation of the Cadbury Committee on Corporate Governance in the United Kingdom.
- The King Committee was established by the Institute of Directors of Southern Africa. This committee was consequently not a formal commission established by a public authority, but it was a private sector initiative and, aside from that, an initiative by a very specific role player in the private sector, namely the Institute of Directors of Southern Africa. The following background information regarding the Institute of Directors of South Africa is important (Institute of Directors, 2008):
  - The Institute of Directors was founded in London in 1903 and was granted a Royal Charter by King Edward VII in 1907.
  - In 1960, the South African division of the Institute was formed in Johannesburg as a branch of the Institute of Directors in London, by Mr Harry Oppenheimer.

- In 1985, the Council of Southern Africa Division sought autonomy in its relationship with the London Institute of Directors. As a result, the Institute of Directors in Southern Africa was established as a section 21 company and registered under registration number 1985/002734/08.
- The first president of the Institute was Mr Harry F. Oppenheimer (1960-1986) followed by Mr Basil E. Hersov (1986-2001) and Mr Reuel J. Khoza (10 October 2001 to date).
- The Institute of Directors is a founding Member of the Global Director Development Circle, and this circle represents about 100 000 individual directors from six continents. The group includes, *inter alia*, the following members:
  - the Australian Institute of Corporate Directors;
  - the Canadian Institute of Corporate Directors;
  - the New Zealand Institute of Directors;
  - the South African Institute of Directors;
  - the United Kingdom Institute of Directors; and
  - the United States National Association of Corporate Directors.
- In 1995, while he was still chairperson of the Institute of Directors, Mr. Basil E. Hersov apparently founded the Airborne Trust, a trust that was aimed at taking forward projects supporting the integration of former freedom fighters into civil society (*News24*, 2001a).
- On 2 March 2001, British Aerospace, a company involved in the arms procurement contract in South Africa, stated that it had paid over a certain amount of money to the Airborne Trust in 1999. At that stage, however, the transaction became controversial and various political role

players expressed the view that the transaction constituted bribery (*News24*, 2001a).

- On 10 October 2001, that is, seven months after the statement was made by British Aerospace, the Chairperson of the Council of the Institute of Directors announced that Mr Reuel J. Khoza had been appointed President of the Institute of Directors of Southern Africa and that Mr Basil E. Hersov had stepped down as Chairperson to become an individual life patron of the Institute. At the time Mr Konrad Tauber declared: “The changed structure reflects the diversity of the IoD and takes account of the future” (*News24*, 2001b).
- Following the stepping down of Mr Hersov as Chairperson of the Institute of Directors, his name was repeatedly mentioned in newspaper reports dealing with the investigation by the serious fraud office of the United Kingdom (*News24*, 2007) into the South African arms procurement transaction.
- At the time of the appointment of Mr Khoza as President of the Institute of Directors, Mr Mervyn King was appointed as the First Vice-President of the Institute. The Institute currently has eight vice-presidents, all eminent business persons, elected from the membership (Institute of Directors, 2008).

The first King Report, adopted by the Institute of Directors in 1994, in essence advanced many of the standards and principles advocated in a number of national codes that had been adopted, especially in the Commonwealth countries (Mallin, 2006). The King Report distinguished itself particularly in one respect, namely its integrated approach to good governance with regard to

financial, social, ethical and environmental practices to serve the interests of a wide range of stakeholders. Mallin (2006) makes the important observation that the approach of the first King Report probably reflected the considerable role that business played in South Africa in both social and economic issues, especially during the period leading up to the political transition from a white minority-dominated system to a democratically elected black majority government.

The first King Report was instrumental in raising awareness of what constitutes good governance, both in the private and in the public sectors. For the first time in South Africa, companies and state-owned enterprises had a coherent and disciplined governance framework that was relevant to local circumstances and that offered practical guidance. Mallin (2006) remarks that the breadth and the sophistication of these reform measures placed South Africa in the top rank of emerging market economies, and in some instances even on a par with more developed markets. A number of significant measures that were first highlighted in the first King Report eventually migrated into the following laws Mallin (2006):

- the Labour Relations Act,1995, (Act 66 of 1995);
- the Employment Equity Act, 1998 (Act 55 of 1998);
- the National Environmental Management Act,1998 (Act 107 of 1998);
- the listing requirements of the JSE Securities Exchange South Africa;
- amendments to the South African Companies Act, 1974, including compulsory disclosure of the identity of beneficial owners of shares held by nominees;

- the Insider Trading Act, 1998 (Act 135 of 1998), providing for rigorous supervision and monitoring of insider trading and extending beyond criminal sanction to embrace civil remedies;
- the Public Finance Management Act, 1999 (Act 1 of 1999), which introduced much more rigorous standards for reporting and accountability by adopting an approach to financial management in public sector institutions that focuses on performance and service delivery and the economically efficient deployment of state assets and resources; and,
- a government-promulgated protocol that laid down comprehensive guidelines for corporate governance in public sector institutions.

In August 2000, the Institute of Directors decided to review the first King Report. The Institute of Directors established the following guiding principles for the committees and assessment process:

- the first principle was to evaluate the first King Report's currency in terms of developments, both local and international, since 1994;
- the second principle was to extend the integrated approach to embrace the interests of a wider range of stakeholders, "without subverting the primary interests of shareholders as enshrined in South African corporate law" (Mallin, 2006, p. 215);
- the third principle was to consider the matter of risk management and internal control assurance;
- the fourth principle was to recommend provisions for the effective enforcement of good corporate governance standards and of the existing rules and regulations.

It is important, for the purposes of this study, to take cognisance of the methodology and work procedures adopted by the King Committee. The review was conducted by five task teams that covered the following areas:

- boards and directors;
- accounting and auditing;
- internal audit, control and risk management;
- integrated sustainability reporting;
- compliance and enforcement.

The members of the various teams were deliberately chosen to include a wide range of interests. The members were recruited from the private and public sectors and represented institutional and vested interests in civil society, government and regulators. The Institute of Directors played an important facilitative role and provided secretarial support. It is vitally important to note that the members of the various task teams were required to seek endorsement of the key recommendations in their respective constituencies. This ensured buy-in by contributing members at an early stage of the process. Apart from this, members made contact with various experts and institutions at the local and international level to discuss key aspects of corporate governance.

The second King Report was formally released on March 2002 (Institute of Directors, 2002). It focused on qualitative aspects of good governance and it was not designed as a regulatory instrument (Mallin, 2006; Van der Merwe *et al.,* [1995] 2004). This second report was noteworthy for bringing societal

obligations of companies within the ambit of corporate governance; and in this way lived up to the expectations of government and the wider community that the corporate sector would contribute to the country's transition and development (Mallin, 2006).

The key components of the second King Report can be summarised as follows:

- Board structure

  A unitary board structure was called for (in line with countries falling under the Commonwealth systems of law). It also required a balance between executive and non-executive directors. A majority of the non-executive directors should be independent of management, and this requirement was largely derived from the rigorous requirements of international investors. This requirement of a greater number of independent non-executive directors enabled company boards to open up and to pay more attention to diversity in terms of gender and race, strategically important for companies that wanted to remain relevant in the South African business environment. The roles of the chairperson of the company and the CEO of the company should be separated. This ruling has been reinforced by the JSE Securities Exchange. The second King Report calls for extensive disclosure and, as a result, directors have become more aware of the implications of accepting invitations to serve on the board and the abilities they needed to fulfil their obligations as board members.

- Risk management and internal control assurances:

  The second code emphasised the importance of organisational integrity; and each company is expected to demonstrate commitment in this regard by drawing up an ethical code or statement of business principles, the

implementation of which should be monitored by the board and management.

- Accounting and reporting:

  The code emphasised the role of the audit committee and introduced a number of accounting and auditing issues. Particularly important were the guidelines urging broad compatibility between the Generally Accepted Accounting Practice (GAAP) of South Africa and the International Accounting Standards. Since the second King Report, accounting regulators in South Africa have taken steps to bring about a formal alignment between the International Accounting Standards (IFRS standards) and South African GAAP (Vorster, Koornhof, Oberholster, Koppeschaar and Venter, 2006).

- Integrated sustainability reports:

  The second King Report takes cognisance of the formal legal framework regarding affirmative action in addressing historical racial imbalances in the workplace, employee skills development, labour and employee rights. The code moves beyond this formal structure and requires a company to report at least once annually on the nature and extent of its social, transformational, ethical safety health and environmental policy and practices. This aspect is treated in the code in such a way that companies are urged to treat these aspects of their activities as strategic issues.

- Relations with shareholders:

  It is interesting to note that the second King Report did not deal extensively with relations between the board and its shareholders. The reason for this is that the South African Companies Act confers extensive rights on shareholders. This aspect remained a serious area of concern because of

the high cost and intricate nature of the remedies available to minority shareholders in the then current South African Company Law code.

The work of Van der Merwe *et al.* ([1995] 2004), referred to in Section 5.2.2.1, described itself in its foreword as the definitive manual of the South African Institute of Chartered Secretaries and Administrators on Company Secretarial practice. According to the website of this Institute, the Institute is currently known as Chartered Secretaries Southern Africa (Chartered Secreteries Southern Africa, 2008). This Institute gives the following information regarding itself on its webpage, "About us": it is an independent self-regulating professional body, founded in 1891 and incorporated by Royal Charter in 1902. According to the website, this Institute was the first institute of professional company secretaries that was founded outside the United Kingdom, 18 years after such an institute was first founded in the United Kingdom. Today there are divisions in Southern Africa, Australia, Canada and New Zealand and associations in Hong Kong, Malaysia, Singapore and Zimbabwe. The purpose of the Institute is described in its website (Chartered Secreteries Southern Africa, 2008) as being involved in Company Secretarial and governance matters. Van der Merwe *et al.* ([1995] 2004) make it clear that the Institute has embraced and supports the second King Report in its entirety.

From the above, the very strong United Kingdom and Commonwealth orientation of South African corporate governance developments is already obvious. This is no coincidence. In a personal communication between the Chairperson of the King Committee with Stefan Andreasson on 21 August 2006, Mr King strongly related South African corporate governance developments to

British corporate history, starting with Gladstone and the Limited Liability Act of 1855 to, more recently, Adrian Cadbury's Committee on Corporate Governance and the Cadbury Report that followed from that. King has emphasised on several occasions that South African corporate governance was firmly rooted in the British tradition (Andreasson, 2008b).

West (2006, p. 445) observes that the approach of the second King Report represents a more “inclusive” approach to corporate governance in South Africa, but that the position of shareholders, capital, return on capital – in short, all the issues that were regarded as central to Anglo-American corporate governance systems – have remained paramount.

5.3 CORPORATE GOVERNANCE IN SOUTH AFRICAN LEGISLATION

Scrutiny of South Africa's legislation revealed that the term “corporate governance” was not used in any legislation prior to the year 2001. From 2001 onwards, a number of important legislative enactments took place. What follows is a chronological synopsis of these enactments:

- In 2000, the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) was promulgated. Section 93H of the Act stipulated that the board of directors of the municipal entity must “provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity”.
- In 2000, the Protected Disclosures Act, 2000 (Act 26 of 2000) was promulgated. The preamble of the Act states that “criminal and other irregular conduct in organs of state and private bodies are detrimental to

good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage". The Act enacts a number of measures to facilitate the context within which individuals would be protected if they disclose such "criminal and irregular conduct" (whistle-blowing).

- In 2001, the South African Weather Service Act, 2001 (Act 8 of 2001) established a Board of Weather Service and provided in section 5 that members of such a board must be qualified "to provide effective corporate governance and must be able to bring their special expertise and knowledge to bear on the strategy, enterprise and innovative ideas and business planning of the Weather Service".
- In 2001, the Industrial Development Amendment Act, 2001 (Act 49 of 2001) was promulgated, amending the original 1940 Act, obliging the Industrial Development Corporation, in Section 3(h), "to enhance corporate governance so as to achieve business excellence".
- In 2003, the Banks Amendment Act, 2003 (Act 19 of 2003) was promulgated. This act amended the Banks Act, 1990 (Act 94 of 1990) in the following ways:
    - the long title of the Act provided that the purpose of the Act was to require of banks to establish a system of corporate governance and that "corporate governance shall be established with the objective of achieving the bank's strategic and business objectives efficiently, effectively, ethically and equitably (within acceptable risk parameters)";

- the word definition of the term “corporate governance” was provided for as follows: “'corporate governance', in relation to the management of a bank or a controlling company, includes all structures, processes, policies, systems and procedures whereby the bank or controlling company is governed”; and
- the Amendment Act inserted 60(B) into the Banks Act, and subsection 2 of this section required a company “to provide for the establishment of a compliance function and to require banks to establish and maintain an adequate process of corporate governance”.

- In 2003, the National Conventional Arms Control Act, 2003 (Act 41 of 2003) was promulgated. The Act established the Armaments Corporation of South Africa and stipulates in Section 3(2) that the “Corporation must adhere to accepted corporate governance principles, best business practices and generally accepted accounting practices within a framework of established norms and standards that reflect fairness, equity, transparency, economy, efficiency, accountability and lawfulness”.
- In 2004, the Securities Services Act, 2004 (Act 36 of 2004) was promulgated. It provided in Section 12 that a company that wished to list on the stock exchange was obliged to, *inter alia*, prescribe in its listing requirements, requirements detailing “the standards of disclosure and corporate governance that issuers of listed securities must meet”.
- In 2005, the Auditing Profession Act, 2005 (Act 26 of 2005) created an independent regulatory board for the auditing profession. Section 17 of the Act stated that the independent regulatory board would be the accounting authority within the meaning of the Public Finance Management Act, 1999

(Act 1 of 1999), and would adhere to all obligations prescribed in the Public Finance Management Act and, apart from that, would "provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the Regulatory Board".

- In 2005, the Nursing Act, 2005 (Act 33 of 2005) established a Nursing Council. Section 29 of the Act dealt with the corporate governance of the Nursing Council.
- In 2007, the Co-Operative Banks Act, 2007 (Act 40 of 2007) was promulgated. This Act established a co-operative banks development agency, and provided in section 64 that the Board shall "provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the Agency".
- In 2007, the Transport Agencies General Laws Amendment Act, 2000 (Act 42 of 2007) was promulgated, and it amended four prominent transport-related Acts:
    - The South African Civil Aviation Authority Act, 1998 (Act 40 of 1998) established the South African Civil Aviation Authority. Section 2C of the 2007 Amended Act stipulated that the Minister will only appoint a person as a member of the South African Civil Aviation Authority if the Minister is convinced that such a person has expertise in, amongst other areas, corporate governance.
    - The Cross-Border Road Transport Act, 1998 (Act 4 of 1998) established a Board of Agency. The Amendment Act amended section 5(3)(d) to the effect that the Minister may only appoint board members that have corporate governance experience.

- The Road Traffic Management Corporation Act, 1998 (Act 20 of 1999) was amended in respect of section 12 of the 1998 Act so that it stipulated that the Minister would appoint four members to the Board of the South African National Roads Agency Limited that had "special qualifications, skills, expertise or experience in matters concerning national roads, corporate governance, financial management, business or operations of the Agency".
- The South African Maritime Safety Authority, 1998 (Act 5 of 1998) was amended in respect of section 12 of the 1998 Act to stipulate that the Minister would appoint members to the South African Maritime Safety Authority (a body established in terms of the 1998 Act) only if such a person "has suitable expertise" in corporate governance (Section 12(4)).

Scrutiny of regulations promulgated in terms of legislation reveal that the concept of corporate governance was built into a wide variety of regulatory regimes, which underscored the increased importance of the concept in legislation. This could be observed from the year 2000 onwards. For the purposes of this research report, three such instances in particular are important:

- The Code of Conduct for All Parties Engaged in Construction Procurement, published under BN 127 in GG 25656 of 31 October 2003 not only referred to the centrality of corporate governance, but stipulated in particular that the King Code would be applicable to construction procurement.
- Codes of Good Practice on Black Economic Empowerment, published under GenN 112 in GG 29617 of 9 February 2007, stipulated that corporate

governance would be a cornerstone of good practice on Black Economic Empowerment and defined various aspects of corporate governance explicitly in terms of the second King Report.

- Various sets of regulations promulgated in terms of the Higher Education Act, 1997 (Act 101 of 1997) stipulated the obligation of higher education institutions to practise accepted corporate governance. In specific instances, even the terms of the text of the second King Report were made applicable.

5.4 CORPORATE GOVERNANCE IN SOUTH AFRICAN LITIGATION

No reference to the term “corporate governance” could be traced in any formally reported South African case prior to 1995. The first reference to the term appeared in the South African law reports of 1996 and, between 1996 and 2007 the term appeared in 11 reported judgments, some of which are highly relevant to this study. A short summary of the 11 judgments follows:

- In *Knox D'arcy Ltd and Another V Shaw and Another 1996 (2) SA 651 (W)D,* the first respondent was employed as a direct result of the requirements of the second King Report, which became the accepted norm for the corporate governance for listed companies following the requirements of the JSE Securities Exchange. The dispute, however, eventually did not revolve around any aspect of the King code and the judgment is not discussed any further.
- In *Mineworkers Investment Co (Pty) Ltd V Modibane 2002 (6) SA 512 (W)*, the plaintiff, which described itself as a 100% BEE Investment Company, established by the Mineworkers Investment Trust (MIT) to create a sustainable asset base for the benefit of mine, energy and construction

workers (MIC, 2008), sued the respondent for defamation because the respondent accused the plaintiff, in a letter to one of the associates of the plaintiff and in a public newspaper advertisement, of a lack of "corporate governance". Given the identity of the plaintiff, this lawsuit is highly significant. The Mineworkers Investment Trust was founded in 1982 by the National Union of Mineworkers, which in turn was a co-founding member of the Congress of South African Trade Unions (COSATU) (MIT, 2008). The Mineworkers Investment Trust pledged an amount of R 3 million in 1982 to the plaintiff company and the asset value of the plaintiff grew to an amount of R 10 billion.

- In *Welihockyj and Others V Advtech Ltd and Others 2003 (6) SA 737 (W),* the plaintiffs accused the defendants of failing to adhere to the principles of good corporate governance. These allegations would consequently have formed part of any particulars of the claim. The reported judgment dealt only with the question of whether the dispute between the parties would have to be settled by way of arbitration rather than by way of litigation. The question of whether "good corporate governance" formed the basis of particulars of the claim was consequently not considered.
- In *Triptomania Twee (Pty) Ltd and Others V Connolly And Another 2003 (3) SA 558 (C),* the applicants attacked the emphasis which the second King Report placed on the role of the board of directors in general and the role of non-executive directors in particular, by stating that the emphasis in the code was misplaced. In this case, the court came to certain conclusions on the facts and did not consider the above-mentioned contentions of the applicants.

- In *Anglo South Africa Capital (Pty) Ltd and Others V Industrial Development Corporation of South Africa and Another 2004 (6) SA 196 (Cac),* the court simply quoted from the Founding Act of the Industrial Development Corporation to the effect that the corporation had the duty to promote good corporate governance. The dispute between the parties did not involve any aspects regarding corporate governance.
- The case of *Diners Club SA (Pty) Ltd V Singh and Another 2004 (3) SA 630 (D)* dealt with an issue that could safely be described as a risk management issue. The official of the plaintiff presenting the plaintiff and testifying on behalf of the plaintiff was employed as the "Director of Corporate Governance and Compliance". The dispute between the parties did not involve a corporate governance issue.
- In *De Villiers and Another NNO V BOE Bank Ltd 2004 (3) SA 1 (SCA)*, the advocates of the parties relied on the text of the second King Report in support of certain arguments; however, the court did not refer to and did not deal with the King code in the judgment in any way.
- In the case of the *Minister of Water Affairs and Forestry V Stilfontein Gold Mining Co Ltd And Others 2006 (5) SA 333 (W),* the court arrived at a number of remarkable conclusions regarding corporate governance in general, all of which were relevant to this study. In this case, the applicant obtained a previous court order with regard to environmental requirements against the respondent which the respondent had to adhere to. In an attempt to escape the consequences of this court order, the whole board of the respondent resigned, leaving the first respondent unable to comply with a court order, and leaving the applicant in a dilemma, since, at the time that

this application was brought, the second to fifth respondents (the previous members of the board of the first respondent) were no longer the board members of the first respondent. In this regard, the court held that the code of conduct of the second King Report was almost uniformly endorsed by the corporate community in South Africa and that the conduct of the respondent directors flew in the face of their responsibilities in terms of the King code of conduct, which they were obliged to implement by virtue of the fact that the respondent was a listed company and consequently had to adhere to the listing requirements of the JSE Securities Exchange. The court referred extensively to the second King Report, and eventually held all the respondents guilty of contempt of court.

- Two reported cases dealt with the same dispute: in *Chairpersons' Association V Minister of Arts And Culture and Others 2006 (2) SA 32 (T)* and *Chairpersons' Association V Minister of Arts and Culture and Others 2007 (5) SA 236 (SCA)*, the applicant (and eventually appellant), "an organisation set up to promote good corporate governance", sought, *inter alia*, the review and setting aside of the decision of the Minister of Arts and Culture (the first respondent), made in May 2003 under section 10(1) of the Act, to approve the name change of Louis Trichardt to Makhado. The appellant eventually succeeded and the decision of the first respondent was reviewed and set aside;
- In *Tshishonga v Minister of Justice and Constitutional Development and another 2007 (4) SA 135 (LC),* the work performance of the applicant was in issue. One of the issues relevant in the dispute was the fact that the applicant was able to communicate a message of "clean and good corporate

governance" to the first respondent. This case concerned certain remarks that the applicant made with regard to the first respondent, and in the case the applicant contended that the remarks he made were protected by the Protected Disclosures Act 26 of 2000 (one of the Acts discussed above, which was enacted consequent to the first King Report). The first respondent caused the applicant to be removed from his position as a result of the remarks, and applicant applied for relief because he was removed from his position. Applicant was eventually successful and the court granted judgment in the applicant's favour.

5.5 GENERAL POLITICAL DEVELOPMENTS AND THE CORPORATE GOVERNANCE REFORM DEBATE IN SOUTH AFRICA AFTER THE SECOND KING REPORT

As became clear in Section 5.2 above, corporate South Africa took the initiative to devise and implement corporate governance reform in South Africa. These reform measures seeped through into legislation and to a certain degree into the legal system, as evidenced by the analysis of the above law reports.

At the time that all of the above events occurred, role players in the political process in South Africa, and more particularly those that represented the black majority, notably the ANC and its partners, made several attempts to position themselves with regard to economic policy. During the 1980s, a shared social and economic vision originally bound a tripartite alliance between the ANC, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). Over time, however, differences arose between the partners; and these differences eroded the bond between the parties (Majova

and Mgibisa, 2007). These differences amongst the parties had a profound impact on policy positions made by the tripartite alliance and held several implications for the corporate governance reform debate.

The following synopsis of the development of the economic policies of the alliance should be noted for the purposes of this study:

- Early in 1991, that is, at the start of the negotiation phase described above, the tripartite alliance and other mass democratic movement formations inside South Africa realised that they had to put forward a coherent economic policy. They initiated the Macro Economic Research Group, which later became known as MERG. MERG concluded its investigation and submitted its report in December 1993. During this phase, however, some details from the research group were leaked to the press, hinting at a policy change which suggested that the future South African government would bring the Reserve Bank under state control. This generated such intense interest in the press and business sector that the ANC issued a statement on 8 November 1993 indicating that MERG was only a policy proposal for a number of parties, but that the ANC itself would not favour a dispensation that would curtail the independence of the Reserve Bank (ANC Department of Economic Planning, 1993).
- All the policy formation initiatives eventually resulted in the Reconstruction and Development Programme (RDP)-based document, and was published early in 1994 as the election manifesto of the tripartite alliance (Murray and Luiz, 2007).

- It is important to bear the following in mind with regard to this policy document:
    - The formation of this policy document coincided with the height of the Washington consensus, which prescribes the opening of currency exchanges, the freeing-up of trade, the promotion of export-led growth, the reduction of government expenditure and privatisation. All of this was markedly removed from the principles of ANC's economic policy as it had evolved over time and as it was eventually formulated in the RDP (Murray and Luiz, 2007).
    - The RDP was the result of an alliance-building process, with the result that a wide variety of ideas were put into the document, but there was very little prioritisation. This alliance-building relied heavily on the formulation of policies in such a way that everybody could sign off the policies, without actually dealing with the debates addressing deep and underlying issues, with the result that nobody really knew exactly what the RDP manifesto meant (Murray and Luiz, 2007).

When the ANC came to power in April 1994, it immediately implemented the RDP by establishing the RDP office in the Presidency. Substantial amounts were budgeted to the RDP office. This office would in essence run a parallel budget for the purposes of the reconstruction and development of South Africa.

The RDP failed to live up to expectations, mainly due to the following reasons (Murray and Luiz, 2007):

- Despite the political compromise in South Africa, the country still lacked a coherent macroeconomic environment that instilled enough trust in the business and international community to attract the necessary investment to generate economic growth. The RDP, due to its ambiguity, compounded this uncertainty.
- The RDP, because of its ambiguity, caused discord in the ranks of the tripartite alliance.
- The business community decided to join the ideological debate when the South Africa Foundation, a foundation representing South Africa's 50 largest corporations, published the “Growth for All” report, basically a report in line with the central ideas of the Washington consensus.
- The release of this report sparked an immediate response from COSATU, rejecting this approach, and the SACP, condemning the approach of the business community as arrogant and as naively relying on the market to solve all South Africa's problems.
- However, the business community and COSATU agreed on one aspect, and that was that the government’s leadership on economic policy was inadequate. In the capital markets, the sentiment was even aired that the value of the currency was declining, not because the government had a bad macroeconomic policy, but because the government had no macroeconomic policy to speak of.

It is against the above background that Minister Trevor Manuel became the Minister of Finance. He had earned a reputation as a tough leader, implementing unpopular policies, most notably the controversial trade

liberalisation programme he implemented as Minister of Trade and Industry (Murray and Luiz, 2007).

Manuel immediately took control of the debate regarding South Africa's macroeconomic policy. This initiative led to the adoption of the Growth, Employment and Redistribution (GEAR) programme. This programme was the result of a think-tank of a group of academics and officials consisting of senior officials from the South African Reserve Bank, the Development Bank of South Africa, the World Bank and the Departments of Finance and Trade and Industry and Labour. When GEAR was announced in June 1996, Manuel indicated unequivocally that the parameters of GEAR were not open to negotiation, and that government had taken control of macroeconomic policy (Murray and Luiz, 2007).

The following can be stated about GEAR for the purposes of this study:

- Business almost immediately signalled its approval of the programme and capital started to flow into the country, while inflation abated and growth rates started to accelerate.
- The programme was by no means a consensus document of the tripartite alliance. On the contrary, COSATU warned that the document was a document that would have been inconceivable to the ANC prior to the 1994 elections.
- GEAR was nothing more than a stabilisation initiative. While the government remained committed to the values and social objectives of the liberation struggle and the RDP, implementation of such policies would have led to economic stagnation to such an extent that the government would have

become dependent on the World Bank and International Monetary Fund for assistance, institutions which were central in the Washington consensus. In order to avoid this, the government had to adopt the core policies of the Washington consensus, which was highly ironic.

- The process of implementing GEAR was intended to bring about poverty alleviation and transformation of the economy by means of large increases in social wages and programmes of Black Economic Empowerment. It is important to note that these initiatives took place within the boundaries of an economy that could safely be described as neo-liberal (Murray and Luiz, 2007).

Since the inception of GEAR and the date of this project, the government has stuck to the GEAR programme and even announced a further programme called the Accelerated and Shared Growth Initiative for South Africa (ASGISA), which is a programme aimed at investing in the long-term growth potential of the economy as a whole (in other words, going beyond the mere macroeconomic policy in an attempt to increase the growth potential of the economy). This has led to intense friction within the tripartite alliance to which this research report will turn later in this section.

Against the above background, the Minister of Trade and Industry (DTI), Mandisi Mpahlwa, published a discussion paper called “Company Law for the 21st century” (DTI, 2004). This paper could potentially have far-reaching consequences for company law and company law reform. Among the most

meaningful remarks in this paper, for the purposes of this study, are the following (DTI, 2004):

- It stated that the current framework of South African company law was built on foundations which were put in place in Victorian England in the middle of the 19th century.
- Even in the country of origin of South African Company Law, core aspects of the Company Law regime were questioned.
- A new constitutional framework and political, social and economic environment has been established in South Africa since 1994.
- It was stated against the above background that South African Company Law needed fundamental reform and the discussion paper promised a process of consultation to deliver such fundamental reform.

Simultaneously, the South African government initiated a fundamental rethink of the South African economy and decided to draw both Business and Labour into a debate. It challenged Labour to move beyond its sectarian interests and, at the same time, challenged Business to buy into the idea of "stakeholder capitalism". On 15 July 2005, the *Business Day* published the results of an interview which it had with Deputy Finance Minister, Jabu Moleketi (Brown, Dlamini and Radebe, 2005, n.p.). The following important points emerged:

- "The State" was growing in confidence and in its ability to be a major economic player.
- The State was drawing up an industrial strategy that would not be determined by the markets.

- For the first time, the State indicated that it expected sacrifices from the business sector in exchange for long-term economic stability.
- The challenge for the business community was to embrace the concept of "stakeholder capitalism". This entailed, in Moleketi's words, that business should move beyond its short-term profit drive and to focus more on long-term economic growth. This approach could potentially have far-reaching implications for company law reform and for corporate governance reform and it is explored in the next chapter.
- The government also expected Labour to make sacrifices by accepting the centrality of a market economy. Moleketi said that the viewpoint of government was not **whether** South Africa needed a capitalist system, but rather the **kind** of capitalist system, and government proposed a system of "stakeholder capitalism".

The Deputy Minister was personally responsible for this formal economic rethink of the government and forwarded the approach of the government to the National General Council of the ANC in July 2005. The General Council, however, referred the document back to ANC branches for discussion and it was not adopted. The *Business Day* put it to the Deputy Minister that the referral of the discussion document to the branches meant that the General Council of the ANC rejected the proposals. The Deputy Minister denied this. As far as could be ascertained, this initiative of the Deputy Minister never surfaced in the public domain again. In fact, since 1995 to date, the relationship among the members of the tripartite agreement has deteriorated to such an extent that the economic thinking of the South African government at the time of this report

appeared to be vague and unclear. Brief reference to this will be made later on in this section.

The drive to write a new company law and the drive by the government that business should embrace its new idea of "stakeholder capitalism" occurred almost simultaneously, the first in 2004 and the second in 2005. It is against this background that the release of the Companies Bill that was drafted following the consultation process after the release of "Company Law for the 21st Century" was eagerly awaited. The Bill was released on 19 March 2007. In the explanatory memorandum, attention was drawn to the fact that "Company Law for the 21st Century" promised to retain the basic principles of the previous Company Law regime but also to incorporate best practice internationally and the possibilities for its adaptation to the South African context.

Various interest groups and commentators commented on the draft. One such eminent commentator was Professor Andreas van Wyk, a previous rector of the University of Stellenbosch and a prominent academic in the field of Company Law. His remarks were as follows (Van Wyk, 2007):

- The DTI primarily used overseas and American advisers to draft the new Bill, and they introduced a whole range of new concepts and ideas completely foreign to the South African Company Law tradition.
- The drafters of the Bill did not give any indication that it considered South African Company Law and traditions, nor even that they were aware of the differences between the system proposed by them and the traditional approach.

- Van Wyk (2007) indicated that whereas Company Law reform was indeed necessary, the new American approach of the Bill would prove to be disruptive and counterproductive.

Various role players commented on the Bill and South African corporate society awaited the outcome of the result of the consultation process. On 29 August 2008, the DTI published the Companies Bill 2008 (DTI, 2008). The explanatory memorandum indicated that the Department had received wide support for its diagnosis of many problem areas in the South African Company and Corporate Law system and regime, but widespread opposition against the new Bill. The opposition was mainly based on the same objections as those articulated by Van Wyk (2007). The memorandum indicated that the criticisms were taken into account in the drafting of the 2008 Companies Bill.

Van Wyk (2008) once again commented in public on the Bill, as follows:

- He exclaimed: "*Aha! 'n Sinvolle maatskappywet-plan!*" ["Aha! A sensible Company Law plan!"] and he indicated that the drafters of the Bill had returned to the well-known South African Company Law and tradition.
- He stated that the 2007 Bill was a disjointed concoction of foreign ideas and terminology drafted without any sensitivity to the South African Company Law tradition.
- He welcomed the new Bill as being realistic and laying the basis for sensible Company Law reform.

The DTI called for public comment on the Bill and 30 organisations responded to the Bill. The Bill is currently being debated. The most wide-ranging comment

was received from the Institute of Directors of South Africa. The vast majority of contributions came from the business community, members of the academic fraternity (for instance, the Department of Mercantile Law at the University of South Africa) and a number of auditors' and attorneys' firms. Two aspects of these contributions are noteworthy:

- the absence of contributions from participants that could be described as representative of the leftist social and political forces in South Africa;
- the contribution by two role players, namely the South African Human Rights Commission (SAHRC) and the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

The SAHRC submission stated that Section 8 of the Constitution of the Republic Act, 1996 (Act 108 of 1996) conferred not only rights on juristic persons, but also obligations. The submission states that these obligations should be included explicitly in any new Companies Act. The SAHRC submission took into account the SAIFAC submission and supports the submission in the SAIFAC document without reservation (SAHRC, 2008)

The SAIFAC submission gave a fairly elaborate overview of the divergent approaches, internationally and in South Africa, that can be observed with regard to corporations' adoption of their human rights responsibilities. The two approaches are the voluntary approach (followed by South Africa and the second King Report) and the approach towards binding obligations. This is a thorough submission and it referred to a wide range of academic resources on the subject (Bilchitz, 2008). Once again, this debate falls beyond the scope of this study. The importance of the submission is that this international debate is

carried into the public debate on company law reform and will have to be dealt with.

SAIFAC is a non-governmental, non-profit, tax-exempt research institute operating from Constitution Hill, Johannesburg. It was established in 2004 by Justice Laurie Ackermann. The initial impetus behind its establishment was the recognition that the Constitutional Court Library was a public resource that should be used to promote constitutional democracy. Justice Ackermann approached the Ford Foundation for an establishment grant, and this grant provided the initial funding for the activities of SAIFAC (SAIFAC, 2008). The Ford Foundation in its turn was established on 15 January 1936 by Mr Edsel Ford, the son of the well-known Henry Ford, who founded that the Ford motor company. Over time, the Ford Foundation evolved into an international philanthropic organisation focusing on ways and means to solve mankind's most pressing problems and contributing to world peace and the establishment of a world order of law and justice (Ford Foundation, n.d.).

One event which proved to be meaningful in terms of South African politics took place between the 2007 and 2008 Bills, namely the 52nd National Conference of the ANC, held in Polokwane at the University of the North, from 16 to 21 December 2007 (ANC, 2007). At this conference, President Mbeki and a large number of members of his government were voted out of the leadership structures of the ANC. The *Financial Mail* reported the outcome of the proceedings at Polokwane and interpreted it as follows (Paton, 2007):

- In Polokwane, power within the ANC shifted markedly to the left.

- The first thing that would change under the new leadership was the revival of the alliance with the left-wing allies, the SACP and COSATU.
- Evidence of a leftist economic orientation already started to become clear at this conference.

Simultaneous with the broad political developments in the country, and with the attempts to reform South African Company Law, the Institute of Directors revisited the second King Report with a view to amending the report and to adding a chapter that would deal with the concept of "sustainability" (Brand, 2008d). In an interview with Nellie Brand of *Beeld*, Lindie Engelbrecht, the Executive Head of the Institute of Directors, placed the imminent third King Report in the following context:

- When the drafters of the King Report investigated the possible addition of a chapter to the second King Report, they realised that the whole of the second King Report was outdated in terms of international trends; hence, they decided to embark on the drafting of a third King Report.
- Factors that have changed are, first, that worldwide, and also in South Africa, public and municipal finances have been brought within the ambit of good corporate governance, and, secondly, and very significantly, various Amendment Acts of Company Laws and the Company Bill, 2008;
- The plan of the Institute of Directors was to have a final copy of the third King Report available at the beginning of 2009 and the Institute hoped that the third King Report would be able to give guidance to all role players in the implementation of the new Companies Act, based on the 2008 Bill, which was expected to be promulgated in January 2010.

- Engelbrecht reiterated on a number of occasions, throughout the interview, that the concept of sustainability would be a cornerstone of the third King Report.

During July 2008, the International Society of Business Economics and Ethics held its first congress in Africa (Brand, 2008b) and the following was reported:

- Mervyn King, head of the King Committee of the Institute of Directors, confirmed that a hybrid system of corporate governance was awaiting South Africa, in line with international trends. He described the system as hybrid on the basis of the fact that some of the guidelines would be enacted in legislation, such as the new Companies Act, and some of it would be contained in voluntary codes, such as those set out in the third King Report (Brand, 2008b).
- King described the United States' Sarbanes-Oxley Act as extraordinary in that interview in that it represented direct government interference in the private sector. He indicated that this was followed worldwide by the development of hybrid corporate governance systems (Brand, 2008b).
- Mervyn King also indicated that he had been involved in discussions with Sir David Tweedy, the Chairman of the International Standards Accountancy Board and Chairman of the Global Reporting Initiative with the aim of aligning international company reporting systems to achieve one standard of holistic reporting, embracing triple bottom line reporting, in other words reporting not only on accounting measures, but also on social, environmental and other aspects. He indicated that consensus had been reached amongst the big four accounting firms in the world

(PricewaterhouseCoopers, Deloitte Touche Tohmatsu, Ernest and Young and KPMG) regarding these envisaged reporting standards. He indicated that the technical committee was already formed and that guidelines would be available and broadly implemented within the next ten years (Van Gass, 2008).

Role players in the South African corporate governance fraternity have increased their international profiles. Two notable examples in this regard are

- Philip Armstrong

  He was the principal convenor of the second King Report, and gained international acclaim in the field of corporate governance. The Oxford Brookes University in the United Kingdom conferred an honorary doctorate in Business Administration to him in 2006 and he now heads the Global Corporate Governance Forum, based in Washington, DC, in the United States, a forum funded by the World Bank and the Organisation for Economic Co-Operation and Development (ECGI, 2008).

- Mervyn King

  He was appointed Chairman of a United Nations steering committee on corporate governance at the United Nations in 2006 (Katzenellenbogen, 2006).

In the meantime, following the developments at the National Convention of the ANC in Polokwane, the following sequence of events transpired, with regard to the prominent political role players in South Africa:

- The rift between the three alliance partners deepened. A group within the ANC that held government positions formed a rebel breakaway group under the leadership of the former Minister of Defence, Mr Musiwa Lekota. At the date of writing, they contemplated establishing a new party on 16 December 2008. Some commentators reported that support for this breakaway group was growing, as it became clear that the SACP and COSATU were taking charge of the ANC (De Lange, 2008).
- The ANC held an economic summit from 17 to 19 October 2008. At the conclusion of its economic policy summit, two members of the SACP appeared and announced a number of policy changes, described by them as follows: “Very important and fundamental policy shifts are occurring” (Malala, 2008, n.p.). This prompted the commentator to remark that there is no doubt that the ascendant trajectory in the ANC was leftist, while the traditional ANC has become silent. The article gave a long exposition of the deepening alienation between the various factions in the tripartite alliance.

Since the events at Polokwane in 2007, no meaningful and detailed policy developments with regard to aspects that could have an impact on corporate governance became apparent, other than the very general observed tendency that the ascendant trajectory in the ANC is to the left of the political spectrum.

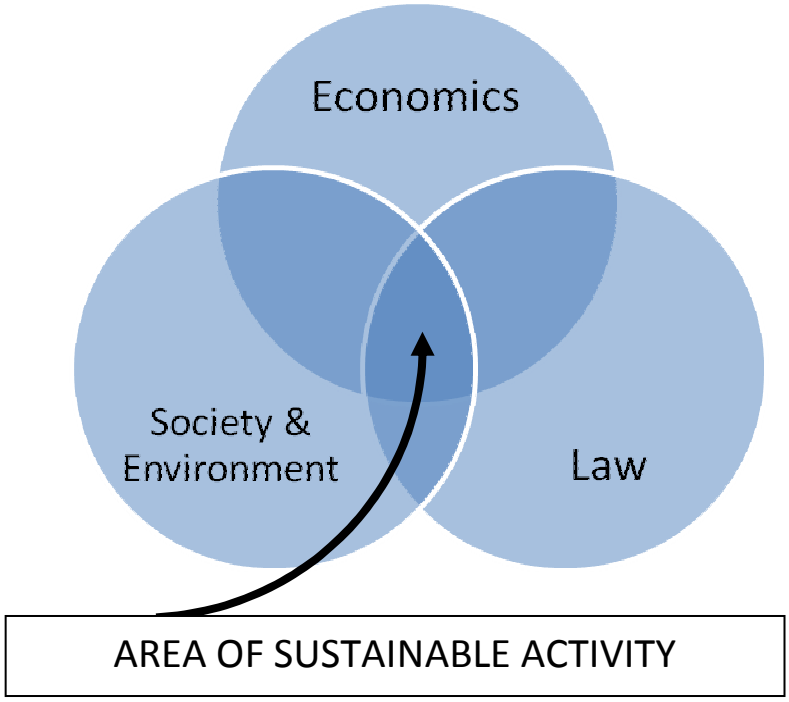
5.6 SPECIFIC OBSERVATIONS REGARDING THE CURRENT STATE OF THE INTERNATIONAL CORPORATE GOVERNANCE DEBATE

During the annual MBA Global Elective visit of the Gordon Institute of Business Science (GIBS) 2009 visit to the Harvard Business School on 10 October 2009,

the study group had a session on leadership, economics and ethics. The following observations were made regarding aspects that have an impact on the corporate governance debate:

- Professor Tom Piper, eminent academic at the Harvard Business School, led the discussion on the issues;
- the visit to Harvard business School took place in the midst of the credit meltdown in the United States of America (*The Economist*, 2008) – a copy of the cover of the magazine is attached to this report as Appendix A – portraying much of the emotional state of mind of the United States business fraternity;
- Professor Piper remarked that at that stage, business schools, other academic institutions and the corporate world were busy revisiting some of their basic premises with regard to economics, business, ethics and leadership;
- in this regard, Professor Piper indicated two aspects that were being seriously revisited by the business community at that stage, and which affected the corporate governance debate:
    - firstly, the question of sustainability was starting to take centre stage, according to Professor Piper, who provided the schematic exposition set out in Figure 6 (overleaf) as to the then current thinking on the future of the concept of “sustainability”.

Figure 6: Matrix of law and legal institutions

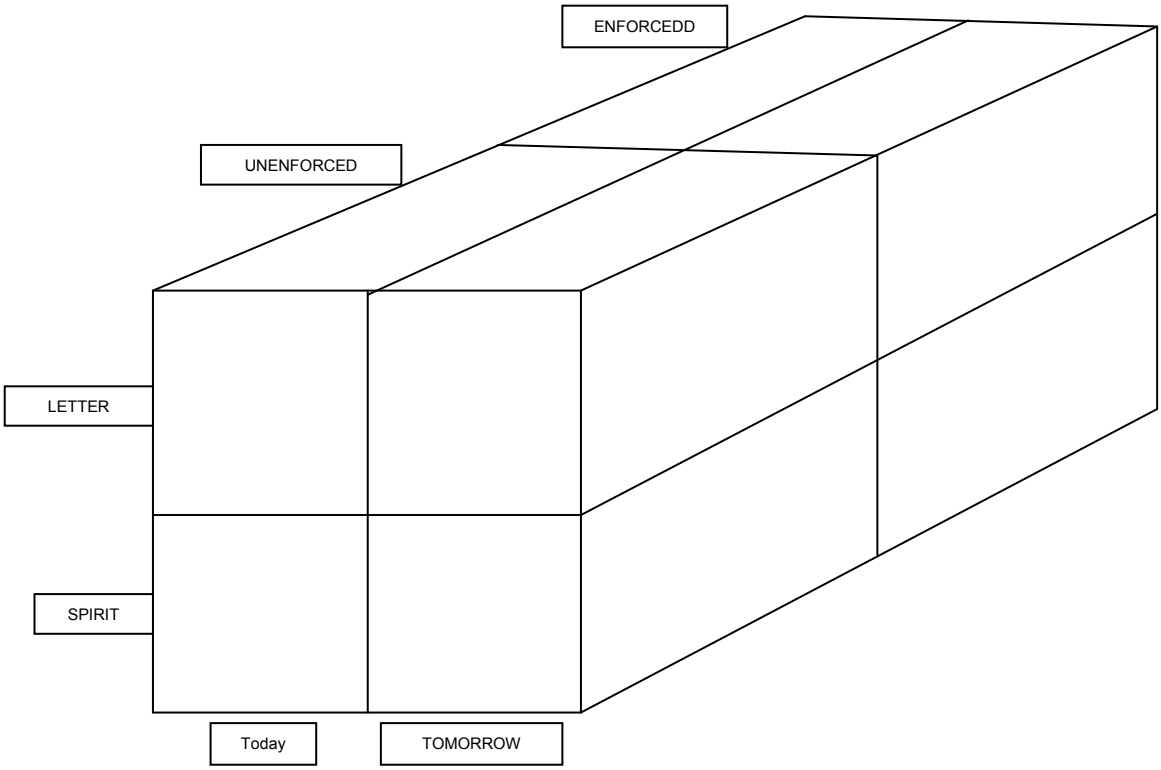


Source: Piper (2008, pers.com.)

Professor Piper remarked that economic, legal and business systems and structures should be aimed at maximising the area of the overlap of the three above circles in order to ensure sustainable businesses for the future. He remarked that much of the then current credit crisis could perhaps be ascribed to too strong an emphasis on economics and perhaps an inappropriate emphasis on the role of the law within the total context of business activity;

- secondly, the role of the law and legal institutions was also being re-evaluated. In this regard Professor Piper presented the schematic three-dimensional matrix of the law and legal institutions set out in Figure 7 (overleaf).

Figure 7: Matrix of law and legal institutions



Source: Piper (2008, pers. com.)

Professor Piper remarked that the law and legal institutions could be situated within the space of the enforced letter of the law of the day as opposed to the unenforced spirit of the law with a strategic (long-term-"tomorrow") intention. He remarked that the former could lead to unintended consequences. This matter is highly important for the purposes of the current debate on hybrid corporate governance systems

and the question as to why the Sarbanes-Oxley Act, with its emphasis on the letter of the law and the enforced compliance with it, could not ensure proper risk assessment and consequently risk pricing to avoid the credit crisis that the United States was experiencing at that stage.

5.7 SUMMARY OF THE IMPLICATIONS OF THESE OBSERVATIONS FOR THE RESEARCH QUESTIONS

The observations presented above in this chapter are summarised below in terms of the first four research questions. In Chapter 6, the results presented in Chapter 5 are discussed in terms of the research questions and the literature review, after which conclusions are drawn regarding Research Questions 1 to 4 and also, finally, Research Question 5.

5.7.1 Research Question 1: Historical perspective

The following points can be noted with regard to Research Question 1 (What is the historical trajectory of corporate governance developments in South Africa thus far?):

- The development of corporate governance as a recognizable part of corporate life in South Africa commenced simultaneously with the rise of the phenomenon of corporate governance, especially in the Commonwealth corporate community.
- Corporate governance developments in South Africa were very closely intertwined with those in especially the Commonwealth corporate community.

- During the first 14 years of the South African economy after 1994 the traditional anti-apartheid liberation movements as such contributed very little to the development of the corporate governance debate in South Africa.
- The corporate community in South Africa was the driving force behind corporate governance reform in South Africa.

5.7.2 Research Question 2: Actors

In respect of Research Question 2 (Who are the actors in the corporate governance reform debate in South Africa, and what are their characteristics?), the actors are

- the South African business community;
- the Institute of Directors of Southern Africa;
- international actors active in the corporate governance field;
- the South African government (as opposed to an increasingly leftist loose alliance within the ruling ANC);
- the international business community;
- a loose alliance of leftist parties, notably the SACP and COSATU and left-wing ANC members, within the ANC's tripartite alliance.

5.7.3 Research Question 3: Preferences

In terms of Research Question 3 (What are the corporate governance preferences of the actors identified in Research Question 2?), the following data emerged:

- the Institute of Directors had a very strong preference for a Commonwealth corporate governance system that could act as a strategic guideline for business;
- the South African government favoured the development of a system of "stakeholder capitalism", but, due to political and economic forces, this preference never survived its embryonic phase;
- the South African government initially proposed a radical new Company Law regime, but eventually reverted to a new Companies Act based squarely on the traditions and history of the existing South African Company Law, due to the preferences of internal role players;
- the South African business community preferred a new Company Law system, firmly based on the country's historical traditions of Company Law; and
- the business community in South Africa preferred a so-called soft approach to corporate governance, that is, corporate governance instruments that would offer strategic guidance for firms as opposed to the hard approach adopted especially by the Sarbanes-Oxley Act in the United States of America, which emphasises compliance with the letter of the law.

5.7.4 Research Question 4: Forces affecting the reform debate

With regard to Research Question 4 (What forces operate in corporate governance reform in South Africa?), the following forces were noted:

- the international drive to formalise and institutionalise corporate governance systems and structures;

- the drive of South African business to align itself with these international trends;
- the centrality of capital markets to attract capital;
- the inability of the political role players representing mainly black South Africans to mobilise around a common economic policy;
- international economic realities interacting on the small open economy of South Africa;
- the split within the ANC tripartite alliance into an increasingly leftist grouping with leftist economic orientations, and a centrist grouping with an orientation towards economic policies that would be compatible with international mainstream trends; and
- the 2008 credit meltdown of the international capital markets.

The findings set out in this chapter are discussed in Chapter 6.

CHAPTER 6: DATA ANALYSIS AND INTERPRETATION OF OBSERVATIONS

6.1 INTRODUCTION

This chapter consists of four sections, and it contains a discussion and interpretation the results of the observations in the previous chapter in the light of the literature review in Chapter 2. This introduction is followed by a section containing general observations regarding the development of corporate governance reform in South Africa over time. Next, a discussion of the five research questions mapped out in Chapter 3 is related to the findings, once again in the light of the discussion of the literature in Chapter 2. The last section in this chapter presents a general conclusion to the chapter.

6.2 GENERAL OBSERVATIONS REGARDING CORPORATE GOVERNANCE REFORM IN SOUTH AFRICA

On the basis of Section 2.2.2, the following summary can be presented of the various themes regarding the nature of corporate governance in relation to the field of study. According to the literature review, corporate governance as a phenomenon entails **institutional issues** (Markus, 2003), **functional issues** (Gilson, 2001), **decision-making processes** (Pound, 1995), and the **inner workings of the boardroom** (Useem, 2006).

Several observations confirm these dimensions of corporate governance development in South Africa:

- Institutional issues:

  This dimension can also be called the structural dimension and various observations confirm that this aspect is one of the central themes of corporate governance reform. In this regard, the explicit attempt by the South African government to steer South Africa towards "stakeholder capitalism" – see Section 5.5 above (Brown *et al.*, 2005) – could have a profound impact on structural issues (see Section 2.3.2, and Figures 6 and 7 above). The various recommendations of the second King Report dealt with several structural issues, in particular, its recommendations regarding the board, the separation of the positions of chairperson of the company and chief executive officer.

- Functional issues, decision-making processes and the inner workings of the boardroom:

  Scrutiny of Section 5.2.2.2 above reveals that all these aspects, in some way or another, form part of the corporate governance reform debate and programme (relevant issues are the demand for independent audit committees, non-executive directors and, in particular, non-executive directors' duties to be independent from management, and the emphasis on reporting standards, integrated sustainability reports, and so on).

All these aspects are discussed in various forms in this chapter. It is important to note that corporate governance developments in South Africa encompassed all the broad dimensions highlighted in Section 2.2.2 above. In addition, the wide scope of issues observed, as discussed in detail below, supports the claim by Andreasson (2008b) that, even from an international perspective, South Africa stands out among emerging markets as an interesting case when one is

observing corporate governance reform unfold. It is submitted that in the light of this conclusion, corporate governance reform developments in South Africa provide fertile ground for conclusions with regard to corporate governance reform, and this study will attempt to formulate a general corporate governance definition, using the discussion by Zingales (1997) in Section 2.2.2 as a guideline.

6.3 INTERPRETATION OF OBSERVATIONS REGARDING SOUTH AFRICAN CORPORATE GOVERNANCE REFORM IN THE LIGHT OF THE RESEARCH QUESTIONS

6.3.1 Research Question 1: Historical perspective

With regard to Research Question 1 (What is the historical trajectory of corporate governance developments in South Africa thus far?), a number of comments can be made.

An inescapable conclusion from the literature discussed and reviewed in Chapters 1 and 2 is that, whereas some aspects or dimensions of corporate governance can be traced back to the early 20th century, for instance, the classical work by Berle and Means, *The Modern Corporation and Private Property*, published in 1932 (La Porta *et al.*, 1999), the concept of "corporate governance" as a separate field of study and as a separate phenomenon in its own right in corporate life only emerged late in the last century of the previous millennium. The earliest reference found in the literature review in this study is that in the research by Pound published in 1995. The Cadbury Committee on Corporate Governance in the United Kingdom is regarded as the historical point

at which the concept of “corporate governance” began to get a life of its own (see Section 5.2.1). This Committee was appointed in 1991. In South Africa, corporate governance developments and the King Report’s codes of corporate governance are synonymous. The King Committee was established by the Institute of Directors in 1992. It is submitted throughout this study that there is a very close relationship between corporate governance in the United Kingdom and in South Africa. It is clear, moreover, that there is a very close relationship, not only between the content of these two corporate governance regimes, but also between the trajectories of their historical development. Both systems started to develop at more or less the same time, that is in 1991 and 1992.

The motivation for the development of the two systems was not the same, however, and in this respect, the two systems do not share the same historical roots. The system in the United Kingdom was motivated by high-level corporate failures (Sanford, 2005), while the system in South Africa was motivated by the desire of the business community to be competitive in an international business arena after the democratisation of South Africa (Mallin, 2006). This is important, since the United Kingdom is part of the economies of the developed world, whereas South Africa is regarded as an emerging market economy. These themes are explored in more detail later in this chapter.

6.3.2 Research Question 2: Actors

In response to Research Question 2 (Who are the actors in the corporate governance reform debate in South Africa, and what are their characteristics?), the review of corporate governance literature identified the following role players (Section 2.3.1) in corporate governance processes: political parties, financial

institutions, transnational institutions such as the European Union, the vested interests of the existing economic elite, national governments and trade unions.

An analysis of the observations of South Africa in corporate governance processes revealed the following role players (their characteristics are also briefly outlined here):

- The existing economic elite and their institutions:

  As is clear from Giliomee (2004) and Terreblanche (2002), over more than a century, an economic elite developed in South Africa, mainly built up with British capital and expertise during South Africa's colonial past. Certain companies played a central role in this process, most notably companies such as the Anglo-American Corporation. A number of prominent families played an important role and one family that can be mentioned here is the Oppenheimer family. The Oppenheimers took the initiative to consolidate South Africa's poorly capitalised, fragmented and unproductive mines into well-structured international companies (Giliomee, 2004). Over time, a very unique and sometimes uneasy coalition developed between British capital in South Africa and the political system, dominated mainly by Afrikaner-dominated political parties (Terreblanche, 2002). These two forces collapsed into a single force, perhaps dominated by the business community, in 1990, when the negotiation phase in South Africa started. Over time, individuals and organisations from this historical grouping of an economic elite have played a decisive role in corporate governance reform in South Africa:

  - The single most important organisation that took control of the corporate governance debate in South Africa was the Institute of Directors of

Southern Africa, by way of the King Committee. Although this Committee went out of its way to facilitate participation by all role players (including Labour and the government – see Section 5.2.2.2 above), it cannot be denied that the Institute represented the interests of business in South Africa and displayed a very strong Commonwealth orientation in its approach to corporate governance reform. This implies a strong emphasis on "shareholder capitalism" – see Section 2.3.2 above (Roe, 2006). This emphasis is evidenced by the very first principle that the Institute of Directors laid down for the second King Committee, namely the retention of the centrality of shareholder capital rights in the existing corporate code (Mallin, 2006).

- The following is also clear from the observations above: There was a close overlap between individuals involved in both the business community and the Institute of Directors (for instance, the Oppenheimer family, which was highly influential in both the Anglo-American Corporation and the founding of the Institute of Directors). It is also important that at least prominent individuals in the Institute of Directors were not only acutely aware of the politics of the day, but were also involved in it (observations regarding Mr Hersov).

- International role players:

  Corporate governance reform actors in the United Kingdom, for instance, the Cadbury Committee, with its Report and other reports that followed with international economic developments on a broader level had a profound impact on the creation of the context in South Africa within which corporate governance reform took place and continues to take place. The Washington

consensus in the early 1990s predated these reports, presenting an international economic reality which was incompatible with the RDP demanded by the tripartite alliance.

- The tripartite alliance of the ANC, COSATU and SACP:

  The significance of this alliance is twofold:

  - The alliance has so far been unable to put forward a coherent economic policy that could unify the constituent members of the alliance. This has resulted in an economic policy vacuum which made it necessary for the South African government to take control, on a pragmatic level, to stabilise the South African economy – hence the GEAR policy.
  - Flowing from the above, the South African government emerged as a separate role player in corporate governance reform in the country. The tripartite alliance held political control in South Africa, but was unable to formulate an economic policy. This forced the government to emerge over time as a separate entity formulating policy and ensuring the management of South Africa's economy. It is therefore significant that Deputy Minister Moleketi identified the South African government as a separate role player – see Section 5.5 above (Brown *et al.*, 2005), and that he even declared that the South African government had gained confidence in its economic management of the country and in that capacity challenged both Business and Labour to rethink their positions with regard to the economy. In this regard, the Deputy Minister put forward a vision of “stakeholder capitalism” for South Africa.

6.3.3 Research Question 3: Preferences

In response to Research Question 3 (What are the corporate governance preferences of the actors identified in Research Question 2?), a number of findings can be reported, starting with the preferences of the **South African business community and the existing economic elite** from South Africa's pre-1994 history. This community took a very strong conscious decision to align itself, not only with the mainstream of economic developments in the post-1990 international arena (characterised by a sentiment that the ideological economic debate in the world was conclusively settled in favour of capitalism), but also with the Commonwealth corporate governance preference for a diffuse ownership system (Roe, 2006). This system emphasises the efficient use of capital, and the supremacy of the interests of shareholders and the return on shareholder investments.

There are very close ties between South African corporate governance and that of the United Kingdom. It is evident that within the Anglo-Saxon family of corporate governance systems, two separate approaches started to emerge: firstly, the compliance-based approach of the Sarbanes-Oxley Act in the United States of America and, secondly, the "light touch" approach of the United Kingdom (Andreasson, 2008b). In this regard, the South African orientation has thus far favoured the so-called "light touch" approach of the United Kingdom, since the second King Report explicitly declared that the prescriptions of the code should be viewed as a strategic guideline and not as a regulatory compliance-based system. In fact, the Chairperson of the King Committee, in a

personal interview with Andreasson (2008b) indicated in no uncertain terms his preference for the “light touch” approach.

In respect of the preferences of the **South African government**, it can be noted that the South African government has expressed the view that it is in favour of “stakeholder capitalism” in South Africa. This approach could result in fundamental changes in South Africa's corporate governance system, for instance, in line with the explanations by Roe (2006) for why a “stakeholder” model of capitalism could result in corporate structures that promote concentrated ownership structures in which the interests of workers would take preference over the interests of shareholders. In this regard, Deputy Minister Moleketi referred in the interview mentioned above (Brown *et al.*, 2005) to the fact that the government challenged business to move beyond its short-term profit orientation.

As Andreasson (2008b) points out, the term “stakeholder capitalism” could have more than one meaning. The debate needs to progress much further before any accurate conclusions can be drawn from the remarks by the Deputy Minister, about the implications of such a government strategy for the corporate governance reform debate in South Africa. As has been mentioned in Section 5.5 above, the impetus for the South African government to embark on an economic rethink could evaporate under the pressure of intensifying internal friction and alienation in the tripartite alliance.

The two alliance partners of the tripartite alliance, the **SACP** and **COSATU**, can generally be described as representing the left of the political spectrum (De Lange, 2008; Malala, 2008). Given this tendency, and the very obviously

revolutionary language regarding determining the role of economic “classes” in South Africa and the role and function of the revolutionary movement (ANC, 2007) in society, it would be reasonable to conclude that these two partners have a preference to the left of the South African government. However, very little has been articulated in this regard, with the result that it is not possible, at this stage, to draw more definite conclusions.

The preferences of role players in the **international corporate governance debate** should be read against the revision of the second King Report. The current compilation of the third King Report takes place not only against the backdrop of the disintegration of the liberation movement in South Africa (see Section 5.5), but also against the backdrop of a fundamental rethink of corporate governance as a result of the dramatic global credit meltdown (see Section 5.6). The international community is engaging in a fundamental re-evaluation of the concept of “sustainability” and the exact role of the “law” in corporate governance. International preferences are moving towards structures and systems aimed at producing sustainable results. In this process, the international community is pondering whether or not a move away from the compliance-based Sarbanes-Oxley Act approach of the law, to a more strategic approach of the law could be more facilitating, bringing about sustainable economic activity. The position paper of SAIFAC to the South African Parliament with regard to the 2008 Company Bill added a further dimension to the preferences. This document argued very strongly that the human rights obligations of companies should be incorporated explicitly in any future Company Law, and the constituting documents of a company.

6.3.4 Research Question 4: Forces

6.3.4.1 Introduction

In terms of Research Question 4 (What forces operate in corporate governance reform in South Africa?), it is suggested that the forces operative in South African corporate governance formation can be described and categorised under four headings, namely, firstly, the forces of aggregation, secondly, the forces of diffusion, thirdly, the forces of juridification, and fourthly, the forces of international convergence.

6.3.4.2 Forces of aggregation

Gourevitch and Shinn (2007) argue that an economy has certain actors, each with its own preferences. Through the unique institutions of such an economy, the various preferences of the actors are aggregated into corporate governance policies and eventually institutions. In South Africa, the forces of aggregation display interesting characteristics:

- Because the political representatives of the black majority, also called the mass democratic movement, could not arrive at a realistic coherent economic approach, the preferences of the business community (as articulated by the Institute of Directors) became corporate governance policy and regulation in South Africa almost by default. There was no realistic alternative that could compete with the vision of the business community in the public arena as far as corporate governance was concerned.
- The business community was realistic and it realised that corporate institutions would have to contribute to the transformation of South Africa.

Hence, the second King Report in particular placed much emphasis on social responsibility and labour issues. All of this was done without subverting the centrality of capital markets and the central role of the shareholder in corporate governance institutions and functions. Transformation issues were addressed by way of an elaborate system of Black Economic Empowerment, regulated in terms of the broad-based Black Economic Empowerment Act and regulations promulgated in terms of this Act. This had the effect of transforming the central player in corporate governance, the shareholder, to become more representative of South African society. This process is moreover brought explicitly within the guidance of the second King Report (see Section 5.3 above). Whereas this does represent a change of focus and commitment by the business community brought about by (one can even argue forced by) the political realities of the day, this change of focus does not amount to transformational change of the institutions and functions of corporate governance, for instance, changing from the shareholder system to a stakeholder system of corporate governance (West, 2006).

- Terreblanche (2002) remarks that the meeting between the Anglo-American Corporation and ANC leaders in Zambia in 1985 “struck a clever blow for capitalism” (Section. 5.2.2.2 above). It is suggested that the realisation by the South African business community (once again in the form of the Institute of Directors) in 1991 that they had to seize the opportunity to gain the initiative with regard to corporate governance reform in South Africa struck a second clever blow for capitalism at a time when South Africa's future was being negotiated. The first King Report’s code of conduct was

well formulated, took cognisance of the central themes in corporate governance in the international arena and won respect internationally for its realism and coherence.

- It is important to note that during the negotiation phase of the last decade of the previous century, when groundbreaking decisions had to be negotiated regarding South Africa's economy, major developments regarding corporate governance took place when one of the important role players, the political representatives of the majority, were ill-prepared to engage in the economic debate. Fourteen years later, in 2008, the basic tenets of corporate governance institutions and functions are being revisited worldwide, leading to the compilation of the third King Report in South Africa. Yet again, the political representatives of the underdeveloped portion of South African society, which need to strike an economic compromise with the economic elite (Webster and Adler, 1999), is no closer to an economic vision than 14 years earlier. On the contrary, the movement was disintegrating at the time of the writing of this research report. It seems as if the third King Report and the 2008 Companies Bill will become the corporate governance constitutive instruments, yet again entrenching South Africa's long-standing Company Law traditions, and aligning South Africa with international trends.

6.3.4.3 Forces of diffusion

Section 5.3 above testifies to the extent of the diffusion of corporate governance concepts and ideas into legislation which can safely be described as legislation regulating the central institutions of South African society. The following points should be noted:

- the requirement that municipalities throughout South Africa must practise accountable and coherent corporate governance;
- the fact that various public institutions are forced by legislation to adhere to good corporate governance;
- the stipulation that the Independent Regulatory Board of the audit profession should also be the accounting authority within the context of the Public Findings Management Act, and that this regulatory board has the duty to conduct coherent corporate governance;
- the variety of institutions to which the text of the second King Report was made applicable; and
- the fact that the JSE Securities Exchange is compelled by law to require that companies adhere to proper corporate governance regimes, and that it prescribed the second King Report's code of conduct in this regard, forcing all listed companies in South Africa to adhere to the second King Report.

The forces of diffusion regarding corporate governance reform in South Africa are wide-ranging. They have ensured, over a relatively short period, that South African corporate life has become sensitive to corporate governance issues.

6.3.4.4 Forces of juridification

Corporate governance as a phenomenon has seeped into litigation. Two aspects are important:

- Firstly, the private law implications of the observations: in this regard, it is important to note the difference between the South African Law of Delict and

English Law of Tort. The English Law of Tort is a system based on casuistic individual torts. The South African Law of Delict proceeds from an elementological point of departure, stating that any conduct by a person contrary to the *boni mores* of society can constitute the basis for delictual liability (*Minister van Polisie v Ewels 1975(3) SA 590 A*). This more flexible approach could facilitate the reception of corporate governance rules and norms into the body of Private Law in South Africa. Although there has been no reported judgment indicating that the principles underlying the second King Report were indeed representative of the corporate *boni mores* of South African corporate society, the remarks made by the court in *Minister of Water Affairs and Forestry V Stilfontein Gold Mining Co Ltd And Others 2006 (5) SA 333 (W)* were indeed overtures by the court in this direction.

- Secondly, the argument to include the human rights obligations of companies in the 2010 Companies Act: This debate is still in its early stages, but this development could conceivably have far-reaching consequences for various aspects of corporate governance, ranging from the interpretation of laws and contracts, to corporate governance practice. In this regard, the SAIFAC document even goes so far so as to suggest that directors should be held liable if they neglect their human rights duties towards any of the stakeholders in the company. It therefore stands to reason that intense debate can be expected with regard to proposals such as these, since directors were traditionally regarded as safeguarding the interests of shareholders, on account of their having been appointed by the shareholders of the company.

6.3.4.5 Forces of globalization

The two main themes on the global corporate governance agenda currently under discussion, as set out in Section 5.6 above, are the question of sustainable economic activity and the question as to the role of the law in corporate governance (compliance-based in line with the Sarbanes-Oxley Act, as opposed to the "light touch" approach used in the United Kingdom). The compilers of the third King Report have already indicated that in the third King Report sustainability will be central. It is consequently to be expected that the South African code will at least be in step with international trends in this regard. Lastly, the SAIFAC document testifies to a particular theme currently emerging in the international arena, namely the obligatory human rights duties of companies and their organs.

6.4.4 Research Question 5: Possible future trajectories of corporate governance reform

In terms of Research Question 5 (What are the possible trajectories, given the results to Research Questions 1, 2, 3 and 4, for future corporate governance reform in South Africa?), two broad trajectories can be identified, namely the national trajectory and the global trajectory.

The national trajectory can be foreseen as follows:

- At the time of the writing of this report, the business community had already embarked on the writing of the third King Report. It is foreseeable that international trends will be incorporated in this third Report. At the same time, the political landscape in South Africa is undergoing irrevocable

change in the sense that the liberation movement in South Africa (the tripartite alliance of the ANC, COSATU and the SACP) is disintegrating and breaking up into two separate movements, one, a centrist movement occupying the same space that the government previously occupied, and the other, a leftist political movement.

- Several scenarios become possible:
  - If the new centrist movement is able to win majority support at the national elections due to take place in 2009, such a movement would perhaps once again push a system of “stakeholder capitalism” and would have to enter into compromises with regard to the vision of “shareholder capitalism”.
  - If the leftist movement (still under the name of the ANC) wins the majority vote at the 2009 elections, it is foreseeable that the business community would have to deal with much more interventionist corporate governance proposals put forward by a more populist government. That would almost certainly entail more radical structural changes to corporate society.
  - If no party is able to win majority support at the elections, and if the new centrist movement and the pro-Business political parties (for instance, the Democratic Alliance) are able to enter into some or other coalition arrangement, it is foreseeable that South African Business will be able to push its agenda of “shareholder capitalism” and the centrality of capital markets.

The global trajectory can be foreseen as follows:

- Against the backdrop of the global meltdown, the concept of sustainability will take centre stage in order to ensure that businesses will be sustainable in future. All indications, already reported in this report, are that the question of sustainability will also take centre stage in the third King Report.
- The divergences of approaches within the Anglo-Saxon family of corporate governance systems, namely the compliance-based system versus the “soft touch” United Kingdom approach, will also be reflected in the third King Report. In this regard, it seems as if the King Committee has already accepted some kind of a hybrid corporate governance system for the future – compare, for instance, the differences reported by Andreasson (2008a, 2008b). This is strange, since the United States of America is currently revisiting its rule-based compliance system and is contemplating a more strategic based system in line with the United Kingdom’s approach.

CHAPTER 7: CONCLUSION

7.1 INTRODUCTION

Over the last 14 years, South African corporate governance reform has displayed a fascinating relationship between international factors and domestic political realities. Although there was a significant shift in the emphasis in corporate governance from the first King Report to the second King Report, the basic tenets of shareholder-centred corporate governance remained intact, contrary to what could be expected after a country has undergone such fundamental transformation as South Africa has. The reasons that such a fundamental normative instrument of society remained firmly anchored in mainstream capitalist thinking are to be found in the complex relationships between various actors within the corporate governance debate, their relative strengths at the negotiating table and the political realities affecting the conduct of such actors.

7.2 SUGGESTIONS FOR FURTHER RESEARCH

- Further exploratory research with regard to each of the five above research questions is justified in the light of the scope of issues raised in this report.
- Quantitative and statistical methods have been employed lately to quantify corporate governance variables and to describe causality between corporate governance on the one hand and various dependent variables, for instance, economic growth, on the other. Once a body of exploratory studies has been built up with regard to corporate governance in South Africa, such statistical and quantitative research with regard to corporate governance in South

Africa would add immensely to the understanding of corporate governance as a phenomenon in South African corporate life.

- The interrelationship between the diverse fields of study comprising the phenomenon of corporate governance on the one hand, and legal studies on the other hand, would enhance insight into the growing tendency of legal rules of governance which operate in the domain of Private Law.
- The relationship between economic development on the one hand and corporate governance institutions on the other needs to be explored further. In this regard it is noteworthy that South Africa is a developing country; yet, at the same time, it has a system of capital markets. It is these capital market efficiency of capital and shareholder interests that take centre stage in current corporate governance and regulation. There has been criticism against this approach, labelling this approach the prescriptions of the rich northern hemisphere to safeguard Anglo-Saxon investors (Soederberg, 2003). The validity of this claim can be investigated in the case of South Africa, as South Africa provides an excellent, almost experimental, opportunity due to its compressed political transformation.
- The nature of the third King Report and its code, once it becomes available, should be studied in depth, with regard to aspects highlighted in this study. (This code was not available at the date of the finalisation of this report.)
- The extent to which the growing trend in Anglo-Saxon economies, namely to elevate stakeholders other than shareholders in the company to be regarded as much more important than previously, would trump any demand for stakeholder capitalism corporate governance arrangements in future.

7.3 LIMITATIONS OF THIS RESEARCH

- This study never intended to prove any causality or even to provide empirical descriptive data. This study was an attempt to describe the dimensions of particularly the political economy of corporate governance and should be seen in this light.
- Since corporate governance is an interdisciplinary phenomenon, certain points of departure with regard to various fields of study had to be stipulated. Of particular importance is the fact that classical economic theory, the basic tenet of present-day capitalism, was taken as a point of departure. Criticism can be levelled against this approach (see, for instance, Soederberg 2003).

7.4 TOWARDS A BROAD DEFINITION OF THE PHENOMENON OF CORPORATE GOVERNANCE IN THE LIGHT OF THIS RESEARCH REPORT

On the basis of the conclusions drawn from this observational study, as summarised in terms of the research questions as a point of departure, the following broad definition of the term corporate governance is attempted:

> **Corporate governance is the set of corporate institutions and functions that are the outcome of a public political process, and aimed at regulating the relationship amongst the stakeholders in the firm, with a view to maximising value for each of the shareholders in the firm, while at the same time optimising the competitive advantage of the firm in the economic marketplace.**

The above definition takes cognizance of the following:

- the governance features of those aspects of the firm that cannot be regulated by market forces, and which have to be regulated in order to be sustainable;
- the realization that, in the end, a firm has to compete in the market and comply with corporate governance principles in order to be sustainable; and
- the fact that such institutions and functions are constituted as a result of consensus reached between role players in a public political bargaining process.

It is submitted here that it is exactly with regard to the three broad areas identified in the above definition that a fundamental rethinking of corporate governance is currently underway internationally (see Section 1.1). It is in respect of these areas that corporate governance could change fundamentally in future, both internationally and in South Africa.

REFERENCES

Abbott, G.C. (1985/1986) What is political economy?: A study of social theory and underdevelopment. *International Affairs,* 62(1), Winter, 111-134.

Allen, F. (2005) Corporate governance in emerging economies. *Oxford Review of Economic Policy,* 21(2), 164-177.

ANC. (2007) *ANC 52nd National Conference*. Available from http://www.anc.org.za/ancdocs/history/conf/conference52/ (accessed 27/10/2008)

ANC Department of Economic Planning. (1993) *Macroeconomic Research Group and the South African Reserve Bank*. Available from http://www.anc.org.za/ancdocs (accessed 27/10/2008)

Andreasson, S. (2008a) Understanding corporate governance reform in South Africa: Anglo-American divergence, the King reports and hybridization. In *Selected works of Stefan Andreasson*. Available from http://works.bepress.com/stefan_andreasson/8/ (accessed 29/10/2008)

Andreasson, S. (2008b) Understanding corporate governance reform in South Africa: the influence of the Sarbanes-Oxley on the King Reports. Unpublished paper under review. Available from http://works.bepress.com/stefan_andreasson/8 (accessed 27/10/2008)

Bebchuk, L.A. & Roe, M.J. (1999) A theory of path dependance in corporate ownership and governance. *Working Paper No. 131, School Working Paper Series*. New York: The Center for Law and Economic Studies, Columbia Law School.

Berglöf, E. (1997) Reforming corporate governance: Redirecting the European agenda. *Economic Policy,* 12(24), 91-123.

Bilchitz, D. (2008) *Parliamentary Submission: Companies Bill.* Johannesburg: SAIFAC.

Bradley, M., Schipani, C.A., Sundaram, A.K. & Walsh, J.P. (1999) The purpose and accountability of the corporation in contemporory society: Corporate governance at a crossroads. *Law and Contemporary Problems,* 62 (Summer), 9-86.

Brand, N. (2008a) Volhoubare burgerskap van firmas geëis – King III. *Beeld,* 15 Julie, 7.

Brand, N. (2008b). Maatskappybestuur gou hibried. *Beeld – Sakenuus,* 16 Julie, 11.

Brand, N. (2008c) Die werkers het (onbewus) gewen. *Beeld – Sakenuus*, 23 Julie, 13.

Brand, N. (2008d) Volhoubare burgerskap van firmas geeis – King III. *Sake Beeld*, 15 Julie, 7.

Brown, K., Dlamini, J. & Radebe, H. (2005) State urges business to rethink profit drive. *Business Day*, 15 July. Available from http://www.businessday.co.za (accessed 26/10/2008)

Chartered Secreteries Southern Africa. (2008) About us. Available from www.icsa.co.za/aboutus.php (accessed 25/10/2008)

Child, J.W. & Marcoux, A.M. (1999). Freeman and Evan: Stakeholder Theory in the original position. *Business Ethics Quarterly,* 9(2), 207-223.

Cioffi, J.W. & Höpner, M. (2006) The political paradox of finance capitalism: interests, preferences and center-left party politics in corporate governance reform. *Politics and Society,* 34, 463-502.

Crouch, C. & Streeck, W. (1997) *Political Economy of Modern Capitalism – Mapping Convergence and Diversity*. Paris: Sage.

De Lange, J. (2008). Jou vakbondgeld gaan nou aan politiekery bestee word. *Sake-Beeld*, 27 Oktober, 10.

Department of Trade and Industry. (DTI) Republic of South Africa. (2004). Company Law for the 21st Century. *GG No: 26493, 468,* 23 June. Pretoria.

Department of Trade and Industry. (DTI) Republic of South Africa. (2007). *Companies Bill, 2007.* Pretoria: Government Printer. Available from http://www.thedti.gov.za/ccrdlawreview/COMPANIESBILL07.htm (accessed 28/10/2008)

Department of Trade and Industry. (DTI) Republic of South Africa. (2008) *Companies Bill, 2008*. Pretoria: Government Printer. Available from Department of Trade and Industry, Pretoria http://www.thedti.gov.za/ccrdlawreview/COMPANIESBILL08.htm (accessed 29/08/2008);

Dewan, T. & Shepsale, K.A. (2008). Review Article: Recent Economic perpectives on Political Economy, Part 1 and Part 2. *British Journal of Political Science,* 38 (2&3), July, 363-382 and 543-564.

ECGI. (2008) *Mr Philip Armstrong: Head Global Corporate Governance Forum*. Available from the European Corporate Governance Institute:

http://www.ecgi.org/members_directory/member.php?member_id=290 (accessed 27/10/2008)

Ford Foundation. (n.d.) Our History. Available from the Ford Foundation: http://www.fordfound.org/about/history/overview (accessed 7/11/2008)

Gillan, S.L. (2006) Recent developments in corporate governance: An overview. *Journal of Corporate Finance,* 12, 381-402.

Giliomee, H. (2004) *Die Afrikaners.* Cape Town: Tafelberg.

Gilson, R.J. (2001) Globalizing corporate governance: convergence of form or function. *The American Journal of Comparative Law,* 49(2), 329-357.

Goldstein, A.E. (2000) *Big Business and the Wealth of South Africa: Policy Issues in the Transition from Apartheid.* Paris: OECD Development Centre.

Gourevitch, P.A. & Shinn, J.J. (2005) *Political Power and Corporate Control.* Princeton: Princeton University Press.

Gourevitch, P.A. & Shinn, J. (2007). *Political Power and Corporate Control – The New Global Politics of Corporate Governance.* Princeton: Princeton University Press.

Institute of Directors. (2002) King Report for Corporate Governance in South Africa. *King Committee, Second King Report*. Johannesburg: King Committee.

Institute of Directors. (2008) Home page. Available from http://www.iod.co.za (accessed 25/10/2008)

Jackson, G. (2005) Stakeholders under pressure: corporate governance and labour management in Germany and Japan. *Corporate Governance,* 13(3), 419-428.

Katzenellenbogen, J. (2006) King to tackle UN Governance. *Business Day*. Available from http://www.businessday.co.za/articles/article.aspx?ID=BD4A174754 (accessed 27/10/2008)

La Porta, R., Lopez-de-Silanes, F., Shleifer, A. & Vishny, R.W. (1998) Law and finance. *Journal of Political Economy,* 106(6), 1113-1155.

La Porta, R., Lopez-De-Silanes, F. & Shleifer, A. (1999) Corporate ownership around the world. *The Journal of Finance,* 54(2), 471-517.

Licht, A.N., Goldschmidt, C. & Schwartz, S.H. (2005) Culture, law and corporate governance. *International Review of Law and Economics,* 25*,* 229-255.

Lorsch, J.W. & Clark, R.C. (2008) Leading from the board room. *Harvard Business Review*, April, 105-111.

Majova, Z. & Mgibisa, M. (2007) Behind the smiles: state of the ANC. *Mail & Guardian Online*, 12 January. Available from www.mg.co.za (accessed 27/10/2008)

Malala, J. (2008) Changes coming – maybe. *The Times*, 27 October. Available from http://www.thetimes.co.za/News/Article.aspx?id=871108 (accessed 27/10/2008)

Malherbe, S. & Segal, N. (2001) Corporate governance in South Africa. *Policy Dialogue Meeting on Corporate Governance in Developing Countries*

and Emerging Economies (pp. 1-86). Paris: OECD Development Centre and the European Bank for Reconstruction and Development.

Mallin, C.A. (2006) *Handbook on International Corporate Governance.* Cheltenham: Edward Elgar.

Markus, S. (2003) Corporate governance as political insurers: firm-level institutional creation in emerging markets and beyond. *Socio-Economic Review*, 1-30.

MIC. (2008) Mineworkers Investment Company. Available from http://www.mic.co.za (accessed 26/10/2008)

MIT. (2008) History. The Mineworkers Investment Trust. Available from http://www.mit.org.za (accessed 26/10/2008)

Montanye, J.A. (2006) Entrepeneurship. *Independent Review,* 10(4), 547-569.

Murray, T. & Luiz, J. (2007) *South Africa: the Battle for Social and Economic Policy.* Johannesburg: Wits Business School, University of the Witwatersrand.

NACD. (2008) *Change and Opportunity: Sunday Conference Recap*. 19 October. Available from the NACD at http://www.nacdonline.org/conference08/day2.asp (accessed 28/10/2008)

News24. (2001a) 2 March. BAe denies it paid MK vets R5m. Available from http://www.news24.com/News24/South_Africa (accessed 25/10/2008)

News24. (2001b) 19 October. Khoza, President of the Institute of Directors. Available from http://www.news24.com/Archive (accessed 24/10/2008)

News24. (2007) 25 January. Arms-deal probe hits brick wall. Available from http://www.news24.co.za/South_Africa/News/ (accessed 27/10/2008)

Paton, C. (2007) An almighty crunch. *Financial Mail,* 21 December. Available from http://free.financialmail.co.za (accessed 27/10/2008)

Pieterse, J.N. (1997) Globalisation and emancipation: From local empowerment to global reform. *New Political Economy,* 2(1), pages

Porter, M.E. (1992) Capital disadvantage: America's failing capital investment system. *Harvard Business Review,* 13(3), 65-81.

Pound, J. (1995) The promise of the governed corpration. *Harvard Business Review*, March-April, 89-98.

Reed, D. (2002) Corporate governance reforms in developing countries. *Journal of Business Ethics,* 37, 223-247.

Roe, M.J. (2006) *Political Determinants of Corporate Governance – Political Context, Corporate Impact.* Oxford: Oxford University Press.

SAHRC. (2008) *The Companies Amendment Bill.* Cape Town: South African Parliament.

SAIFAC. (2008). About Us. Available from the South African Institute for Advanced Constitutional, Public, Human Rights & International Law: http://www.saifac.org.za/about_us.htm (accessed 7/11/2008).

Sanford, J. (2005) Corporate governance and society. *Challenge,* 48(4), 69-87.

Shleifer, A. & Vishny, R.W. (1997) A survey of corporate governance. *The Journal of Finance,* 52(2), 737-783.

Soederberg, S. (2003) The promotion of "Anglo-American" corporate governance in the South: who benefits from the new international standard? *Third World Quarterly,* 24(1), 7-27.

Terreblanche, S. (2002) *A History of Inequality in South Africa 1652-2002.* Durban: University of Natal Press.

The Economist. (2008) What's next? *The Economist*, 13,14.

Toms, S. (2005) Divergence and convergence within Anglo-American corporate governance systems: Evidence from the US and UK, 1950-2000. *Business History*, April, 267-295.

Useem, M. (2006) How well-run boards make decisions. *Harvard Business Review*, November, 130-138.

Van der Merwe, J.G., Geach, W.D., Havenga, M. & Lombard, S. ([1995] 2004) *South African Corporate Business Administration.* 2nd revised edition. Landsdowne: Juta.

Van Gass, C. (2008). UN crafts global reporting standards. *Business Day*, 16 July. Available from http://www.businessday.co.za/articles/economy (accessed 27/10/2008)

Van Wyk, A. (2007) SA Wet praat Amerikaans. *Sake Beeld*, 28 Mei, 14.

Van Wyk, A. (2008) Aha! 'n Sinvolle maatskappywet-plan. *Sake Beeld,* 15 Julie, 10.

Vorster, Q., Koornhof, C., Oberholster, J., Koppeschaar, Z. & Venter, E. (2006) *Beskrywende Rekeningkunde.* Durban: LexisNexis.

Webster, E. & Adler, G. (1999) Toward a class compromise in South Africa's double transition: Bargained liberalisation and the consolidation of democracy. *Politics and Society,* 27, 347-384.

West, A. (2006) Theorising South Africa's corporate governance. *Journal of Business Ethics,* 68, 433-448.

Wisman, (G) & Whynes, D.K. (1986) What is political economy . *Journal of Economic Issues,* 20, March, 226-229.

www.news.findlaw.com. (2008) Sarbanes-Oxley Act. Available from *www.news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf* (accessed 25/10/2008)

Zikmund, W.G. (2003) *Business Research Methods.* Mason, Ohio: Thomson-South Western.

Zingales, L. (1997) *Corporate Governance.* Cambridge, Massachusetts: National Bureau of Economic Research.

Appendix A: Front page of the Economist: 20 September 2008

Appendix B: Cases

Appendix C: Statutes

Appendix D: Regulations

Appendix E: Table of Figures.