# Human rights obligations and South African companies: A transformative approach

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# DECLARATION

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**Reshard Lee Kolabhai**
**March 2020**

# SUMMARY

In response to colonialism, apartheid and contemporary ills, the Constitution of the Republic of South Africa, 1996 ("the Constitution") builds its legitimacy on the fundamental restructuring of South African society in line with human rights. Human rights violations often involve companies and corporate structures in some form, such structures being central to South Africa's political-economic history since 1652, and continuing to permeate modern South African life. The Constitution's project of transformative constitutionalism extends to all legal and economic relations, including companies, but domestic corporate regulation does not yet exhibit any meaningful transformative change in favour of human rights. This thesis thus examines the implications of the South African Bill of Rights for companies and company law, using the lens of transformative constitutionalism. The current business and human rights law literature generally follows an atomistic conceptual approach to understanding companies, focusing on companies as individual entities capable of committing violations. Transformative constitutionalism, however, requires a critical and contextual systemic understanding of companies as part of a holistic political economic system. Such an approach implicates companies, company law, the wider economy and the State in an alternative transformative paradigm.

As products of the law, companies and company law itself are fully subject to the Bill of Rights, the question rather being of how the Bill of Rights applies where they are concerned. Several constitutional provisions are implicated where companies and company law are involved, namely sections 7(2), 8, 39(2) and 239 of the Constitution. These constitutional mechanisms often overlap, and the jurisprudence on them is generally doctrinally unclear. Further, international business and human rights law also needs to be coherently integrated into the domestic system for it to be transformative.

To address these concerns, this thesis proposes a transformative and systemic conceptual approach to companies, coupled with a rights-centric doctrinal approach. This gives rise to a simultaneous multicentric binding of the State, companies (and other business actors and structures), and law. This thesis outlines the possible contours of such a corporate regime, informed by international human rights law. Such reform requires not only a change in how the law and companies are conceived, but also a fundamental normative shift in favour of human rights foremost, with wide systemic interventions undertaken by the State.

# OPSOMMING

In reaksie op kolonialisme, apartheid en hedendaagse euwels, bou die Grondwet van die Republiek van Suid-Afrika, 1996 ("die Grondwet") sy legitimiteit op die fundamentele herstrukturering van die Suid-Afrikaanse samelewing in ooreenstemming met menseregte. Ondernemings en korporatiewe strukture in een of ander vorm is dikwels betrokke by menseregteskendings – strukture wat al sentraal is tot Suid-Afrika se politieke-ekonomiese geskiedenis sedert 1652, en wat die moderne Suid-Afrikaanse lewe deurdring. Die Grondwet se projek van transformerende konstitusionalisme strek tot alle regs- en ekonomiese verhoudings, insluitend maatskappye, maar binnelandse korporatiewe regulering toon nog geen betekenisvolle transformatiewe verandering ten gunste van menseregte nie. Hierdie tesis ondersoek dus die implikasies van die Suid-Afrikaanse Handves van Regte vir ondernemings en ondernemingsreg deur die lens van transformerende konstitusionalisme.

Die huidige literatuur met betrekking tot ondernemingsreg en menseregte volg gewoonlik 'n atomistiese konseptuele benadering ten opsigte van die begrip van ondernemings, met die fokus op maatskappye as individuele entiteite wat oortredings kan begaan. Transformatiewe konstitusionalisme vereis egter 'n kritiese en kontekstuele sistemiese begrip van ondernemings as deel van 'n holistiese politieke ekonomiese stelsel. So 'n benadering impliseer ondernemings, ondernemingsreg, die breër ekonomie en die staat in 'n alternatiewe transformatiewe paradigma.

Aangesien ondernemings en ondernemingsreg produkte van die wet is en dus self geheel en al onderhewig aan die Handves van Regte is, is die vraag eerder hoe die Handves van Regte van toepassing is waar dit betrekking het. Verskeie grondwetlike bepalings word relevant in die konteks van ondernemings en ondernemingsreg, naamlik artikels 7(2), 8, 39(2) en 239 van die Grondwet. Hierdie grondwetlike meganismes oorvleuel dikwels en die toepaslike regspraak is dikwels onduidelik. Internasionale sake- en menseregte-reg moet samehangend in die binnelandse sisteem geïntegreer word om transformatief te wees. Om hierdie probleme aan te spreek, stel hierdie tesis 'n transformerende en sistemiese konseptuele benadering tot ondernemings met 'n regte-sentriese leerstellige benadering voor. Dit lei tot 'n gelyktydige multisentriese binding van die staat, maatskappye (en ander besigheidsrolspelers en -strukture) en die reg. Hierdie tesis gee 'n uiteensetting van die moontlike kontoere van so 'n ondernemingsregime wat internasionale menseregte-

reg in ag neem. Sodanige hervorming vereis nie net ‘n verandering in die manier waarop die reg en ondernemings beskou word nie, maar ook ‘n fundamentele normatiewe verskuiwing ten gunste van menseregte, met wye sistemiese ingrepe deur die Staat.

# ACKNOWLEDGEMENTS

> "Millions of human beings have laboured to create this civilisation on which we pride ourselves to-day. Other millions, scattered through the globe, labour to maintain it. … Science and industry, knowledge and application, discovery and practical realisation leading to new discoveries, cunning of brain and of hand, toil of mind and muscle — all work together. Each discovery, each advance, each increase in the sum of human riches, owes its being to the physical and mental travail of the past and the present.
>
> By what right then can any one whatever appropriate the least morsel of this immense whole and say — 'This is mine, not yours?'"
>
> PA Kropotkin *The Conquest of Bread* (1892)

This work – like all work – was only possible through the work of countless others.

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*Para todos todo. Para nosotros nada.*

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# Chapter 1: Introduction

## 1 1 Research problem

### 1 1 1 Companies, corporate influence and human rights

Modern life, both locally and globally, is permeated by the existence and operations of companies. It is difficult to imagine a part of the modern South African experience not deeply and constantly influenced by companies in their roles as employers, producers and financial institutions. This is not a wholly recent development, however. The modern history of South Africa is a history of political-economic conflict,[1] and companies are not ahistoric. The present pervasiveness of companies is the intensification of the history of colonial capitalism, facilitated by State force and law.[2] This history began as early as the operations of the Dutch East India Company in the Cape, serving as both colonial government and corporation.[3] It is tied to the imposition of serfdom, slavery and the slave trade, and to the commencement of the oppression of indigenous peoples.[4] It continued with the British conquest of the Cape, in Britain's attempt to establish and maintain economic dominance over France.[5] The thread can be traced through British imperialist expansion, through Britain's fight for gold and diamond control during the Anglo-Boer Wars, and through Cecil John Rhodes' serving as Prime Minister of the Cape.[6] Johannesburg's role as Africa's leading economic hub

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[1] See generally H Wolpe "Capitalism and Cheap Labour-Power in South Africa: From Segregation to Apartheid" (1972) 1 *Economy and Society* 425; SE Merry "Law and Colonialism" (1991) 25 *Law & Society Review* 889; D Masondo "Capitalism and Racist Forms of Political Domination" (2007) 37 *Africanus* 66; S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002); S Terreblanche *Lost in Transformation* (2012) 37-90; B Bunting *The Rise of the South African Reich* (1969).

[2] Terreblanche *Inequality* 153-156, 239-250; Terreblanche *Transformation* 37-58; Bunting *Reich* 369-400; Merry (1991) *LSR*; K Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), especially 1-22. Colonialism and imperialism are systemically linked to capitalist expansion: G Lee "Rosa Luxemburg and the Impact of Imperialism" (1971) 81 *The Economic Journal* 847; N Faulkner *A Radical History of the World* (2018) 165-187, 268-274.

[3] Terreblanche *Inequality* 153-156.

[4] Terreblanche *Inequality* 156-163; Faulkner *History* 165-187.

[5] Terreblanche *Inequality* 179-183.

[6] Terreblanche *Inequality* 239-250; Faulkner *History* 268-274.

– and indeed, much of its entire history as a city overall – is owed to its historic gold reserves and mining operations.[7]

Corporate ideology intensified racist political ideology, and originated South Africa's dark history of exploitative migrant labour and confiscation of indigenous land.[8] Capitalist interests were later a core cause of, and influence on, the policies of formal apartheid, which violently oppressed the majority of the population both politically and economically.[9] Formal apartheid itself could not have been sustained without extensive corporate involvement and support, both legal and illegal.[10] Nor could corporations have developed or profited without colonial and apartheid government policy serving them.[11] Companies continued to hold sway over South African politics through the end of formal apartheid, and into the constitutional era.[12] They were key to the introduction of neoliberal policies and financialisation,[13] and to the recent cultivation of consumerist culture in the country.[14] South Africa's extreme poverty and inequality, and its issues

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[7] P Harrison & T Zack "The Power of Mining: The Fall of Gold and Rise of Johannesburg" (2012) 30 *Journal of Contemporary African Studies* 551.

[8] Terreblanche *Inequality* 251-264.

[9] Terreblanche *Inequality* 264-342; Wolpe (1972) *Economy and Society* 425.

[10] Terreblanche *Inequality* 343-346; Terreblanche *Transformation* 37-58; H van Vuuren *Apartheid Guns and Money: A Tale of Profit* (2017) 489-511.

[11] Truth and Reconciliation Commission of South Africa *Report vol 4* (1998) 187; Terreblanche *Inequality* 153-156, 239-250; Terreblanche *Transformation* 37-58; Bunting *Reich* 369-400; see generally Pistor *Capital*.

[12] Terreblanche *Inequality* 59-90.

[13] Neoliberal policies aim to engineer a so-called "free market" fundamentalist political economy, reducing the democratic and social role of the State while simultaneously expanding its role in creating profit for narrow private business interests. In South Africa, such policies have included privatisation, austerity and the drastic "liberalisation" of the economy: Terreblanche *Inequality* 51-65; Terreblanche *Transformation* 17-40; Masondo (2007) *Africanus* 67-72; S Ashman, B Fine & S Newman "The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development" (2011) 47 *Socialist Register* 174 182; Faulkner *History* 438-446, 471-482.

[14] Terreblanche *Transformation* 17-36; D Posel "Races to Consume: Revisiting South Africa's History of Race, Consumption and the Struggle for Freedom" (2010) 33 *Ethnic and Racial Studies* 157 163.

of unjust wealth and land distribution,[15] cannot be considered without equally considering business's historic role in the systems producing these social crises.[16] Business interests were central to the human rights violations of colonialism and formal apartheid, and to their enduring legacy.

More recently, businesses and corporate structures have been at the centre of a great many other specific violations and scandals: the arms deal scandal;[17] the bread price-fixing scandal;[18] violent and fatal evictions by the "Red Ants" private security

[15] 30,4 million South Africans – 55,5% of the population – were living in poverty in 2015: Stats SA *Poverty Trends in South Africa* (2017) 18-20. The wealthiest 10% of South Africans possess 90-95% of all South African wealth, while the highest-earning 10% receive 55-60% of all income. The poorest 50% of South Africans earn only 10% of all income, and have no measurable wealth: A Orthofer "Wealth Inequality – Striking New Insights from Tax Data" (2016) *Econ 3x3* 1 4-6. South Africa has the highest GINI coefficient in the world: World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xv. See also K Wilkinson "Guide: Black Ownership on SA's Stock Exchange – What We Know" (29-08-2017) *Africa Check* <https://africacheck.org/factsheets/guide-much-sas-stock-exchange-black-owned-know/> (accessed 25-09-2019); B Cousins "Land Reform in South Africa is Failing. Can it be Saved?" (2017) 92 *Transformation* 135.

[16] Terreblanche *Transformation* 101-115; Terreblanche *Inequality* 95-149, 371-415; JM Modiri "Law's Poverty" (2015) 18 *PER* 224; S Sibanda "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" (2011) 22 *Stell LR* 482; T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 123 *Stell LR* 123; JM Modiri "Towards a '(Post-)apartheid' Critical Race Jurisprudence: 'Divining Our Racial Themes'" (2012) 27 *SAPL* 231 237; Faulkner *History* 488-491; Pistor *Capital*; S Moyn *Not Enough: Human Rights in an Unequal World* (2018); P Joseph *The New Human Rights Movement: Reinventing the Economy to End Oppression* (2017).

[17] T Crawford-Browne "The Arms Deal Scandal" (2004) 31 *Review of African Political Economy* 329.

[18] *Competition Commission v Pioneer Foods (Pty) Ltd* 2010 JOL 25542 (CT); Competition Commission "Media Release: Competition Commission Welcomes Settlement Between Premier Foods and Civil Society" (12-05-2016) *Competition Commission of South Africa* <http://www.compcom.co.za/wp-content/uploads/2016/01/Media-Release-Competition-Commission-welcomes-settlement-between-Premier-Foods-and-Civil-Society-1.pdf> (accessed 25-09-2019).

company;[19] the anti-poor pricing of mobile data and internet access;[20] the Marikana massacre;[21] the social grants scandal and crisis;[22] mass deaths during the listeriosis outbreak;[23] mass deaths during the Life Esidimeni tragedy;[24] the record-breaking silicosis class action against the mining sector;[25] abusive debt-collection practices exploiting the poor;[26] Bell Pottinger's "public relations" project of socio-political control in South Africa;[27] data analytics and social media corporations' political manipulation and privacy invasion worldwide;[28] severe droughts related to climate change as the

[19] A Bennie "No One Held Accountable for Death of Man During Red Ants Raid" (13-09-2017) *GroundUp* <https://www.groundup.org.za/article/no-one-held-accountable-death-man-during-red-ants-raid/> (accessed 25-09-2019); M Langa, T Matsena & S Xinwa "Land Occupations and Violence in Protea Glen, Soweto" in M Langa & D Hartford (eds) *Urban Land and the Genesis of Violence* (2018) 11.

[20] Competition Commission *Data Services Market Inquiry: Provisional Findings and Recommendations* (2019) 82; L Schelenz & K Schopp "Digitalization in Africa: Interdisciplinary Perspectives on Technology, Development and Justice" (2018) 9 *International Journal of Digital Society* 1413.

[21] G Marinovich *Murder at Small Koppie: The Real Story of the Marikana Massacre* (2016); D Magaziner & S Jacobs "Notes from Marikana, South Africa: The Platinum Miners' Strike, the Massacre, and the Struggle for Equivalence" (2013) 83 *International Labor and Working-Class History* 137; E Cairncross & S Kisting "Platinum and Gold Mining in South Africa: The Context of the Marikana Massacre" (2016) 25 *New Solutions* 513.

[22] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 3 SA 335 (CC).

[23] J Hunter-Adams, J Battersby & T Oni "Fault Lines in Food System Governance Exposed: Reflections from the Listeria Outbreak in South Africa" (2018) 2 *Cities & Health* 17.

[24] A Ornellas & LK Engelbrecht "The Life Esidimeni Crisis: Why a Neoliberal Agenda Leaves No Room for the Mentally Ill" (2017) 54 *Social Work* 296.

[25] *Nkala v Harmony Gold Mining Company Limited* 2016 5 SA 240 (GJ); *Ex Parte Nkala* 2019 JOL 41956 (GJ).

[26] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC); *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC).

[27] G Hart & M Nassimbeni "The Value of Information in South Africa's New Democracy" 39 *Library Management* 322 327-330.

[28] FJ Zuiderveen Borgesius, J Moller, S Kruikemeier, RO Fathaigh, K Irion, T Dobber, B Bodo & C de Vreese "Online Political Microtargeting: Promises and Threats for Democracy" (2018) 14 *Utrecht LR* 82.

result of corporate pollution;[29] and the mismanagement of numerous South African state-owned entities.[30] Of these, only the social grants scandal and the debt collection abuse case gave rise to substantive human rights law judgments in the South African courts.[31]

Companies' systemic influence is felt beyond these high-profile incidents, however. The South African media is wholly dominated by massive corporations, public and private.[32] Chronic public-private corruption and collusion runs through formal apartheid to modern state capture, most famously involving former President Jacob Zuma.[33] Current President Cyril Ramaphosa was himself a highly prominent businessman, shareholder and director.[34] He and his brother-in-law, Patrice Motsepe, are two of South Africa's richest men, each having amassed several billion rand through their individual corporate interests and having benefited from pro-business neoliberal governmental policies.[35] The profound and ubiquitous influence of companies on every facet of South African life cannot be overstated. This influence is economic, social,

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[29] N Shepherd "Making Sense of 'Day Zero': Slow Catastrophes, Anthropocene Futures, and the Story of Cape Town's Water Crisis" (2019) 11 *Water* 1744; Faulkner *History* 491-496. 71% of global carbon emissions since 1988 have been produced by only 100 companies, with more than half of emissions produced by just 25 companies: CDP *The Carbon Majors Database: CDP Carbon Majors Report* (2017) 8.

[30] Auditor-General of South Africa *Consolidated General Report on National and Provincial Audit Outcomes* (2018) 106-120.

[31] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 3 SA 335 (CC); *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC).

[32] S Mpofu-Walsh *Democracy and Delusion: 10 Myths in South African Politics* (2017) 102-113.

[33] "State capture" refers to the control and exploitation of the State and its institutions by private actors: Marinovich *Marikana Massacre*; PL Myburgh *The Republic of Gupta: A Story of State Capture* (2017); Van Vuuren *Apartheid Guns and Money* 489-511. As noted in this part and in chapter three part 3 2 2, such activity is common throughout, and intrinsic to, South Africa's political economic history. However, "state capture" typically refers more specifically to cases where this control and exploitation is corrupt and illegal.

[34] GE Schneider "The Post-Apartheid Development Debacle in South Africa: How Mainstream Economics and the Vested Interests Preserved Apartheid Economic Structures" (2018) 52 *Journal of Economic Issues* 306 310-311.

[35] 310-311.

cultural, and political; it is both historic and ongoing; and it implicates all South Africans, from the poorest and weakest to the wealthiest and most powerful.

Companies have also been central to recent developments internationally. The rise of massive multinational corporations, and the international economic policies that favour them, has raised critical questions about the nature of modern global democracy.[36] Corporate financial abuse was central to the global economic crash of 2008.[37] Business interests and neoliberal policies have been identified as primary contributors to the ongoing rise of far-right nationalism and fascism globally.[38] The two greatest existential threats to humanity and the planet more broadly – namely, extinction due to the present climate crisis and/or due to nuclear war[39] – have corporate profiteering at their centres.[40]

In response to these worsening problems of corporate human rights violations, the international community has recently started taking steps to intervene. On 26 June 2014, the Human Rights Council appointed an intergovernmental working group to

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[36] See generally J Stiglitz *Globalization and its Discontents Revisited: Anti-Globalization in the Era of Trump* (2017); P Phillips *Giants: The Global Power Elite* (2018); Faulkner 438-446, 471-491.

[37] H Grove, L Patelli, LM Victoravich & P Xu "Corporate Governance and Performance in the Wake of the Financial Crisis: Evidence from US Commercial Banks" (2011) 19 *Corporate Governance: An International Review* 418; JE Stiglitz "Lessons from the Global Financial Crisis of 2008" (2010) 23 *Seoul Journal of Economics* 321; Faulkner *History* 471-488.

[38] R Saull "Capitalism, Crisis and the Far-Right in the Neoliberal Era" (2015) 18 *Journal of International Relations and Development* 25; N Davidson & R Saull "Neoliberalism and the Far-Right: A Contradictory Embrace" (2017) 43 *Critical Sociology* 707; Faulkner *History* 496-499.

[39] Bulletin of the Atomic Scientists Science and Security Board *A New Abnormal: It is Still 2 Minutes to Midnight – 2019 Doomsday Clock Statement* (2019); N Chomsky *Who Rules The World?* (2017) 128-134, 230-238.

[40] PAX *Producing Mass Destruction: Private Companies and the Nuclear Weapon Industry* (2019); G Kirk & M Okazawa-Rey "Neoliberalism, Militarism, and Armed Conflict" (2000) 27 *Social Justice* 1; T Gabelnick & A Rich "Globalized Weaponry" (2000) 27 *Social Justice* 37; N Klein *This Changes Everything: Capitalism vs the Climate* (2014); K Lux "The Failure of the Profit Motive" (2003) 44 *Ecological Economics* 1; Faulkner *History* 491-496.

investigate and draft a binding treaty for business and human rights.[41] The following day, the Council adopted a resolution[42] supporting and calling for greater implementation of the non-binding United Nations *Guiding Principles on Business and Human Rights*.[43] In 2016 and 2018, the Human Rights Council adopted resolutions calling for improved accountability and access to remedy in business and human rights matters.[44] In June 2017, the United Nations Committee on Economic, Social and Cultural Rights[45] adopted a General Comment on state obligations in the context of business activities.[46] Most recently, the United Nations High Commissioner for Human Rights noted the immense human rights threat posed by the worsening climate crisis.[47] The issue of corporate abuse of human rights, locally and globally, is thus both current and deeply urgent.

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[41] United Nations Human Rights Council Resolution 26/9 *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (26 June 2014) A/HRC/RES/26/9; Global Policy Forum *The Struggle for a UN Treaty: Towards Global Regulation on Human Rights and Business* (2016) 24-29. The latest draft of 16 July 2019 can be found at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> (accessed 25-09-2019).

[42] United Nations Human Rights Council Resolution 26/22 *Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc A/HRC/RES/26/22.

[43] United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31. These are considered in some depth in chapter four part 4 4.

[44] United Nations Human Rights Council Resolution 32/10 *Business and Human Rights: Improving Accountability and Access to Remedy* UN Doc A/HRC/32/10; United Nations Human Rights Council Resolution 38/13 *Business and Human Rights: Improving Accountability and Access to Remedy* UN Doc A/HRC/38/13.

[45] The Committee is established in terms of the International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3. This Covenant is discussed in chapter four part 4 4.

[46] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* UN Doc E/C 12/GC/24.

[47] United Nations High Commissioner for Human Rights "Opening Statement at the Global Update, 42nd Session of the Human Rights Council" (09-09-2019) *United Nations Office of the High Commissioner for Human Rights* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E> (accessed 25-09-2019).

1 1 2 Transformative constitutionalism as a response

To address its numerous political and economic ills, past and present, South Africa has been undertaking a wide socio-legal project grounded in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). This has been commonly understood as transformative constitutionalism, a concept originally described by Karl Klare.[48] Deeply aware of historical and present contexts,[49] transformative constitutionalism founds South African society on "democratic values, social justice and fundamental human rights."[50] It can thus be described as an ongoing project of "large scale social change through nonviolent political processes grounded in law".[51] At base, it is dedicated to constant evaluation and legal reform for the good of the people of South Africa, and especially for the victims of human rights abuses.[52] Prominent principles of the constitutional order, such as the rule of law,[53] constitutional supremacy[54] and justiciability,[55] aim to give effect to these ambitions. These principles place human rights at the centre of the legal system, with the vindication of rights being a core aim of the transformative project.[56] Rights underpin the State itself,[57] and the State accordingly has a duty to respect, protect, promote and fulfil them.[58] Any law or legal concept in conflict with the Constitution or its values must thus actively be transformed until it can be considered constitutional, and consistent with human

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[48] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146; chapter 2 in S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010).

[49] Preamble to the Constitution.

[50] Preamble.

[51] Klare (1998) *SAJHR* 146 150.

[52] DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403.

[53] S 1(c) of the Constitution.

[54] S 2.

[55] See the "culture of justification" conceived in E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31; I Currie & J de Waal *The Bill of Rights Handbook* 2 ed (2013) 7.

[56] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) para 82; Currie & De Waal *Bill of Rights Handbook* 26-27; Mureinik (1994) *SAJHR*; *S v Zuma* 1995 2 SA 642 (CC) para 21; *S v Makwanyane* 1995 3 SA 391 (CC) paras 100-102, 155-156; Liebenberg *Socio-Economic Rights* 199-203; T Roux "Democracy" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2006) 10-34 – 10-37.

[57] S 1(a) of the Constitution.

[58] S 7(2).

rights.[59] Transformative constitutionalism thus points to a fundamentally rights-centric approach to the law. Moreover, this transformative process requires a deep openness to international human rights law standards, integrating any such progressive developments into the domestic regime.[60] In sum, meaningful legal transformation is essential to the constitutional project, and to its legitimacy.[61]

Given the prominent issue of human rights violations by business, recent international law developments, and the critical importance of transformative constitutionalism, this thesis aims to focus on the effect of this transformative process on South African companies.[62] Specifically, it aims to establish the implications of the Bill of Rights for companies and company law in South Africa – as informed by international human rights law – and to make proposals for transformative reform where necessary. This is essential for two reasons. First, as noted, the transformation of the law is constitutionally mandated: it is central to rectifying South Africa's ills, and

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[59] There is a great deal of literature on this aspect, and it is particularly relevant to the transformation of the private law governing companies. See, for instance, Liebenberg *Socio-Economic Rights* 43-62; D Bilchitz "Do Corporations Have Positive Fundamental Rights Obligations?" (2010) *Theoria* 1; D Bhana "The Horizontal Application of The Bill of Rights: A Reconciliation of Sections 8 And 39 of the Constitution" (2013) 29 *SAJHR* 351; DM Chirwa "In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights" (2008) 8 *AHRLJ* 294; J Katzew "Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008" (2011) 128 *SALJ* 686; S Liebenberg "The Application of Socio-Economic Rights to Private Law" (2008) *TSAR* 464; M Pieterse "Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa" (2003) 14 *Stell LR* 3; Davis & Klare (2010) *SAJHR*.

[60] *S v Makwanyane* 1995 3 SA 391 (CC) para 35. See chapter four part 4 3.

[61] Importantly, authors have noted the materialist and philosophical limitations of the constitutional project itself: Terreblanche *Inequality* 95-149, 371-415; Terreblanche *Transformation* 59-77, 101-115; Ashman, Fine & Newman (2011) *Socialist Register* 182; Modiri (2015) *PER*; Sibanda (2011) *Stell LR*; Madlingozi (2017) *Stell LR*; Modiri (2012) *SAPL* 246-259; Moyn *Not Enough*; M Albertus & V Menaldo *Authoritarianism and the Elite Origins of Democracy* (2018) 2, 102-103, 278-279, 285. It is thus possible that transformative constitutionalism does not in fact contain the necessary tools to achieve meaningful social, economic and political transformation in South Africa. Critically, then, it may be impossible to operate "within the law" and achieve some notion of sufficient change. Nonetheless, as this study takes the Bill of Rights as its point of departure, it is presently assumed that the transformative constitutional project can achieve what it purports to be able to achieve.

[62] Companies in South Africa are incorporated in terms of the Companies Act 71 of 2008. This study considers companies generally, as opposed to, for instance, only public companies, or only those listed on the Johannesburg Stock Exchange; see chapter two.

to the legitimacy of the constitutional project as a whole. Second, effective legal remedies for victims of corporate abuse cannot be granted without rights being recognised and relevant duties imposed by law. The transformative implications of the Bill of Rights thus critically require study and concrete implementation. This need is made all the more urgent by the fact that company law has seen little to no meaningful transformation at all since the end of formal apartheid, as considered below.

### 1 1 3 The absence of human rights reform in company law

In 2004, the Department of Trade and Industry published a promising policy paper titled "Company Law for the 21st Century: Guidelines for Corporate Reform" ("the Guidelines"),[63] intended to be a foundational document for the proposed Companies Bill.[64] The Guidelines included an evaluation of the history of South African company law, and emphasised that it needed to be reformed to render it consistent with constitutional rights and values.[65] The process would be mindful of the country's historical, social and economic context,[66] "recognising the broader social role of companies".[67] The Guidelines also predicted international developments being adapted for the South African constitutional context.[68] More specifically, they motivated at length that when a company board makes decisions, it should be compelled to consider human rights stakeholder interests for their inherent value, rather than focus solely on the profit interests of shareholders.[69] In short, the Guidelines made clear the inescapable need for company law to give effect to human rights.

However, by the time the Companies Bill[70] was before Parliament, it had entirely lost all meaningful reference to the Bill of Rights.[71] Absent, too, was any recognition of

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[63] South African Company Law for the 21st Century: Guidelines for Corporate Reform GN 1183 in *GG* 26493 of 23-06-2004.

[64] 10.

[65] 14-16.

[66] 27.

[67] Objective 4 in Guidelines 9. See also Guidelines 25.

[68] 11.

[69] 19-27. Stakeholder models are considered in chapter two part 2 5 2.

[70] The Companies Bill B61-2008.

[71] S 11(1)(c) of the Companies Act 71 of 2008 referred to the South African Human Rights Commission, but only in the context of company names. The section prohibits names amounting to speech unprotected by the constitutional right to freedom of expression. The constitutional right is not mentioned expressly, its exclusions are simply repeated.

the inherent value of human rights considerations in the board of directors' decisions, as called for in the Guidelines.[72] The Companies Bill contained no substantive provisions concerning the company's social purpose as envisioned by the Guidelines.[73] By the time it was made law as the Companies Act 71 of 2008 ("the Companies Act" or "the Act"), only one relevant change had been made. This was a line inserted in the Act's "Purposes" clause as the new section 7(a), holding that one of the purposes of the Act was to "promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law."[74] Three years later, the amendments[75] to the Act added little to the substantive promotion of human rights.[76]

Arguably, regulation 43(5)(a)(i)(aa) of the Companies Regulations 2011 ("the Regulations")[77] is of most significance in giving substance to human rights concerns.

[72] S 76 of the Act maintains shareholder primacy – directors must make decisions "in the best interests of the company". The meaning of this phrase and duty is examined in chapter two part 2 5 2.

[73] S 7(b)(iii) lists a purpose of the Act as being to promote transparency and good corporate governance "given the significant role of enterprises with the social and economic life of the nation". Reference is also made to social and ethics committees in s 72(4). Neither of these provisions amount to clear substantive protection or remedies.

[74] S 7(a) of the Companies Act. Given that the Memorandum to the Bill does not mention human rights at all in its goals or proposals, and that there is an absence of provisions directly relating to human rights in the Act, it is likely that this purpose was not factually borne in mind during the drafting process, and simply added as an afterthought. It may still be of indirect interpretive value, however, as considered in chapter five part 5 3.

[75] Companies Amendment Act 3 of 2011.

[76] The Memorandum to the Companies Amendment Bill B40B-2010 indicated that its priorities lay in fixing the numerous technical issues with the Companies Act. S 47 of the Companies Amendment Act merely added further provisions concerning social and ethics committee implementation (see following paragraph and accompanying notes).

[77] Company Regulations 2011 GN R351 in *GG* 34239 of 26-03-2011.

It requires that company social and ethics committees[78] "monitor the company's activities … with regard to matters relating to social and economic development, including the company's standing in terms of the goals and purposes of … the United Nations Global Compact Principles."[79] The effect of this provision, however, appears very limited.[80] More limiting still is the fact that such committees are only required for certain types of companies.[81]

No remedies under the Act appear intended to apply specifically to human rights violations. This is not to say that the Act or Regulations, or indeed the common law of companies, cannot be interpreted to be consistent with the Constitution to develop remedies for corporate violations of human rights. Indeed, such interpretations must be preferred over interpretations leading to constitutional invalidity, where reasonably

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[78] Social and ethics committees perform monitoring, board-advisory and shareholder-reporting duties on human rights-related matters such as the environment, labour and equality. They are established in terms of s 72(4) of the Act, and reg 43 of the Regulations. They must comprise at least three directors or prescribed officers of the company, amongst other conditions: reg 43(3). HJ Kloppers "Driving Corporate Social Responsibility (CSR) Through the Companies Act: An Overview of the Role of the Social and Ethics Committee" (2013) 16 *PER* 166; M Gwanyanya "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" (2015) 18 *PER* 3102 3113-3114; M Havenga "The Social and Ethics Committee in South African Company Law" (2015) 78 *THRHR* 285; IM Esser "Corporate Social Responsibility: A Company Law Perspective" (2011) 23 *SAMLJ* 317 325. See chapter 2 part 2 5 2 2.

[79] The United Nations Global Compact ("UN Global Compact") is a voluntary corporate governance initiative. It is centred on a set of ten principles, which provide guidance in the areas of human rights, labour, the environment and anti-corruption. It is not legally-binding, and the initiative performs no evaluation of goals being met. The sole requirement is that a company participating in the initiative submit progress reports for transparency; should it not comply, it may be expelled. United Nations Global Compact *Guide to Corporate Sustainability: Shaping a Sustainable Future* (2014) 11, 38.

[80] There are no external enforcement mechanisms for victims in terms of these provisions: the monitoring, advising and reporting on the matters is obligatory, not the compliance with the substance of the matters themselves. The committees merely remain obliged to submit reports to the shareholder body; thereafter shareholders are presumably expected to make active, altruistic decisions in favour of human rights, even if to the detriment of their own interests. An interesting implication is that a company need not strictly comply with the UN Global Compact, or even the reporting requirements the UN Global Compact itself contains, provided that this non-compliance is monitored, reported and advised upon by the committee.

[81] Reg 43(1) of the Regulations.

possible.[82] However, this requires first studying and establishing the implications of the Bill of Rights for companies and company law. Further, where common law remedies exist parallel to the Act, they are generally poorly-suited to providing relief for violations of constitutional rights without undergoing substantial development.[83] Such development must again follow an investigation of the Bill of Rights and its implications.

Therefore, despite the purpose-declaration in section 7(a), it appears that the Companies Act does not clearly give substance to the human rights obligations of companies, and provides no specific human rights remedies where those obligations are breached. Of course, certain rights can be promoted outside of the Act, such as through labour or environmental legislation. In fact, the Guidelines expressly support specific legislation in certain cases.[84] However, this does not address the general human rights obligations of companies, and leaves a great deal of uncertainty. It is currently unclear how obligations and remedies are to be regulated in the absence of specific legislation. External human rights victims seem unable to claim remedies that are traditionally "internal" to the company, such as against directors or shareholders. It is also unclear if the defences against director liability are narrow enough to avoid impunity for human rights violations, and unclear how the validity of board decisions or conduct should be affected where they unjustifiably infringe on human rights. Moreover, international developments in the field of business and human rights law have not been incorporated into the domestic regime.

There thus appears to be a conceptual and implementation chasm between human rights obligations and corporate regulation.[85] Managers, directors and shareholders not versed in human rights law would see its impact on corporate regulation as esoteric at best. At worst, it may seem irrelevant or inconvenient. In both cases, there is a profound disconnect between transformative constitutionalism and companies in South Africa. It is this disconnect that this study aims to address. There is not a great volume of literature interpreting the nature and scope of the human rights obligations

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[82] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 23.

[83] An example is s 77(2) of the Act, which allows the common law to run alongside the Act for directors' liability remedies, but does not provide a remedy to external victims. The common law would thus likely need constitutional development, as occurred in the law of delict in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

[84] Guidelines 26.

[85] Katzew (2011) *SALJ* 686.

of companies in a specifically South African context.[86] Some authors discuss human rights reform and the subsequent interpretation of existing company law provisions very generally.[87] There is also extensive literature[88] on the imposition of human rights obligations on non-state entities. However, little study has been devoted to the actual interaction and operation of human rights themselves vis-à-vis companies, and particularly not from the perspective of transformative constitutionalism. As will be seen, the literature and jurisprudence also centre primarily on the duties imposed on companies, instead of following a rights-centric approach focusing on victims.[89] The research aims accordingly specifically target this perspective.

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[86] Bilchitz appears to offer the most extensive contribution. See D Bilchitz "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 125 *SALJ* 754; D Bilchitz "Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law" (2016) 23 *Indiana Journal of Global Legal Studies* 143.

[87] Esser (2011) *SAMLJ* 323; Katzew (2011) *SALJ* 686.

[88] See broadly S Woolman "Application" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2005); M Tushnet "The Issue of State Action / Horizontal Effect in Comparative Constitutional Law" (2003) 1 *IJCL* 79 79; S Woolman & D Davis "The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and the Final Constitutions" (1996) 12 *SAJHR* 361 399-400; DM Chirwa "The Horizontal Application of Constitutional Rights in a Comparative Perspective" (2006) 10 *Law, Democracy and Development* 21; Davis & Klare (2010) *SAJHR*; Bhana (2013) *SAJHR* 351; C Sprigman & M Osbourne "Du Plessis Is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" (1999) 15 *SAJHR* 25; J van der Walt "Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation Between Common-Law and Constitutional Jurisprudence" (2001) 17 *SAJHR* 341; Liebenberg *Socio-Economic Rights* 317-376; N Friedman "The South African Common Law and the Constitution: Revisiting Horizontality" (2014) 30 *SAJHR* 63; S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *SALJ* 762; AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 107; A Fagan "The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development" (2010) 127 *SALJ* 611.
The term "non-state entities" will be preferred to "private parties" throughout this thesis when referring to natural and juristic persons that are not functioning as organs of state. This is due both to the existing usage of "public/private companies" and to the potential obfuscation caused by arguments of "privateness", as discussed in chapter three.

[89] This is considered in chapter three part 3 3 5 and chapter four part 4 3 3.

## 1 2 Research aims and hypothesis

The overarching aim of the present study is to consider the implications of a transformative approach to the Bill of Rights for companies and company law in South Africa. This may be divided into four smaller aims. First, to consider what is meant by "companies" and "company law" in the context of the Bill of Rights. Second, to examine and analyse how transformative constitutionalism and the Bill of Rights operate where companies are concerned. Third, to establish the value, content and implications of international human rights law in the interpretation and application of the Bill of Rights in the context of companies. And fourth, to consider the theoretical implications of the prior findings, and provide theoretical and practical recommendations for transformative judicial and legislative reform.

The underlying hypothesis of this study is that Bill of Rights doctrine and corporate human rights regulation must both undergo substantive development if these are to be aligned with transformative constitutionalism.

## 1 3 Methodology

The study centres foremost on the interpretation of the Bill of Rights. It necessarily focuses in the first instance on the common law and legislation regulating companies, and especially the Companies Act 71 of 2008, to establish what is meant by "companies" in this context. However, the core of the study seeks to reach a transformative understanding of the Bill of Rights through extensive reference to case law and academic writing. This understanding is further informed by historical and political-economic literature, especially in the context of business operations. Transformative constitutionalism as thus conceived is then used to analyse the relevant human rights jurisprudence and corporate regulation. Case law on the transformative relevance of international human rights law is also considered. International human rights law in the field is used to inform the interpretation of the Bill of Rights, and thereby to inform regulatory proposals. In particular, two international law instruments will be studied: the International Covenant on Economic, Social and Cultural Rights,[90] and the United Nations Guiding Principles on Business and Human

[90] International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3.

Rights.[91] Academic literature, primarily in the form of books and journal articles, will be referred to throughout.

Importantly, however, the study's focus remains on the general human rights regulation of companies. Thus, detailed surveys of the regulation of specific rights (such as in labour or environmental law) are outside its scope. Further, the focus is on human rights violations committed by South African companies within South Africa's territory. The important issue of extraterritorial application of the Bill of Rights is not considered here due to space limitations.[92] Finally, while early steps are taken in this direction, a detailed systemic political-economic analysis of companies in South Africa and their collective impact on human rights also cannot be performed due to space limitations.

### 1 4 Outline of chapters

Chapter two sets the foundation for the entity and regime being studied – namely "companies" and "company law" in the context of the Bill of Rights. It refers to common law and legislation, and provides an overview of the legal nature and structuring of companies. This chapter next considers the relationship between companies and company law on the one hand, and the Bill of Rights on the other. It also analyses two conceptual approaches to business and human rights, namely an atomistic and a systemic approach. The characteristics of each of these are considered. Thereafter, following the predominant atomistic approach in the field, specific existing doctrines and mechanisms in company law are studied.

Chapter three considers South Africa's project of transformative constitutionalism as the core lens to interpreting the Bill of Rights. Following a transformative and systemic conceptual approach to companies, rather than the prevailing atomistic approach, the chapter places companies in their political-economic context. Thereafter, it examines the application of the Bill of Rights in the context of companies through reference to several relevant constitutional provisions and applicable

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[91] United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31.

[92] See in this regard Woolman "Application" in *Constitutional Law* 31-113 – 31-122; *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC); *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC); *Minister of Home Affairs v Tsebe, Minister of Justice and Constitutional Development v Tsebe* 2012 5 SA 467 (CC).

jurisprudence. The application regime is then analysed, and early proposals for improvement noted. The relevance of the study for other business structures and actors is also considered.

Chapter four considers the relevance of international human rights law where companies are concerned. With reference to case law, it first illustrates that transformative constitutionalism requires the deep consideration and integration of international law in the domestic Bill of Rights regime. Two specific international human rights law instruments are then considered for their relevance, namely the International Covenant on Economic, Social and Cultural Rights,[93] and the United Nations Guiding Principles on Business and Human Rights.[94] Their content and implications for the State and companies are then examined.

Chapter five identifies salient theoretical implications and recommendations of the study, both in terms of Bill of Rights application doctrine and the conceptual approach to companies. It then provides some practical recommendations for judicial and legislative reform, and sketches the early contours of a more transformative business and human rights regime. In conclusion, the final chapter summarises the primary findings of the thesis, and presents some areas of further study and development in the field.

## 1 5 Value of study

This study aims to assist victims of human rights violations, who may better be able to vindicate their rights once the field has been better clarified and developed. It will be of value to the State – especially the judiciary and legislature – in its consideration of State duties and recommendations for practical reform. It will also be relevant to companies themselves, as it provides greater clarity regarding the implications of the Bill of Rights for their operations. Overall, the purpose of this study is to contribute to the greater transformative aims and aspirations of the Constitution, in a field and time where meaningful transformation is ever more necessary and urgent.

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[93] International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3.

[94] United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31.

# Chapter 2: The conception of South African companies and company law in the context of the Bill of Rights

## 2 1 Introduction

This thesis considers the application of the Bill of Rights[1] on companies and the field of company law. This chapter addresses the preliminary question of the scope of the inquiry, specifically considering the broad nature of company law and the companies whose operations may be affected by the Bill of Rights. Before these effects can be considered, it is necessary to determine the scope of what may be implicated by the Bill of Rights as far as companies are involved. In other words, it is necessary to establish what is meant by "companies" and "company law" in the context of human rights, and specifically the Constitution. This chapter aims to address this question.

As a point of departure, this chapter examines the nature and structure of companies as defined in the Companies Act 71 of 2008 ("the Companies Act" or "the Act"). It then briefly considers the relationship between the Constitution, as supreme law, and company law. Finally, this chapter explores several company law mechanisms that are generally identified as having implications for human rights, with a specific focus on piercing the corporate veil and the duty of directors to act in the company's best interests.

## 2 2 Companies and company structures

### 2 2 1 The legal formation, nature and structure of companies

Companies can take several distinct forms with differing regulations, and they operate at the intersection of many areas of law, such as property, contract and administrative law. As the Bill of Rights operates across all of these areas, it would be incorrect to merely focus on, for instance, its effect on large public companies, or on the Act. This chapter thus takes, as a point of departure, the meaning of "companies" in the broad sense contemplated by the Act. This part provides a general summary of companies and their structure.

[1] Chapter 2 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

The creation of a company is known as its "incorporation",[2] a process which must generally meet the requirements of section 13 of the Act.[3] This section requires that a company's incorporators complete and sign a Memorandum of Incorporation ("MOI")[4] and file a Notice of Incorporation, after which the company may be registered.[5] The MOI must be consistent with the Act, and may determine any internal provisions governing the company to the extent that the Act permits such provisions.[6] The MOI is binding between the company and its shareholders; between shareholders themselves; and between the company and its directors.[7]

The Act provides that, from the date and time of the incorporation of a company, such a company is a juristic person with all the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of possessing such powers or capacities or where the company's MOI states otherwise.[8] This is referred to as "separate juristic personality",[9] and permits the company to be the holder of its own assets and liabilities,[10] to conclude contracts,[11] to commit and suffer delicts,[12] and to sue and be sued in its own name.[13] The juristic person then exists in "perpetual succession",[14] meaning that its continued and independent personhood is not affected by a change in the identity of its shareholders, directors or employees.

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[2] See generally MF Cassim "Formation of Companies and the Company Constitution" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 105.

[3] Exceptions are determined by s 8(3) of the Act. For instance, for-profit companies may exist outside of the Act if they are formed pursuant to another law.

[4] Cassim "Formation" in *Company Law* 122-141.

[5] S 14 of the Act.

[6] S 15(1) and (2).

[7] S 15(6). As with directors, the MOI is further binding between the company and other officers prescribed by the Act, in the exercise of each of the respective functions of these persons.

[8] Ss 1 and 19(a)-(b) of the Act; R Cassim "The Legal Concept of a Company" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 28 29-31.

[9] PL Davies & S Worthington *Gower and Davies' Principles of Modern Company Law* 9 ed (2012) 37-39; Cassim "The Legal Concept of a Company" in *Company Law* 31-35.

[10] Davies & Worthington *Principles* 42-43; Cassim "The Legal Concept of a Company" in *Company Law* 28 36-38, 39.

[11] Cassim "The Concept of a Company" in *Company Law* 39-40.

[12] *McCrae v Absa Bank Limited* 2009 JOL 24153 (GSJ).

[13] Davies & Worthington *Principles* 43.

[14] *De Waal v African National Congress Youth League* 2019 JOL 41076 (GJ) paras 30-37; Cassim "The Legal Concept of a Company" in *Company Law* 36.

As will be seen, the Act distinguishes between profit and non-profit companies. Non-profit companies are generally regulated in the same way as profit companies, although the Act has provisions establishing some regulatory differences.[15] Profit companies will thus be examined first, and thereafter the regulatory differences applicable to non-profit companies will be considered.

### 2 2 2 Profit companies

Profit companies are so named because they are considered to be run for the profit of their shareholders, who are considered investors.[16] Natural and juristic persons may thus be able to acquire and hold shares in such companies. Shares are authorised and issued by the company,[17] and are considered to be movable property.[18] Shares may thus be sold and transferred to others.[19] Holding shares may allow the shareholder to exercise particular rights with regard to the company.[20] Most importantly, shareholders may vote[21] to amend the MOI, and generally may appoint at least half of the directors on the company's board.[22] The "intention" of a company with regard to any of its acts is determined by deeming the intention of relevant board-authorised managers to be that of the company.[23] As a result, shareholders generally ultimately control both the rules governing the company and the persons who control and manage it. Importantly, companies are able to hold shares in other companies. If a company's shares in a second company amounts to majority voting control over that second company, the controlling company is known as the "parent" company, and the controlled company

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[15] S 10 and sch 1 of the Act.

[16] See generally R Jooste & J Yeats "Shares, Securities and Transfer" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 212; R Cassim "Governance and Shareholders" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 353.

[17] Ss 35-48 of the Act.

[18] S 35(1).

[19] Ss 49-56; *Smuts v Booyens, Markplaas (Edms) Bpk v Booyens* 2001 3 All SA 536 (A).

[20] S 37 of the Act. See generally Cassim "Governance and Shareholders" in *Company Law* 353.

[21] Ss 60-65 of the Act.

[22] S 66(4)(b).

[23] This is known as the directing minds doctrine: see generally *Consolidated News Agencies v Mobile Telephone Networks* 2010 3 SA 382 (SCA); s 332 of the Criminal Procedure Act 51 of 1977; R Cassim "Governance and the Board of Directors" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 400.

as the "subsidiary".[24] Companies are in this way able to form extended networks of control over each other. While a parent company may be able to control a subsidiary, both are independent juristic persons. The assets and liabilities of each are thus separate.

The rationalisation for shareholder control stems from the traditional notion of shares as investment.[25] By purchasing a share, a shareholder invests in a company and thus earns some degree of control in how the company is run, proportional to their investment. In principle, this would allow the investors to ensure that they receive their desired returns on their investments. Importantly, the company retains ownership of all profit it makes.[26] Accordingly, returns to shareholders must be given as "distributions" that are generally authorised by the board after certain requirements are met,[27] and may take several forms (such as dividends or property transfer).[28] Shareholders, in turn, authorise the remuneration directors receive for their services to the company as directors.[29]

Critically, a person cannot be held liable for any liabilities or obligations of the company by the sole reason of being an incorporator, shareholder or director of the company.[30] In particular, shareholders can lose no more than the value of their investment should the company suffer loss. This is the principle of "limited liability".[31] The company may also hold directors liable should the latter fail to act in the "best interests of the company".[32] This phrase will be considered in some depth below,[33] but

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[24] S 3 of the Act; R Jooste "Groups of Companies and Related Persons" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 194; see for instance *Lubbe v Cape Plc* (2000) *UKHL* 41.

[25] See the discussion of the profit motive and the best interests of the company, part 2 5 2 below.

[26] Cassim "The Legal Concept of a Company" in *Company Law* 38-39.

[27] S 46 of the Act. Most importantly, distributions cannot compromise the company's continued operation, and thus must meet certain solvency and liquidity tests as assessed by the board.

[28] See generally R Jooste "Corporate Finance" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 262 263-294.

[29] S 65(11)(h) of the Act. Shareholders would not have control, however, over directors' pay as employees.

[30] S 19(2) of the Act; Davies & Worthington *Principles* 39-42; Cassim "The Legal Concept of a Company" in *Company Law* 35-36.

[31] See most prominently *Salomon v Salomon & Co Ltd* (1896) UKHL 1. The exception to this is the personal liability company, discussed below.

[32] S 76(3)(b).

[33] See part 2 5 2 below.

for present purposes it can be noted that profit companies generally follow the principle of investors' control for investors' financial gain – that is, they are run for shareholder profit.[34] Separate juristic personality and limited liability encourage such investment due to mitigation of risk – as shareholders are not liable for company debts, they cannot lose more than the value of their share in the company. Similarly, the company cannot be held liable for any debts incurred by shareholders in their personal capacity, and so shareholders need not evaluate each other's solvency before investing. The assets and liabilities of the company and its shareholders, and of shareholders between themselves, are all fully partitioned from each other.[35]

Importantly, shareholders are generally not considered to be under an obligation to exercise any standard of control over the company.[36] Indeed, a prominent area of interest in political-economic company theory concerns the degree to which shareholders can (and do) control directors. It is possible, for instance, that directors act in their own self-interest, justifying their remuneration through the pursuit of short-term goals, which are detrimental to the longer-term interest of the company and shareholders. This is generally referred to as the "agency problem".[37] Higher concentrations of shareholding may overcome this, by incentivising and facilitating increased shareholder control over, and engagement in, the company. A prominent instance of shareholders' systemic inability to control directors is considered to have been a central cause of the financial crisis of 2007-2008.[38] In such cases, external regulation may be necessary to ensure control over directors. Empirical research on

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[34] See the definitions of "profit company" and "non-profit company" in the Act.

[35] H Hansmann & R Kraakman "Organizational Law as Asset Partitioning" (2000) 44 *European Economic Review* 807. This can be contrasted with a partnership or sole proprietorship, where there is far less partitioning (or indeed none) between personal assets/liabilities and those of the business operation. Personal creditors may thus be able to claim from business assets, and business creditors from personal assets.

[36] *Living Hands (Pty) Ltd NO v Ditz* 2013 2 SA 368 (GSJ).

[37] MS Mizruchi "Berle and Means Revisited: The Governance and Power of Large US Corporations" (2004) 33 *Theory and Society* 579; EF Fama "Agency Problems and the Theory of the Firm" (1980) 88 *Journal of Political Economy* 288; LV Ryan "Shareholders and the Atom of Property: Fission or Fusion?" (2000) 39 *Business and Society* 49. For a broader theoretical and historical examination, see P Ireland "Company Law and the Myth of Shareholder Ownership" (1999) 62 *Modern LR* 32.

[38] H Grove, L Patelli, LM Victoravich & P Xu "Corporate Governance and Performance in the Wake of the Financial Crisis: Evidence from US Commercial Banks" (2011) 19 *Corporate Governance: An International Review* 418.

shareholder concentration and control in South Africa is needed to establish the balance of control between shareholders and directors, and its effect on how companies are run. This can in turn have implications for how companies should be regulated, and is especially important in light of the recent growth of financial markets and large institutional investors.[39]

Profit companies can be divided into four sub-categories, each with distinctive regulatory implications. These sub-categories are respectively state-owned, private, personal liability and public companies.[40] A state-owned company is a public entity in terms of the Public Finance Management Act 1 of 1999, or is owned by a municipality,[41] with the State retaining majority ownership control over the company.[42] It is subject to modified regulation,[43] such as being able to receive governmental exemptions from certain regulations under the Act, provided that the alternative regulatory scheme still achieves the purposes of the Act.[44] Such companies are often at the nexus of administrative and company law.[45] A private company is a non-state-owned company whose MOI prohibits the offering of its securities to the public and restricts the transfer of these securities.[46] A personal liability company is a private company whose MOI explicitly states that it is to operate under personal liability principles, rather than the usual principle of limited liability.[47] Directors and past directors of such a company are jointly and severally liable with the company for any company debts contracted during

[39] S Ashman, B Fine & S Newman "The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development" (2011) 47 *Socialist Register* 174.

[40] S 8(2) of the Act.

[41] As per the Act's definitions.

[42] As per the definitions of the Public Finance Management Act 1 of 1999.

[43] S 9 of the Act. See generally *South African Broadcasting Corporation Ltd v Mpofu* (2009) 4 All SA 169 (GSJ); *Maroga v Eskom Holdings Ltd* 2011 JDR 1586 (GSJ).

[44] S 9(3) of the Act. As discussed in the introductory chapter, s 7 of the Act lists the Act's purposes, including the promotion of Bill of Rights compliance in the application of company law.

[45] See *Gama v Transnet Limited* 2010 JOL 24972 paras 30-46.

[46] S 8(2)(b) of the Act; *Smuts v Booyens, Markplaas (Edms) Bpk en v Booyens* 2001 3 All SA 536 (A). The Companies Act defines "securities" as broader than merely shares. Rather, they comprise shares, debentures or other instruments, regardless of form or title, as issued or authorised by a profit company.

[47] S 8(2)(c) of the Act.

their periods in office.[48] Finally, any other profit company is considered a public company.[49]

### 2 2 3 Non-profit companies

As noted earlier, the Act applies to non-profit companies in largely the same way as it does to profit companies, although some regulatory differences exist.[50] For instance, unlike profit companies, an association not for profit can have the benefits of juristic personality without being formally incorporated in terms of the Act.[51] Most prominently, however, non-profit companies must have at least one stated object in their MOI, which must relate to cultural or social activities or communal or group interests, or otherwise be for public benefit.[52] Such a company must use all its assets and income in pursuit of its stated objects, rather than for shareholder gain.[53] Thus, a non-profit company does not have shareholders, but may have members[54] who may have voting rights in controlling the company.[55] As it is not run for the members' financial gain, a non-profit company cannot transfer its income or assets to its incorporators, members or directors, with some narrow exceptions (such as bona fide remuneration for services rendered in pursuing the non-profit objects).[56] On the winding up or dissolution of a non-profit company, members or directors (past and present) may only receive payment as company creditors.[57] The remaining net value of the company is not distributed to members, but to other similar non-profit companies.[58] In sum, then, a

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[48] S 19(3); *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 1 All SA 644 (A).

[49] S 8(d) of the Act.

[50] S 10 and sch 1 of the Act. See for instance *Cuninghame v First Ready Development 249* 2010 5 SA 325 (SCA); *Khan v Communicare* 2012 JOL 29360.

[51] S 8(3) of the Act. However, the association's constitution would have to explicitly state these benefits, such as perpetual succession and limited liability: *Mitchells Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (SCA); *La Lucia Sands Share Block Ltd v Flexi Holiday Club* 2012 3 All SA 49 (SCA); *Huey Extreme Club v McDonald VA Sport Helicopters* 2005 1 SA 486 (C).

[52] S 1 of sch 1 of the Act.

[53] S 10(2)(a) of the Act. Subject to this, s 10(2)(b) notes that non-profit companies may carry on any business or trade or acquire and hold securities in profit companies.

[54] S 4 of sch 1 of the Act.

[55] S 10(3) and (4) of the Act.

[56] S 3 of sch 1 of the Act.

[57] S 1(4)(a) of sch 1.

[58] S 1(4)(a) of sch 1 of the Act.

non-profit company only allows for members to benefit if such benefit is in line with the stated non-profit object.

## 2 3 Companies as arising in the law and subject to the Constitution

While the Companies Act is the most recent and extensive development of company law, companies are generally regulated by both the Act and the common law. Several observations can be made regarding this intersection. First, the common law continues to regulate companies where the Companies Act does not apply,[59] and certain common law remedies are explicitly retained by the Act.[60] Second, certain Companies Act remedies rely explicitly on common-law principles and their development.[61] Third, common-law principles inform the interpretation of the Act's provisions.[62] Fourth, common-law principles may be tangentially related to company law.[63] Finally, as specifically concerns human rights law and companies, the Bill of Rights itself uses the common law to fill any human rights lacunae in legislation. Section 8(3) of the Constitution holds that, where persons (including companies) are bound to fulfil a right in the Bill, a court must develop the common law to either give effect to that right or justifiably limit it (to the extent that legislation does not give effect to that right). Thus, if the Act cannot provide an adequate remedy for a human rights violation, the common law must be developed to do so.

As the following chapter will consider in greater depth,[64] the Constitution is the foundation of all South African law, and all such law derives its force only from the

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[59] AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 107.

[60] Such as s 20(8), concerning validity of company actions; s 95(6), retaining common law liability for public offerings; and s 161(2), retaining any remedy available to a securities-holder in terms of the common law subject to the Act.

[61] Such as s 77(2), concerning directors' liability for breach of fiduciary duty or by delict for breach of the duty of care, skill and diligence; s 158(a), requiring a court to develop the common law as necessary to improve the realisation and enjoyment of rights established by the Act; and s 218(2), which holds that any person who contravenes a provision of the Act may be held liable for loss caused by that contravention.

[62] Such as s 76(3)(b), which requires directors to act "in the best interests of the company". This is read as equivalent to the same duty at common law. See part 2 5 2 below.

[63] For instance, the common law of property may be implicated throughout business rescue proceedings in chapter 6 of the Act.

[64] See chapter three part 3 2.

Constitution.[65] The Act and common law of companies are also subject to the Bill of Rights in particular.[66] The Constitution, the Act and the common law applicable to companies thus form a single system of law.[67] This system fully describes the capacities and duties of, and relations between, the company and all persons involved in its running. Accordingly, South African companies and their powers and functions originate in law, and ultimately derive their validity from the Constitution and Bill of Rights. This implies that all regulation and conduction of companies is equally subject to the Bill of Rights.[68] This is not only the case for companies themselves. Any lawful economic relation – such as a contract of sale or property ownership – is underpinned by a relationship in law. Economic relations are thus, at their base, legal relations. Capitalism cannot exist without State law and force.[69] As all legal relations are subject to the Constitution, the conclusion is that all economic relations are subject to the Constitution.[70]

While the above is the simplest description of the legal principle underlying South African constitutional law, there are conflicting theoretical views in other jurisdictions. As will be seen later in this chapter, the question of the legal nature of a company is closely linked to the question of in whose interests it should be run. Theories which hold that the sole purpose of a company is to produce shareholder profit tend to align with the position that companies and company law should not (or even cannot) be regulated for purposes such as social good or human rights. It must be noted, however, that while these theories and debates on the nature of companies have historically been considered central to questions of company regulation, they are generally unnecessary in the modern South African legal system. The Constitution's transformative approach requires a move beyond the legal formalism of company

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[65] Ss 1(c) and 2 of the Constitution; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

[66] S 8(1) of the Constitution.

[67] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

[68] D Bilchitz "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 125 *SALJ* 754 780-781.

[69] S Terreblanche *Lost in Transformation* (2012) 31-40; K Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), especially 1-22.

[70] This is considered further in chapter three part 3 2 2.

theories.[71] All law is subject to the Bill of Rights, regardless of whether that law is considered public or private, and whether such a divide is relevant. Companies and company regulation are accordingly subject to human rights regulation. The pertinent question is rather how precisely the Bill of Rights interacts with companies and company law.[72] To address this question properly, however, it is necessary to first examine specific company law mechanisms that have possible implications for human rights.

## 2 4 Systemic and atomistic conceptions of companies

South African scholars have broadly considered how companies and company law may be affected by the Bill of Rights.[73] As noted previously,[74] the Companies Act states that one of its purposes is to promote compliance with the Bill of Rights in the application of company law,[75] but there has otherwise been little perceptible regulatory change in company law as regards human rights. In the absence of major developments by the judiciary or legislature, scholars have focused on using this stated purpose to consider the possible implications of human rights for existing company law

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[71] AJ van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1994) 11 *SAJHR* 169 203-205; DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 411; J van der Walt "Piracy, Property and Plurality: Re-Reading the Foundations of Modern Law" (2001) *TSAR* 52; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 343; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 28-42. See chapter three.

[72] See chapter three.

[73] See Bilchitz (2008) *SALJ* 780-783; C Samaradiwakera-Wijesundara "Business and Human Rights: To What Extent Has the Constitution Transformed the Obligations of Business? Conference Paper: Twenty Years of South African Constitutionalism" (14-11-2014) *New York Law School Law Review Papers* 4-5, 24 <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Samaradiwakera-Wijesundara.pdf> (accessed 25-09-2019); M Gwanyanya "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" (2015) 18 *PER* 3102; J Katzew "Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008" (2011) 128 *SALJ* 686; L Smit "Binding Corporate Human Rights Obligations: A Few Observations from the South African Legal Framework" (2016) 1 *Business and Human Rights Journal* 349.

[74] Chapter one part 1 1 3.

[75] S 7(a) of the Act.

mechanisms.[76] They thus focus on how individual companies may be deterred from committing rights violations, or how human rights remedies can be ordered against them, within the existing framework of company law. This approach – which may be termed an "atomistic approach" – is predominant in the present domestic legal study of the field.[77] The aim of this approach is to reform company law specifically, deterring individual companies from committing what are deemed unreasonable violations in their daily operation, and to provide remedies for victims. In sum, when evaluating whether or not a right has been infringed, this approach focuses on the conduct committed by individual companies, whether such conduct amounts to a violation, and what remedy the company must provide for that individual violation. Regulatory reform is intended to facilitate the appropriate deterrence and remedy. These authors have thus identified several existing company law mechanisms as being particularly relevant to Bill of Rights litigation, in particular the doctrine of "piercing the corporate veil",[78] and the directors' duty to act in the "best interests of the company".[79] Further, there are some civil and criminal remedies under the Act that have been identified as potentially useful for human rights purposes.[80]

As the literature centres on this approach and these doctrines and mechanisms, this chapter presents these as central to the understanding of "companies" and "company law" where human rights law is concerned. Accordingly, recommendations for reform will later be made in respect of these specific doctrines and mechanisms, building on the existing scholarship. However, it is important to note that alternative approaches to the conceptualisation of company law may lead to significantly different implications for reform. For instance, an alternative conceptual approach is to consider the systemic role of companies and company law in South Africa's political-

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[76] Katzew (2011) *SALJ* 688-694; Gwanyanya (2015) *PER* 3108-3109; Smit (2016) *BHRJ* 354-355; Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 2-5, 7-11, 15-18.

[77] The approach is similar for developments and discussions at the international level: see chapter four.

[78] Bilchitz (2008) *SALJ* 786-789; Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 15-18; Smit (2016) *BHRJ* 350-352; Katzew (2011) *SALJ* 700-704.

[79] Bilchitz (2008) *SALJ* 780-783; Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 7-11; Gwanyanya (2015) *PER* 3109-3111; Katzew (2011) *SALJ* 691-694, 704-709.

[80] Such as s 218(2) of the Act: Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 11; Cassim "The Legal Concept of a Company" in *Company Law* 65; MF Cassim "Enforcement and Regulatory Agencies" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 824 858.

economic context. There is support for such an approach in some legal academic literature,[81] especially in the recent work of Pistor.[82] Further support for systemic approaches to economic relations can be found in diverse fields, such as political theory and economy,[83] history,[84] philosophy,[85] sociology,[86] psychology,[87] and anti-racial and decolonial theory.[88] The immense, varied and historied body of anti-capitalist critique and literature strongly supports systemic analysis.[89] Such a "systemic approach" would examine the political, social and economic functions and effects of the State, companies and company-related law generally. Thus – in contrast

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[81] FS Cohen "Dialogue on Private Property" (1954) 9 *Rutgers LR* 357; MR Cohen "Property and Sovereignty" (1927) 13 *Cornell LR* 8; MR Cohen "The Basis of Contract" 46 *Harv LR* 553; JL Harrison "Class, Personality, Contract and Unconscionability" (1994) 35 *William & Mary LR* 445; Ireland (1999) *Modern LR* 32 44-45; D Harvey *A Companion to Marx's Capital* (2019), especially at 50-51, 139-140, 158.

[82] Pistor *Capital* (2019).

[83] Ashman, Fine & Newman (2011) *Socialist Register*; S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 8-17, 56-65, 153-415; Terreblanche *Transformation*; H Wolpe "Capitalism and Cheap Labour-Power in South Africa: From Segregation to Apartheid" (1972) 1 *Economy and Society* 425; RL Hale "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 470.

[84] J Dewey "The Historic Background of Corporate Legal Personality" (1926) 35 *Yale LJ* 655; N Faulkner *A Radical History of the World* (2018) 165-187, 268-274, 438-446, 471-499.

[85] L Crocker "Marx's Concept of Exploitation" (1972) 2 *Social Theory and Practice* 201; MR Cohen "Communal Ghosts and Other Perils in Social Philosophy" (1919) 16 *Journal of Philosophy, Psychology and Scientific Methods* 673.

[86] WP Archibald "Marx, Globalization and Alienation: Received and Underappreciated Wisdoms" (2009) 35 *Critical Sociology* 151; A Shantz, K Alfes & C Truss "Alienation from Work: Marxist Ideologies and Twenty-First-Century Practice" (2014) 25 *International Journal of Human Resource Management* 2529.

[87] I Crinson & C Yuill "What Can Alienation Theory Contribute to an Understanding of Social Inequalities in Health?" (2008) 38 *International Journal of Health Services* 455.

[88] T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 123 *Stell LR* 123; S Makgetlaneng "How Capitalism and Racism Continue to Shape the Socio-Economic Structure of South Africa" (2016) 46 *Africanus* 1 6-7; D Masondo "Capitalism and Racist Forms of Political Domination" (2007) 37 *Africanus* 66 68-72; R Fine "The Antimonies of Neo-Marxism" (1990) 11 *Transformation* 92 92-94; S Biko *I Write What I Like* (2005) 21-25, 27-32, 48-50; JM Modiri "Towards a '(Post-)apartheid' Critical Race Jurisprudence: 'Divining Our Racial Themes'" (2012) 27 *SAPL* 231; SE Merry "Law and Colonialism" (1991) 25 *Law & Society Review* 889.

[89] See the sources listed above. Most historically prominent in this regard is Marxist literature; see for instance Harvey *Companion to Marx's Capital*; Faulkner *History*.

to the atomistic approach – the systemic approach views companies, the law affecting them, the wider economy and the State as a collective system. The entire economic system is thus viewed as underpinned by the legal system and State enforcement. The systemic approach examines whether this system, considered holistically, gives rise to rights violations. Company law is thus not considered in isolation, but rather seen as deeply linked to other legal fields – most notably property and contract law – and connected to questions of equality and political-economic democracy. Moreover, the functions and effects of companies are not reified as abstract economic or legal principles.[90] Rather, the law is properly seen as a historic and sociological product of political-economic power relations, with these relations reciprocally supported and shaped by the law. The systemic approach thus studies companies in context, as a historical result of political-economic relations manifesting in law.

Some practical examples illustrate the difference in these two approaches. First, the atomistic approach may consider whether specific companies violate the rights of their workers. The systemic approach may instead consider the combined effect of unequal wealth distribution and shareholder/director control for profit to assess the overall structural impact on all workers and unemployed people in the country. Second, the atomistic approach could consider whether a company's operations unreasonably pollute its environs. The systemic approach may instead consider how the structure of the economy as a whole may drive companies to pollute wherever profitable lest they become uncompetitive and fail, and thus how there may be a deep tension between economic growth and environmental rights. The role of companies and company law in perpetuating structural inequality, the effect of wealth distribution on political and economic democracy, and the relations between political and economic power centres, could all only be considered if companies were viewed systemically.[91]

The systemic approach thus potentially allows for a richer and more substantive understanding of companies and company-related law than the atomistic approach. By focusing on the conduct of companies individually, the atomistic approach inherently presumes the systemic capitalist background as acceptable or "normal", and thus automatically sees the effects of this background as non-violations of human rights. By

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[90] Cohen (1919) *Journal of Philosophy, Psychology and Scientific Methods* 673 682; Dewey (1926) *Yale LJ* 655; FS Cohen "Transcendental Nonsense and the Functional Approach" (1935) 35 *Colum LR* 809 811.

[91] Terreblanche *Inequality* 8-17, 56-65, 153-415; Makgetlaneng (2016) *Africanus* 6-7; Masondo (2007) *Africanus* 68-72; Crocker (1972) *Social Theory and Practice* 201.

contrast, the systemic approach allows for a far deeper perception of rights violations, and potentially provides a more critical interrogation of South Africa's political-economic structuring as concerns human rights. Following a systemic approach may thus lead to a normative shift in what is perceived as a human rights violation, and thus in how human rights are conceived and fulfilled. Such an approach would also align more closely with the concept of transformative constitutionalism.[92]

However, the present literature and jurisprudence on business and human rights law has not meaningfully engaged with the systemic approach. An exception is Samaradiwakera-Wijesundara, who calls for a paradigm shift in the conception of the structural role and function of the company in modern South African society.[93] Thus, while important to note that the systemic approach exists as an alternative to the atomistic approach, it is not presently the conceptual approach in South African human rights law where companies are concerned. This thesis focuses on the present approach to companies and company law. An exploration of the full implications and possibilities of a systemic approach are beyond the scope of the current study. However, the systemic approach will nevertheless be partly considered in the context of transformative constitutionalism, and an argument developed that it is generally more consonant with transformative constitutionalism than the prevailing atomistic approach.[94]

This chapter proceeds to set out a basic description of the doctrines and mechanisms presented in existing business and human rights law literature. This will more fully build a foundational understanding of the meaning of "companies" and "company law" where the Bill of Rights is concerned. The following chapters will then consider how precisely the Bill of Rights applies to companies and company law as thus conceived, and proposals for the reform of these doctrines and mechanisms will thereafter be considered.

## 2 5 Significant company law mechanisms implicating human rights

### 2 5 1 Piercing the corporate veil

As noted earlier, companies are granted separate juristic personality in terms of the Act, and shareholders and directors generally cannot be liable for company debts by

[92] See chapter three part 3 2 2.

[93] Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 16-17.

[94] Chapter three part 3 2 2.

reason of those capacities alone.[95] However, South African courts have recognised that they have the power in common law to ignore the company's separate juristic personality to the extent necessary in a matter.[96] As such, they are able to attribute liabilities directly to shareholders in certain circumstances, and thus "pierce the corporate veil".[97] As concerns human rights, the question is whether, and how, this section could serve to allow for the piercing of the veil (and shareholder liability) in cases of human rights abuses.

There are no strict criteria for when courts will pierce the veil, and the courts have held that a flexible approach is necessary.[98] However, courts have shown that they will pierce the veil where separate juristic personality is abused in a "fraudulent, dishonest or improper way" or where it is in the interests of justice.[99] It is thus not a matter of holding shareholders liable for abuses by the company, but of holding shareholders liable for their own abuse of the company structure. The underlying reasoning appears to be that separate juristic personality is a benefit granted in law, and as such it can be revoked if unreasonably abused.[100] This could equally apply to a group of companies functioning as an economic unit and abusing their separate personalities.[101]

The Companies Act also provides a statutory form of piercing. Under the Act, if an interested person makes an application, or during any proceedings involving a company, a court can find the incorporation, use or acts of a company constitute an "unconscionable abuse of the juristic personality of the company as a separate entity".[102] In such a case, the court may pierce the veil as under the common law, and

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[95] S 19(1) and (2) of the Act.

[96] *Ex parte application of Gore NO* 2013 3 SA 382 (WCC) para 4; see also *Hulse-Reutter v Godde* 2002 2 All SA 211 (A); *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A); Cassim "The Legal Concept of a Company" in *Company Law* 48-50.

[97] See generally *Ex parte application of Gore NO* 2013 3 SA 382 (WCC); *Hulse-Reutter v Godde* 2002 2 All SA 211 (A); *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 2 All SA 543 (A); Cassim "The Legal Concept of a Company" in *Company Law* 41-63.

[98] *Ex parte application of Gore NO* 2013 3 SA 382 (WCC) paras 19-20; Cassim "The Legal Concept of a Company" in *Company Law* 42.

[99] *Ex parte application of Gore NO* 2013 3 SA 382 (WCC) para 29; for further examples see Cassim "The Legal Concept of a Company" in *Company Law* 43-46.

[100] *Ex parte application of Gore NO* 2013 3 SA 382 (WCC) para 34; *Ebrahim v Airports Cold Storage (Pty) Ltd* 2008 6 SA 585 (SCA) para 15.

[101] Cassim "The Legal Concept of a Company" in *Company Law* 53-57.

[102] S 20(9); D Davis & W Geach (eds) *Companies and Other Business Structures in South Africa* 3 ed (2013) 307; Cassim "The Legal Concept of a Company" in *Company Law* 57-63.

make any further order necessary to give effect to the piercing order. Statutory piercing has been considered separate and parallel to the common law remedy.[103] However, the difference in wording – fraudulent, dishonest or improper abuse, as opposed to unconscionable abuse – makes it unclear whether it is stricter or more lenient a standard than that of the common law.[104] At common law, it is not necessary that the abuse be "unconscionable".[105] However, the High Court has seen the statutory mechanism as being a lower standard with far broader remedial powers to give any further appropriate order.[106] Statutory piercing may thus be a stronger mechanism than common law piercing.

Overall, however, in both common and statutory law, the matter of piercing generally appears to be a matter of interpretation in the circumstances. Importantly, as limited liability reduces the risk of shareholders experiencing loss in business dealings, reintroducing shareholder liability by veil-piercing may deter companies from committing human rights violations. Further, it may be a means of ensuring an adequate remedy to victims of violations by, for instance, allowing compensation to be ordered against shareholders where the company is insolvent.

### 2 5 2 The directors' duty to act in the best interests of the company

Two central issues in company law relate to the governance of companies. The first examines who controls or runs a company, and the second considers in whose interest the company should be run. Regarding control, and as noted earlier, shareholders are generally considered to control a company, while the board directs it, and managers and other employees carry out the board's directions. There are indeed debates about the degree to which shareholders are able to exercise meaningful control over directors,[107] but overall control is generally exercised by the joint group of shareholders and directors.

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[103] *Ex parte application of Gore NO* 2013 3 SA 382 (WCC) para 34.

[104] FHI Cassim "Introduction to the New Companies Act: General Overview of the Act" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 1 25; Cassim "The Legal Concept of a Company" in *Company Law* 59-62.

[105] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (AD) paras 36-38.

[106] *Ex parte application of Gore NO* 2013 3 SA 382 (WCC) para 34.

[107] See the discussion on the agency problem under part 2 2, above.

The more significant question concerns in whose interest companies should be run. Importantly, the company is able to hold directors liable should directors breach their duty to act in the "best interests of the company".[108] It is necessary to consider various interpretations of this duty as it stands, before considering the possible impact of the Constitution. As this duty is core to the structure and rationale of the company as an entity, it requires a simultaneous examination of theories of the company as an institution, and of models of corporate governance.

*2 5 2 1 Theories of the company and corporate governance models*

During the early development of company law, academics were critical of the personification of the company, and of its ability to have its own "interests" as a legal fiction.[109] As already noted, a company cannot have a mind, and so its "intention" is decided in law by deeming the intentions of the directors and managers to be those of the company.[110] Similarly, given that it is a legal fiction, a company does not have inherent "best interests". Rather, the scope of the duty is wholly determined by how it is interpreted. This has important implications for human rights. Firstly, it can be asked if "the best interests of the company" can or should encompass the interests of human rights stakeholders – that is, people whose human rights are implicated by the company's operations. Secondly, it can further be asked if this interpretation effectively promotes human rights, and if it could provide an effective human rights remedy if breached. Practically, this is an enquiry as to how deeply human rights (and rights-holders' interests) are incorporated into the governance of the company. This is important, as the fulfilment or non-violation of relevant rights may be wholly at odds with a company's business goals, with rights accordingly being violated in pursuit of these goals. The interactions between company interests and human rights thus warrant close attention.

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[108] This duty arose in common law: Davies & Worthington *Principles* 505-507. The Act for the first time refers to and codifies the same duty in s 76(3)(b): Cassim "Introduction to the New Companies Act" in *Company Law* 19; FHI Cassim "The Duties and the Liability of Directors" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 505 514-517.

[109] Dewey (1926) *Yale LJ* 655; Cohen (1919) *JPPSM* 682; Cohen (1935) *Colum LR* 809-814, 820-821.

[110] *Consolidated News Agencies v Mobile Telephone Networks* 2010 3 SA 382 (SCA); s 332 of the Criminal Procedure Act 51 of 1977.

There are generally two distinct conceptions of the company and its motive, which are outlined in the famous 1930s debate between Berle and Dodd in the United States.[111] Berle believed that companies served only to benefit their shareholders, as the company only had operating capital because of the shareholders.[112] Directors were thus simply fiduciaries over the private property (or capital) of shareholders, by a series of contracts in private law. Any powers exercised by the company or its directors could only be exercised for the shareholders' benefit, as an expression of the shareholders' control over their property.[113] In Berle's view, companies owed no duty to society at large, or to any other stakeholders. Such a duty, if it existed, would be performed fully by the company's paying tax. This approach is known as the "shareholder primacy" model, and relies on several capitalist economic theories.[114] In particular, it relies on a specific conception of private control over private property, and of self-interested control in a market economy generally being perceived as leading to optimal social benefits.[115] The shareholder primacy model thus sees the wider economy as producing social good if individual companies act only in their own interest, and follow the sole

[111] AA Berle "Corporate Powers as Powers in Trust" (1931) 44 *Harv LR* 1049; EM Dodd "For Whom Are Corporate Managers Trustees?" (1932) 45 *Harv LR* 1145 1145-1163; AA Sommer "Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later" (1991) 16 *Delaware Journal of Corporate Law* 33 33-37. See in a recent South African context *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) para 16.9.

[112] Berle (1931) *Harv LR* 1049.

[113] Confirmed earlier by *Dodge v Ford Motor Company* 170 NW 668 (Mich 1919), for example.

[114] Guidelines 20-21.

[115] In the human rights literature, Bilchitz aligns with the capitalist economic theory claim that companies' individual profit-seeking is for the public good, but suggests that profit be restrained by human rights regulation. In his view, companies are part private and part public: D Bilchitz "Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law" (2016) 23 *Indiana Journal of Global Legal Studies* 143 165-166 and footnote 50; Bilchitz (2008) *SALJ* 781. See also Cassim "Introduction to the New Companies Act" in *Company Law* 21.

motive of pursuing profit.[116] For Berle, the "best interests of the company" thus meant shareholder profit.[117]

A prominent variant of this model is termed the "enlightened shareholder value" model.[118] Here, the company may take the interests of other stakeholders into account, but only as far as these benefit the shareholders. That is, shareholder interests retain primacy, but it is understood that such primacy may benefit other stakeholders indirectly.[119] Other stakeholders' interests do not have value in and of themselves, but are merely a means to an end.[120] Accordingly, there is little difference between enlightened shareholder value and shareholder primacy models, as both seek only to maximise shareholder profit.

Shareholder primacy tends to align with two theories of the company, namely the contract (or inherence) and natural entity theories. The contract theory holds that company structures could theoretically arise merely from the private common law of contract and property.[121] Separate personality and limited liability would thus be benefits arising from contractual arrangement between shareholders and creditors. Hessen even argues that such common law structures were in fact developing until legislatures actively outlawed them, and that legislatures thus improperly subjected all companies to control and regulation.[122] The natural entity theory of the company similarly holds that companies are factual and consensual social relations which simply need recognition and enforcement by the law, but that the law should have no

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[116] Importantly, a non-profit company acting in pursuit of its own social or public benefit interests may nonetheless infringe on human rights. Accordingly, while this part focuses on the historical and theoretical conception of the profit company, it still bears relevance for non-profit companies.

[117] The present discussion focuses on the principle of the directors' duty to run the company for shareholder profit. However, as noted earlier, there is also the existing agency problem of directors running companies for their own short-term gain, rather than for longer-term shareholder profit: see part 2 2 above.

[118] Cassim "Introduction to the New Companies Act" in *Company Law* 20-21.

[119] S Lombard & T Joubert "The Legislative Response to the Shareholders v Stakeholders Debate: A Comparative Overview" (2014) 14 *Journal of Corporate Law Studies* 211 212.

[120] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

[121] DL Ratner "Corporations and the Constitution" (1980) 15 *University of San Francisco LR* 11 19.

[122] R Hessen "A New Concept of Corporations: A Contractual and Private Property Model" (1979) 30 *Hastings LJ* 1327; PG Mahoney "Contract or Concession – an Essay on the History of Corporate Law" (2000) 34 *Georgia LR* 873.

discretion as to whether to give this recognition and enforcement.[123] These theories generally depict legislative regulation as illegitimate interference with shareholders' private property and contractual relations. The State's duty is perceived as limited to enforcing and protecting the shareholders' decisions as to how their property is mobilised for profit. These theories thus rely on a rigid conceptual divide between public and private law, with public interest regulation being unable to interfere with private property and contract.

An altogether different approach was advocated by Dodd, who believed that a company also necessarily had to serve the social good and benefit other stakeholders (including employees, creditors, consumers, society and the environment).[124] Dodd held that the common law, charters and statutes governing corporations had always originated in state power. Therefore, at least in principle, company law was always premised on policy decisions taken by law-makers in the public interest, and their work was closely monitored by the State.[125] All companies were thus public entities by their very nature, rather than being private entities for private benefit. As they served public functions and exercised public power,[126] they should assume social responsibility akin to that of the State.[127] Any perceived freedom of private property use in business was a result of the policy-based regulation of business, rather than such freedom being determinative of policy and regulation. The consequence is that even profit companies do not (and cannot) have a fully private profit motive, as they are equally public entities. Berle himself did in fact note earlier common-law authorities' formulation that a

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[123] MJ Phillips "Reappraising the Real Entity Theory of the Corporation" (1994) 21 *Florida State University LR* 1061.

[124] Dodd (1932) *Harv LR* 1145-1163. See also Brandeis J's dissent in *Louis K Liggett Co v Lee* (1933) 288 US 517 545, 564-581.

[125] Sommer (1991) 36.

[126] This is reminiscent of the South African organ of state, defined in s 239 of the Constitution, considered more fully chapter three part 3 3 4. For a theoretical critique of this approach, see Bilchitz (2016) *IJGLS* 143.

[127] An interesting modern South African example of this holding of public-function companies to the standard of government is found in s 1 of the Promotion of Administrative Justice Act 3 of 2000. The section classifies decisions as administrative action if they are made in exercising a public power or performing a public function, even if the actor is a non-governmental juristic person. Non-shareholder interests are thus often considered and protected outside of the field of company law. See also *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) and the remedies under the National Water Act 36 of 1998 in that case.

company cannot be incorporated without state authority,[128] and later conceded that Dodd's position was likely correct.[129]

As public actors, directors would thus have to consider other stakeholders' interests as independently valuable in and of themselves – they were not to be regarded as contingent on their indirect value to shareholders' interests. This is known as the "stakeholder inclusive" or "pluralist" model.[130] It closely aligns with the concession theory of the company, which holds that companies exist only as a special concession made by the legislature as a matter of public policy. The concession is a benefit granted to business actors – an exemption from the traditional rules of personal liability, allowing companies to exist as separate juristic persons with separate liability.[131] As these are benefits granted by the legislature, they may equally be regulated, limited or withdrawn by the legislature for policy reasons.[132] As noted above, in South Africa this concession would also be subject to the Bill of Rights.[133]

### *2 5 2 2 The corporate governance model in South Africa*

South African company law has historically adhered to a shareholder primacy approach, following the legal tradition in common law jurisdictions.[134] In other words, directors were required to act in the "best interests of the company", interpreted as the shareholders' interest in profit. As discussed,[135] in the lead-up to the drafting of the new Companies Act, the Department of Trade and Industry published a policy document titled *Company Law for the 21st Century: Guidelines for Corporate Reform* ("the Guidelines").[136] The Guidelines provided a number of guiding recommendations

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[128] AA Berle *Studies in the Law of Corporation Finance* (1928) 9.

[129] Sommer (1991) *DJCL* 33-37; *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) para 16.9.

[130] Cassim "Introduction to the New Companies Act" in *Company Law* 20-21; R Cassim "Corporate Governance" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 472 495-497; Cassim "The Duties and the Liability of Directors" in *Company Law* 517-521.

[131] SJ Padfield "Rehabilitating Concession Theory" (2014) 66 *Oklahoma LR* 327.

[132] *Ebrahim v Airports Cold Storage (Pty) Ltd* 2008 6 SA 585 (SCA) para 15.

[133] See part 2 3 above.

[134] Guidelines 26; Cassim "The Duties and the Liability of Directors" in *Company Law* 514-517; R Croucher & L Miles "Corporate Governance and Employees in South Africa" (2010) 10 *Journal of Corporate Law Studies* 367 369-370.

[135] See chapter one part 1 1 3.

[136] South African Company Law for the 21st Century: Guidelines for Corporate Reform GN 1183 in *GG* 26493 of 23-06-2004.

for corporate reform in the modern South Africa. It noted that, due to the isolation and sanctions imposed by the international community in response to the formal apartheid regime, South Africa's corporate law had fallen behind international best practice and norms.[137] As a result, the Guidelines committed to strongly imbuing South African company law with the values and principles of the Constitution and Bill of Rights,[138] mindful of constitutional obligations and the South African historical, social and economic context.[139]

On this basis, the Guidelines firmly held to a vision of South African company law based on the pluralist model.[140] They made repeated reference to non-shareholder concepts, such as "social renewal",[141] the company as a "social institution",[142] "social and economic [factors]",[143] and that a company's "pursuit of economic objectives should be constrained by social imperatives".[144] Most significantly, the Guidelines expressly break with traditional shareholder primacy, and stress that other stakeholder interests have independent value.[145] Despite these statements, some authors consider that the Guidelines in fact adhere to an enlightened shareholder model.[146] Most prominently, Mongalo (who worked on the reform process within the Department of Trade and Industry) holds that the designers of the Guidelines did not intend the recognition of stakeholder interests to the detriment of shareholders.[147]

In any event, the Companies Act maintains the common law definition of the "best interests of the company", thereby implying an ongoing focus on shareholder value in

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[137] M Vaughn & LV Ryan "Corporate Governance in South Africa: A Bellwether for the Continent?" (2006) 14 *Corporate Governance: An International Review* 504 505.

[138] Guidelines 16.

[139] 27.

[140] Lombard & Joubert (2014) *JCLS* 211 220.

[141] Guidelines 4.

[142] 26.

[143] 27.

[144] 27.

[145] 27.

[146] L Muswaka "Corporate Governance under the South African Companies Act: A Critique" (2012) *Proceedings of World Business and Economics Research Conference* 3.

[147] T Mongalo "An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act 2008" (2010) 2010 *Acta Juridica* xiii xix.

the absence of provisions to the contrary.[148] Further, as the directors owe their duty solely to the company, only the company itself (under direction of the shareholders) possesses an action against directors for breach of this duty.[149] Other stakeholders may claim for breach only indirectly, through a derivative action in terms of section 165 of the Act. Under strict conditions, such an action allows any person to make a claim on behalf of the company against the directors for breach, but such a claim must still be in the best interests of the company.[150] The focus thus remains on loss suffered by the company, rather than on the loss suffered independently by other stakeholders.[151]

There have been arguments in support of a broader view of the company's interests, apart from human rights considerations. In *Teck Corp Ltd v Millar*,[152] for instance, it was held that acting in the interests of employees is acting in the interests of the company itself. Cassim firmly holds that South African courts should follow this approach, as failing to do so would mark a return to shareholder primacy.[153] However, while consciously balancing employee and shareholder interests is a positive step, it is not clear how such balancing is to be done. Elsewhere, the Act states that listed and state-owned companies, and other significant companies, must generally appoint a

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[148] Lombard & Joubert (2014) *JCLS* 220-221; P Sutherland "The State of Company Law in South Africa" (2012) 23 *Stell LR* 157 160-161; Cassim "Introduction to the New Companies Act" in *Company Law* 1 20; IM Esser "Corporate Social Responsibility: A Company Law Perspective" (2011) 23 *SAMLJ* 317 322; Cassim "The Duties and the Liability of Directors" in *Company Law* 515.

[149] The Guidelines observed that the decriminalisation of company law may place too much reliance on shareholders to enforce duties, and so called for an independent body to ensure compliance. See Guidelines 46.

[150] S 165 of the Act, especially s 165(5)(b)(iii) and 165(7); Cassim "Introduction to the New Companies Act" in *Company Law* 22-23; Cassim "The Duties and the Liability of Directors" in *Company Law* 523; MF Cassim "Shareholder Remedies and Minority Protection" in FHI Cassim (ed) *Contemporary Company Law* 2 ed (2015) 755 775-796; Davis & Geach *Companies* 295-297. Lombard and Joubert hold that the possibility of a derivative action would at least indirectly cause directors to consider other stakeholders' interests: Lombard & Joubert (2014) *JCLS* 227.

[151] Croucher and Miles note that the Act does provide some limited relief for employees, but only in cases of director delinquency, business rescue proceedings and derivative actions: Croucher & Miles (2010) *JCLS* 371-373.

[152] *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC) 313.

[153] Cassim "The Duties and the Liability of Directors" in *Company Law* 521; see also L Muswaka "An Appraisal of the Protection of Stakeholder Interests under the South African Companies Act and King III" (2013) 3 *World Journal of Social Sciences* 67 70; and Muswaka (2012) *PWBERC* 7.

social and ethics committee.[154] This committee must monitor the company's activities, mindful of compliance with all applicable legislation and codes, and good corporate social responsibility generally. This does indirectly compel these companies to consider environmental and social stakeholders. However, the relative weakness of Committee, and its integration with the company, may lead to a formalistic "box-ticking" approach to social imperatives rather than substantively realigning the company's governance priorities.[155] Moreover, there is again no enforceable remedy for stakeholders outside of derivative actions.[156] At best, the duties on the social and ethics committee may be enforced by means of a compliance notice under section 171 of the Act. Such a notice allows the Companies Commission or Panel to enforce compliance with the Act.[157] However, this still does not ensure that other stakeholder interests have independent value in director decisions.

Accordingly, outside of the suggested reforms proposed by human rights academics,[158] modern South African company law appears to still adhere to a model of shareholder/director control for shareholder gain.

It is necessary, however, to briefly consider the corporate governance impact of the *King Report and Code on Corporate Governance*, recently in its fourth incarnation ("King" or "the Code").[159] This prominent corporate governance instrument is voluntary, and does not give rise to legal obligations.[160] Instead, it is enforced privately. Compliance with King is a requirement for listing on the JSE, and there is a belief that the market punishes any major company that does not comply with King, as such companies may be considered a poor and possibly unethical investment.[161] However, it must again be borne in mind that investor interests do not necessarily align with those of other stakeholders. An unethical company may increase shareholder value by exploiting rights. In the absence of legal proceedings that affect profits, such a

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[154] S 72(4) of the Act; HJ Kloppers "Driving Corporate Social Responsibility (CSR) Through the Companies Act: An Overview of the Role of the Social and Ethics Committee" (2013) 16 *PER* 166; Gwanyanya (2015) *PER* 3113-3114; M Havenga "The Social and Ethics Committee in South African Company Law" (2015) 78 *THRHR* 285; Esser (2011) *SAMLJ* 325.

[155] Cassim "The Duties and the Liability of Directors" in *Company Law* 523.

[156] 523.

[157] Davis & Geach *Companies* 307.

[158] See chapter five part 5 3 1.

[159] Institute of Directors *King IV Report on Corporate Governance for South Africa* (2016).

[160] 35.

[161] Esser (2011) *SAMLJ* 326.

company may still be an attractive investment. This is especially the case where investors do not (or cannot) meaningfully assess and respond a company's ethical performance. The market enforcement of King may thus be limited. Beyond King's intended private enforcement, however, the courts have occasionally used duties under King to inform the standards of conduct that applicable companies should meet, thereby crystallising the voluntary code into legal obligations.[162]

King IV, like its predecessor, expressly follows what it terms a pluralistic stakeholder model, rather than one of shareholder primacy.[163] It defines "stakeholders" as groups or individuals who can be reasonably expected to be "significantly affected" by a business' activities, outputs or outcomes, or whose actions can be reasonably expected to "significantly affect" the business' ability to create value over time.[164] Shareholders' interests as capital providers are thus deprioritised, giving rise to "stakeholder inclusivity" – one of the central principles of King IV.[165] Under such a model, shareholder interests do not have predetermined precedence. Rather, any material stakeholders' interests have intrinsic value, and may even clash with those of shareholders.[166] King further recommends "triple-bottom-line" reporting, promoting transparency with regard to its "triple context" of economic, social and environmental impacts.[167]

However, King's effect on the standard corporate governance model is likely very limited. The report claims to apply to all organisations, regardless of model or structure, but it is unlikely that King is known of or followed by smaller business structures, especially where there is no enforcement. The Code's reliance on private enforcement by investors, who stand to lose if a model of stakeholder inclusivity is followed, further restricts the uptake of such a model. "Triple-bottom-line" reporting has also been shown to not result in stakeholder interests being meaningfully considered or upheld.[168] The report itself stresses that the balancing of stakeholder interests must

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[162] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) para 16.9; *South African Broadcasting Corporation Ltd v Mpofu* 2009 4 All SA 169 (GSJ) paras 29-30. Muswaka argues that the Act must incorporate *King* principles if the Act's progressive aims are to be met: Muswaka (2013) *WJSS* 72.

[163] Institute of Directors *King IV Report* 25-26.

[164] 17.

[165] 25-26.

[166] 26; Principle 16 of the *King IV* Code; Croucher & Miles (2010) *JCLS* 375.

[167] Institute of Directors *King IV Report* definitions and part 5.2.

[168] Croucher & Miles (2010) *JCLS* 377-380.

remain in the longer-term "best interests of the organisation" as a separate legal entity.[169] This revives the same interpretative difficulties as with the Act's definition of "the best interests of the company". Most importantly, the Code cannot override legislation,[170] and so its model of "stakeholder inclusivity" remains restricted by the interpretation of the Act's requirement that directors act in the "best interests of the company".[171]

In sum, South African company law in practice follows – in the absence of clear reform – the traditional common law principle of shareholders/directors controlling the company for shareholder profit. This manifests as the directors' duty to act in "best interests of the company". However, even outside of explicit human rights considerations, there is significant reason to judicially reinterpret this duty, although legislative amendments would be clearer and more desirable.[172] Clarity in this regard is crucial, as the duty informs the core purpose, governance and direction of companies in South Africa. It may be that human rights infringements immediately cause loss to a company, and so human rights and shareholder interests fully overlap. It is more likely, however, that human rights are infringed in the pursuit of value for shareholders.[173] While the potential effect of the Bill of Rights on the directors' duty to act in the "best interests of the company" will be considered later,[174] it can be noted here that without explicit and clear regulation to the contrary, companies will likely continue to be run for profit at the expense of rights.

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[169] Institute of Directors *King IV Report* 26. See also M Havenga "Directors' Fiduciary Duties Under Our Future Company-Law Regime" (1997) 9 *SAMLJ* 310 (arguing for a company's interests as an entity independent of shareholders); J Folson "South Africa Moves to a Global Model of Corporate Governance But With Important National Variations" (2010) 2010 *Acta Juridica* 219 221-222.

[170] Institute of Directors *King IV Report* 35.

[171] Muswaka thus argues that courts should follow King and read "the best of interests of the company" as a stakeholder-inclusive model: Muswaka (2013) *WJSS* 71.

[172] Havenga notes the difficulties of reforming the duty by interpretation alone: Havenga (1997) *SAMLJ* 321.

[173] See chapter one part 1 1 1. For examples in the mining industry alone, see: Centre for Environmental Rights *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* (2016), especially 74; Amnesty International *Smoke and Mirrors: Lonmin's Failure to Address Housing Conditions at Marikana, South Africa* (2016) 7-10; A Seccombe "Number of Mining Deaths and Injuries Falls in 2018" (01-03-2019) *Business Day* <https://www.businesslive.co.za/bd/companies/mining/2019-03-01-number-of-mining-deaths-and-injuries-falls-in-2018/> (accessed 25-09-2019).

[174] Chapter five part 5 3.

### 2 5 3 Civil and criminal mechanisms under the Companies Act

Outside of piercing the corporate veil and the directors' duty to act in the "best interests of the company", the Act contains some provisions that are likely relevant to human rights considerations. Section 218(2) of the Act declares that a person who contravenes the Act, thereby causing another person loss or damage, may be held liable by that other person for that loss or damage.[175] This is a general civil remedy for loss arising from the contravention of the Act, and may allow some relief for victims of human rights violations. Any contravention of the Act which causes a human rights violation would appear to be actionable. Further, the remedy appears to allow for strict liability, with proof of fault or negligence unnecessary.[176] However, it is unclear whether any human rights violation would automatically contravene the Act, as there are no explicit provisions to this effect. This remedy also only imposes liability for loss or damage suffered. This implies that it only provides compensatory remedies, rather than broader constitutional remedies.[177]

In terms of criminal sanctions, one of the explicit goals of the reform process was to drastically narrow the scope of criminal liability for companies and business actors.[178] As a result, criminal sanctions are now only imposed for the disclosure of certain forms of confidential information;[179] committing fraud or misrepresentation in various ways;[180] and hindering the administration of the Act.[181] In terms of relevance to potential human rights enforcement, the Act states that non-compliance with a compliance notice is an offence.[182] Such notices are issued to any person who contravenes the Act, or who

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[175] Cassim "The Legal Concept of a Company" in *Company Law* 65; Cassim "Enforcement and Regulatory Agencies" in *Company Law* 858.

[176] Cassim "Enforcement and Regulatory Agencies" in *Company Law* 832-833.

[177] For an extensive consideration, see M Bishop "Remedies" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008).

[178] Guidelines 11; Cassim "Introduction to the New Companies Act" in *Company Law* 26; Cassim "Enforcement and Regulatory Agencies" in *Company Law* 853-857; Davis & Geach *Companies* 291-293.

[179] S 213 of the Act.

[180] S 214.

[181] S 215.

[182] S 214(3); Cassim "Enforcement and Regulatory Agencies" in *Company Law* 856. The Companies Commission, Panel and Tribunal are intended to be the primary means of enforcing the Act: Cassim "Enforcement and Regulatory Agencies" in *Company Law* 832-833.

benefited from or was implicated in such a contravention.[183] As with the section 218 civil remedy, above, the interpretative question is whether a company, in violating human rights, contravenes the Act.

Accordingly, civil and criminal remedies that may be claimed by people outside the company – while limited in their scope and application – could possibly be used for human rights purposes if interpreted to this effect. However, it will still be for courts to first adopt such deliberate human rights interpretations of the relevant provisions, as their potential human rights application is not explicit.

## 2 6 Conclusion

This chapter laid the foundation for the kind of entity and regulatory regime that is subject to the Bill of Rights, namely "companies" and "company law". It established the legal nature of the entity under examination, namely, the South African company as established in terms of the Act. Such companies may take several forms, and find themselves at the intersection of legislation and the common law. However, all companies, and the laws which constitute them, are entirely subject to the Bill of Rights. The primary question concerns *how* the Bill of Rights applies vis-à-vis companies. This issue constitutes the focus of the following chapter.

Importantly, the current literature on business and human rights law takes what may be termed an "atomistic approach" to companies, focusing on the violations committed by companies individually. Such an approach is in contrast to a more "systemic approach", viewing companies, the law affecting them, the wider economy and the State as a holistic system subject to the Constitution. The literature accordingly focuses on certain prominent existing company law doctrines and mechanisms that it identifies as having significant implications for holding companies accountable for human rights violations. The doctrine of piercing the corporate veil may allow for human rights remedies against business actors that would otherwise have been shielded from liability by the doctrine of separate legal personality. The corporate governance model in South Africa presently continues to prioritise the interests of the shareholders in pursuing profit, but there is historical and present evidence that companies should be subordinate to public interest considerations, including human rights. Further, civil and

[183] S 171 of the Act; Cassim "Introduction to the New Companies Act" in *Company Law* 26; Cassim "Enforcement and Regulatory Agencies" in *Company Law* 846-853; Davis & Geach *Companies* 307.

criminal remedies under the Act may potentially be used for human rights purposes if interpreted in such a way. However, a more comprehensive consideration of the potential reform of these aspects of company law can only follow a proper examination of the Bill of Rights' application to companies and company law, as will take place in the following chapter.

# Chapter 3: Companies, transformative constitutionalism and the application of the Bill of Rights

## 3 1 Introduction

This chapter aims to establish how the Bill of Rights[1] applies to South African companies and company law. It will be recalled that this study does not focus on any particular right, but rather considers the impact of the Bill of Rights generally. Accordingly, this chapter focuses on the general implications of the Bill of Rights for companies and company regulation, rather than on consequences concerning specific rights or regulatory mechanisms. Concrete implications for the regulatory scheme will be proposed in chapter five, following the doctrinal application study and consideration of international law.

This chapter will begin by describing the purpose of the Bill of Rights in light of South Africa's project of transformative constitutionalism. It will then proceed to consider the particular contextual relationship between transformative constitutionalism on the one hand, and companies and company law on the other. The focus will then shift to examining how the Bill of Rights applies where the State, non-state entities (such as companies) and relevant law are concerned. This will require a broad consideration of the application and interpretation provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution").[2]

Specifically, four sets of provisions will be examined for their interactions with companies and company law: the State's duty to respect, protect, promote and fulfil rights as per section 7(2); the direct binding of the State, law and non-state entities as per section 8(1) and 8(2); the interpretation of legislation and development of the common law following constitutional values, as per section 39(2); and the treating of companies as organs of state as per section 239. A synthesis and analysis of the jurisprudence on these provisions will follow. The chapter will then conclude by extrapolating how the implications of the Bill of Rights may apply by extension to other business structures and actors, beyond solely companies.

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[1] Chapter 2 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[2] Ss 8 and 39.

## 3 2 Transformative constitutionalism and company law

### 3 2 1 General features of transformative constitutionalism

As will be seen in this part, the Constitution's framework – and thus the guide for its interpretation and application – has been described as the project of transformative constitutionalism. It is thus first necessary to examine transformative constitutionalism itself before analysing how the Bill of Rights may be interpreted to apply to companies. Some general observations in this regard will first be made relating to the context of the constitutional project in South Africa, followed by a more nuanced examination of the particular context of companies and company law.

As has been introduced,[3] South Africa has been undertaking a large-scale legal and social project since the end of formal apartheid in 1994. This project, grounded in the Constitution, is commonly conceived as transformative constitutionalism.[4] This ongoing constitutional process – whether considered a fundamental reform or unique revolution[5] – is openly and deeply aware of the country's present and historical contexts,[6] founding its society on "democratic values, social justice and fundamental human rights."[7] It is thus a continuous project of "large scale social change through

[3] Chapter one part 1 1 2.

[4] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146; DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403; E Van Huyssteen "The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism" (2000) 59 *African Studies* 245; P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 351; D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *SAJHR* 308 313-314; J Brickhill & Y van Leeve "Transformative Constitutionalism: Guiding Light or Empty Slogan?" (2015) *Acta Juridica* 141 146-147; LWH Ackermann "The Legal Nature of the South African Constitutional Revolution" (2004) *New Zealand LR* 633; K Van Marle "Transformative Constitutionalism As/And Critique" (2009) 20 *Stell LR* 286; chapter 2 in S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010); *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC) para 165; *Print Media South Africa v Minister of Home Affairs* 2012 6 SA 443 (CC) para 97; *Hassam v Jacobs NO* 2009 5 SA 572 (CC) para 28; *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 126; *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC).

[5] Compare, for instance, Klare (1998) *SAJHR* 150 and Ackermann (2004) *NZLR* 643-646; I Currie & J De Waal *The Bill of Rights Handbook* 2 ed (2013) 2.

[6] Preamble to the Constitution.

[7] Preamble.

nonviolent political processes grounded in law".[8] It gives rise to a single legal system[9] fundamentally dedicated to constant self-evaluation and self-reform for the good of all its people, and especially for the victims of human rights abuses.[10] The Constitution declares the South African people and State as committed to this project.[11] Transformative constitutionalism thus forms the bedrock of modern South African society.

Klare, in initially developing the paradigm of transformative constitutionalism, suggested that such a reading of the Constitution was merely a plausible one that he himself argued to be preferable over any alternative.[12] Others, however, have seen transformative approach as being a necessary and inescapable part of the text.[13] Either way, the Constitutional Court has repeatedly affirmed transformative constitutionalism as being core to South African society and its legal regime.[14] Transformative constitutionalism thus provides a generally-accepted collective paradigm that guides the interpretation and implementation of the Constitution.

There are some evident key features of the transformative project found in the text. The Constitution declares the State to be founded on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.[15] Accordingly, these values should inform all interpretations of the Bill of Rights,[16] and value-driven, substantive legal reasoning is preferred over formalism.[17] Additionally, in following the Constitution's dialogic openness to global human rights discourse,[18]

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[8] Klare (1998) *SAJHR* 150.

[9] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA (CC) 674 para 44.

[10] Davis & Klare (2010) *SAJHR*.

[11] Preamble and s 8 (Application of the Bill of Rights) of the Constitution.

[12] Klare (1998) *SAJHR* 152.

[13] T Roux "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?" (2009) 20 *Stell LR* 258; Moseneke (2002) *SAJHR*; Langa (2006) *Stell LR* 351; Brickhill & Van Leeve (2015) *Acta Juridica*.

[14] See, for instance, *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC) para 165; *Print Media South Africa v Minister of Home Affairs* 2012 6 SA 443 (CC) para 97; *Hassam v Jacobs NO* 2009 5 SA 572 (CC) para 28; *AB v Minister of Social Developm*ent 2017 3 SA 570 (CC) para 126; *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC).

[15] S 1(c) of the Constitution.

[16] S 39(1)(a).

[17] Liebenberg *Socio-Economic Rights* 44-51, 97-101.

[18] 101-117.

interpretations must also consider international law.[19] Foundational principles of the constitutional order, such as the rule of law,[20] constitutional supremacy[21] and justiciability,[22] aim to give effect to these guiding values. South Africa's legislation, common law, legal culture and private legal relationships are thus all subordinate to the Constitution. These may not inhibit the goals of the Constitution. On the contrary, they should in fact be tools to achieve those goals, producing a single coherent system of law founded on human rights.[23]

The legal transformation project can thus be broadly stated as follows: all law and legal concepts should be radically reconsidered and reworked in light of a transformative interpretation of the Bill of Rights. No legal relationship between any parties – public or private – can exist if it is unconstitutional, and the laws on which these rely must be actively brought into conformity with the Constitution.[24] Phrased in terms of Etienne Mureinik's concept of a shift from a "culture of authority" to a "culture of justification",[25] no law or exercise of state power falling within the Constitution's wide

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[19] S 39(1)(b) of the Constitution. Chapter four will focus on these international law considerations.

[20] S 1(c) of the Constitution.

[21] S 2 of the Constitution.

[22] See the "culture of justification" conceived in E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31; Currie & De Waal *Bill of Rights Handbook* 7.

[23] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See for instance s 8(3) of the Constitution, which portrays legislation and the common law as the primary means of regulating the human rights obligations of non-state entities such as companies.

[24] For a selection of academic literature pertaining to the application of the Bill of Rights to private law, see: Liebenberg *Socio-Economic Rights* 43-62; D Bilchitz "Do Corporations Have Positive Fundamental Rights Obligations?" (2010) *Theoria* 1; D Bhana "The Horizontal Application of The Bill of Rights: A Reconciliation of Sections 8 And 39 of the Constitution" (2013) 29 *SAJHR* 351; DM Chirwa "In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights" (2008) 8 *AHRLJ* 294; J Katzew "Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008" (2011) 128 *SALJ* 686; S Liebenberg "The Application of Socio-Economic Rights to Private Law" (2008) *TSAR* 464; M Pieterse "Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa" (2003) 14 *Stell LR* 3; Davis & Klare (2010) *SAJHR*.

[25] Mureinik (1994) *SAJHR*.

ambit of applicability has any prior justification.[26] Any such law or power must be capable of justification in terms of the Constitution, including the Bill of Rights.

The following part considers the implications of these general features of transformative constitutionalism in the specific context of companies and company law.

### 3 2 2 The Bill of Rights, economic relations and company law

As discussed, any economic relation that ultimately relies on some form of legal enforcement by the State is, in fact, a legal relation.[27] Economic entities such as companies, and economic relations of contract or property, are at their base sourced in the law, which itself is wholly subject to the Constitution. Thus, in the context of companies specifically, the Companies Act 71 of 2008 ("the Companies Act" or "the Act") and the common law – to the extent compatible with the Constitution and Bill of Rights – describe the nature, structure, capacities and duties of, and relations between, the company and all persons involved in its running. The dominant "atomistic" approach to companies and company law has also already been noted.[28] However, transformative constitutionalism emphasises that the past is often deeply connected to ongoing abuses in the present, and that these cannot be undone without adopting a

[26] In terms of the Bill of Rights, this generally manifests in the two-stage approach of Bill of Rights litigation: Currie & De Waal *Bill of Rights Handbook* 26-27. Procedural questions such as the correctness of forum aside, an applicant need only show that power has been exercised in contravention of their rights, with the rights themselves being interpreted as broadly as possible. Thereafter, it is for the respondent to show either that there was no such contravention, or that any contravention was justifiable in terms of s 36 of the Constitution. *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) para 82; *S v Zuma* 1995 2 SA 642 (CC) para 21; *S v Makwanyane* 1995 3 SA 391 (CC) paras 100-102. In the context of socio-economic rights, Liebenberg argues that the burden of justification should lie with the State as far as possible, to ensure that the marginalised are not placed at a further disadvantage: Liebenberg *Socio-Economic Rights* 199-203. On the relationship between justification and democracy, see T Roux "Democracy" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2006) 10-34 – 10-37; *S v Makwanyane* 1995 3 SA 391 (CC) paras 155-156; ss 2 and 36 of the Constitution.

[27] Chapter two parts 2 3 and 2 4.

[28] See chapter two part 2 4.

critical contextual approach to the origin and functioning of the law.[29] Thus, the Bill of Rights and its effects on companies and company law cannot be considered in the abstract, but must rather be placed in historical context. It is thus necessary to consider the systemic dimensions of South Africa's political economy for a transformative interpretation of the Bill of Rights to be reached. The real-world history and influence of companies has already been introduced,[30] and a brief systemic consideration of companies in the context of transformative constitutionalism will be performed here.

The systemic legal-economic aspect of apartheid oppression, its close ties to violent political repression under the regime, and its ongoing political-economic legacy today have been well documented.[31] Colonialism and formal apartheid, while founded on "white"[32] supremacy, relied on both racist and economically exploitative relations. These relations relied on legal enforcement and state power, and manifested in the

[29] Langa (2006) *Stell LR* 352-354. This observation was forcefully made in *Daniels v Scribante* 2017 4 SA 341 (CC). The judgments of Madlanga J (writing for the majority; paras 1-2 and 13-31) and Froneman J (concurring; paras 109-144, particularly para 110) make it clear that historical context is a crucial part of constitutional interpretation – the past is a critical factor in considering what amounts to an abuse of human rights. Cameron J (concurring) cautions that there are dangers in judges' writing of history, but firmly concludes that judges should not use the "indeterminacies of history and the inevitable incompleteness and partiality of its telling" to limit justice mechanisms (paras 145-155). See also P de Vos "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution" (2001) 17 *SAJHR* 1.

[30] See chapter one part 1 1 1.

[31] See most generally H Wolpe "Capitalism and Cheap Labour-Power in South Africa: From Segregation to Apartheid" (1972) 1 *Economy and Society* 425; D Masondo "Capitalism and Racist Forms of Political Domination" (2007) 37 *Africanus* 66 68-72; S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002); B Bunting *The Rise of the South African Reich* (1969); JM Modiri "Law's Poverty" (2015) 18 *PER* 224.

[32] Race and racial categories are historical and unscientific social constructs that arbitrarily group humans together for the purpose of discrimination: see generally A Smedley & BD Smedley "Race as Biology is Fiction, Racism as a Social Problem is Real: Anthropological and Historical Perspectives on the Social Construction of Race" (2005) *American Psychologist* 16; R Fine "The Antimonies of Neo-Marxism" (1990) 11 *Transformation* 92 92-94; Bunting *Reich* 159-160, 189. Any reference to race or racial categories in this study is made with this in mind, and racial categories are referred to with quotation marks.

political and socio-economic oppression of the majority of South Africans.[33] In other words, this systemic oppression was a result of the undemocratic imposition of the law by State force. Far-reaching state power and policy could thus serve specific minority private business interests, and came at the expense of the public interest and the private interests of the majority. Importantly, this system was produced by both the judiciary and legislature, and relied on both common law and statute. For instance, contract law validated forced labour contracts as "consensual", and delict, property and succession laws ensured that wealth accrued and remained in minority circles.[34]

Company law could not operate without this broader economic framework of property rights and contract, and was itself constructed to allow those with property to benefit at the expense of those without.[35] The law gave shareholders wide control over economic decisions, exercised through directors only they appointed, with State force upholding the private decisions of how the shareholders chose to use their increasingly-concentrated property.[36] Control over capital was thus shielded from any direct political or economic control by workers, communities or "black" people generally. Economic regulation such as company law accordingly became a means of privatising democratic control. Limited liability and the State's strong support for the

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[33] SE Merry "Law and Colonialism" (1991) 25 *Law & Society Review* 889; Moseneke (2002) *SAJHR* 315. Makgetlaneng demonstrates that oppressive "white" supremacist policies in South African history have tended to align with economic interests, leading to an enduring connection between racial and class oppression: S Makgetlaneng "How Capitalism and Racism Continue to Shape the Socio-Economic Structure of South Africa" (2016) 46 *Africanus* 1. In fact, if Afrikaner nationalism was largely a reaction to the oppression of Afrikaners by the British, it was ultimately a result of British economic imperialism: Bunting *Reich* 9-12; FA van Jaarsveld *The Afrikaner's Interpretation of South African History* (1964) 1-21.

[34] See very generally AJ van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1994) 11 *SAJHR* 169 181-187; Davis & Klare (2010) *SAJHR* 443-445; J Van der Walt "Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation Between Common-Law and Constitutional Jurisprudence" (2001) 17 *SAJHR* 341 361-362; J van der Walt "Piracy, Property and Plurality: Re-Reading the Foundations of Modern Law" (2001) *TSAR* 52.

[35] DL Ratner "Corporations and the Constitution" (1980) 15 *University of San Francisco LR* 11; K Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

[36] The development of company law in the late 19th and early 20th century in the United States led to similar observations, even when quite apart from the specific oppressive context of South African formal apartheid: FS Cohen "Transcendental Nonsense and the Functional Approach" (1935) 35 *Colum LR* 809; FS Cohen "Dialogue on Private Property" (1954) 9 *Rutgers LR* 357; MR Cohen "Property and Sovereignty" (1927) 13 *Cornell LR* 8; Brandeis J's dissent in *Louis K Liggett Co v Lee* (1933) 288 US 517 564-581.

business sector further reduced risks for capital investment. Throughout, a wealthy "white" minority was able to enforce, influence and develop the common law in their favour, as the judicial system was significantly more accessible to them than to poor people and "black" people generally.[37] Businesses thus benefited significantly from the State force and law of colonialism and formal apartheid.[38]

Transformative constitutionalism aims to address this complex political-economic legacy of colonialism and formal apartheid. The present Constitution rejects the old formalist division between socio-economic and political rights, and considers these rights to be interrelated and indivisible.[39] In other words, given the interconnectedness of power relations, people whose socio-economic rights remain unrealised cannot meaningfully be said to be politically free.[40] Democracy, human dignity, equality and freedom are thus intended to penetrate every facet of South African society, not only the sphere of parliamentary politics.[41]

Accordingly, as formal apartheid was both a racial and economic system, the constitutional transition requires more than rectifying racial discrimination. It also requires economic restructuring, including the restructuring of company regulation. In short, the democratic transition will be incomplete if the economic system is left unchanged. Even if non-racialism were the sole purpose of the transition, non-racialism itself remains inherently incompatible with structural patterns of economic exploitation,

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[37] See Truth and Reconciliation Commission of South Africa *Report vol 4* (1998) 93-108; J Dugard "The Judicial Process, Positivism and Civil Liberty" (1971) 88 *SALJ* 181; C Albertyn & DM Davis "Legal Realism, Transformation and the Legacy of Dugard" (2010) 26 *SAJHR* 188.

[38] Truth and Reconciliation Commission of South Africa *Report vol 4* (1998) 187; Terreblanche *Inequality* 153-156, 239-250; S Terreblanche *Lost in Transformation* (2012) 37-58; Bunting *Reich* 369-400; see generally Pistor *Capital*.

[39] "Indivisibility" refers to the inability to separate the enjoyment of rights from one another: the enjoyment of one right inherently depends on the enjoyment of all other rights. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 153.

[40] D Bilchitz "Are Socio-Economic Rights a Form of Political Rights?" (2015) 31 *SAJHR* 86; Moseneke (2002) *SAJHR* 318; Liebenberg *Socio-Economic Rights* 9, 51-54.

[41] Langa (2006) *Stell LR* 352-353.

both past and present.[42] Race is a social construct which must be (and was in fact) unnaturally created and imposed by force. Once imposed, it "rationalises" the continuation of such force.[43] In South Africa, this was achieved through the mechanisms of colonialism and formal apartheid. This was partly done by aligning "blackness" with poverty and childlike lack of agency, while "whiteness" was equated with wealth and the right to rule.[44] Thus, racism was used to justify exploitative economic policy, while economic policy simultaneously reproduced racial constructs.[45] Accordingly, any maintaining of formal apartheid patterns of economic exploitation in the present not only amounts to economic oppression, but is also inherently racist, in that it forcefully perpetuates the construct of "blackness". Similar relations can be

[42] Studies of inequality make plain that the "black" majority remains overwhelmingly poor today; the ongoing general correlation between poverty and "blackness" is well-documented: Stats SA *Poverty Trends in South Africa* (2017) 18-20; A Orthofer "Wealth Inequality – Striking New Insights from Tax Data" (2016) *Econ 3x3* 1 4-6. Estimates of direct broad-based "black" ownership on the Johannesburg Stock Exchange ("JSE") range from 0.6% to 10%, with the JSE itself stating it to be at 3%; indirect "black" investment is at 13%, and "white" investment at 22%: K Wilkinson "Guide: Black Ownership on SA's Stock Exchange – What We Know" (29-08-2017) *Africa Check* <https://africacheck.org/factsheets/guide-much-sas-stock-exchange-black-owned-know/> (accessed 25-09-2019). Collectively, these statistics indicate that JSE ownership is very highly concentrated, and far from being meaningfully under the control of the poor "black" majority.

[43] See generally Smedley & Smedley (2005) *AmPsych*; Fine (1990) *Transformation* 92-94; Bunting *Reich* 159-160, 189.

[44] The confluence of race and class patterns today is thus not merely a vestige of formal apartheid: race in South Africa has always been sociologically tied to class. Even Afrikaner nationalism has its roots in the racial subjugation of Afrikaner people by the British: K Norman *Into the Laager* (2016) 61-71; Van Jaarsveld *Afrikaner's Interpretation* 1-32; C van der Westhuizen *Sitting Pretty: White Afrikaans Women in Postapartheid South Africa* (2017) 36-41; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 116-132; Terreblanche *Inequality* 264-275.

[45] For a recent case illustrating the link between class and race, see *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC), especially paras 53 and 90. The Equality Court held in this case that the allocation of police human resources in the Western Cape discriminated unfairly against "black" and poor people on the basis of race and poverty.

observed between the economic system and the construct of gender,[46] and even more critically between the economic system and the intersection of racial and gender-based oppression.[47]

The legacy of this legal-economic structuring extends to the present day, and is arguably a primary cause of contemporary socio-economic problems. For instance, Terreblanche observed that democratic political control has not sufficiently been extended over the laws governing the economy.[48] He described four modern structural "poverty traps" produced by the system:[49] high unemployment with low economic

[46] See s 1(c) of the Constitution, which founds its values of non-racialism and non-sexism on equal grounds; Liebenberg *Socio-Economic Rights* 27. Men are consistently less likely to suffer poverty than women: Stats SA *Poverty Trends in South Africa* (2017) 56-57. While no broad statistics exist for South Africa, it is likely that genderqueer people suffer from higher rates of poverty as well, based on trends for abuse they suffer: Triangle Project *Levels of Empowerment Among LGBT People in the Western Cape* (2006) 34-41; OUT LGBT Well-Being *The Crimes Against Lesbian, Gay, Bisexual and Transgender (LGBT) People in South Africa* (2016).

[47] See generally K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan LR* 1241; J Conaghan "Intersectionality and the Feminist Project in Law" in E Grabham, D Cooper, J Krishnadas & D Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (2008) 21-48; Van der Westhuizen *Sitting Pretty* (2017).

[48] Terreblanche *Transformation* 101-115; Terreblanche *Inequality* 95-149. Madlingozi's describes the present dispensation as being neo-apartheid, with little meaningful structural change from formal apartheid: T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 123 *Stell LR* 123. Modiri declares that "the fact of Apartheid refuses to fade": JM Modiri "Towards a '(Post-)apartheid' Critical Race jurisprudence: 'Divining our racial themes'" (2012) 27 *SAPL* 231 237.

[49] 30,4 million South Africans – 55,5% of the population – were living in poverty in 2015: Stats SA *Poverty Trends in South Africa* (2017) 18-20.

growth;[50] deep institutionalised inequality of wealth,[51] power, and opportunities, coupled with racial prejudices; chronic community poverty due to disrupted social structures amongst the oppressed; and the vicious cycle produced between poverty and crime/violence/ill health.[52] These traps make it structurally impossible for poor "black" people, and poor people generally, to escape their circumstances without owning meaningful capital.[53] Critically, it is by State force and law that this system is maintained.[54]

Concentrated capital structures such as companies, on the other hand, continue to benefit from the legacy of this undemocratic economic structuring, and this undemocratic structuring itself continues into the present.[55] Human rights violations by companies can thus often be viewed as the systemic result of a history of anti-democratic and narrowly concentrated shareholder/director control. The awareness and subsequent transformation of these patterns of wide private control should accordingly constitute a core concern of the Bill of Rights. Practically, for instance, a transformative approach to company regulation in the mining sector would note the sector's economic and political role in the creation of the migrant labour system and the development of racist land distribution and planning, as well as the sector's exploitation of "black" workers and communities under formal apartheid.[56] Specific human rights violations related to mining today are then properly seen as systemic vestiges of undemocratic ordering, with examples including the environmental and

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[50] Terreblanche wrote this in 2002, but unemployment reached 27.7% in 2017 – the highest on record since 2003: Stats SA "Quarterly Labour Force Survey – QLFS Q1:2017" (01-06-2017) *Statistics South Africa* <http://www.statssa.gov.za/?p=9960> (accessed 25-09-2019).

[51] The wealthiest 10% of South Africans possess 90-95% of all South African wealth, while the highest-earning 10% receive 55-60% of all income. The poorest 50% of South Africans earn only 10% of all income, and have no measurable wealth: A Orthofer "Wealth Inequality – Striking New Insights from Tax Data" (2016) *Econ 3x3* 1 4-6. South Africa has the highest GINI coefficient in the world: World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xv. See also Stats SA *Poverty Trends in South Africa* (2017) 18-20; K Wilkinson "Guide: Black Ownership on SA's Stock Exchange – What We Know" (29-08-2017) *Africa Check* <https://africacheck.org/factsheets/guide-much-sas-stock-exchange-black-owned-know/> (accessed 25-09-2019); B Cousins "Land Reform in South Africa is Failing. Can it be Saved?" (2017) 92 *Transformation* 135.

[52] Terreblanche *Inequality* 25-49.

[53] Terreblanche *Transformation* 101-115.

[54] Modiri (2015) *PER*; Pistor *Capital*.

[55] See generally Terreblanche *Transformation* (2012).

[56] Bunting *Reich* 518-519.

health damage by mining operations in Mpumalanga;[57] Lonmin's ongoing failure to provide its workers with adequate housing in Marikana, despite their legal commitment and obligation to provide such housing;[58] and the number of yearly industry deaths – at 73 in 2016, spiking to 90 in 2017, and only dropping to 81 in 2018.[59] South Africa's "history is omnipresent when one applies the Constitution"[60] to the evaluation and transformation of these abuses.

These critical and historical insights must also inform analyses of company theory itself. As noted in the previous chapter, there are debates concerning legal theories of the company, such as concession theory and contract theory. These theories have prominent implications for whether (and to what degree) the State can regulate companies on principle. For instance, contract theory stresses that companies should be permitted full private autonomy, and that the State's role is merely to support this autonomy. Concession theory, on the other hand, observes that companies have always been subject to public control via the law, per legal principle, and that arguments of "privateness" are accordingly unsupported and undemocratic. As has been noted in this part, such arguments of "privateness" were core to systemic economic oppression in South Africa's history. Judges historically hid economic policy decisions by separating private and public law, following a formalist approach attributed to classical liberalism and its reception in South African law.[61] This gave rise to the shareholder primacy model that continues to form the basis of South African company law.[62] Shareholder primacy and contract theory emphasised the maximal freedom of a specific few in the "private sphere", at the expense of the freedom (public and private both) of the rest of the population. The resulting unequal systemic power relations were thus left unquestioned and shielded from democratic review.[63]

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[57] Centre for Environmental Rights *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* (2016), especially 74.

[58] Amnesty International *Smoke and Mirrors: Lonmin's Failure to Address Housing Conditions at Marikana, South Africa* (2016) 7-10. The report openly links the systemic current abuse to mining practices during formal apartheid.

[59] A Seccombe "Number of Mining Deaths and Injuries Falls in 2018" (01-03-2019) *Business Day* <https://www.businesslive.co.za/bd/companies/mining/2019-03-01-number-of-mining-deaths-and-injuries-falls-in-2018/> (accessed 25-09-2019).

[60] Cameron J in *Daniels v Scribante* 2017 4 SA 341 (CC) para 148.

[61] Liebenberg *Socio-Economic Rights* 59-63.

[62] See chapter two part 2 5 2.

[63] Van der Walt (1994) *SAJHR* 180-181. See also the majority decision of *Du Plessis v De Klerk* 1996 3 SA 850 (CC) paras 1-67, decided under the Interim Constitution.

Moreover, wealthy private business interests have often had immense control over the State itself, such as when the Dutch East India Company and later Cecil John Rhodes governed the Cape.[64] Uncritical company conceptions that favour preserving business interests above legal transformation are thus the sociological products of South Africa's capitalist-colonialist history, and of the rise of neoliberal market fundamentalist ideology.[65]

A critical historical understanding of company theory implies that the "privateness" arguments that facilitated economic oppression in the past cannot serve to oppose transformative public regulation. Further, it can be recalled that a minority of interests in the "private sphere" have historically controlled so-called "public" power for their advancement. Regulation of this power thus does not simply amount to regulation of the "private" sphere, as the sphere has historically been "private" in name only. Rather, regulation amounts to restoring the public's control over state power. Accordingly, while the current corporate governance model adheres to a shareholder primacy model that follows contract theory and the prioritisation of private profit, the concession theory discussed in the previous chapter aligns somewhat more with transformative constitutionalism and the historical reality of South African companies.

The current doctrinal position in South Africa appears to move beyond the formalist debate between contract and concession theory, however – at least in principle if not yet in application.[66] As a matter of principle, all law is subject to the Constitution and the Bill of Rights.[67] Thus, all company regulation and all actions taken by companies are equally subject to the Bill of Rights. Transformative constitutionalism accordingly

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[64] Terreblanche *Inequality* 51-65; Terreblanche *Transformation* 39-77. See also Brandeis J's dissent in *Louis K Liggett Co v Lee* (1933) 288 US 517 564-581. The use of public power and policy for narrow private gain has continued into the present; see most prominently G Marinovich *Murder at Small Koppie: The Real Story of the Marikana Massacre* (2016); PL Myburgh *The Republic of Gupta: A Story of State Capture* (2017); H van Vuuren *Apartheid Guns and Money: A Tale of Profit* (2017) 489-511.

[65] Terreblanche *Transformation* (2012) 17-36; Terreblanche *Inequality* 239-250; Merry (1991) *LSR*; Masondo (2007) *Africanus* 68-72; S Ashman, B Fine & S Newman "The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development" (2011) 47 *Socialist Register* 174 182; N Faulkner *A Radical History of the World* (2018) 438-446.

[66] Van der Walt (1994) *SAJHR* 203-205; Davis & Klare (2010) *SAJHR* 411; Van der Walt (2001) *TSAR* 52; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 343; Liebenberg *Socio-Economic Rights* 28-42.

[67] Ss 2 and 8(1) of the Constitution; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

aligns with the claim that private relations are always subject to democratic public control in law.[68] This public control is foundationally that of the Constitution, and secondarily that of statute and common law. Accordingly, the legislature and courts are always able, in principle, to regulate companies as they see fit. Indeed, they are obliged to limit the benefits of the company structure where the law of companies, or any area of law concerning companies, infringes on the rights of natural persons.[69]

This transformative constitutional approach has practical implications for how companies themselves are conceived, which in turn has consequences for how the regulation of companies is approached. For instance, following a critical and historical interpretation, a juristic person is simply any entity other than a natural person that the law deems as a legal subject, and to which it chooses to attach certain rights and duties.[70] In other words, juristic personhood arises from the law; it does not occur naturally. It thus cannot be claimed that personhood must automatically be legally protected, as personhood itself is rather the result of legal protection. The question of whether such protection and personhood should arise at all necessarily relies on public policy considerations other than the mere existence of that protection. Most fundamentally, this means that the legal recognition of a company is (and must be) subject to public control via the law, as it is only by the law that such recognition can arise.[71] Arguments of "privateness" which depict the personhood of a company as naturally occurring, or as automatically requiring protection in the law, are thus an inversion of the legal reality. This transformative constitutional reading ensures that company law is the result of democratic control – which in South Africa is grounded in the Bill of Rights – rather than allowing existing economic power relations to determine the contours of the law.

In sum, transformative constitutionalism views the fundamental restructuring of economic relations of wealth and control – such as company regulation – as being

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[68] Davis & Klare (2010) *SAJHR* 435-449; Cohen (1935) *Colum LR* 809; Cohen (1954) *Rutgers LR* 357; Cohen (1927) *Cornell LR* 8; MR Cohen "The Basis of Contract" (1933) 46 *Harv LR* 553; S Woolman "Application" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2005) 31-32 – 31-33.

[69] Ratner (1980) *USFLR* 20-21.

[70] H Kruger & A Skelton (eds) *The Law of Persons in South Africa* (2012) 13, 17-18; MR Cohen "Communal Ghosts and Other Perils in Social Philosophy" (1919) 16 *Journal of Philosophy, Psychology and Scientific Methods* 673 678-684; Cohen (1935) *Colum LR* 812-813.

[71] J Dewey "The Historic Background of Corporate Legal Personality" (1926) 35 *Yale LJ* 655.

crucial to meaningful non-racial democracy and political freedom.[72] The influence of the Bill of Rights on company, property and contract law can thus be seen as part of a broad systematic response to systemic economic-racial oppression.[73] The notion that considerations of human interests must be the primary guide in regulating companies is also not wholly novel to historical conceptions of company theory. On the contrary, it finds support in concession theory's notion of public control over the law. In essence, companies and any laws concerning companies are subject to the Bill of Rights.

Transformative constitutionalism thus takes an openly systemic approach to South Africa's legal landscape. However, as noted,[74] the present literature on business and human rights law appears to align more with an "atomistic" approach, focusing primarily on companies as individuals rather than as part of a wider political-economic system that can or should be altered. As will be seen, human rights law doctrine concerning non-state entities as a whole also prefers an atomistic approach to some degree.[75] In failing to scrutinise and critique South Africa's fundamental political-economic structure, the atomistic approach thus risks inadvertently entrenching

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[72] Biko emphasised that the destruction of "whiteness" and "blackness", and the achievement of non-racialism, would require that all structural oppressive relations between all people be undone; that all people have equal democratic agency; and that "black" people accordingly regain their confiscated human dignity: S Biko *I Write What I Like* (2005) 21-25, 27-32, 48-50. See generally Modiri (2012) *SAPL*.

[73] Brickhill & Van Leeve (2015) *Acta Juridica* 148-151. This view was shared by the broader anti-Apartheid movement. During the address at Cape Town after his release, Nelson Mandela stated firmly that:

> "There must be an end to white monopoly on political power, and a fundamental restructuring of our political and economic systems to ensure that the inequalities of apartheid are addressed and our society thoroughly democratised."

NR Mandela "Remarks by Nelson Mandela in Cape Town on 11 February 1990 After His Release From Victor Verster" (11-02-1990) *The Nelson Mandela Foundation* <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv03445/04lv04015/05lv04154/06lv04191.htm> (accessed 25-09-2019). The struggle movement generally believed that undoing overtly racist laws but maintaining the economic status quo would be tantamount to maintaining minority domination: Makgetlaneng (2016) *Africanus* 1 6-7. On the African National Congress' shift away from its historic policies of economic restructuring, see Terreblanche *Inequality* 84-149; Ashman, Fine & Newman (2011) *Socialist Register*.

[74] See chapter 2 part 2 4.

[75] See part 3 3, below.

colonial capitalist and neoliberal ideology.[76] The alignment of aspects of the global human rights project with neoliberalism in particular has been criticised.[77] So too has been the failure to scrutinise the core role of the State and law in socio-economic and political oppression.[78] Conceptually, then, a shift towards a critical and systemic approach to companies is needed if the Bill of Rights is to achieve its full transformative potential.

Accordingly, while it is clear that companies and company law are subject to the Bill of Rights in principle, the pertinent question rather concerns how precisely the Bill of Rights interacts with companies and company law. In other words, it is possible that the present doctrinal approach to companies does not fully align with transformative constitutionalism's systemic conception of companies. It is thus necessary to consider jurisprudence on the interactions between the Bill of Rights and companies, and the mechanisms by which the Constitution is able to transform company law. Thereafter, an analysis of the jurisprudence will follow, as guided by transformative constitutionalism and its insights. As will become apparent, while the principle is that companies and company law are subject to the Bill of Rights, the current application of the Bill of Rights is far more complex and unclear.

## 3 3 The application of the Bill of Rights to company law

This section will broadly summarise the ways in which the Bill of Rights interacts with companies and company law. This predominantly concerns the topic of "horizontality", wherein human rights obligations are imposed on persons (including companies) in various ways, rather than resting solely on the State. There is an immense body of literature on this issue, and many contrasting interpretations and

[76] Merry (1991) *LSR*; A Rafudeen "A South African Reflection on the Nature of Human Rights" (2016) 16 *AHRLJ* 225. Hyper-individualism and the erasure of systemic factors is especially core to neoliberal market fundamentalist ideology: Terreblanche *Inequality* 239-250; Terreblanche *Transformation* 17-36; Masondo (2007) *Africanus* 68-72; Ashman, Fine & Newman (2011) *Socialist Register* 182; Faulkner *History* 164-187, 268-274, 438-446.

[77] See, for instance, S Moyn *Not Enough: Human Rights in an Unequal World* (2018) 212-220; P Joseph *The New Human Rights Movement: Reinventing the Economy to End Oppression* (2017).

[78] Pistor *Capital*; Terreblanche *Transformation* 31-90.

analyses.[79] This section will focus on describing and then analysing existing legal doctrine pertaining to the application of the Bill of Rights to companies.

The application of the Bill of Rights to companies takes place via four broad mechanisms, corresponding to sections 7(2), 8, 39(2) and 239 of the Constitution.[80] As will be seen, these often overlap, and there is little doctrinal clarity on the intersection between them. These approaches should thus not be seen as mutually exclusive, but rather as co-existing in complex relations with each other.

### 3 3 1 Section 7(2): The State's duty to respect, protect, promote and fulfil

Section 7(2) of the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This provision supports the substantive rights in the Bill of Rights, and means that, for instance, courts must ensure that effect is given to the substantive rights.[81] However, the provision is also justiciable on its own,

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[79] As a broad sample, see: Woolman "Application" in *Constitutional Law*; M Tushnet "The Issue of State Action / Horizontal Effect in Comparative Constitutional Law" (2003) 1 *IJCL* 79 79; S Woolman & D Davis "The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and the Final Constitutions" (1996) 12 *SAJHR* 361 399-400; DM Chirwa "The Horizontal Application of Constitutional Rights in a Comparative Perspective" (2006) 10 *Law, Democracy and Development* 21; Davis & Klare (2010) *SAJHR*; Bhana (2013) *SAJHR*; C Sprigman & M Osbourne "Du Plessis Is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" (1999) 15 *SAJHR* 25; Van der Walt (2001) *SAJHR* 341; Liebenberg *Socio-Economic Rights* 317-376; N Friedman "The South African Common Law and the Constitution: Revisiting Horizontality" (2014) 30 *SAJHR* 63; S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *SALJ* 762; AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 107; A Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *SALJ* 611.

[80] Authors use the terms "direct/indirect application", "direct/indirect remedies" and "horizontal/vertical application" when referring to these approaches, but their definitions of each can vary or contradict each other considerably. To avoid confusion, these terms will not be used here; reference will rather be made to the underlying principles themselves.

[81] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 20.

without necessary reference to a specific implicated right.[82] Importantly for the context of human rights infringements committed by companies, section 7(2) requires the State to protect against infringements by non-state entities.[83] Critically, regardless of the identity of the duty-bearer of a right – whether they be State or non-state – section 7(2) indicates that the State must always enforce that duty, and vindicate the right. The State is always under a duty to protect rights, even where the substantive rights obligation falls on a company.

An important case in this regard is *Glenister v President of the Republic of South Africa*[84] ("*Glenister*"). In this case, the Constitutional Court considered whether the Bill of Rights placed an obligation on the State to create and maintain an independent anti-corruption unit. In the event, the majority judgment did find such an obligation.[85] The Court held that, while there is no express duty to establish an independent unit, the constitutional scheme as a whole, when coupled with international law inputs, implies a State duty to deal effectively with corruption.[86] The Court reasoned that corruption actively "undermines" democracy[87] and "disenables" the State from meeting its duty to respect, protect, promote and fulfil human rights as per section 7(2) of the Constitution.[88] As a result, for the Bill of Rights and the section 7(2) duty to be

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[82] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) paras 189-201; L Du Plessis "Interpretation" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 32-121 – 32-125; S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 33-6. The implications of s 7(2) for international law are considered more fully in chapter 4; the present focus is how the Bill interacts with the law and non-state entities generally. Importantly, however, s 7(2) requires the State to respect, protect, promote and fulfil the rights in the Bill whether they arise through s 8(1) or s 8(2): Liebenberg "The Interpretation of Socio-Economic Rights" in *Constitutional Law* 33-57 – 33-59; Liebenberg *Socio-Economic Rights* 82-87, 332-335.

[83] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 27; AJ van Der Walt "The State's Duty to Protect Property Owners v The State's Duty to Provide Housing: Thoughts on the *Modderklip* Case" (2005) 21 *SAJHR* 144.

[84] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC); J Tuovinen "The Role of International Law in Constitutional Adjudication: *Glenister v President of the Republic of South Africa*" (2013) 130 *SALJ* 66.

[85] Paras 160-251.

[86] Paras 175-176.

[87] Para 166.

[88] Para 175.

meaningfully effective and not nugatory, the section must necessarily be read to require the implementation of effective anti-corruption measures.

It is possible in certain cases for companies to directly undermine the State's section 7(2) duty in a manner similar to corruption as considered in *Glenister*. An example would be where companies are organs of state in terms of section 239 of the Constitution. The classification of companies as organs of state will be considered more fully below, but for present purposes it can be noted that any company which can be considered an organ of state would naturally accrue State duties where relevant. Infringement of the Bill of Rights by the company (as an organ of state) would thus be regarded as a direct violation of its own State duty to respect, protect, promote and fulfil human rights. Thus, similar to *Glenister*, the company's infringement would directly undermine the section 7(2) duty, and would have to be guarded against. Another example would be where violations by companies (even as non-state entities) interfere with the State's ability to meet its duty, such as where companies themselves participate in corruption.[89] The companies' infringements in these cases would thus also directly undermine section 7(2), and the State would have to take action to remedy and protect against this. Following *Glenister*, then, section 7(2) must be understood as requiring safeguards against these particular forms of company infringements, which directly interfere with the State's duty and capacity to respect, protect, promote and fulfil rights.

However, outside of these examples, it should be noted that human rights infringements by companies do not automatically "undermine" or "disenable" the State's section 7(2) duty in precisely the same way as corruption does. In other words, companies may conceivably infringe on substantive rights without directly interfering

[89] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* UN Doc E/C 12/GC/24 paras 18 and 20; United Nations Committee on Economic, Social and Cultural Rights *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights* UN Doc E/C12/2011/1 paras 2-3. Improper collusion between the State and non-state entities can be found both before and after the end of formal apartheid: see Myburgh *Republic of Gupta*; Van Vuuren *Apartheid Guns and Money*. See chapter 2 part 2 5 2 for further detail on the blurring of the public/private divide.

with the State's own capacity to respect, protect, promote and fulfil rights.[90] For instance, a company acting as a non-state entity and polluting a community may violate rights, but this does not itself interfere with the State's ability to respect or protect rights as in the case of corruption. Nonetheless, while company infringements do not generally directly undermine the State's ability to meet its section 7(2) duty, the State still has a section 7(2) duty to protect against such infringements and provide remedies for them. In other words, while the State's duty and capacity is not directly interfered with by the company's violation, the company's violation still triggers the State's duty. For company infringements generally, then, the *Glenister* view of section 7(2) as being a necessary gateway to the rest of the Bill of Rights has greater implications for business and human rights matters than the concept of direct "undermining" or "disenabling" does.

The majority of the Court in *Glenister* held on this point that a failure to adequately deal with corruption lays the foundation for the infringement of any number of rights.[91] More directly, it held that any potential infringement of any right, and even the potential infringement of rights as a whole in the abstract, immediately triggers section 7(2).[92] Section 7(2) thus presents a clear justiciable duty that is separate to, but underpins, the application provisions of section 8 and the substantive rights provisions of the Bill of Rights.[93] The Court held that the State must take "reasonable and effective" steps to fulfil this duty, which in some cases may require positive steps to "provide appropriate protection to everyone through laws and structures designed to afford such protection".[94] As the State as a whole is bound, these steps may be taken by the

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[90] This is following the "atomistic" conception of companies as presented in chapter 2 part 2 4. A systemic reading may conceive of capitalist economic relations as inherently hamstringing human rights fulfilment. See for instance D Harvey *A Companion to Marx's Capital* (2019), especially at 50-51, 139-140, 158.

[91] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 198.

[92] Para 200.

[93] See paras 177, 189, 190, 194, 200-201. See also Du Plessis "Interpretation" in *Constitutional Law* 32-121 – 32-125; Liebenberg "The Interpretation of Socio-Economic Rights" in *Constitutional Law* 33-6; *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 17.

[94] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 189, citing *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 44. This latter quote originally referred to a s 8(1) duty, based on the Bill of Rights binding all law and all branches and organs of state. The *Glenister* Court expands this duty into s 7(2) as well.

judiciary[95] as well as the legislature. Where it is most appropriate for the legislature to take these steps, the Court will not be prescriptive of what steps should be taken, provided they are reasonable.[96]

In sum, then, section 7(2) runs parallel to and underpins the substantive provisions of the Bill of Rights. Any substantive rights must be given effect to via section 7(2), but the provision also provides an independently justiciable duty on the State to give effect to the Bill of Rights as a whole, without reference needing to be made to a specific right.

### 3 3 2 Section 8(1) and (2): A perceived dichotomy between approaches centred on the State versus non-state entities

The literature on section 8 application doctrine is complex and conflicting, and so the present exposition and analysis will begin with a preliminary overview of the section's text before considering its interpretation as given by the courts.

Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds organs of state as well as the three primary branches of government. It thus ostensibly gives rise to two implications. First, laws can be directly tested against the Bill of Rights for constitutionality, and any unconstitutional laws must be deemed invalid.[97] Second, the State – a branch of it, or an organ of state – can be under an obligation itself in terms of the Bill of Rights, and may not infringe it by act or omission. Thus, it would be unconstitutional for a legislature to promulgate laws that unjustifiably infringe on human rights, or for a court to interpret legislation or develop the common law in a manner that unjustifiably infringes on fundamental rights. It would equally be unconstitutional to fail to promulgate or reform laws to give effect to rights. Thus, when coupled with the State's duty to respect, protect, promote and fulfil the rights in the Bill of Rights – as part of section 7(2), considered above – the State may be obliged, for instance, to regulate companies and provide remedies for victims. As a result, section 8(1) may implicate companies, but only secondarily – either as a result of the State's own human rights obligations, or as a result of the law being reformed to accord with the Bill of Rights.

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[95] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 20.

[96] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) paras 190-191.

[97] S 172(1)(a) of the Constitution.

Section 8(2) of the Constitution states:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

This provision provides a basis on which to directly bind non-state entities, such as companies, to applicable provisions in the Bill of Rights. Section 8(3) describes the effect of a finding that a right in the Bill of Rights binds a non-state entity. It provides that, to the extent that the right cannot be vindicated through existing legislation, a court must apply or develop the common law to do so.[98] Alternatively, a court may develop common law rules to limit the right in accordance with the Constitution's section 36 limitations clause.[99] In other words, while section 8(2) may bind a company directly, section 8(3) requires courts to use the law – whether existing legislation or through common law development – to give effect to the binding effect established in section 8(2).

However, in the case of *Khumalo v Holomisa*[100] ("*Khumalo*") the Constitutional Court ("the Court") gave an important gloss to section 8(1) and 8(2) of the Constitution. O'Regan J held for a unanimous Court that each of these provisions must be interpreted mindful of the other's existence, and that each must accordingly be given its own independent meaning, distinct from the other.[101] The applicants had argued, on a plain reading of the provisions, that section 8(1) binds all law and the judiciary to the Bill of Rights, and thus could theoretically be used to invalidate any common law regulating non-state entities. However, O'Regan J held that if this interpretation were accorded to section 8(1), then section 8(2) and its attached section 8(3) would have no apparent purpose.[102] She went on to hold that an interpretation that negated a provision of the Constitution was not tenable. Accordingly, the Court held that, as far the common law regulates relations between non-state entities, it is section 8(2) and 8(3) that applies, and not section 8(1).

Further, the Court dealt with the meaning of section 8(2)'s statement that a non-state entity may be bound "to the extent that it is applicable, taking into account the

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[98] S 8(3)(a).
[99] S 8(3)(b).
[100] *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 29-31.
[101] Para 31.
[102] Para 32.

nature of the right and the nature of any duty imposed by the right." O'Regan J interpreted this to mean that, given the "intensity" of the right and its "potential invasion" by non-state entities, there is a human rights obligation on those entities in terms of section 8(2).[103] Ultimately, then, this enquiry centres on the interpretation and content of the right itself, rather than on an interpretation of section 8(2).[104] In other words, the imposition of an obligation on a non-state entity will ultimately turn on how its correlative substantive right is interpreted.

Later, in *Governing Body of the Juma Musjid Primary School & Others v Essay NO*[105] ("*Juma Musjid*"), the Court relied on *Khumalo* to impose a human rights obligation on a non-state entity. The case concerned the common law *rei vindicatio* eviction of a public school from a non-state entity's property. The non-state entity had met the requirements of the *rei vindicatio* – that is, they proved their ownership and that the school had been in possession of the property at the time of proceedings.[106] In terms of the common law, the onus was thus on the school to justify their continued occupation. The Court first held that, following section 8(2) of the Constitution, the non-state entity could not impair the learners' right to basic education.[107] However, the Court held that the application for eviction had still been reasonable in terms of the common law *rei vindicatio* test.[108] The Court did not make reference to section 8(3) or section 36 of the Constitution, and so this was not a case of using the common law to justifiably limit the right. The Court's reasoning is thus not clear. It appears to not bind the non-state entity to the right, in contradiction to its earlier rights analysis. Alternatively, it appears to elevate the common law above the Bill of Rights.

Thereafter, the Court emphasised that, despite the reasonableness of the eviction, the non-state entity's common law property rights could not trump the right to basic education and children's rights. The Court thus appeared to return to its earlier position, holding that the *rei vindicatio* should be developed to respect these rights – implying some degree of invalidity of the law.[109] However, the Court then did not develop the common law in any way, and makes no further mention of the *rei vindicatio*. Finally,

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[103] Para 33. Liebenberg *Socio-Economic Rights* 331; Friedman (2014) *SAJHR*.

[104] *Daniels v Scribante* 2017 4 SA 341 (CC) paras 38 (majority) and 156 (minority).

[105] *Governing Body of the Juma Musjid Primary School & Others v Essay NO* 2011 8 BCLR 761 (CC).

[106] Para 15, and footnote 14.

[107] Paras 54-60.

[108] Paras 61-66.

[109] Paras 65, 71.

the Court ordered that, even given the confirmed priority of the learners' rights over the non-state entity's property rights, it would be "just and equitable" in the circumstances to order eviction in terms of the Court's wide remedial powers.[110] The judgment thus vacillates between binding the non-state entity to the Bill of Rights and vindicating the entity's common law rights, and ultimately settles on the latter. In other words, it is not clear to what extent non-state entities can be bound where they have opposing "private" common law rights. However, *Juma Musjid* has since generally been received to at least mean that non-state entities can be obliged to not interfere with the enjoyment of rights, depending on the interpretation of the right in question.[111] Importantly in the context of companies, the Court holds that the distinction between public and private law has historically "sheltered private power used for public purposes",[112] and it is this that section 8(2) seeks to address.

More recently, the case of *Daniels v Scribante*[113] ("*Daniels*") has emphasised that positive human rights obligations may also be imposed on companies directly via section 8(2). This case concerned the potential positive obligation on a private natural person landowner in terms of the right to security of tenure. Madlanga J for the majority noted that the Court has never denied the possibility of positive human rights obligations being imposed on non-state entities, and in fact saw some potential precedent of such obligations.[114] He held that whether an obligation can be seen as "positive" is a factor when considering whether or not to impose it, but that this positive nature is "not dispositive".[115] The positive nature is primarily relevant when considering the potential financial burden on a non-state entity, whose resources are limited as compared to the public purse.[116] Indeed, the Court formulated a broader test than the

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[110] Paras 73-80.

[111] *Daniels v Scribante* 2017 4 SA 341 (CC) para 47.

[112] *Governing Body of the Juma Musjid Primary School & Others v Essay NO* 2011 8 BCLR 761 (CC) para 54.

[113] *Daniels v Scribante* 2017 4 SA 341 (CC).

[114] Paras 37-54. The Court also noted here that *Juma Musjid* should not be read as denying the possibility of positive human rights obligations on non-state entities.

[115] *Daniels v Scribante* 2017 4 SA 341 (CC) para 41. For deeper critiques of the formalist conception of positive duties, see S Liebenberg "Grootboom and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37; Liebenberg *Socio-Economic Rights* 54-59.

[116] Para 40. As considered earlier, this analysis unduly obscures the role of the State and law in enforcing "private" relations, such as protecting and creating private property and wealth.

mere question of positive duty for determining whether a non-state entity is directly bound by a a right in the Bill of Rights in terms of section 8(2). Thus Madlanga J held:

> "Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the State or organs of state"; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[117]

The Court held that there was, in this case, a positive duty on a natural person towards the rights claimant, via section 8(2). On the facts, this required the owner of a dwelling to allow an occupier to make improvements to that dwelling. The positive duty would arise indirectly, as under the relevant human rights legislation[118] the owner may later be ordered by a court, upon the eviction of the occupier, to provide compensation to the occupier for any improvements made.[119] That is, the occupier's human right to effect improvements would result in a later positive duty to compensate her. However, this result was used to inform the interpretation of human rights legislation,[120] despite the positive duty being examined through binding a non-state entity directly via section 8(2). In other words, despite the reliance on section 8(2) and its implications for binding non-state actors, the outcome was in terms of statute and statutory interpretation – and thus should have implicated sections 8(1) and 39(2). This is an important observation. Normally, the legislature would be able to promulgate legislation that impose burdens on non-state entities as part of its legislative powers. Such an approach was taken earlier in the *Daniels* case,[121] but the explicit reference to section 8(2) here implies that

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[117] Para 39 (footnotes omitted).

[118] S 13 of the Extension of Security of Tenure Act 62 of 1997.

[119] *Daniels v Scribante* 2017 4 SA 341 (CC) para 37.

[120] The Extension of Security of Tenure Act 62 of 1997 is directly called for in the right to security of tenure in s 25(6) of the Constitution. Parliament was thus under a duty to give effect to this right by enacting this Act: *Daniels v Scribante* 2017 4 SA 341 (CC) paras 12-13.

[121] The duty to pay compensation had already been established through interpretation of the relevant legislation without reference to a positive duty. Madlanga J was here noting the respondent's objection that the imposition of a positive duty precludes such an interpretation. He disagreed, and argued that in any case it would be appropriate here to impose a positive duty: paras 37-54.

the legislature may only have such legislative powers where the non-state entity is bound in terms of section 8(2). Moreover, even where the legislature is itself under a human rights duty to promulgate legislation – as was the case here – it seemingly can only impose duties on non-state entities (and meet its own duty) where the non-state entity can also be bound. In other words, the Court introduced the question of severity of duty on non-state entities into the statutory interpretation process. In doing so, it provided a form of defence to non-state entities, allowing such entities to allege that a legislative burden on them to give effect to rights is too strenuous (even without claiming a competing constitutional right). This potentially narrows the State's ability to promulgate legislation that gives effect to rights, and reduces the scope of its own duty.

Ideally, *Daniels* should not be read as providing such a "defence" to non-state entities, but it did open the door to considerations of "privateness" and severity of duty in the process of legislative interpretation. As a result, while *Daniels* found the legislative burden to not be too strenuous, the opposite was found in *Baron v Claytile (Pty) Limited*[122] ("*Baron*"), which followed and relied on *Daniels*. Like *Daniels*, *Baron* made express mention of directly binding a non-state entity (specifically, a company) with a positive obligation to house occupants on its property, but (as in *Daniels*) used this duty to interpret and apply legislation.[123] Despite referring to *Daniels* and its approval of positive duties on non-state entities,[124] the *Baron* Court ultimately ordered an eviction. In interpreting whether the legislation required that the company should continue to house the occupants, the Court stressed the importance of the company's common law right to property and how the occupation had unfairly limited that right.[125] Importantly, this was not a question of the company's competing constitutional right to property, and the balancing and limitation of such a right against the occupants' rights. The section 25 constitutional right to property was not mentioned, and no such balancing was done. In other words, this was not a matter of the non-state entity's human rights being balanced against or shaping the occupants' human rights. Rather, the Court used the non-state entity's duty to shape the content of the occupants' right, by way of statutory interpretation. The confluence of sections 8(1), 8(2) and 39(2) thus allowed for common law rights to dominate the interpretation of legislation intended to give effect to human rights.

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[122] *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC).

[123] Paras 35-37.

[124] Paras 35-37.

[125] Para 49.

The judgments in *Daniels* and *Baron* thus implicate the law itself, interpretation of statute, non-state entities, and the judiciary and legislature all at once. However, there is little clarity as to how these are all implicated, as only the interpretation of statute via section 39(2)[126] and the potential binding of a non-state entity via section 8(2) are referred to explicitly. It is thus not fully clear what role section 8(2) is to play in cases such as these where legislation is involved – an important factor where companies and company regulation is concerned.

A final case to consider in relation to section 8 is *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*[127] ("*Legal Aid Clinic*"). The case concerned a number of micro-lenders exploiting their vulnerable and impoverished debtors by forging or improperly obtaining their consent to judgment when the debtors defaulted.[128] The lenders would also often "forum-shop" for courts far from where the debtors could defend themselves. Emoluments attachment orders were then inevitably given by the clerk of the court, and thus without any judicial oversight, against the debtors' salaries. As a result, the debtors were left wholly unable to support themselves or their families. The Western Cape Division of the High Court saw this as a case specifically concerning companies, namely micro-lenders and debt-collectors, and the human rights abuses committed by them. The court noted that one of the debt collection companies had 150 000 active cases, and that the value of the debts it collected were over R1,5 billion. Concerning the individual experience of those exploited, an illustrative debtor was a farm worker earning R2 420 per month, with emoluments deductions of R1 194. As the sole breadwinner for his family, comprising himself, his wife, five children and a grandchild, he was thus left with a net pay of R1 263. The impact of the infringements by the companies was thus both wide and severe, with very many cases and serious consequences in each.

To decide the matter, the court had to consider the interpretation of the Magistrates' Courts Act 32 of 1944. In particular, it had to assess whether the provision allowing debtors to consent to judgment against them without judicial oversight was

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[126] *Daniels v Scribante* 2017 4 SA 341 (CC) paras 25-29.

[127] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC).

[128] These facts were given in the later Constitutional Court confirmation judgment of *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC) paras 42-57.

constitutionally valid. The court referred extensively to foreign jurisdictions and international human rights instruments, especially those concerning business and non-state entities.[129] Importantly, the court emphasised that the State is under a duty to protect against human rights abuses by third parties, and eliminate legal barriers to remedies.[130] The court thus concerned itself primarily with the State's duty to protect against the infringement of rights by companies. The court specifically noted the rights infringed, namely rights to shelter, health, food, education, housing, family life, human dignity, and access to courts.[131] The High Court ultimately found the provision of the Magistrates' Court Act 32 of 1944 to be constitutionally invalid insofar as it allowed written consent to judgment, and as a remedy severed that portion of the provision.

The case proceeded to the Constitutional Court for confirmation of the invalidity and remedy.[132] The Constitutional Court did not refer to section 7(2) or 8, instead focusing solely on statutory interpretation and the assessment of the statute's validity.[133] It nonetheless reached a similar conclusion on the invalidity of the statute to the High Court, although differing in remedy. The Constitutional Court held that the statute was invalid to the extent that it did not provide for judicial oversight, and ordered that such provisions be read in.[134]

*Legal Aid Clinic* does not refer explicitly to sections 7(2) or 8 of the Constitution.[135] Nonetheless, the case presents a number of interesting approaches to the application of the Bill of Rights where companies are involved. Firstly, the assessment and declaration of invalidity implies a reliance on section 8(1) and the binding effect of the

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[129] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC) paras 42-48, 67-70. The influence of international law on Bill of Rights interpretation will be considered fully in chapter four.

[130] Paras 67-70.

[131] Paras 40-41, 51, 80.

[132] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC).

[133] Paras 164-203, 129-149.

[134] Paras 204-212.

[135] The court does refer to s 39(1)(a), which allows courts to consider foreign law in the interpretation of statute: *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC) para 42. The court also relies on international law – implying s 39(1)(b), which requires courts to consider international law. The case's reference to international law is considered in chapter 4.

Bill of Rights on all law.[136] Secondly, the emphasis on the court's duty to protect seems to imply a reliance on section 7(2), as well as imply a reference to section 8(1)'s binding of the State. Thirdly, the case emphasises the infringement of rights by non-state entities, referring in particular to abuses by companies, and thus hints at companies themselves being under an obligation to respect rights in terms of section 8(2). Like *Daniels,* then, *Legal Aid Clinic* implicates the State, law, and companies simultaneously, although it places a greater emphasis on the State's duty to protect.[137] The promising implications of this approach will be considered in a later analysis.

### 3 3 3 Section 39(2): Avoiding the direct binding effect of section 8

Section 39(2) of the Constitution requires every court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common and customary law. There are numerous interpretations of this provision, both by academics and the courts.[138] Importantly, the section does not provide for the imposition of Bill of Rights obligations on non-state entities, as per section 8(2). Rather, it requires the interpretation of legislation or the development of the common law to promote the normative value system of the Bill of Rights.[139] It thus does not directly give rise to enforceable human rights obligations for state or non-state entities, nor does it provide for the direct testing of the law against the Bill of Rights, but it may nonetheless lead to the indirect human rights regulation of companies.[140] In other words, the non-state entity may come under a secondary obligation in terms of the law being interpreted or developed, rather than (for instance) directly under a substantive Bill of Rights obligation via section 8(2).

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[136] Para 85.

[137] See the discussion of s 7(2), part 3 3 1 above; *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 27; Van Der Walt (2005) *SAJHR*.

[138] See, for instance: *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Thebus v S* 2003 6 SA 505 (CC); Liebenberg *Socio-Economic Rights* 322-326; Davis & Klare (2010) *SAJHR* 415-431; Woolman (2007) *SALJ* 762; Woolman "Application" in *Constitutional Law* 31-144 – 31-146; Van der Walt (2008) *CCR* 107; Friedman (2014) *SAJHR*; Bhana (2013) *SAJHR*; Fagan (2010) *SALJ*.

[139] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) paras 54-56.

[140] See for instance *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) paras 87-91, referring to *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* 2012 6 SA 249 (CC) paras 52-55.

The distinction between direct binding via section 8 and the indirect human rights regulation via section 39(2) is important, as it gives rise to material differences in the effects of the Bill of Rights. The most prominent of these is that the rights in the Bill are enforceable and are given substantive meaning by the Constitutional Court, thereby distinguishing them from the broader value-based analyses for which section 39(2) is often used.[141] As section 39(2) merely requires the promotion of the spirit, purport and objects of the Bill of Rights – and not the advancement of discrete substantive rights – the use of section 39(2) allows for substantive rights analyses to be avoided. Indeed, prior to *Daniels*, authors had observed that the confusion regarding the application of section 8 to non-state entities has resulted in courts tending to avoid that section altogether, and instead using section 39(2).[142] As a result, legislation can be interpreted or the common law developed without reference being made to the substantive provisions of the Bill of Rights. This approach has been criticised as defeating the purposes of the Bill of Rights, and as rendering section 8(2) nugatory.[143] In particular, as the substantive rights form the core of the Bill of Rights, an interpretation of section 39(2) that avoids those rights has been argued as untenable.[144] Certain authors have nonetheless asserted that section 39(2) may well have the same effect as substantive rights, especially if substantive rights are used to reciprocally inform the meaning of constitutional values.[145] Rather than resolve the doctrinal tension between sections 8 and 39(2), the High Court has in one case assumed that the outcome will be the same regardless of which route is followed.[146]

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[141] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) paras 54-56; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 3 SA 280 (CC) para 21; Woolman (2007) *SALJ* 771. It may be possible that s 39(2) can be given substantive meaning rather than simply being broadly value-based: Davis & Klare (2010) *SAJHR* 428-431. However, substantive application of rights to disputes cannot be avoided, and should generally occur outside of s 39(2). That section, for its part, is primarily useful in matters that implicate no rights at all: Friedman (2014) *SAJHR* 74-78, 81-83.

[142] See Woolman (2007) *SALJ* 762; Woolman "Application" in *Constitutional Law* 31-77 – 31-100, 31-144 – 31-146. See for instance *Barkhuizen v Napier* 2007 5 SA 323 (CC).

[143] Liebenberg *Socio-Economic Rights* 322-326; Currie & De Waal *Bill of Rights Handbook* 45-48.

[144] See for instance Woolman (2007) *SALJ* 769-770; Woolman "Application" in *Constitutional Law* 31-144 – 31-146; Friedman (2014) *SAJHR* 74-78, 81-83.

[145] Woolman "Application" in *Constitutional Law* 31-10, 31-55 – 31-56; Friedman (2014) *SAJHR* 82.

[146] *Bondev Midrand (Pty) Ltd v Madzhie* 2017 4 SA 166 (GP) para 30.

Authors have also argued that there are benefits to preferring section 39(2), such as allowing courts to engage with applicable legislation and developing a constitutionally consistent interpretation of the legislation in question, thereby displaying more respect for the legislature.[147]

Where non-state entities such as companies are concerned, however, section 39(2) is sometimes used by courts alongside the other sections considered in this chapter. For instance, *Daniels* referred to section 39(2), and explicitly linked it to substantive rights and duties analysis.[148] The same occurred in *Makate v Vodacom (Pty) Ltd*,[149] where the interpretation of a statute (namely the Prescription Act 68 of 1969) was expressly linked to substantive rights in evaluating the victim's contract with a company. Nonetheless, the potential for avoidance of substantive rights is compounded where companies are involved, as – in addition to section 8(1) and 8(2) – companies are at the nexus of both legislation and common law. Company matters may thus trigger section 39(2) on either or both of those fronts, and allow for avoidance of substantive rights. Accordingly, as with the other constitutional provisions considered in this chapter, this is a developing area, and some clarity is needed in the interaction between section 39(2) and substantive rights application, especially where companies are concerned.

### 3 3 4 Section 239: Companies as organs of state

Section 239 of the Constitution allows for a company to qualify as an organ of state if it exercises a public power or performs a public function in terms of any legislation.[150] Critically, companies qualifying as organs of state are subject to the obligations applicable to the State in terms of sections 7(2) and 8(1). Thus, insofar as it constitutes an organ of State in terms of section 239, the company ceases to be treated as a non-state entity. As concerns the application of the Bill of Rights, there is a clear distinction between a company acting as part of state machinery and its acting as a non-state entity. This difference is implied by the inverse of section 8(2): where a company is an organ of state, it is bound regardless of the nature of the right and its correlative duty.

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[147] Van der Walt (2008) *CCR* 118-119.

[148] *Daniels v Scribante* 2017 4 SA 341 (CC) para 25.

[149] *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) paras 87-90.

[150] Woolman "Application" in *Constitutional Law* 31-100 – 31-103; G Quinot & P Maree "Administrative Action" in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 65 82-85; *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) (minority) paras 186-194.

The considerations of whether to impose an obligation on a non-state entity, as considered by the *Khumalo* and *Daniels* cases, above, are irrelevant. Rather, the enquiry would centre on whether the company qualifies as an organ of state. Where the company is found to be an organ of state, even state-specific Bill of Rights provisions, such as those requiring progressive realisation of rights within available resources,[151] would bind the company.[152]

The difference produced by being an organ of state should not be overstated, however. It should be remembered that, to fulfil its own obligations, the State itself may require companies to progressively fulfil rights. For instance, in keeping with its obligations to promote rights in terms of sections 7(2) and 8(1), the State may legislate that certain companies take steps to provide housing for its employees. Alternatively, companies may be under such obligations even as non-state entities. As discussed earlier, the *Daniels* case implies that even positive obligations may be imposed on companies as non-state entities, and these non-state obligations may take a similar form to the progressive realisation obligations of the State.

In cases where companies are treated as non-state entities, section 8(3) would prompt section 36, and thereby function as a check: where a company has a smaller scope and fewer resources, and such burdens may lead to undue hardship for the company, it may be justifiable to limit the rights that demand specific human rights regulation. This consideration of scope and impact is very similar to the requirement of public function, as required when treating companies as organs of state in terms of section 239.

In other words, the same conclusion may conceivably be reached whether one binds the State, the company as a non-state entity, or the company as an organ of state

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[151] See ss 26(2) and 27(2) of the Constitution, requiring the progressive realisation within available resources of the rights to housing, health care, food, water and social security.

[152] Organs of state are also required to exercise their public power or perform their public function in terms of legislation. For companies, the Companies Act would be the legislation in terms of which they function. That such legislation was envisaged by the definition is clear from a memorandum of the Technical Refinement Team of the Final Constitution's drafting process. The memorandum explains that the qualification that the power and function be public was intended to allow churches established in terms of legislation to be excluded. For companies, then, the focus is not on the legislation requirement, but on the public power/function requirement: Final Constitution Technical Refinement Team *Memorandum re: Proposed Definition of "Organs of State"* (1996).

itself. The different approaches simply shift questions of company scope and impact to different parts of the evaluation.

That the line between "influential non-state entity company" and "organ of state company" is blurred is evidenced by the case of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)*.[153] The judgment seemingly hovers between imposing obligations on the company concerned as an organ of state and as a non-state entity.[154] The company under consideration is treated explicitly as an organ of state at some points, with direct reference to section 8(1) of the Constitution.[155] However, at other points, it is treated as a non-state entity, with explicit reference made to *Juma Musjid* and section 8(2) of the Constitution, and to the company as a "private party" rather than as a public organ of state.[156] The confusion is clearest when the Court holds that "[where] an entity has performed a constitutional function [as an organ of state] for a significant period already … considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all."[157] The Court reintroduces questions of private autonomy and attempts to justify imposing state duties on a "private party". However, it had already confirmed that the private party was acting as an organ of state, and so questions of "privateness" were irrelevant. Nonetheless, the judgment ultimately rested on the organ of state characterisation. The confusion between the company's characterisation as non-state entity and organ of state was later repeated in the related case of *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)*.[158]

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[153] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC).

[154] Paras 49-67. See M Finn "AllPay Remedy: Dissecting the Constitutional Court's Approach to Organs of State" (2016) 6 *Constitutional Court Review* 258 267-268.

[155] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) paras 49-64.

[156] Paras 65-67.

[157] Para 66.

[158] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 3 SA 335 (CC) paras 40-41, 48.

### 3 3 5 Analysis of the various Bill of Rights application approaches to companies and human rights

The jurisprudence and literature on sections 7(2), 8, 39(2) and 239 of the Constitution are immensely varied and often contradictory. It is thus necessary to perform some degree of synthesis analysis across these sections to understand how the Bill of Rights affects companies.

The dichotomy between section 8(1) and 8(2) is the primary source of difficulty with the Bill of Rights' application doctrine, and of debate on the subject.[159] Firstly, it is necessary to start with *Khumalo*, as the central case on section 8(2).[160] *Khumalo* implies that the "public" common law – where the dispute concerns a vertical relationship between a non-state entity and the State – can and should be tested against the Bill of Rights via section 8(1). However, the "private" common law, involving common law rules regulating the "horizontal" relationship between non-state entities, must follow section 8(2) and (3). In other words, the nature of the parties determines the nature of the evaluation. This is an outcome at odds with the doctrine of objective unconstitutionality, which holds that constitutionality should not turn on which parties are before the Court.[161] Further, as far as the common law is concerned, the conclusion from *Khumalo* is that section 8(1) and section 8(2) are mutually exclusive: they do not apply at the same time. There is thus an apparent dichotomy between binding the State (or testing the law), and binding non-state entities. Moreover, *Khumalo* clearly implies that if it is possible to bind a non-state entity through section 8(2), this must be preferred to taking the section 8(1) routes of directly testing the common law against the Bill of Rights, or of obliging the legislature or judiciary to reform the law. The implication of this is that the scope of section 8(1) is determined by the scope of section 8(2): where section 8(2) can potentially be seen as applicable, section 8(1) does not apply. In other words, if a section 8(2) enquiry could conceivably be performed, it must be. This is the case even if the section 8(2) enquiry ultimately concludes that the non-state entity

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[159] See Woolman "Application" in *Constitutional Law*; Tushnet (2003) *IJCL* 79; Woolman & Davis (1996) *SAJHR* 399-400; Chirwa (2006) *LDD*; Davis & Klare (2010) *SAJHR*; Bhana (2013) *SAJHR*; Sprigman & Osbourne (1999) *SAJHR*; Van der Walt (2001) *SAJHR*; Liebenberg *Socio-Economic Rights* 317-376; Friedman (2014) *SAJHR*; Woolman (2007) *SALJ*; Van der Walt (2008) *CCR*; Fagan (2010) *SALJ*.

[160] For an extensive analysis and critique of *Khumalo*, see Woolman "Application" in *Constitutional Law* 31-47 – 31-73.

[161] Woolman "Application" in *Constitutional Law* 31-49 – 31-52.

should not be bound. Section 8(1) will still not apply: where a non-state entity is implicated, the matter "[does] not involve the state or an organ of state".[162]

*Khumalo* dealt with the common law specifically, and so it is not immediately clear whether the dichotomy between section 8(1) and 8(2) extends to legislation. Some case law indicates that legislation can always be directly tested for validity via section 8(1) in all cases, whether the legal relationships concerned are between a non-state entity and the State ("public") or between non-state entities themselves ("private").[163] The implication is thus that, where legislation is considered, the law is directly subject to the Bill of Rights and the State's obligations under the Bill are determinative. There is thus no question of directly binding a non-state entity via section 8(2). In *Daniels* and *Baron*, however, the Court invoked section 8(2) where legislation affecting relationships between non-state entities was concerned, rather than rely on section 8(1).[164] In these cases, the Court considered the binding of non-state entities via section 8(2) expressly, and subsequently used the conclusions drawn to establish the meaning of the statute. In other words, these cases imply that legislation regulating "horizontal" relationships implicates the direct binding of non-state entities via section 8(2). Again, the Court does not consider the question of the binding of the State and/or law via section 8(1).

As concerns company law, difficulties arise in the close links between public and private law, in the relevance of both statute and common law to company regulation, and in the significant role of the State in enforcing the legal relations that constitute the economy. These difficulties have already been discussed to some degree, but bear elaboration in this particular context. Practically, the three central problems for company law arising from the *Khumalo* dichotomy are the following. First, it is uncertain whether company law reform should rely on State obligations and the direct testing of the law via section 8(1), or on the obligations of companies themselves via section 8(2). Company law relies on clear public regulation and enforcement by all branches of state, has wide public economic implications, involves "private" non-state entities, and arises from common law and statute. It is not clear where company law fits into the hard categories *Khumalo* creates from "public" common law, "private" common law,

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[162] *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 46.

[163] Woolman "Application" in *Constitutional Law* 31-7, 31-11, 31-48 – 31-51. See, for instance, *Daniels v Campbell* 2004 5 SA 331 (CC).

[164] *Daniels v Scribante* 2017 4 SA 341 (CC) paras 38-48; *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC) paras 12, 35-37.

and legislation. It is also in any case not evident why the common law should be handled differently to legislation, when section 8(1) binds "all law" and both the legislature and judiciary equally.[165] It is further difficult to see why, whenever companies are implicated, the State's role in enforcing the legal regime supporting companies and company activities should not be scrutinised and tested against the Bill of Rights via section 8(1). The same applies for why the law (and regulatory scheme) itself should not be scrutinised and tested via section 8(1).[166]

Second, the difficulty with the section 8 dichotomy has, as noted previously, given rise to a greater reliance on section 39(2) to avoid questions of the direct application of the Bill of Rights to non-state entities.[167] Instead of binding the State or relevant law directly to substantive rights via section 8(1), or binding non-state entities directly to substantive rights via section 8(2), courts simply interpret legislation or develop the common law following the normative system of the Bill of Rights. The relationship between section 39(2) and sections 8(1) or 8(2) is thus uncertain. This uncertainty is again compounded by the simultaneous relevance of both the common law and statute to companies, as section 39(2) applies to both the interpretation of legislation and the development of common law. As mentioned above, this is coupled with the uncertainty of how sections 8(1) and 8(2) may have differing application depending on whether common law or statute is implicated. It is thus unclear which of the aforementioned approaches to applying the Bill of Rights to companies should be used when, and why. It can be noted, however, that the preference for section 39(2) reduces the scope of both parts of section 8, as those parts cease to apply where section 39(2) is used. This may have serious implications for the extent to which substantive rights considerations feature in matters involving companies. Where section 39(2) is preferred, and where it only prompts a consideration of broader constitutional values, the use of substantive rights might be avoided as well. Such an approach would make it impossible to use

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[165] Woolman "Application" in *Constitutional Law* 31-47 – 31-73.

[166] The shielding of the role of the State and law from scrutiny supports the "atomistic" approach to companies and human rights, as presented in chapter two part 2 4. Focusing on the interactions and overlap between the State, law and non-state entities would lend itself more to a systemic approach.

[167] See for instance *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Thebus v S* 2003 6 SA 505 (CC); *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) paras 87-91. Liebenberg *Socio-Economic Rights* 322-326; Woolman (2007) *SALJ*; Friedman (2014) *SAJHR*; Currie & De Waal *Bill of Rights Handbook* 45-48.

substantive rights to test the law or bind the State or non-state entities. This is a significant loss, as it neglects the substantive content given to rights by courts in jurisprudence, and reduces the potential of this content to inform and transform the law. It also potentially excludes the content given to rights by international instruments, as considered in the following chapter.

Third, the State has a duty to respect, protect, promote and fulfil the Bill of Rights in terms of section 7(2) of the Constitution. As with section 39(2), the interaction between section 7(2) and the section 8 dichotomy is not firmly established. *Khumalo* can be read to imply that, where companies are concerned, obligations under the Bill of Rights only arise by assessing whether a company should be directly bound via section 8(2). As noted above, any assessments of the law and State obligations under section 8(1) are seemingly precluded. If paired with section 7(2), *Khumalo* means that the State only has a duty to respect, protect, promote and fulfil rights where a company is found to be bound by a right in the Bill of Rights in terms of section 8(2). In other words, the State's duties under section 7(2) are contingent on the existence of a binding obligation on the company in terms of section 8(2). The scope of the State's obligations (and thus of the substantive rights themselves) accordingly turns on whether the company is bound, and to what degree. The sphere of application of the Bill of Rights is thus noticeably diminished, as it must always first be shown that the non-state entity in question can be bound. This paradigm may give rise to some undesirable consequences. As discussed, it is contrary to transformative constitutionalism to shield the law and state action from scrutiny, and especially so to cloak the law and state action in a garb of "privateness".[168] Further, as companies are still primarily viewed as "private" entities, there may be a conceptual reluctance to interfere too heavily with them or impose duties on them. A human rights enquiry then turns primarily on what would seem reasonable to expect from companies in their pursuit of "private" self-gain, instead of focusing on the implications of the rights themselves. This approach subjects human rights to private economic interests, such as profit, and amounts to a conceptual privatisation of human rights obligations.[169] The public role of the State and the law is reduced to solely ensuring that the company fulfils the obligations deemed appropriate for it as a private entity. This is a subversion of constitutional supremacy; of the origin

[168] See part 3 2 2, above.

[169] This is again related to the present "atomistic" approach to companies and human rights, as compared to the systemic approach: see chapter 2 part 2 4.

of companies in law subject to the Bill of Rights; of the substantive reasoning and reform envisioned by transformative constitutionalism; and arguably of the spirit and content of sections 7(2) and 8(1) themselves.

Practically, following *Khumalo*, where a company is involved and the common law of companies is implicated, it should thus solely be asked whether the company should be bound via section 8(2) – section 8(1) does not apply. The common law of companies cannot on this approach be directly tested for validity against the Bill of Rights, and no branches or organs of state are bound. If there is an obligation on the State to regulate the company or provide a remedy, it arises only if it is found that the company itself should be bound, with the State's obligation arising indirectly from its section 7(2) duty to protect, respect, promote and fulfil rights. The State and law are thus not directly bound, and the enquiry turns entirely on whether the company should be bound. Following *Khumalo*, then, the Bill of Rights only applies to all law and binds state institutions insofar as the matter does not concern the possible binding of a non-state entity (at least as far as the common law is concerned). Paradoxically, the Bill of Rights thus only binds the law and state institutions sometimes: where a non-state entity is implicated, the matter "[does] not involve the state or an organ of state".[170]

*Juma Musjid* follows *Khumalo*, in that the common law was not scrutinised or developed once the non-state entity was found to be bound, whereafter that entity's property rights were prioritised. *Daniels* appeared to similarly confuse section 8(2) with the interpretation of a statute, and arguably narrowed the legislature's ability to regulate non-state entities by implying that such regulation can only occur where the non-state entity is found to be bound under a section 8(2) duty themselves. *Baron* followed the approach in *Daniels*, and accordingly could prioritise the company's common law property rights when interpreting the content of the occupants' human rights. That is, *Baron* shaped the human rights of the victims according to the perceived severity of the burden on the non-state entity. This is evidently a reversal of a more transformative approach, where legislation is interpreted to give effect to rights foremost, and the common law of property is made subordinate to that rights-centric legislation. In sum, *Daniels* inadvertently led to an approach that centres on the duties and ordinary rights of the non-state entity, rather than on the human rights of the victims – as evidenced by the outcome in *Baron*. Moreover, as noted earlier, these cases thus take *Khumalo* even further. It appears that section 8(2) is generally to be preferred in any matter

[170] *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 46.

between non-state entities, such as where a company allegedly violates the human rights of another non-state entity, whether statute or common law is implicated. As with *Khumalo*, the explicit analysis of the validity of a law, or of binding the State, is precluded, and it becomes seemingly necessary to prove that any statutory burden on a company can first be established through section 8(2). In all these cases, there is also little indication of how and where section 8(3) is to be used to give effect to (or limit) the substantive rights in question.[171]

However, *Daniels* also holds important progressive implications for the imposition of positive duties on companies. Specifically, section 8(2) allows for positive duties to be imposed on companies after consideration of the factors listed above. Here, transformative constitutionalism and the historical context of companies and their wider sphere of economic and political influence and control must be borne in mind. A systemic (rather than atomistic) approach to understanding the origin and nature of wealth and economic relations may be insightful here. Companies also tend to have far greater resources than individuals, and so considerations of resource limitations are somewhat diminished as concerns positive obligations.

As concerns companies as organs of state, there is also some degree of confusion as to whether they lose their nature as non-state entities once they qualify as part of the State. Specifically, there is insufficient clarity on the overlap between directly binding a company as an organ of state, and directly binding them as a non-state entity. This is because the Bill of Rights provisions binding companies as organs of state can apply at the same time as provisions binding companies as non-state entities, and with regard to the same facts. Clarity is also needed on the implications of companies qualifying as organs of state, and the extent to which they are under state duties as a result – for instance, to what degree they attract the State duty to respect, protect, promote and fulfil in terms of section 7(2), and the subsequent impact on their pursuit of private profit.

In sum, there is extensive confusion in numerous areas where the Bill of Rights and companies are concerned. First, concerning when precisely the law is to be (or can be) scrutinised and invalidated. Second, concerning when the State is to attract duties, and whether in terms of section 7(2), 8(1), or both. Third, concerning whether the State's duties preclude companies' duties, and vice-versa. Fourth, concerning when and why companies are to be bound directly in terms of 8(2). Fifth, concerning whether

[171] See for instance Friedman (2014) *SAJHR* 84-86.

section 8(2) obligations trump companies' common law rights (such as property). Sixth, concerning whether the State can regulate companies even where section 8(2) duties on the company are not clearly established. Seventh, concerning when companies are to be seen as organs of state, to what extent, and with what implications. Eighth, concerning when legislation is to be interpreted or the common law developed through section 39(2) rather than by imposing direct obligations. Finally, concerning whether there is a difference in any of these approaches in how statute and common law are handled, considering how companies exist at the intersection of the two.

There are several consequences stemming from this lack of clarity and consistency. First, it is difficult for victims to reliably seek relief given the confusion in the field. Second, if each of these constitutional provisions are applied separately, lacunae are likely to arise. For instance, if section 8(1) and 8(2) are to be applied exclusive of each other, and a company is found not to be bound under section 8(2), the State and law escape section 8(1) scrutiny. Similarly, even if the company is bound and a claim succeeds against it, wider systemic failures in the regulatory regime could escape scrutiny if section 8(1) is ignored. Third, the present state of application doctrine exhibits a reluctance to scrutinise the systemic role of the State and law in facilitating corporate power and profit.[172] This aligns it with an atomistic conception of companies. It thus risks ideologically favouring and preserving corporate interests over victims' rights, and it thereby risks being insufficiently transformative.[173]

There are nonetheless some promising developments in recent case law. *Legal Aid Clinic* – in not referring to section 7(2) or section 8 – implies a plurality of obligations. It is implied that companies, the State and the law are all bound at the same time, and can all infringe rights. These rights were infringed simultaneously by the companies, by the legislative and judicial regime that facilitated their infringement, and by the State

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[172] See generally Pistor *Capital,* especially 1-22; Truth and Reconciliation Commission of South Africa *Report vol 4* (1998) 187; Terreblanche *Inequality* 153-156, 239-250; Terreblanche *Transformation* 37-58; Bunting *Reich* 369-400; N Chomsky *Who Rules The World?* (2017) 147-161.

[173] See chapter 2 part 2 4, and part 3 2 2 of this chapter, above; Rafudeen (2016) *AHRLJ*. On the judicial tendency towards non-transformative interpretation in practice despite progressive transformative theory, see generally M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383; J Van der Westhuizen "A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy" (2008) 8 *AHRLJ* 251 260-262; Davis & Klare (2010) *SAJHR* 413-415.

(of which the court was a part) as long as it did not meet its duty to protect against violations.

Similarly, *Glenister* appears to move beyond the dichotomised and formalist approach to non-state entities and violations. Even before considering whether the State or a non-state entity is bound by the Bill of Rights, the mere possibility of a right being infringed is enough to trigger the State's section 7(2) duty.[174] Without necessarily having to specify a particular right, and thus without having to specify the duty-bearer, the State is required take reasonable measures to prevent and remedy infringements of rights generally.[175] This extends to infringements committed by companies. Reasoning by analogy, this aspect of *Glenister* implies that company regulation as a whole must be rendered systemically consistent with the Bill of Rights, and that a case-by-case approach to specific reported violations of specific rights would be insufficient. This places the focus on rights and rights-holders, even where it can only be said that the Bill of Rights as a whole would be systemically infringed if the State failed its section 7(2) duty. That is, it is not strictly necessary to refer to particular substantive rights or rights-holders. It is rather necessary only to show that retaining the present regulatory scheme would negatively affect rights more generally. The core of this approach is thus the State's duty to systemically protect and supply an effective remedy for all potential rights-holders and violations. This lends itself well to a systemic (rather than atomistic) approach to companies and human rights. The role of the State and law is stressed, and steps taken by the State would have to amount to a sufficiently reasonable and effective systemic intervention. Similarly, as both the judiciary and legislature are implicated, the focus is shifted to deciding what the most effective means to meet the duty would be, whether by a range of judicial remedies, legislative reform**,** or both. The chosen remedy may then happen to implicate the State, its law, and companies all at once. This moves towards substantive reasoning rather than formalism, and places the protection of rights at the foundation of the analysis.[176]

Thus, these two cases point to a potential rights-centric approach to companies and human rights, rather than a complex and formalistic duty-bearer-centric approach. The question of rights infringement is answered first, while more formalist questions of

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[174] Liebenberg "The Interpretation of Socio-Economic Rights" in *Constitutional Law* 33-57 – 33-59; Liebenberg *Socio-Economic Rights* 82-87, 332-335.

[175] This supports the conception of the Bill of Rights approach as ultimately being state-centric from the view of international law. This will be considered further in chapter 4 part 4 2.

[176] See *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC) para 36.

whether the duty in the case should be considered to be imposed on non-state entities (in terms of section 8(2)) or the State and its law (in terms of section 8(1)) are deprioritised. Emphasis is also put on the State's constant, underlying and independent duty to respect, protect, promote and fulfil rights in terms of section 7(2). Simply put, all parties and the law implicated in the infringement are bound by the right. The specific duties on these bound parties and the implications for the law are merely the result of a policy decision, that being the effective remedy for the infringement. In *Legal Aid Clinic*, for instance, the remedy chosen fulfilled the State (including the court's) duty to protect, enforced companies' duty to not infringe rights, and harmonised the legislative-judicial regulatory regime with the Bill of Rights.

A remedy that follows a rights-centric analysis is thus multicentric in nature where duty-bearers are concerned, in that it simultaneously implicates the State, the law and any non-state entities. It also applies regardless of whether a company is itself considered an organ of state or a non-state entity, as it centres on the right and not the duty-bearer. The nature of any ensuing obligations as "positive" or "negative" is also irrelevant, with the focus being on the effectiveness of the remedy rather than the classification of the burden. Whether (and how) legislation or common law are affected is a result of the remedy, rather than a formalist determinant of how the analysis proceeds. If a right is to be limited, it can only be done through the law and a rights limitation analysis, as required by section 36 of the Constitution. This allows for the broadest and most generous interpretation of the right, followed by a strict analysis of justifiable limitations. It thus accords with the two-step approach to human rights that is a prominent feature of transformative jurisprudence and the culture of justification.[177]

This approach further aligns with section 8(3), which requires that courts use the ordinary law to vindicate rights where a non-state entity is bound – whether by using legislation or by applying or developing the common law.[178] Similarly, section 8(3) holds that courts may use the common law to limit rights, provided such limitation is in accordance with section 36. Both the rights vindication and rights limitation

[177] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) para 82; Currie & De Waal *Bill of Rights Handbook* 26-27; Mureinik (1994) *SAJHR*; *S v Zuma* 1995 2 SA 642 (CC) para 21; *S v Makwanyane* 1995 3 SA 391 (CC) paras 100-102, 155-156; Liebenberg *Socio-Economic Rights* 199-203; Roux "Democracy" in *Constitutional Law* 10-34 – 10-37.

[178] L Smit (2016) "Binding Corporate Human Rights Obligations: A Few Observations from the South African Legal Framework" 1 *Business and Human Rights Journal* 349.

mechanisms of section 8(3) therefore point toward the simultaneous binding of the law and non-state entities.

Overall, then, this rights-centric approach provides a harmonious interpretation and implementation of the various constitutional provisions discussed, giving them all meaningful and effective content centred on rights fulfilment. It also inherently facilitates deep systemic legal reform following the supremacy of the Constitution and Bill of Rights, and does not allow ordinary economic-legal conceptions or structures to predominate the analysis. In addressing systemic concerns holistically, it also maintains the transformative notion of a single system of law founded on human rights.[179] It would thus strongly benefit from a fuller study and conception of the systemic approach to conceptualising companies.

The rights-centric approach – while still in need of development – aligns well with transformative constitutionalism's focus on the substance of the Bill of Rights and the meaningful transformation of the law. Substantive rights become determining factors, rather than former perceived divisions between the public and private spheres, positive and negative obligations, or the economy and law. In this vein, placing the focus on the Constitution foremost, Pretorius AJ for a unanimous Court aptly observed in *Baron*:

> "But often adherence to a strict classification of horizontal or vertical application of the Bill of Rights obfuscates the true issue: whether, within the relevant constitutional and statutory context, a greater "give" is required from certain parties. Any 'give' must be in line with the Constitution. This Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations."[180]

To conclude this analysis, there is thus a need for far greater doctrinal clarity on how the Bill of Rights applies where companies and company law are concerned. However, there is the possibility of a move past difficult and contradictory doctrine towards a multicentric approach focused on substantive rights and effective remedies for violations. Moreover, this approach can be extended beyond companies, to other business structures and actors, as considered in the following part.

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[179] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See chapter three part 3 2.

[180] *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC) para 36. As discussed in the previous part, the Court in *Baron* nonetheless prioritised the company's common law property rights over the human rights of the victims in the case.

### 3 4 The Bill of Rights and other business structures/actors

This study focuses specifically on the implications of human rights for companies. Companies are able to secure greater investment due to their separate juristic personality granting limited liability for investors. They are thus able to operate on a large scale, with a far greater potential impact on human rights. Accordingly, the particular structure of the company merits special study. However, many of this study's findings may be applicable to other forms of business as well, which, in the South African context, include close corporations, business trusts, partnerships and sole proprietorships. Further, there are many business actors involved in the running of the company. These will be considered very briefly, along with their potential relevance to the study.

Close corporations are regulated by the Close Corporations Act 69 of 1984. Importantly, instead of shareholders and directors as in a company, close corporations can have up to ten natural persons as members, and these both control and direct the close corporation.[181] Like companies, corporations are separate juristic persons to their members, and their members receive the benefits of limited liability.[182] This results in a business form better suited to smaller undertakings between members in close interaction. The Act makes provision for the continued operation of any close corporations that existed when the Act came into effect (although no new close corporations can be formed).[183]

Business trusts, partnerships and sole proprietorships do not create a separate juristic person with separate liability (unlike companies and close corporations). Business trusts are established in terms of common law.[184] Being trusts, they distinguish between trust beneficiaries and trustees – a similar distinction as that between shareholders and directors for companies. Trustees must manage trust assets and liabilities to the financial benefit of the beneficiaries, or they may be liable for trust mismanagement.[185] The trustees formally own the trust's assets and liabilities

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[181] Ss 24 and 28-30 of the Close Corporations Act 69 of 1984.

[182] S 2 of the Close Corporations Act 69 of 1984; *Ebrahim v Airports Cold Storage (Pty) Ltd* 2008 6 SA 585 (SCA) para 15.

[183] S 8 and schs 2 and 3 of the Act.

[184] *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) para 15. However, they are partly regulated by (for instance) the Trust Property Control Act 57 of 1988.

[185] D Davis & W Geach (eds) *Companies and Other Business Structures in South Africa* 3 ed (2013) 387-401**.**

in their own name, although these cannot be mingled with the trustees' personal assets and liabilities.[186] Similar to trusts, formal business partnerships are concluded and regulated through the common law.[187] Each partner to the partnership contract must financially contribute to the partnership, and the partners must agree to jointly run the business for their joint financial gain.[188] Finally, a business may be run as a sole proprietorship, where the proprietor owns assets and conducts business in their own name, and is thus solely personally liable for any business losses.

As noted in this chapter,[189] the Bill of Rights' application provisions state that it applies to "all law"[190] and that it binds "natural and juristic persons", if applicable.[191] The Bill of Rights thus does not distinguish its application based on the form of the particular business structure. The same act performed by different business structures or business actors could equally violate rights and attract obligations. Large companies may be more likely to have a severe impact on human rights due to their larger scale and operational capacity. However, it must be noted that, if the same infringements were performed by a partnership or sole proprietor, the partners or proprietor would likely be legally bound in the same way. Thus, the form of a business structure does not, by itself, attract or diminish human rights duties under the Bill of Rights. In other words, a business operation cannot be structured in such a way that it avoids human rights duties that would otherwise be imposed on it by the Bill of Rights. As concerns human rights, then, the difference between a company and a partnership, for example, would primarily lie in tailoring human rights regulation to suit the specific business structure. In other words, a company and partnership would not be bound differently by the Bill of Rights, but the implications of the Bill of Rights for each would differ. While the principles of separate juristic personality for companies could be regulated to protect human rights, for instance, there are no such principles to regulate for partnerships.

The Bill of Rights' application provisions, cited above, also imply that natural and juristic persons may be simultaneously bound in respect of a violation. Importantly, despite the principle of separate juristic personality, South African companies are a

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[186] *Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal* 1974 1 SA 404 (N).

[187] Davis & Geach (eds) *Companies* 367-383.

[188] *Joubert v Tarry and Company* 1915 TPD 277 280-1.

[189] Part 3 3 2, above.

[190] S 8(1) of the Constitution.

[191] S 8(2) of the Constitution.

legal fiction and thus can only act by attributing some human conduct to them.[192] It is thus likely that – where a company is bound by the Bill of Rights – persons involved with the company are also effectively bound, according to the scope of their respective duties and/or powers. In other words, if a human act attributable to the company amounts to a rights violation, that human act itself is likely a violation as well, and both company and human are effectively bound by the right. The practical benefit of such a multicentric approach is that it allows effective remedies to be found and ordered against any relevant parties. This further provides incentives for each to comply with their own human rights duties within the particular business structure, even if the structure itself is a separate juristic person. Where applicable, rights would thus likely bind directors, managers and employees, but may also effectively bind anyone whose business interactions with the company cause or facilitate violations. For instance, shareholder resolutions could not infringe on human rights, and this would effectively mean both the company and the shareholders are bound by the Bill of Rights. It could also be argued that the shareholders themselves are in any case bound to not act to infringe rights, and that a shareholder resolution is an act by the shareholders. This multicentric binding could possibly also extend to external contractors who contribute to rights violations committed by the company. Again, this approach facilitates a systemic (rather than atomistic) and transformative intervention where companies are concerned, centring on rights and effective remedies foremost. Formalist questions of legal personality and duty-bearers are deprioritised in favour of rights vindication.

In essence, the particular structure or juristic personality of a company does not necessarily determine who is bound by a right where business structures are concerned. Instead, the transformative rights-centric analysis and multicentric remedy approach implies moving beyond the formalist conception of business actors. It implies instead a multicentric assessment of human rights obligations that can involve any persons, natural or juristic, to the extent that they are involved in business operations affecting rights. Indeed, all of the numerous business structures and actors considered in this section may be implicated by the Bill of Rights in principle. Thus, while this study focuses primarily on the implications of the Bill of Rights for companies and company law, it must be noted that these implications likely extend in some way to other business structures and actors, and to the laws concerning them.

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[192] *Consolidated News Agencies v Mobile Telephone Networks* 2010 3 SA 382 (SCA); s 332 of the Criminal Procedure Act 51 of 1977.

## 3 5 Conclusion

This chapter has considered the application of the Bill of Rights to matters concerning companies and company law. This assessment relied on a study of the roots of the Bill of Rights in transformative constitutionalism generally, followed by a contextual and systemic consideration of transformative constitutionalism's insights for companies and company law. These have been used to inform and guide the analysis that followed.

There are several constitutional provisions which have been used where companies and non-state entities are concerned. Firstly, section 7(2) places a duty on the State to respect, protect, promote and fulfil the substantive rights in the Bill of Rights, and is also independently justiciable. Secondly, section 8 allows for the State, law and non-state entities to variously be bound by the Bill of Rights. Thirdly, section 39(2) requires courts, when interpreting legislation or developing the common law, to do so within the normative framework of the Bill of Rights. Fourthly, companies can qualify as organs of state in terms of section 239 of the Constitution. The interactions and intersections between the various understandings of these are often not clear or contradictory in jurisprudence. However, there are some promising developments in recent cases, indicating an early move towards a more transformative and rights-centric approach with multicentric duties and remedies.

Finally, this chapter has considered the potential extension of these implications to non-company business structures and actors. While presently unclear, it appears that a move past a formalist approach to business structures – again focusing on rights and an effective remedy – may be preferable here. If that is the case, the implications for how the Bill of Rights affects companies would extend to all actors involved in companies – such as directors, employees, shareholders and external contractors – as well as to other types of business structures.

This chapter has considered the implications of a transformative approach to the application of the Bill of Rights to companies. The following chapter will consider the implications of international human rights law for the application of the Bill of Rights to companies within the framework of transformative constitutionalism.

# Chapter 4: The constitutional implications of international law concerning business and human rights

## 4 1 Introduction

The previous chapter considered the theoretical approach of the transformative application of the Bill of Rights to the State and non-state entities. This chapter focuses on a specific aspect of this application – the effect of international law on the interpretation of the Constitution of the Republic of South Africa, 1996, and specifically on that of domestic Bill of Rights obligations. The analysis commences by comparing and linking the approaches to business and human rights at the international and domestic levels. It then considers how international law contributes to interpretations of the Bill of Rights, referring to transformative constitutionalism and case law. Finally, it examines two specific and relevant instruments – the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"),[1] and the United Nations Guiding Principles on Business and Human Rights (the "UNGPs")[2] – and considers their implications for the domestic regime on business and human rights.

## 4 2 State obligations and company obligations: Distinguishing the domestic and international law discussions

As discussed in the previous chapter, constitutional jurisprudence on the application of the Bill of Rights creates a dichotomy between the Bill of Rights binding the State and its binding of companies as non-state entities. The academic literature also tends to focus on the question of the duty-bearer of accountability for human rights violations: the State, companies, or possibly both. As a result, the vindication of rights is determined primarily by the duty-bearer enquiry, rather than the other way around. This is in contrast with a potential rights-centric approach, as considered previously.[3]

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[1] International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3.

[2] United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31.

[3] See chapter three parts 3 3 and 3 4.

A similar focus and debate on the question of duty-bearer extends into international law.[4] Historically, human rights obligations were owed by States to their citizens domestically, and later were also owed by States to each other in terms of international law.[5] How states treated those in their jurisdiction thus became a matter of international concern. Imposing human rights obligations directly on companies is a relatively newer and more contentious phenomenon, however, in terms of both domestic constitutional law provisions and international law.[6] As recent developments in international law and the burgeoning body of literature indicate,[7] the current focus of the discussion concerns whether primary international human rights obligations should be imposed on States, companies, or both. This has raised questions of whether companies can and should bear human rights duties in international law, with both the legal principle and policy effectiveness of companies' owing such duties being debated.[8] Further academic and policy discussions revolve around which institutions can and should bear the duty to regulate transnational companies and enforce companies' own duties, and the degree to which a State can and should interfere with the "private" business operations of its

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[4] M Ssenyonjo *Economic, Social and Cultural Rights in International Law* 2 ed (2016) 169, 177-187.

[5] A Clapham *Human Rights Obligations of Non-State Actors* (2006) 25; D Bilchitz "Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law" (2016) 23 *Indiana Journal of Global Legal Studies* 143 146-149.

[6] Clapham *Non-State Actors* (2006) 25-84, 195-270; Ssenyonjo *Economic, Social and Cultural Rights* 169, 177-187.

[7] See chapter one part 1 1 1. These developments most prominently including the UNGPs and ICESCR, as considered in this chapter, and the ongoing work of the task team to establish a business and human rights treaty: D Bilchitz "The Necessity for a Business and Human Rights Treaty" (2016) 1 *Business and Human Rights Journal* 203; L McConnell "Assessing the Feasibility of a Business and Human Rights Treaty" (2017) 66 *International & Comparative Law Quarterly* 143; O De Schutter "Towards a New Treaty on Business and Human Rights" (2016) 1 *Business and Human Rights Journal* 41; Global Policy Forum *The Struggle for a UN Treaty: Towards Global Regulation on Human Rights and Business* (2016).

[8] J Nolan & L Taylor "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87 *Journal of Business Ethics* 433 433-434; D Bilchitz "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 125 *SALJ* 754 760-761; Bilchitz (2016) *BHRJ* 205-219; D Bilchitz "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" (2010) 7 *SUR* 198-229; S Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale LJ* 443 461-465, 475-477; RC Blitt "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48 *Texas International Law Journal* 33.

subjects in order to fulfil its own international obligations as a (public) State.[9] In practice, the primary approach at international law has generally been "state-centric", in that it has primarily retained States as the primary bearers of formal human rights obligations. Companies are only being indirectly "bound" through domestic regulation introduced by the State in the meeting of its own human rights obligations.[10]

The question of who can and should be a duty-bearer thus appears similar at both the international and domestic constitutional levels. However, the "state-centric" approach as used at international law must be distinguished from its domestic meaning. As considered in the previous chapter, the State or companies (or possibly both) may be under domestic human rights duties, but it is ultimately always the obligation of the State to enforce those duties.[11] In domestic law terminology, and as considered previously, this may be discussed variously as a state-centric "vertical" approach (in terms of which the State is always the final enforcer of the law and duties), a "horizontal" approach (focusing on the imposition of direct obligations on companies, enforced by the State), or a mixed approach (in terms of which both companies and the State are under direct obligations, with the State enforcing all obligations via the law – which may itself also be tested against substantive rights). While the terminology varies with the conceptualisation of who bears the duty, it remains for the State to enforce that duty in domestic law. Thus, from an international law perspective, the domestic enforcement of the Bill of Rights by the State is always an inherently state-centric approach.[12] The Bill of Rights obligations on companies only exist in terms of the State's domestic law, and can ultimately only be legally enforced by the State. In other words, while outwardly similar in that they both consider State and direct

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[9] See generally Clapham *Non-State Actors* (2006) 25-58, 195-270. For a discussion on the "private" versus "public" dichotomy, see chapter three.

[10] As will be seen in part 4 4, below, this has been the approach of the ICESCR and UNGPs. It has also been the approach of the proposed binding treaty on business and human rights: Bilchitz (2016) *BHRJ* 203-227; McConnell (2017) *ICLQ* 143-180; De Schutter (2016) *BHRJ* 41-67; Global Policy Forum *The Struggle for a UN Treaty* (2016); United Nations Human Rights Council Resolution 26/9 *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* Un Doc A/HRC/RES/26/9.

[11] See s 7(2) of the Constitution; chapter three part 3 3 1.

[12] This is not to deny the crucial role of such non-State actors in promoting human rights, such as in pressuring companies or the State to act differently. These actors may even cause changes or enforcement of legal obligations, such as by the legal development of legislation or public interest case law.

company obligations, the discussion of state-centrism in international law is distinct from the discussion of verticality/horizontality in domestic law as considered in the previous chapter.[13]

Importantly, this study focuses on the legally-enforceable domestic human rights regulation of companies in terms of the South African Constitution. This chapter thus specifically views the international discussion on business and human rights through the inherent state-centrism of domestic law, rather than considering whether such state-centrism is the most effective policy at international law. As such, while the debate surrounding state-centrism at international law is central to that field and rapidly developing, it is less relevant from a domestic constitutional law lens. In other words, the present focus is solely on the implications of international law for the interpretation of the Bill of Rights.

The following part will show how such openness and sensitivity to international law is core to transformative constitutionalism. This will then lay the foundation for the consideration of the ICESCR and UNGPs and their implications for our domestic rights regime.

## 4 3 The relationship between the South African Constitution and international law

### 4 3 1 Transformative constitutionalism and international law

Transformative constitutionalism has already been considered in the context of the application of the Bill of Rights to non-state entities.[14] However, it also forms the foundation of the South African human rights regime's openness towards international law. Accordingly, as the background of the case law analysis that follows, transformative constitutionalism is considered in this context as well.

[13] Bilchitz has, however, used similar arguments in both the discussion at international law and on domestic horizontality to advocate for obligations being imposed directly on companies: Bilchitz (2016) *IJGLS* 143-170.

[14] Chapter three part 3 2.

South Africa's legal tradition, descended from liberal legalism, has historically been relatively formalist in nature.[15] Under formal apartheid especially, courts would use abstract mechanical reasoning, and fundamental assumptions would be neither expressed nor challenged.[16] Following the principle of parliamentary supremacy, the judiciary would defer almost entirely to the legislature, without much question.[17] Indeed, a deliberate strategy of political and legal isolationism from international human rights developments was central to the maintenance of formal apartheid.[18] Overall, then, South Africa's legal culture traditionally exhibited an avoidance of substantive reasoning and a tendency to "close itself off" to contesting insights and opinions, both locally and abroad.

In Mureinik's famous turn of phrase, transformative constitutionalism deliberately aims to move away from this "culture of authority" to a "culture of justification".[19] Johan van der Walt argues that constitutional review is thus a means of democratic "re-plurification", as it destabilises power relations and re-introduces a wide plurality of parties, each with meaningful power of engagement and contestation.[20] Liebenberg has more recently echoed this approach in advocating a conception of adjudication as a form of dialogic politics.[21] In this paradigm, courts become a forum (but are far from

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[15] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 43-51. KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146; J Dugard "The Judicial Process, Positivism and Civil Liberty" (1971) 88 *SALJ* 181; C Albertyn & DM Davis "Legal Realism, Transformation and the Legacy of Dugard" (2010) 26 *SAJHR* 188.

[16] S Liebenberg *Socio-Economic Rights* 47.

[17] On the political factors that exacerbated this, see B Bunting *The Rise of the South African Reich* (1969) 140, 155-157.

[18] On the roots of "laager" isolationism in South Africa's Afrikaner nationalist apartheid history, see FA van Jaarsveld *The Afrikaner's Interpretation of South African History* (1964) 21-25.

[19] E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31.

[20] Johan van der Walt argues for the reconceiving of wealth as improper distribution instead of legitimate appropriation, which is particularly relevant to economic transformation and company law: J van der Walt "Piracy, Property and Plurality: Re-Reading the Foundations of Modern Law" (2001) *TSAR* 52. André van der Walt similarly argued that property should no longer be a trump over all other rights, but that it should be a meeting-point for collective engagement and participation in society: AJ van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1994) 11 *SAJHR* 169 203-205. This is particularly relevant in light of companies and their relative wealth as compared to potential rights victims. See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 343.

[21] Liebenberg *Socio-Economic Rights* 28-42.

being the only forum) where marginalised groups are empowered to engage deliberatively with authority.[22] The political and economic historical context of South Africa as considered in the previous chapter is of relevance here – as companies in the pre-constitutional era received extensive state support in law and policy, they formed part of a system of powerful and democratically-unaccountable political-economic structures. Open and dialogic conceptions of human rights are thus especially relevant to the democratic transformation and contestation of this system.[23] Formalist, isolationist or "top-down" approaches to the interpretation and content of human rights as they affect companies would be inconsistent with the nature of transformative constitutionalism.[24] Indeed, the transformative approach is rather one of embracing openness and critique "from below".[25]

This appreciation is seen most clearly in section 39 of the Constitution and its implications for the interpretation of the Bill of Rights. First, section 39(1)(a) holds that a court interpreting the Bill of Rights "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom." This indicates that, as part of the democratisation of the legal system after formal apartheid, courts must embrace substantive value-based reasoning and an open plurality of inputs and ideas.[26]

Second, and importantly for the present chapter, this dialogic openness extends to norms beyond domestic borders:[27] when interpreting the Bill of Rights, a court "must consider international law", and "may consider foreign law", as required by section

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[22] S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5 7-8, 12-21; S Rosa "Transformative Constitutionalism in a Democratic Developmental State" (2011) 22 *Stell LR* 542; DM Davis "Transformation and the Democratic Case for Judicial Review: The South African Experience" (2007) 5 *Loyola University Chicago International LR* 45 50-55.

[23] Terreblanche *Lost in Transformation* (2012) 101-115. This is not only relevant to colonial and formal apartheid systemic issues, but extends as well to contemporary issues of companies and state capture: see broadly PL Myburgh *The Republic of Gupta: A Story of State Capture* (2017); H van Vuuren *Apartheid Guns and Money: A Tale of Profit* (2017).

[24] Van der Walt (1994) *SAJHR* 203-205; DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 411.

[25] K Van Marle "Transformative Constitutionalism As/And Critique" (2009) 20 *Stell LR* 286; Davis & Klare (2010) *SAJHR* 435-449.

[26] S 39(1) of the Constitution. The Constitution's values are always supremely determinative, not narrow categorical reasoning: *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 149-158.

[27] Liebenberg *Socio-Economic Rights* 101-102.

39(1)(b) and (c) of the Constitution respectively.[28] Interpretations of the Bill of Rights are thus influenced both by international norms[29] and foreign jurisdictions where appropriate.[30] This openness to the international community's normative input is crucial to self-reflective and substantive domestic human rights interpretations.[31] Such a cooperative dialogue between domestic and international law is also in direct response to the isolationism of formal apartheid. It acknowledges the role international human rights law played in the anti-Apartheid struggle, and the deep influence it had on the Constitution's drafting.[32] It embraces South Africa's place in the modern closely-interconnected international community,[33] and further allows South Africa itself to contribute to the development of international human rights law.[34] As shown in the previous section, the dialogue between domestic and international human rights law is particularly important in the present era of economic globalisation, where the potential violations of human rights by powerful and unaccountable transnational companies are especially in focus.[35]

Transformative constitutionalism thus supports the position that international law must play a role in the interpretation of the Bill of Rights as it concerns companies. The

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[28] I Currie & J de Waal *The Bill of Rights Handbook* 2 ed (2013) 146-147; H Strydom & K Hopkins "International Law" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2005) 30-11 – 30-14; L Du Plessis "Interpretation" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 32-173 – 32-191.

[29] Liebenberg *Socio-Economic Rights* 101-118.

[30] 118-120.

[31] 117-118.

[32] K Maclean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 1-21.

[33] Liebenberg *Socio-Economic Rights* 102.

[34] 101-102, 117-118. Most recently, the landmark case of *Daniels v Scribante* 2017 4 SA 341 (CC), considered in chapter three part 3 3, has been cited internationally in the context of human rights and business regulation. The United Nations Committee on Economic, Social and Cultural Rights cited the case as an example of positive human rights duties imposed on a non-state entity in domestic law: United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* UN Doc E/C 12/GC/24 para 6.

[35] See generally K Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019); J Stiglitz *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (2017); P Phillips *Giants: The Global Power Elite* (2018); chapter one part 1 1 1, and chapter three part 3 2.

mechanisms by which international law informs rights interpretation will now be considered, with reference to applicable case law.

### 4 3 2 How international law affects Bill of Rights interpretations

#### *4 3 2 1 Overview of the relationships between international law and the Bill of Rights*

International law can interact with domestic law in several distinct ways, depending on the nature of the instrument[36] and the purpose of the interaction. The Constitutional Court has observed interactions between domestic and international law via four constitutional provisions in particular.[37] First, a court interpreting a provision of the Bill of Rights "must consider international law".[38] Second, international agreements are governed by section 231.[39] This provision holds that the negotiating and signing of all such agreements is the responsibility of the national executive;[40] that both houses of Parliament must ratify such an agreement for it to "bind the Republic";[41] that technical, administrative or executive treaties "bind the Republic" even without parliamentary ratification;[42] and that international agreements only become domestic law in the Republic when enacted into law by national legislation, unless they are self-executing.[43] An important distinction must thus be made between treaties "binding the Republic" on the international level and treaties being enacted as part of domestic law. Signed treaties must first be ratified by Parliament to "bind the Republic" (unless of a technical, administrative or executive nature). Ratified treaties (unless self-executing) must then necessarily be enacted by national legislation to be considered domestic law. Third, customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[44] Fourth, when interpreting any

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[36] On the various sources of international law and their relevance to domestic litigation, see M du Plessis & S Scott "The World's Law and South African Domestic Courts: The Role of International Law in Public Interest Litigation" in J Brickhill (ed) *Public Interest Litigation in South Africa* (2018) 48 50-59.

[37] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 179; see also Liebenberg *Socio-Economic Rights* 102-105.

[38] S 39(1)(b) of the Constitution.

[39] Du Plessis & Scott "The Role of International Law" in *Public Interest Litigation* 59-70.

[40] S 231(1) of the Constitution.

[41] S 231(2).

[42] S 231(3).

[43] S 231(4).

[44] S 232; Du Plessis & Scott "The Role of International Law" in *Public Interest Litigation* 71-73.

legislation, a court "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[45]

Following the above, the provisions and jurisprudence governing how international instruments interact with domestic law rely on three distinctions, which must be borne in mind as the case law is considered. First, customary international law is automatically law in the Republic unless inconsistent with the Constitution or legislation, while international agreements must be signed and ratified to bind the Republic, and must generally be enacted to form domestic law. Second, the interpretative use of international law[46] is different to its use as substantive law domestically. Third, as regards interpretative use, legislative interpretations must be "reasonably consistent" with international law, while interpretations of the Bill of Rights must be reached after international law is "considered".

It should be noted that international human rights law may affect companies and company law without specific reference to the Bill of Rights regime. Section 233 for instance, requires that all legislation must be interpreted as far as possible to be reasonably consistent with international law. The Companies Act 71 of 2008 ("the Companies Act" or "the Act") would thus have to be reasonably consistent with international law, including international business and human rights law, without reference needing to be made to the domestic Bill of Rights regime. Similarly, any international human rights instruments that are enacted domestically constitute legislation – again without reference to the Bill of Rights – and the Companies Act would have to be interpreted to form a coherent part of this legislative scheme. International human rights law can even prompt a development of the common law.[47] In all these cases, international human rights law would affect domestic law without necessarily arising from a direct interpretation and application of the Bill of Rights. However, it is likely that in a case where international human rights law is concerned, the Bill of Rights regime would be applicable as well. As this study specifically considers the legal implications of the Bill of Rights for companies and company law, the use of international law in interpreting the Bill of Rights will thus be the primary focus. Nonetheless, many of the applicable principles will apply as well to the

[45] S 233 of the Constitution.

[46] Du Plessis & Scott "The Role of International Law" in *Public Interest Litigation* 73-79.

[47] 81-85; *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC) paras 58-59.

interpretation of the Companies Act, or the development of the common law concerning companies, in line with international human rights law.

There are four cases particularly relevant to the use of international law in the interpretation of the Bill of Rights, namely *S v Makwanyane;*[48] *Government of the Republic of South Africa v Grootboom*;[49] *Glenister v President of the Republic of South Africa;*[50] and *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*.[51] These will be considered in turn.

*4 3 2 2 S v Makwanyane*[52] *("Makwanyane")*

This early Constitutional Court case concerned the constitutionality of the death penalty in South Africa. This necessarily turned on the interpretation of the Bill of Rights. In order to properly achieve such an interpretation, several justices made reference to international law.[53] In the event, the death penalty was ruled unconstitutional.

The case was decided under the Interim Constitution, with the relevant interpretive provision being section 35(1). Its formulation held that a court "shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter." The Final Constitution's section 39(1)(b), requiring that a court interpreting the Bill of Rights "must consider international law", is clearly less qualified than its Interim Constitution equivalent. The case's position thus remains relevant.

Importantly, Sachs J noted that the Constitution reflects an adherence by the South African State to principles which are internationally accepted,[54] and Mokgoro J observed that this is deeply linked to the transformative pursuit of an open and democratic society founded on freedom and equality.[55] Chaskalson P cited a wide variety of international sources that could be considered, including international

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[48] *S v Makwanyane* 1995 3 SA 391 (CC).
[49] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
[50] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).
[51] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC).
[52] *S v Makwanyane* 1995 3 SA 391 (CC).
[53] See paras 34-36, 63-69, 97, 109, 198, 265, 204, 308, 362, 373.
[54] Para 362.
[55] Para 304.

agreements and customary international law.[56] Critically, even under the Interim Constitution, it was held that "public international law" included both binding and non-binding law.[57] Limiting the dialogic contribution to strictly binding law would evidently be an unduly narrow and untransformative approach.[58] As concerns this study, this is an especially important point, as developing fields – such as business and human rights law – might not yet have any binding instrument or customary law developed that caters directly to the field. The crucial implication of *Makwanyane* is thus simply that, regardless of the status of the ICESCR or UNGPs, these must be considered in a proper transformative interpretation of the Bill of Rights.

#### *4 3 2 3 Government of the Republic of South Africa v Grootboom*[59] *("Grootboom")*

*Grootboom* was another early Constitutional Court case, and laid down important principles regarding the use of international law when interpreting the Bill of Rights. The respondents were people rendered homeless by eviction from private land in the Western Cape, and the case concerned the State's duty and programme to provide housing for them. The *amici curiae* submitted that the right to access to adequate housing in section 26 of the Constitution had to be interpreted in line with international law, and specifically with the ICESCR.[60] In particular, the *amici* attempted to persuade the Court that the provision should contain a minimum core obligation that the State must meet, as endorsed by the United Nations Committee on Economic, Social and Cultural Rights ("the CESCR") in its General Comment No 3.[61] The case has two important implications for the present chapter. Firstly, the Court held that socio-economic rights are justiciable, and "cannot be said to exist on paper only".[62] This justiciability was directly linked to section 7(2) of the Constitution and the State's duty to respect, protect, promote and fulfil the Bill of Rights. A duty thus falls on the courts to ensure that these rights are protected and fulfilled.[63] Accordingly, where companies

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[56] Para 35; Ssenyonjo *Economic, Social and Cultural Rights* 270.

[57] Para 35.

[58] Liebenberg *Socio-Economic Rights* 103, 106-107.

[59] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

[60] Paras 26-33; Liebenberg *Socio-Economic Rights* 146-155; Ssenyonjo *Economic, Social and Cultural Rights* 271.

[61] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of States Parties' Obligations (Art 2 par 1)* UN Doc E /1991/23.

[62] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 20.

[63] Para 20.

infringe on socio-economic rights, or company regulation facilitates such infringement, the State – including the courts – is under a constitutional duty to intervene.

Secondly, the court held that any relevant international law can be an interpretative guide, although the weight attached to this interpretative input will vary.[64] Where the law is binding on South Africa, it may be "directly applicable".[65] At the time of this judgment, South Africa had signed but not ratified the ICESCR. It was thus not binding law on the Republic.[66] Importantly, however, the non-binding nature of the ICESCR was not at all considered in the Court's reasoning. This implies that, while international law may be "directly applicable" to interpretation and thus easily directly incorporated, non-binding law still remains relevant to interpretation. The Court further expressly cited and approved Chaskalson P's statement in *Makwanyane* that both binding and non-binding law must be considered when interpreting the Bill of Rights.[67]

In the event, the Court in *Grootboom* declined to include minimum core obligations in the interpretation of section 26, as the Court believed that such a standard could not be effectively assessed or enforced in a judicial setting.[68] This decision has been criticised.[69] However, the Court nonetheless wholly incorporated the CESCR's interpretation of "progressive realisation" into the interpretation of the same phrase in section 26(2) of the Constitution.[70] The Court held that the term's context in the Constitution and at international law were in harmony, and that the Constitution clearly derived its use of it from international law.

Three implications can be drawn from *Grootboom*. First, *Grootboom* holds that socio-economic rights are justiciable and that the State must take measures in terms of section 7(2), to respect, protect, promote and fulfil these rights. Second, as with

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[64] Para 26.

[65] Para 26.

[66] See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) footnote 23.

[67] Para 26; *S v Makwanyane* 1995 3 SA 391 (CC) paras 34-35.

[68] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 26-33; Liebenberg *Socio-Economic Rights* 107-108, 146-155; D Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 119 *SALJ* 484 486-487.

[69] A similar comparison of rights and rejection of a minimum core occurred in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 26-39, and in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 46-68. See Liebenberg *Socio-Economic Rights* 146-151. The Court's approach has been criticised: Liebenberg *Socio-Economic Rights* 163-227, 466-480; Bilchitz (2002) *SALJ* 484; Ssenyonjo *Economic, Social and Cultural Rights* 271.

[70] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45.

*Makwanyane*, relevant non-binding international law must always be considered in the interpretation of the substantive rights in the Bill of Rights. It could be decided that the international law position should in fact not be incorporated into the interpretation in question, but it must still at all times be considered. Thirdly, international law – whether binding or not – should especially be incorporated where its implementation would be harmonious and effective within the domestic constitutional regime. *Grootboom* thus provides strong support for considering and incorporating international instruments (such as the ICESCR and UNGPs) in the interpretation of substantive rights in the Bill of Rights.

### *4 3 2 4 Glenister v President of the Republic of South Africa*[71] *("Glenister")*

The *Glenister* case provides especially relevant contributions to the jurisprudence on section 7(2) of the Constitution, both as regards the State's section 7(2) duty to respect, protect, promote and fulfil the Bill of Rights, as well as the dialogic interaction between the Bill of Rights and international law.[72] The relevance of section 7(2) has already been largely considered in the previous chapter, and the relationship between constitutional and international law will be the current focus. In essence, the Constitutional Court was to consider whether the Bill of Rights placed an obligation on the State to create and maintain an independent anti-corruption unit, and confirmed such an obligation.[73] While there is no express constitutional duty to establish an independent unit, Moseneke DCJ and Cameron J for the majority held that the constitutional scheme as a whole, when coupled with relevant international law, gives rise to the duty.[74] International law thus informed the section 7(2) duty, and especially informed the standard of "reasonableness" used in assessing whether the State met this duty. There are a few important points that can be drawn from this part of the judgment, especially as they concern international law and companies.

First, the majority held that the standard of reasonableness for the section 7(2) duty must be found by considering international law, as section 39(1)(b) of the Constitution

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[71] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

[72] Du Plessis & Scott "The Role of International Law" in *Public Interest Litigation* 76-78.

[73] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) paras 160-251; J Tuovinen "The Role of International Law in Constitutional Adjudication: *Glenister v President of the Republic of South Africa*" (2013) 130 *SALJ* 66.

[74] Paras 175-176.

requires.[75] As considered above, *Grootboom* demonstrated that international law must be considered and, where appropriate, incorporated into interpretations of the substantive rights in the Bill of Rights. *Glenister*, however, shows that international law also informs the State's overarching duty to respect, protect, promote and fulfil substantive rights as a whole.[76] Thus, where this overarching duty is concerned, reference need not be made to specific substantive rights, rights infringements, victims of those infringements, or duty-bearers of any such rights. The implication is that the State must take pre-emptive action to secure a system that effectively respects, protects, promotes and fulfils rights generally, rather than only acting casuistically. This approach, focusing as it does on the State's overarching duty to rights-holders, is also particularly receptive to state-centric international human rights law considerations. That is, where international human rights law focuses on describing the content of the State's duty to respect and protect rights, and to remedy infringements, such law easily informs the interpretation of section 7(2) of the Constitution. This is a crucial observation for the present study, as it implies that state-centric international human rights instruments can inform section 7(2) directly, without necessarily being impeded by the complex questions of duty-bearer considered in the previous chapter. As will be seen, this wider non-casuistic approach to the State's duty also lends itself to the preventative systemic intervention against violations by companies, as sought by current international human rights law trends and the transformative systemic approach as discussed.[77]

Second, the majority specifically noted the difference between international law that "binds the Republic", and international law which becomes domestic law within the Republic.[78] In the case, the Court was faced with binding but unenacted international instruments, but still used these to inform the section 7(2) duty.[79] The majority emphasised that international law which is not enacted into domestic law may still have "domestic constitutional effect", if used for its interpretative value by section 39(1)(b) of the Constitution.[80] In fact, they held that law that "binds the Republic" has particularly

[75] Para 192.

[76] Paras 175-176.

[77] See chapter two part 2 4, and chapter three parts 3 2, 3 3 and 3 4.

[78] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 182.

[79] Paras 183-189.

[80] Para 182.

convincing interpretative power.[81] If the particular obligation of international law is binding, the Constitution "appropriates the obligation for itself" and binds the State domestically via the Bill of Rights, even if not enacted as domestic law.[82] Moseneke DCJ and Cameron J took pains to note that this was not a case of making the Constitution subject to external norms, or of enacting international law into domestic law without following the proper section 231 process for enactment. Rather, finding the meaning of constitutional provisions by using international law is a process wholly mandated by and internal to the Constitution itself.[83] This perspective avoids seeing the Constitution as defensive or antagonistic towards international law, and is thus consistent with transformative constitutionalism's dialogic openness.

Third, while the majority focuses on binding international law principles, their point was that there would have to be a particularly convincing reason to *not* integrate binding principles into Bill of Rights interpretations. This does not imply the inverse – that non-binding principles are less persuasive simply because they are non-binding. As considered under *Makwanyane* and *Grootboom*, above, and cited again in *Glenister*,[84] both binding and non-binding international law principles can have powerful interpretative value when reading the Bill of Rights, and must be considered.

Fourth, Moseneke DCJ and Cameron J make an important point regarding constitutional interpretation and international law. They emphasise that the Court must consider international law in interpretation, but imply that international law cannot be used to narrow the Constitution's provisions. Even if the international law provisions were not relevant, or could not be used in interpretation, the domestic provisions themselves point to a duty to tackle corruption.[85] This is reinforced by the Court's earlier consideration of the negative impact of corruption, entirely apart from the question of how binding international law instruments influence interpretation.[86] There is thus a deep respect for the South African Constitution and its transformative context, while appreciating the Constitution's openness to international norms.[87]

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[81] Paras 192-195.

[82] Para 189.

[83] Paras 195-197.

[84] See *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) footnote 155.

[85] Paras 199-200.

[86] Paras 166-174.

[87] Du Plessis & Scott "The Role of International Law" in *Public Interest Litigation* 78.

The majority summarises this approach as follows:

> "The point we make is this. It is possible to determine the content of the obligation section 7(2) imposes on the state without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision, as the [dissenting] judgment suggests, to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact."[88]

The conclusions that can be drawn from *Glenister* for the present context of business and human rights, then, are as follows. International law informs both substantive rights and the State's overarching section 7(2) duty, even without specific reference to particular rights or duty-bearers. Binding international law principles on business and human rights – especially those that are textually linked to the relevant Bill of Rights provision – have particular persuasive power in influencing the content of a provision's interpretation. It would be difficult to deliberately exclude the contribution of such binding international law to Bill of Rights provisions. However, non-binding international law on business and human rights is also persuasive. Moreover, other international legal sources can also provide sufficient guidance where binding international law is insufficiently developed – even unratified international sources or other normative material.

A clear observation, following *Makwanyane*, *Grootboom* and *Glenister*, is that international law need not be domestically enacted or binding to influence the interpretation of the Bill of Rights. This is particularly important as far as the area of business and human rights is concerned. As already noted, the field is still developing, and so many of the international contributions are neither formally enacted nor strictly binding (as will be shown in the case of the ICESCR and the UNGPs).[89] Indeed, despite the recent developments, international law is only beginning to develop dedicated accountability systems for companies' human rights violations. By contrast, South Africa's 1996 Constitution and its transformative purpose and context provide mechanisms with the potential to transform company regulation to better respect,

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[88] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 201. For a view critical of the majority's approach and reasoning, see Tuovinen (2013) *SALJ*.

[89] See part 4 4 below.

protect, promote and fulfil human rights.[90] Moreover, if international business and human rights law indeed follows a "state-centric" approach,[91] non-binding international law necessarily relies on being domestically integrated and enforced if it is to be effective. Following jurisprudence, then, the South African Constitution and its purpose and context remain the starting-point and foundation of any interpretative exercise, while simultaneously remaining open to progressive human rights developments in the field, whatever the source or its nature.[92]

*4 3 2 5 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*[93] *("Legal Aid Clinic")*

The specific and active use of international law on business and human rights in constitutional interpretation was prominently seen in the recent High Court (Western Cape Division) judgment of *Legal Aid Clinic*.[94] This case has already been considered in terms of section 8 of the Constitution,[95] and so the focus will be placed on the international law dimensions here. The case concerned the validity of legislation allowing emoluments attachment orders issued by court clerks. The judgment thus required both statutory and constitutional interpretation, for which the High Court relied on foreign and international law on business and human rights as required by section 39(1)(b) and (c) of the Constitution. It first noted that South Africa's regime for emoluments attachment orders did not meet the standards set in several other jurisdictions.[96] It proceeded to consider the International Labour Organisation's Protection of Wages Convention of 1949**97** as binding customary international law,[98] focusing on how it informed the State's duty to prevent human rights abuses by

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[90] See chapter three part 3 4 for analysis and critique of the present doctrinal approach to Bill of Rights application where non-state entities are concerned.

[91] See part 4 2 of this chapter, above.

[92] *S v Makwanyane* 1995 3 SA 391 (CC) paras 36-37, 304.

[93] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC).

[94] See L Smit (2016) "Binding Corporate Human Rights Obligations: A Few Observations from the South African Legal Framework" 1 *Business and Human Rights Journal* 349 352-355.

[95] Chapter three part 3 3 2.

[96] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC) paras 42-48.

[97] International Labour Organisation Protection of Wages Convention of 1949 (No 95).

[98] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC) paras 67-70.

businesses under its jurisdiction. The Court proceeded to consider non-binding instruments, including the UNGPs (discussed later in this chapter) and United Nations Human Rights Council Resolution 26/22 of 2014.[99] The court emphasised that both these instruments make clear that the State must eliminate legal barriers to remedy for business human rights abuses. With reference to the influence of international law on the interpretation of the State's duties, therefore, the court stated:

> "While reports of the UN General Assembly and Human Rights Council are not binding, they are highly persuasive and generally express the current consensus among States.
> It seems to be firmly established in international law that states have a duty to protect their citizens against the abuse of human rights by business enterprises in their territory. Where such abuses do occur, states have a duty to provide victims with an effective remedy. These duties should be taken into account in the interpretation of the [Magistrates' Court Act 32 of 1944] and the Constitution."[100]

The court does not mention *Makwanyane*, *Grootboom* or *Glenister*. Nor does it expressly link the international contributions to the interpretation of the justiciable State duty in section 7(2) of the Constitution, or to any part of section 8. However, the emphasis on the State duty to protect rights and provide a remedy, and the ultimate remedy of invalidation of statute, imply that both sections 7(2) and 8 (concerning the binding of law and the State) were effectively involved. This case can thus be seen as one of the earliest to rely on the incorporation of international instruments on business and human rights in the interpretation of the State's own constitutional duties – especially its duty to respect, protect, promote and fulfil human rights – and to use these instruments to test and invalidate domestic legislation.

After the High Court gave its order, the case proceeded to the Constitutional Court for confirmation in terms of section 167(5) of the Constitution. The Constitutional Court considered neither foreign nor international law in reaching its decision. However, it agreed with the High Court's interpretation and conclusion, although it chose to read-

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[99] United Nations Human Rights Council Resolution 26/22 *Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc A/HRC/RES/26/22.

[100] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC) paras 73-74.

in words rather than sever them as a remedy.[101] The High Court judgment thus still retains some value for its use of international instruments on business and human rights, and for its elaboration of the State's duty to protect against human rights infringements by companies.

### 4 3 3 Summary of the implications of transformative constitutionalism and jurisprudence considered

Based on a synthesis of case law and constitutional provisions against the backdrop of transformative constitutionalism, it is evident that international law plays a significant role in the interpretation of substantive rights in the Bill of Rights. Further, the overarching section 7(2) State duty to respect, protect, promote and fulfil human rights is also closely linked to and informed by international law norms, especially where business and human rights are concerned. When interpreting the Bill of Rights, it seems that it is for the court in the final instance to weigh the various dialogic inputs' relevance, and then reach a conclusion as to how it will interpret the relevant Bill of Rights provision.

The guiding light for this process is the Constitution's own transformative spirit and context, a necessary part of which is an openness to pluralism and international norms. International law which has been enacted domestically, or that is ratified and binds the Republic, is especially persuasive when considering interpretations of the Bill of Rights. However, non-enacted or non-binding international law, or indeed any other transformative considerations both domestically and internationally, cannot simply be ignored. Where relevant, these should equally be incorporated into interpretations. As the Constitutional Court has held, such an approach to interpretation is part of the Court's own constitutional obligations – not only in terms of section 39(1) of the Constitution, but also in terms of the State's section 7(2) duty to respect, protect, promote and fulfil human rights. Generally, case law indicates that positive and transformative contributions in the field of international business and human rights law should be considered on substantive merit, rather than simply dismissed formalistically due to their source or nature.

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[101] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC) paras 128-212.

Finally, international law centred on State enforcement of human rights obligations appears to support a focus on substantive rights and the State's overarching duty to protect them. The perceived domestic dichotomy between the binding of the State and the binding of non-state entities has already been considered, as has been the support for transcending this dichotomy and moving towards a rights-centric approach.[102] The case law on the State's overarching duty to protect as interpreted with international legal sources – especially concerning infringements by non-state entities such as companies – further supports a move towards a rights-centric approach. It thus moves away from an atomistic "company duty-bearer" approach which focuses only on whether a duty should be imposed on a specific company, and which ignores the systemic role and duties of the State. In particular, constitutional jurisprudence on the influence of international law on domestic law suggests an approach operating through the overarching duty of the State to respect, protect, promote and fulfil rights in terms of section 7(2) of the Constitution. This approach appears to answer the question of what the duty (and thus who the duty-bearer) should be by first establishing the relevant rights – even in terms of the Bill of Rights as a whole – and an effective remedy. In other words, the Bill of Rights and what would constitute an effective remedy for its breach determines the duties and duty-bearers, rather than the other way around.

This rights-centric approach relying on the State's duty to protect remains a new and ongoing development, and aligns fully with current initiatives under international law to require states to regulate companies. It also points to a critical systemic conceptual approach implicating State action and legal reform.[103] It thus holds much promise for a transformative approach to the Bill of Rights and company law. This chapter will thus conclude by specifically considering the ICESCR and UNGPs, and provide an overview of their content and influence on the interpretation of the Bill of Rights.

[102] See chapter three parts 3 2, 3 3 and 3 4.

[103] See chapter two part 2 4, and chapter three part 3 2.

## 4 4 The implications of the ICESCR and UNGPs for domestic business and human rights law

This chapter has thus far laid the theoretical basis for the use of international law in interpreting the Bill of Rights. The remainder of this chapter will consider the specific implications of the ICESCR and UNGPs for Bill of Rights interpretations. These two instruments have been chosen for their prominence in the field of business and human rights, and for recent and ongoing developments stemming from them. Thus, these instruments will first be briefly introduced. Thereafter, their substantive content and implications for the State, companies and company law will be considered.[104]

### 4 4 1 Overview of the instruments under consideration

#### *4 4 1 1 The International Covenant on Economic, Social and Cultural Rights ("ICESCR")*[105]

The ICESCR is a treaty which has been both signed and ratified by South Africa,[106] and so is binding on the Republic.[107] It has not formally been enacted into South African law, however.[108] Nonetheless, as the prior discussion of constitutional provisions and jurisprudence has shown, the ICESCR still has overwhelming persuasive value in

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[104] See part 4 2, below.

[105] International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3.

[106] South Africa became a signatory to the ICESCR on 3 October 1994, and ratified it on 12 January 2015. For an overview of the ICESCR in South Africa, see Ssenyonjo *Economic, Social and Cultural Rights* 268. For a historical contextual overview of the ICESCR, see M Odello & F Seatzu *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (2013) 4-11; M Langford & JA King "Committee on Economic, Social and Cultural Rights: Past, Present and Future" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477 477-478; Ssenyonjo *Economic, Social and Cultural Rights* 36-39.

[107] Odello & Seatzu *Committee on Economic, Social and Cultural Rights* 11.

[108] In its recent concluding observations on South Africa's initial State Party report, the CESCR strongly recommended that the rights in the ICESCR be fully recognised in the Constitution and domestic legislation, and that ICESCR provisions be able to be directly invoked in domestic courts: United Nations Committee on Economic, Social and Cultural Rights *Concluding Observations on the Initial Report of South Africa* UN Doc E/C12/ZAD/CO/1.
Importantly, however, Liebenberg shows that certain provisions of the ICESCR are likely self-executing in terms of section 231(4) of the Constitution, as discussed in part 4 3 2 1 above, and that courts should be wary of easily deferring to Parliament for express enactment where it may not be needed: Liebenberg *Socio-Economic Rights* 103-104.

constitutional and statutory interpretation. It thus must play a crucial role in the interpretation of the Bill of Rights, and it would be difficult to refute its incorporation. Importantly, the interpretative value of the ICESCR goes beyond the pure text of the ICESCR itself. General Comments on the interpretation of the ICESCR by the instrument's Committee on Economic, Social and Cultural Rights (the "CESCR")[109] are not binding, but remain persuasive.[110] Similarly, views adopted by the CESCR with regard to communications submitted to them under the Optional Protocol to the ICESCR[111] also inform interpretations of Covenant provisions.

The ICESCR contains provisions relating both to the general duties of States with regard to rights,[112] and to the content of substantive rights themselves. Articles 6 through 15 detail various substantive socio-economic rights. Article 2(1) provides an overarching duty for States parties with regard to these substantive rights. It holds that:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[113]

The ICESCR thus informs both the interpretation of the substantive rights of the Bill of Rights and the interpretation of the State's overarching duty to respect, protect,

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[109] For general background of the CESCR, see Odello & Seatzu *Committee on Economic, Social and Cultural Rights* 23, 33, 108-111; Langford & King "Committee on Economic, Social and Cultural Rights" in *Social Rights Jurisprudence* 477-479; Ssenyonjo *Economic, Social and Cultural Rights* 39-43.

[110] In terms of Article 21 of the ICESCR; Odello & Seatzu *Committee on Economic, Social and Cultural Rights* 29, 33-34, 127-129, 195-291; Langford & King "Committee on Economic, Social and Cultural Rights" in *Social Rights Jurisprudence* 480-481; Ssenyonjo *Economic, Social and Cultural Rights* 42-43.

[111] United Nations General Assembly Resolution 63/117 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* UN Doc A/RES/63/117.

[112] Odello & Seatzu *Committee on Economic, Social and Cultural Rights* 14-23; Ssenyonjo *Economic, Social and Cultural Rights* 78.

[113] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3. See United Nations Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of States Parties' Obligations (Art 2 par 1)* UN Doc E /1991/23.

promote and fulfil those rights.[114] This is especially important as concerns business and human rights. The CESCR's General Comment No 24 on state obligations in the context of business activities,[115] for instance, does not focus on the content of specific substantive rights. Rather, it concerns itself with the regulation of business and human rights generally. As such, it is highly relevant to informing the meaning of the duty on the State in terms of section 7(2) of the Constitution, even though it is not directly relevant to the interpretation of specific substantive rights. Where applicable, however, other comments on substantive rights must be read together with General Comment No 24.[116] Similarly, Article 2(1) (described above) could also inform section 7(2), rather than a specific right. As discussed previously, this implies that systemic change (such as law reform) should take place without reference needing to be made to a specific instance of a rights violation by a specific company as a duty-bearer. An exclusive focus on a single rights abuse in a case, with an offending company being seen as the sole-duty bearer, could obscure the State's duty to (for instance) take steps to the maximum of its available resources to have avoided the violation. Again, the implication is that a holistic approach to reform is necessary, with less emphasis on who is the duty-bearer.

As concerns the enactment of the ICESCR into domestic law, the Minister of Justice and Correctional Services stated to Parliament in late 2016 that the Bill of Rights is "based on the ICESCR", and that "[socio-economic] and cultural rights are also promoted in myriad pieces of legislation".[117] Accordingly, he has stated the government's belief that there is "therefore no additional legislation required to implement the tenets of the ICESCR".[118] Despite these comments, as has been previously demonstrated, the regulatory framework for company law has not been extensively regulated by human rights considerations, whether domestic or international.[119] It is thus unclear whether the ICESCR still needs to be enacted as

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[114] Langford & King "Committee on Economic, Social and Cultural Rights" in *Social Rights Jurisprudence* 484-496; Ssenyonjo *Economic, Social and Cultural Rights* 31-36.

[115] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* UN Doc E/C 12/GC/24.

[116] Para 2.

[117] National Assembly of South Africa *Internal Question Paper* 43/2016, para 1 of reply to question 2718.

[118] Para 1 of reply to question 2718.

[119] Chapter one part 1 1 1.

domestic law as regards business and human rights. Most likely, the existing company law regulatory framework should be judicially interpreted as far as possible to be consistent with the ICESCR and its interpretive texts (such as General Comments)[120] – especially if the executive does not presently intend to introduce further legislation in this regard. Where such consistency is impossible, however, it will have to be decided whether further reform should come from the judiciary, executive or legislature, and how each of these bodies should work and cooperate to achieve such reform.[121] Regardless of enactment, however, the ICESCR still informs the interpretation of the Bill of Rights, which itself would inform the interpretation of legislation and the development of the common law.[122] It would also inform any assessments of the constitutional validity of existing legislation, and thus may be given effect through judicial action on a case by case basis.

*4 4 1 2 The United Nations Guiding Principles on Business and Human Rights ("UNGPs")*[123]

Unlike the ICESCR, the UNGPs are simply guidelines endorsed by the United Nations Human Rights Council.[124] They are considered the most prominent instrument on international business and human rights law, being part of the final report of the extensive work by the then Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other businesses enterprises. They provide the "Protect, Respect and Remedy Framework"

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[120] Legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution), and interpretations that are reasonably consistent with international law must be preferred over inconsistent ones (s 233 of the Constitution).

[121] Ssenyonjo *Economic, Social and Cultural Rights* 84-86. Concerning judicial remedies – which may require legislative or executive action – see Currie & De Waal *Bill of Rights Handbook* 176-208.

[122] S 39(1)(b) and (2) of the Constitution.

[123] United Nations Human Rights Council *Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31.

[124] United Nations Human Rights Council Resolution 17/4 *Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc A/HRC/RES/17/4**.**

as developed by the Special Representative[125] and unanimously adopted by the Human Rights Council in 2008.[126] While the UNGPs apply to "all States and to all business enterprises",[127] they do not generate binding legal obligations for companies at international law.[128] The framework rather relies on, firstly, a State duty to protect against human rights abuses, including by companies, through various means; secondly, companies' non-legal responsibility to respect human rights and avoid infringing them; and thirdly, the need to provide victims with access to both judicial and non-judicial remedies for violations. The absence of direct human rights obligations imposed on companies is the result of the political failure of an earlier instrument, the "Norms on Transnational Corporations and Other Business Enterprises".[129] These were produced by an expert subsidiary body of the former Commission on Human Rights, but were rejected by the Commission as having no legal standing after objections by business advocacy groups and governments.[130] Seeking to avoid a similar fate, the UNGPs avoid placing any direct obligations on companies at international law, and instead rely on a state-centric approach. Without domestic

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[125] United Nations Human Rights Council *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie* UN Doc A/HRC/8/5.

[126] United Nations Human Rights Council Resolution 8/7 *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc A/HRC/RES/8/7.

[127] United Nations Human Rights Council *Guiding Principles*, under "General Principles".

[128] This is the foremost criticism against the UNGPs: see for instance Nolan & Taylor (2009) *JBE* 433-434; Bilchitz (2008) *SALJ* 760-761; Bilchitz (2016) *BHRJ* 205-219; Bilchitz (2010) *SUR* 198-229; Ratner (2001) *Yale LJ* 461-465, 475-477; Blitt (2012) *TILJ* 33-62.

[129] United Nations Human Rights Sub-Commission on the Promotion and Protection of Human Rights *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* UN Doc E/CN 4/Sub 2/2003/12/Rev 2; United Nations Commission on Human Rights *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* UN Doc E/CN 4/DEC/2004/116; Bilchitz (2008) *SALJ* 765-770.

[130] United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31 paras 2-3; PP Miretski & SD Bachmann "The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights': A Requiem" (2012) 17 *Deakin LR* 5 5-41; Nolan & Taylor (2009) *JBE* 442, 445; Bilchitz (2008) *SALJ* 765-769.

enforcement by the State, reliance must be placed on companies' voluntary commitment to human rights.[131] For this reason, the UNGPs refer to a non-legal corporate "responsibility" (in constrast with the State's legal "duty") to respect rights. As discussed earlier, this has led to a great deal of criticism at the level of international law.[132]

Nonetheless, the UNGPs bear a great deal of relevance for the inherently state-centric domestic human rights regime. While not creating any new obligations,[133] they refer to two already-existing international human rights law obligations which bind the Republic. The first is the traditional international human rights obligation of States, namely being to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[134] The second is part of this duty to protect, and obliges States to "take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[135]

The UNGPs are thus binding on South Africa as far as these two obligations are concerned, as these are simply re-statements of existing international law obligations. In other words, while the UNGPs are generally a "non-binding" instrument, they do rely on two existing binding obligations, and are binding in this narrow respect.[136] However, it should be noted that a significant portion of the UNGPs is effectively an elaboration and explication of these two State obligations in the context of business activities.[137] That is, much of the detailed UNGP provisions explain and flesh out the content of the State's existing international law duties to protect and provide effective remedy where companies are concerned. It can thus be argued that these other provisions are also binding, as far as they are an elaboration of the content of the two existing obligations.[138] In other words, wherever the UNGPs describe the role of the State in

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[131] Bilchitz (2008) *SALJ* 756-760.

[132] See part 4 2, above.

[133] United Nations Human Rights Council *Guiding Principles* para 13.

[134] Principle 1. The principle's commentary mentions States' obligation to "respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction."

[135] Para 25.

[136] This is evidenced by the use of the words "must" and "duty" in the description of each of these State obligations.

[137] See part 4 4 1 2 below.

[138] Para 14.

regulating companies, this can be seen as a description of how States are to meet their existing international law duties. This does not make the UNGPs binding on companies directly; if companies are affected, it is only indirectly, through the State being bound and obliged to regulate companies.[139] This is consistent with the nature of the UNGPs as a "state-centric" instrument, as discussed.[140] Regardless of their binding nature, however, the UNGPs hold great persuasive power in constitutional interpretation.[141]

Finally, as with General Comment 24 of the CESCR, it is important to note that the UNGPs do not deal extensively with substantive rights. Rather, they deal generally with the State duty to respect, protect, promote and fulfil rights. They would thus likely be most necessary and useful in informing section 7(2) of the Constitution, as in *Glenister*.[142] Again, an approach that turns too heavily on the question of a single right and duty-bearer may neglect the value of this overarching State duty.

### 4 4 2 Implications of the instruments considered

Both the ICESCR (via, for instance, General Comment 24) and the UNGPs cover a wide number of issues concerning business and human rights. The UNGPs, in particular, give a great number of detailed operational principles aimed at realising an effective business and human rights regime. The ICESCR, for its part, also deals extensively with substantive rights. A full consideration of either instrument is beyond the scope of this study, which only aims to introduce them and their relevance to the interpretation of the Bill of Rights in the context of business and human rights. However, some remarks can be made of the implications of these instruments for the Bill of Rights, and thus for companies and company law.

#### *4 4 2 1 Implications for the State*

As noted, the ICESCR and UNGPs follow a state-centric approach to the field of business and human rights. As a result, it is at all times for the State to ensure that the desired change in company behaviour is realised. The UNGPs, for instance, hold that

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[139] This is considered further in part 4 4 2 1 below.

[140] See part 4 2 above.

[141] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC) para 73.

[142] See chapter three part 3 3 1.

the State has a duty to protect against abuses by businesses, and must take appropriate steps to prevent, punish and remedy such abuses through effective policies, legislation, regulation and adjudication.[143] Moreover, Principle 3(a) of the UNGPs holds that the State should enforce laws that "are aimed at, or have the effect of, requiring business enterprises to respect human rights", perform assessments of laws at appropriate intervals, and address regulatory gaps where appropriate.

This is evidently only a guideline interpretation of the international law duty to protect, as evidenced by the use of "should". However, it is nonetheless a strong recommendation that the UNGP guidelines for the corporate "responsibility" to respect become enforceable domestic obligations.[144] In other words, the content of the UNGPs' (non-enforceable) corporate "responsibility" to respect rights can be seen as a guideline for an enforceable domestic business and human rights regime. This is especially the case if a transformative approach is followed, with rights being prioritised above business interests. Enforcing the corporate "responsibility" to respect could thus conceivably be viewed as an important and integral part of the State's own duty to protect. As a result, while the UNGPs do not themselves create binding obligations for business, a transformative approach to the State's duties under the UNGPs may in effect transform the corporate "responsibility" into a duty enforced by the State.

Where the State owns, controls or supports companies, additional steps to guard against rights violations should be taken.[145] This is reminiscent of the organ of state approach, as discussed in the previous chapter.[146] Importantly, however, even where the State merely contracts with or legislates for companies to provide services that "may impact upon the enjoyment of human rights",[147] the State should exercise adequate oversight to meet its own obligations. This must be be interpreted broadly, given the number of services that could be seen as relating to human rights, and the possible meanings of "contracts with" and "legislates for" (since all South African companies are born of enabling legislation). Moreover, the accompanying commentary to this Principle holds that the State does not relinquish its international human rights

[143] United Nations Human Rights Council *Guiding Principles* Principle 1.

[144] The implications for companies of the corporate responsibility to respect are considered in the following part.

[145] United Nations Human Rights Council *Guiding Principles* Principle 4.

[146] Nolan & Taylor (2009) *JBE* 443-444.

[147] United Nations Human Rights Council *Guiding Principles* Principle 5.

obligations when it privatises the delivery of such services.[148] At its most robust, this provision implies that the State must exercise adequate oversight over a company in two circumstances in particular: first, wherever the State outsources the provision of a human rights service to the company; and second, where the company's services may impact on human rights in any way. Indeed, Principle 6 holds that the State should use their contracts with companies to promote respect for human rights, including through contractual terms.

With regard to policy coherence, the State should ensure that all state organs that shape business practice understand and observe the State's human rights obligations.[149] The State should also leave policy space to meet these obligations, and should not unduly narrow the space for human rights duty fulfilment (either for itself or for companies) through contracts, investment treaties or as members of relevant multilateral institutions.[150]

It can be recalled that the ICESCR is a human rights treaty, binding on states that have ratified it.[151] As a result, the ICESCR (like the UNGPs) focuses on the obligations of the State, rather than any primary obligation of companies themselves.[152] The ICESCR shows that, for the State to meet its human rights obligations, it must reform its domestic company law regulation accordingly.[153] This reform entails introducing and enforcing domestic legal obligations for companies. Domestic regulation is thus the

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[148] DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *AHRLJ* 219; K Moyo *Water as a Human Right Under International Human Rights Law: Implications for the Privatisation of Water Services* (2013) LLD dissertation Stellenbosch; K Moyo & S Liebenberg "The Privatisation of Water Services: The Quest for Enhanced Human Rights Accountability" (2015) 37 *Human Rights Quarterly* 691; A Nolan "Privatization and Economic and Social Rights" (2018) 40 *Human Rights Quarterly* 815.

[149] United Nations Human Rights Council *Guiding Principles* Principle 8.

[150] Principles 9 and 10.

[151] Odello & Seatzu *Committee on Economic, Social and Cultural Rights* 4-11.

[152] See, for instance, United Nations Committee on Economic, Social and Cultural Rights *Statement Regarding the Corporate Sector* para 3; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24*; Odello & Seatzu *Committee on Economic, Social and Cultural Rights* 14-23; Langford & King "Committee on Economic, Social and Cultural Rights" in *Social Rights Jurisprudence* 484-496; Ssenyonjo *Economic, Social and Cultural Rights* 31-36, 78. See also part 4 2, above.

[153] See, for instance, United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 15; Ssenyonjo *Economic, Social and Cultural Rights* 84-86.

means by which the ICESCR reaches companies and affects their behaviour.[154] On this point, the Committee recently noted:

> "States parties do not only have the obligation to respect Covenant rights, and, it follows, to refrain from infringing them, but they also have the obligation to protect them by adopting measures to prevent the direct or indirect interference of individuals in the enjoyment of these rights. If a State party does not take appropriate measures to protect a Covenant right, it has a responsibility even when the action that undermined the right in the first place was carried out by an individual or a private entity. Thus, although the Covenant primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Covenant extends to relations between individuals."[155]

As with the UNGPs, then, the State may be considered responsible for the action or inaction of businesses in various ways. A State may directly violate its own duty to respect rights where a company acts under State instructions or control (such as with public contracts); where the State empowers the company with governmental authority by legislation or the company fulfils governmental functions; or where a State party acknowledges and adopts the company's conduct as its own.[156] This is again similar to the organ of state approach in domestic law. Importantly, however, the State may also directly violate its duties under the ICESCR by prioritising business or business policies over ICESCR rights without adequate justification, or by concluding trade or investment treaties that conflict with the ICESCR.[157]

In terms of the State duty to protect, the State must thus take active measures to effectively prevent infringements of ICESCR rights in the context of business activities, and provide remedies where they occur.[158] This also extends to any public or private corruption that may facilitate the abuse of rights, and thus specialised and effective anti-corruption measures (including whistle-blower protection) are necessary.[159] More broadly, measures to meet the duty to protect should variously take the form of criminal and administrative sanctions by the State, and enable victims to pursue civil suits as

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[154] United Nations Committee on Economic, Social and Cultural Rights *Statement Regarding the Corporate Sector* paras 4-5.

[155] *Ben Djazia and Bellili v Spain* 5/2015 UN Doc E/C 12/61/D/5/2015 para 14.2.

[156] Para 11.

[157] Paras 12-13.

[158] Para 14.

[159] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* paras 18 and 20.

well.[160] Direct regulation and intervention may also be necessary, such as in the restriction of marketing goods that are detrimental to public health, the control of rents in private housing markets, and the establishment of a liveable and fair minimum wage.[161] As with the UNGPs, strict regulation is especially necessary where public sectors are privatised, and non-state businesses performing public services should still meet the standards required by the public nature of such services.[162] Crucially, the profit motive should not negatively affect the price or quality of goods or services necessary for the enjoyment of basic rights, as this would intensify economic segregation.[163] On the contrary, these goods and services must be adequate and accessible to all, and individuals must be able to participate in assessing whether this is the case.

As is already evident, both the UNGPs and the ICESCR also give attention to the matter of remedies for victims of violations. While remedies concern the State and companies both, they can be better seen as a corollary of the State's duty to protect.[164] Thus, while having access to adequate remedy as a separate third pillar from the State duty and business responsibility, the UNGPs state the remedial foundational principle in terms of the State's duty foremost. The UNGPs accordingly hold that the State must take "appropriate steps" to ensure, through judicial, administrative, legislative or other appropriate means, that those affected by abuses in its territory or jurisdiction have access to effective remedy.[165] This requires promoting, and removing barriers to, state-based judicial and non-judicial mechanisms, and non-state grievance mechanisms (such as those internal to companies).[166] Guidelines and criteria are also given for assessing the effectiveness for all these mechanisms. In particular, judicial mechanisms should not be obstructed by difficulties in financial costs, obtaining legal

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[160] Para 15.

[161] Para 19.

[162] Para 21.

[163] Para 22.

[164] United Nations Committee on Economic, Social and Cultural Rights *Statement Regarding the Corporate Sector* para 5. See also the recent United Nations Human Rights Council *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Report of the United Nations High Commissioner for Human Rights* UN Doc A/HRC/32/19, of 2016, which gives extensive guidance for improving access to judicial remedies.

[165] United Nations Human Rights Council *Guiding Principles* Principle 25.

[166] Principles 26-31.

representation, using class action procedures, ensuring state prosecutor expertise and resources, and legal complications such as attribution of responsibility amongst the members of a corporate group.[167]

The ICESCR also provides extensive guidelines for how States are to meet their obligations where remedies are concerned. Importantly, the treaty strongly aligns with a proposed notion of a rights-centric approach with multicentric binding of the State, companies and law, as discussed in this thesis.[168] The ICESCR obliges States parties to provide appropriate redress to victims of corporate violations, and to ensure corporate accountability.[169] States must take all necessary measures to prevent such violations, and where such measures fail, States must investigate and take action against offenders.[170] Critically, victims must be provided with effective access to justice and remedies, including reparation, regardless of who ultimately bears responsibility for the violation.[171] Further, while violations of Covenant rights normally allow for victims to claim against the State, it should also be possible for victims to directly sue a company for violations.[172] The ICESCR also binds all branches and organs of state to its obligations.[173] Furthermore, legal structuring must not formalistically protect violators and thereby lead to a denial of justice.[174] In particular, the corporate veil should not deny victims a remedy by allowing parent companies or shareholders to be shielded from liability.[175]

A further significant advance presented by the ICESCR concerns the State's duty to fulfil rights, which requires that States parties mobilise the operations and resources of companies in their territory to ensure that rights are fulfilled.[176] This again points to a systemic intervention, recognising the role of State force and law in political economy, and implicating both State and companies in rights fulfilment. This also ensures that

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[167] Principle 26.

[168] See chapter three parts 3 3 and 3 4.

[169] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 39.

[170] Para 40.

[171] Para 40.

[172] Para 51.

[173] Para 47.

[174] Paras 42-44.

[175] Paras 23-24. The implications for companies of the State duty to fulfil are considered in further detail in part 4 4 2 2, below.

[176] Para 42. See chapter 2 parts 2 2 1 and 2 5 1.

companies are not formalistically shielded from duties by virtue of their nature as non-state entities. Finally, a variety of remedies should be developed and promoted in both private and public law, allowing matters to be pursued by affected parties and state agencies.[177] Existing administrative bodies in the Companies Act, such as the Companies Commission,[178] should thus be reformed to effectively prevent violations and provide remedies.[179] Collectively, then, the ICESCR points to a substantive (rather than formalistic) and rights-centric (rather than duty-bearer-centric) approach to remedies for corporate violations. It thus further aligns with some degree of holistic and systemic intervention, and holds much promise for a transformative approach to companies and human rights.[180]

#### *4 4 2 2 Implications for companies and company law*

The preceding section has considered the State duty to respect, protect, promote and fulfil human rights, and how this duty calls for domestic regulation and enforcement of business activities. This will necessarily lead to a change in company regulation, and thus in the behaviour of companies themselves. The details of this change will now be considered.

As noted previously, the UNGPs refer to a "corporate responsibility to respect" rights which may be seen as a guideline to the regime the State should implement to meet its own duty. On the content of this responsibility, the UNGPs hold that businesses should, firstly, avoid causing or contributing to "adverse rights impacts"[181] (whether actions or omissions), and address any such impacts.[182] Secondly, businesses should seek to prevent or mitigate any such impacts that are "directly linked" to their operations, products or services, even if the business has not contributed to these

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[177] Para 15.

[178] Chapter 8 of the Act; D Davis & W Geach (eds) *Companies and Other Business Structures in South Africa* 3 ed (2013) 307.

[179] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* paras 53-57.

[180] See chapter 2 part 2 4.

[181] United Nations Human Rights Council *Guiding Principles* Principle 12 states a core list of human rights instruments to which this responsibility applies. The commentary to this principle also notes that businesses can affect "virtually the entire spectrum of internationally recognised human rights", and that the responsibility applies to all of these.

[182] Principle 13(a).

impacts.[183] This applies to all businesses, regardless of size, ownership or structure, although the scale and complexity of the steps taken to meet this responsibility may vary accordingly.[184]

Businesses should have appropriate policies and processes in place to meet their responsibility, including a policy commitment, a due diligence process, and processes to enable remediation of adverse rights impacts they cause or contribute to.[185] The policy commitment should be informed by expertise, be approved by the most senior management, stipulate expectations of all parties directly linked to the business or its operations or services, be internally and publicly communicated and available, and should be reflected in operational policies and procedures.[186]

Central to the recommended change in company regulation is the concept of due diligence.[187] Both the UNGPs and the ICESCR refer to this as the minimum standard by which companies should be regulated so the State's duty to protect rights can be met.[188] In other words, the State is under a positive duty to adopt a legal framework of due diligence for companies in its jurisdiction.[189] Companies, for their part, are then under a positive obligation to implement the due diligence framework.[190] Due diligence is an ongoing and responsive process of assessment of risk and impact, done by the company.[191] It should both draw on human rights expertise, and involve meaningful engagement with affected groups and stakeholders.[192] The CESCR has emphasised that this is particularly important where indigenous people are concerned: companies should seek free, prior and informed consent through these peoples' own

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[183] Principle 13(b).

[184] Principle 14.

[185] Principles 15, and 16 through 22.

[186] Principle 16.

[187] For a detailed background of this concept and its development, see L Heasman *The Corporate Responsibility to Protect Human Rights: The Evolution from Voluntarism to Mandatory Human Rights Due Diligence* PhD dissertation Helsinki (2018).

[188] United Nations Committee on Economic, Social and Cultural Rights *Statement Regarding the Corporate Sector* para 4; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 16; United Nations Human Rights Council *Guiding Principles* Principles 17-21; Moyo *Implications for the Privatisation of Water Services* 323-326.

[189] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 16.

[190] Nolan & Taylor (2009) *JBE* 443; United Nations Human Rights Council *Framework for Business and Human Rights* paras 24, 55.

[191] United Nations Human Rights Council *Guiding Principles* Principle 17.

[192] Principle 18.

representative institutions before the relevant business activities are commenced.[193] Mechanisms should also be found to share the benefits derived from such activities with the indigenous peoples of the territory.[194]

The findings of these impact assessments and interactions should be effectively integrated into the company's functions and processes, with decision-making, budget allocations and oversight assigned to assist in taking appropriate action.[195] Where necessary, such action should be prioritised to prevent and mitigate the most severe impacts, or impacts which may be irremediable without urgent action.[196] As part of the accountability for their impacts, companies should effectively report to, and communicate with, affected stakeholders.[197]

Collectively, then, due diligence forms a mechanism of interrelated steps to be taken to address human rights impacts by businesses. The UNGPs phrase the non-legal corporate responsibility to respect rights in terms of this responsibility to perform due diligence.[198] However, care would need to be taken in how due diligence is implemented by the State. If the State transformed this "responsibility" into a domestic legal duty for companies, it could be in the form of a legal duty to reasonably perform due diligence.[199] In other words, if a company infringed human rights, they would not be liable for the infringement directly. Nor would they be liable for any negligence in failing to prevent the infringement. Rather, they would be liable only if they unreasonably failed to produce an effective due diligence system. On its own, such an approach to the duty would provide companies with means by which to avoid liability for human rights abuses. A company could avoid liability by proving that it acted reasonably in producing its due diligence system, even if that system could not reasonably prevent harm or factually did not do so. Such a formalistic delictual approach to the duty would doubly shift the burden onto the victims of rights

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[193] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 17.

[194] Para 17.

[195] United Nations Human Rights Council *Guiding Principles* Principle 19(a).

[196] Principle 24.

[197] Principle 21.

[198] United Nations Human Rights Council *Framework for Business and Human Rights* paras 25, 56.

[199] Nolan & Taylor (2009) *JBE* 443; United Nations Human Rights Council *Framework for Business and Human Rights* paras 25, 56.

infringements. Letting loss lie where it falls in this way may be undesirable, considering the likely economic and power disparities between companies and victims.

A rights-centric approach to due diligence is thus suggested instead. Such an approach would see due diligence regulations as being a procedural obligation on companies, assisting them to avoid rights infringements. However, while it would assist companies to avoid rights infringements, it would not serve as a defence should the companies nonetheless infringe on rights despite having performed their due diligence. This could allow a right to be remedied (such as by the company giving compensation to victims) even where a company acted entirely reasonably in producing its due diligence system. In other words, where circumstances call for it, some form of strict liability may be necessary. This important point is supported by the commentary to Principle 17 of the UNGPs, which notes that companies should not assume that due diligence by itself will absolve them of liability for abuses. In this way, the focus remains on rights and effective remedies, rather than on providing corporate defences and leaving loss to lie where companies cause it to fall.

Importantly, due diligence is a normative framework, and courts must thus exercise care when evaluating company conduct. The State's positive duty to implement due diligence requires assessing the reasonableness of the company in implementing a due diligence system. Such reasonableness is not determined empirically, but is rather a normative question. It will thus effectively be for courts to set the normative standard of "the reasonable company" that companies will be expected to meet. Again, an approach that errs in favour of the significantly more vulnerable victims of violations would likely be needed, rather than one that is too deferent to companies. Setting a low standard for company reasonableness could significantly weaken the implementation of the State's due diligence framework.

Finally, some attention is given to the question of true positive duties, or duties to actively fulfil socio-economic rights, as imposed on companies.[200] The CESCR has noted the increasing role and impact of non-state entities in traditionally public sectors.[201] It has held that these non-state entities should attract "public service

[200] For a general theoretical argument in favour of such duties being imposed on companies, see D Bilchitz "Do Corporations Have Positive Fundamental Rights Obligations?" (2010) *Theoria* 1 1-35.

[201] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 21.

obligations"[202] – a concept similar to that of the South African organ of state, as discussed.[203] Companies which are involved in fulfilling rights, especially in cases of privatisation, must thus be strictly regulated.[204] The fulfilment of rights must not be compromised for profits, or conditional on the ability to pay.[205] Further, in order to meet its own duty to fulfil, the State should seek business' aid and cooperation in fulfilling rights.[206] The State should also, where necessary, direct company efforts towards performing positive rights fulfilment.[207] It should also again be noted that the State must ensure that its business regulation framework and policy do not hamstring its own ability to fulfil rights.[208] The State may thus be required to implement an effective progressive tax system affecting companies.[209] It may also be the case that the State has to impose a limited legal obligation to fulfil rights on companies where appropriate, such as a duty to fulfil certain basic employee needs or to help indigenous peoples benefit from local activities.[210] This accords with the ICESCR's stressing that rights must be protected, respected and fulfilled, with effective remedies provided.[211] The financial interests of companies must be deprioritised in favour of rights. This is an evidently transformative approach, especially in light of the supremacy of the Bill of Rights.[212] It implicates both the State and companies in the fulfilment of rights, and does not allow for companies to be shielded from involvement simply because they

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[202] Para 21.

[203] See chapter three part 3 3 4.

[204] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 22; Chirwa (2004) *AHRLJ*; Moyo *Implications for the Privatisation of Water Services*; Moyo & Liebenberg (2015) *HRQ*; Nolan (2018) *HRQ*.

[205] Para 22.

[206] United Nations Committee on Economic, Social and Cultural Rights *Statement Regarding the Corporate Sector* para 6.

[207] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 24. A domestic example of this would be legislation requiring that employment equity plans be drafted and implemented by companies, such as Chapter 3 of the Employment Equity Act 55 of 1998.

[208] Paras 12-13; United Nations Human Rights Council *Guiding Principles* Principles 9 and 10.

[209] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 24* para 23.

[210] See, for instance, para 17.

[211] The UNGPs do not provide detailed comment on the State duty to fulfil, but state it as one of their grounding concepts and fundamental principles: United Nations Human Rights Council *Guiding Principles* General Principles, and Principle 1.

[212] S 2 of the Constitution; see chapter three parts 3 2 and 3 3.

are non-state entities. This is especially important given the role of the State in facilitating company business through state policy, law and enforcement.[213] These implications of the State duty to fulfil must thus be strongly integrated into our domestic human rights regime.

As has been shown in this overview, both the ICESCR and the UNGPs hold a great deal of value for the field of business and human rights. More specifically, both instruments extensively inform the interpretation of the overarching State duty to protect and respect rights. The ICESCR further informs the substantive rights in the Bill of Rights and elaborates on the State duty to fulfil rights, and on how this implicates companies. This field is in the process of developing, and so further research and legislative attention is certainly necessary here.

## 4 5 Conclusion

This chapter has sought to consider the value of international business and human rights law for the domestic human rights regime. It first distinguished the present "state-centric" approach at international law from the inherently state-centric domestic approach followed by the Bill of Rights. This chapter proceeded to specifically consider how international law informs interpretations of the Bill of Rights, following examples set by domestic case law. Transformative constitutionalism implies that the interpretation of the Bill of Rights should be open to international law. As a result, the Bill of Rights cannot be read or interpreted without considering international law instruments, even when they are not domestically enacted or binding.

In particular, international business and human rights law informs the overarching State duty to respect, protect, promote and fulfil human rights as stated in section 7(2) of the Constitution. This aligns closely with the rights-centric approach considered previously,[214] focusing on State enforcement and the fulfilment of rights rather than on the question of duty-bearer. It also points to some degree of systemic intervention in the legal structure supporting companies and their economic activity. International law also informs, where relevant, the content of any applicable substantive rights. As a result, the ICESCR and United Nations Guiding Principles can both be seen as persuasively informing the meaning of these provisions in the Bill of Rights. These international instruments thus have important implications for the State, which must

[213] See chapter one part 1 1 1, chapter two, and chapter three part 3 2 2.

[214] See chapter three parts 3 3 and 3 4.

take steps to reform company law so that rights are protected from infringement by business actors, with effective remedies also provided to victims. These instruments also necessarily implicate domestic companies and company regulation, such as by requiring the introduction of (at least) a due diligence framework for companies.

Wide and coordinated systemic reform of company law is likely necessary to align South Africa's regulation with the content of these international instruments. Importantly, however, such reform is evidently necessary for the State to meet its own duties, both at international law and under the Constitution. Accordingly, these instruments should be used as catalysts and core guides to transforming South African company law in line with the Bill of Rights.

Thus, in light of these findings and those of the previous chapters, the following chapter will present some salient implications and recommendations – both theoretical and practical – for business and human rights law in South Africa.

# Chapter 5: Towards the transformation of company law: Implications and recommendations

## 5 1 Introduction

The previous chapters have demonstrated that a transformative interpretation of the Bill of Rights of the Constitution of the Republic of South Africa, 1996, ("the Constitution") points to the need for wide reform of company regulation in South Africa, centred on human rights. However, as discussed,[1] such reform has not yet taken place. This chapter aims to consider the implications of the previous chapters' findings, and to make recommendations for reform in the field of business and human rights law.

The chapter will first consider the theoretical and doctrinal implications of the study. It will consider the shortcomings of the present Bill of Rights application doctrine where companies are concerned, and make recommendations for how this can effectively be addressed. It will then consider the more fundamental question of the conceptual approach to companies in the field of human rights law, advocating for a systemic approach in place of a more atomistic approach. The chapter will then turn to practical proposals for regulatory reform, from both a judicial and legislative perspective. It will consider how existing mechanisms can possibly be reformed by judicial interpretation, and note the regulatory implications of incorporating international human rights law into our domestic company law system via the Bill of Rights. It will conclude by broadly outlining possible legislative interventions that could begin to harmonise company law regulation with the Bill of Rights.

## 5 2 Theoretical implications and recommendations

### 5 2 1 A coherent and rights-centric approach to non-state entities

This thesis has shown that there is a great deal of confusion in the application of the Bill of Rights to non-state entities, and particularly so for companies.[2] It can be concluded that the Bill of Rights binds the State, companies and company-related actors (such as directors, managers and shareholders), and company law.[3] This occurs at once, and variously, through several mechanisms in the Constitution: the

[1] See chapter one part 1 1 3.

[2] See chapter three.

[3] See chapter three part 3 4.

section 7(2) duty to respect, protect, promote and fulfil rights; the binding of the State and law in section 8(1); the binding of non-state entities in section 8(2); the interpretation of statute and development of the common law in accordance with constitutional values, in section 39(2); and the treatment of companies as organs of state through section 239. The first primary implication from this study is that, despite the confusion and overlap, it must be possible to seek effective remedies against companies or company-related actors in court through any (or several) of the provisions discussed. These remedies may arise from direct constitutional obligations being placed on companies; from companies being indirectly regulated through company law, so that the State meets its own human rights obligations and the law be rendered consistent with the Bill of Rights; or from a combination of both of these approaches. Regardless, company law will have to be reformed to give proper effect to these complex multicentric obligations – with the Bill of Rights binding and implicating companies, company-related actors, the State and company law – and thus to give effect to rights. As will be argued below, legislative change in this regard is likely necessary to address the complexity of these obligations, both so that rights can be given effect and so that there is regulatory certainty and guidance for companies and victims.

Further, it is suggested that the judiciary and legislature take active steps to clarify the application of the Bill of Rights where companies are concerned. In particular, there is need for doctrinal clarity, coherence and consistency in the scope and use of sections 7(2), 8(1), 8(2), 39(2) and 239 of the Constitution. This makes it difficult for victims to effectively claim against companies for rights violations, and is a prominent impediment to the transformation of company law. This thesis recommends that reform in this area be achieved by moving away from a formalist duty-bearer-centric approach that focuses on the burdens imposed on companies. Such a duty-focused approach tends to focus on the formalist question of who should be the duty-bearer, rather than on the victim's rights. As such, it conceptually takes for granted existing legal-economic relations – and thus favours them – instead of treating them as subordinate to human rights, and thus not allowing those relations to be critiqued and reformed.[4] In particular, this approach facilitates a reluctance to interfere with companies' legal structuring and interests in making profit – with the accompanying reluctance to impose human rights obligations on non-state entities regardless of the scale or influence of the company in

[4] See chapter two part 2 4, and chapter three part 3 2.

question, and the State's obligations not being considered at all. This latter duty-bearer-centric approach thus significantly reduces the scope of rights, subordinating them to existing ordinary law (such as the common or statute law of companies) and legal conceptions (such as the capitalist conception of the company as a wholly for-profit and "private" institution) – both of which are left unscrutinised.

This thesis has thus instead proposed a rights-centric approach with multicentric duties. As discussed,[5] this would first consider the full, substantive and transformative interpretation of the right – or even the scheme of the Bill of Rights as a whole – which the victims claim has been infringed. Once an infringement is established – agnostic of the question of duty-bearer – an effective remedy for the violation would be decided as a matter of policy. In other words, the remedy (and accompanying obligations) arise from a policy decision of how best to give effect to the right as substantively interpreted, rather than the formalist question of duty-bearer being used to narrow down the scope of the right. Such a transformative remedy will likely effectively give rise all at once to obligations on companies, their related business actors (such as directors and employees), and the State, and further bind company law itself as well.

The rights-centric approach is also coherent across all of the above mentioned constitutional provisions, and with a rich and substantive conception of transformative constitutionalism.[6] Further, it accords well with a more systemic understanding of companies and company law, as considered below. Finally, it allows for the Bill of Rights to be harmonised with international law. As discussed, international law must deeply inform the substantive rights in the Bill of Rights, as well as the overarching State duty in section 7(2), if transformative constitutionalism is to be adhered to.[7] The approach of using state regulation and action informed by international law to ensure that rights are fulfilled coheres with the above rights-centric approach with multicentric obligations on the State, companies and other business actors (in addition to the ordinary law being bound by human rights law).[8] This approach amounts to a fundamental normative shift in favour of rights. It is thus recommended as a means of effectively transforming company law, and of ensuring that formalist reasoning and ideology does not defeat human rights.

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[5] See chapter three parts 3 3 5 and 3 4.
[6] See chapter three parts 3 2, 3 3 and 3 4.
[7] See chapter four parts 4 3 and 4 4.
[8] See chapter four part 4 2.

5 2 2 Transformative constitutionalism as requiring a systemic approach to companies and company law

As discussed, the approach to business and human rights law in South Africa has generally tended to be atomistic, rather than systemic.[9] As a result, space restrictions in this study have not allowed for a meaningful consideration of the systemic approach without compromising the presentation of the current state of the field. Practically, the atomistic approach means that the field has focused on the conduct committed by individual companies; considered whether and on what grounds such conduct may amount to a violation; and explored what remedies could be ordered for such individual violations. Focus has also primarily been placed on considering how existing company law mechanisms could be reformed to better give effect to human rights in cases of individual abuses. The above-mentioned rights-centric approach with multicentric duties has generally not been considered, with the emphasis rather placed on interpreting existing company regulations to be more compliant with the Bill of Rights.[10]

However, it has nonetheless been shown that a critical and contextual systemic approach accords far more deeply with transformative constitutionalism than an atomistic approach does.[11] Such a systemic approach views companies, the law, the economy and the State as part of a complex and integrated system. The effects of this system are then examined for whether they give rise to violations, rather than scrutiny being placed solely on individual companies. The systemic approach thus avoids the pitfalls of the duty-bearer-centric approach, such as the conceptual or ideological reluctance to impose burdens on juristic persons or to scrutinise the role of State power and law in facilitating “private” profit.[12] The systemic approach further aligns well with an openness to international law in the field of business and human rights.[13] An important implication here is that the present atomistic approach to business and human rights law is insufficiently critical of South Africa’s historical colonial-capitalist political economy, and is thus not meaningfully transformative. Indeed, this failure is arguably a significant shortcoming of the present state of constitutionalism and human rights law internationally, and has been extensively critiqued at home and abroad for

[9] See chapter two part 2 4.
[10] See part 5 3 below.
[11] See chapter two part 2 4, and chapter three part 3 2 2.
[12] See chapter three parts 3 2 2, 3 3 5 and 3 4.
[13] See chapter four parts 4 2, 4 3 and 4 4.

its role in inequality and the negation of democracy.[14] Critically, if transformative constitutionalism relies on the meaningful transformation of South Africa's political-economic system, a failure in this regard amounts to a failure in the transformative constitutional project.[15] It is thus recommended that further research be done to consider the implications of a systemic transformative approach to companies and company law. Thereafter, human rights law and doctrine should be reformed accordingly, and thus rendered meaningfully effective where South Africa's political economy is concerned.

In particular, it is recommended that human rights law and academia take cognisance of political economy and the material conditions of systemic inequality in South Africa, rather than rely on formalist principle and doctrine in the abstract. Further, company law should be considered as deeply linked to other fields of law – most prominently property and contract – and thus as part of a wider system that has implications for human rights. Pistor's recent work indicates an early step in this direction.[16] She considers the systemic and contextual role of the law, including company, property, contract, insolvency, and intellectual property law. She pairs this with the systemic context of the concentrated institutional power of the legal profession itself, and thereby assesses the legal system's role in creating wealth inequality and negating democracy worldwide. Human rights law must necessarily incorporate and further this research if the field is to be meaningfully effective and transformative.

Practically speaking, the findings of a study that follows a different conception of business and human rights would likely give rise to significantly different implications for companies and corporate regulation. For instance, an atomistic approach may consider how directors can take human rights into account when making decisions

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[14] See JM Modiri "Law's Poverty" (2015) 18 *PER* 224; S Sibanda "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" (2011) 22 *Stell LR* 482; A Rafudeen "A South African Reflection on the Nature of Human Rights" (2016) 16 *AHRLJ* 225; S Terreblanche *Lost in Transformation* (2012) 101-115; S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 95-149; T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 123 *Stell LR* 123; JM Modiri "Towards a '(Post-)apartheid' Critical Race Jurisprudence: 'Divining Our Racial Themes'" (2012) 27 *SAPL* 231 237; S Moyn *Not Enough: Human Rights in an Unequal World* (2018) 212-220; P Joseph *The New Human Rights Movement: Reinventing the Economy to End Oppression* (2017).

[15] See chapter three part 3 2.

[16] K Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

over the significant capital they control, while a systemic political-economic approach may find that directors (and indeed companies and shareholders) should in the first place not have such extensive control over South African society through their immense concentration of wealth. A systemic approach may also see large companies as both relying on and perpetuating South Africa's extreme economic inequality, and may thus perceive the mere existence of companies of certain degrees of economic and political influence – mobilising their immense "private" concentration of capital for their "private" profit – as an inherent systemic human rights violation or affront to democracy.[17] Concluding implications may thus be that far more extensive legal (and thus economic) transformation is necessary, extending to the fundamental restructuring of companies and company law as it is currently conceived. The systemic approach thus allows a far more critical structural analysis of what constitutes a human rights violation, and of how these violations arise and can be addressed.

Importantly, even following an atomistic approach, it can be noted that companies' spheres of influence and control are determined by their wealth. As a result, it is unlikely that human rights violations by companies can be adequately addressed without equally addressing wealth inequality in South Africa. It is thus recommended that human rights violations by companies never be viewed in isolation, but that they be considered as part of a broader South African legal-economic context. It is also recommended that wider economic issues in South Africa, such as wealth inequality, be practically addressed. In particular, further study is needed on the real implications of wealth inequality and South Africa's political economy for the meaningful fulfilment of human rights, and for the effectiveness of the human rights system as a whole.

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[17] See, for instance, Moyn *Not Enough* 212-220; Joseph *New Human Rights Movement*; S Ashman, B Fine & S Newman "The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development" (2011) 47 *Socialist Register* 174 182; S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 8-17, 56-65, 153-415; S Terreblanche *Lost in Transformation* (2012); H Wolpe "Capitalism and Cheap Labour-Power in South Africa: From Segregation to Apartheid" (1972) 1 *Economy and Society* 425; RL Hale "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 470; L Crocker "Marx's Concept of Exploitation" (1972) 2 *Social Theory and Practice* 201; S Makgetlaneng "How Capitalism and Racism Continue to Shape the Socio-Economic Structure of South Africa" (2016) 46 *Africanus* 1 6-7; Masondo (2007) *Africanus* 68-72.

## 5 3 Practical recommendations for regulatory reform

### 5 3 1 Recommendations for judicial intervention

As previously discussed,[18] the present literature on business and human rights law in South Africa has generally focused on judicially interpreting existing company law mechanisms so that they may better give effect to the Bill of Rights. These academic efforts are thus primarily focused on section 7(a) of the Companies Act 71 of 2008 (hereafter the "Companies Act"). This section, added late in the drafting process of the Companies Act, states that one of the purposes of the Act is to promote compliance with the Bill of Rights in the application of company law.[19] This thesis has shown how, even without the addition of such a section, the regulatory regime would necessarily have to be made coherent with the complex and novel nature of human rights obligations where companies are concerned.[20] Following the concession theory of companies, the State is always able to regulate companies as it sees fit.[21] More fundamentally, however, the State, law and companies are all equally subject to the Constitution.[22] Indeed, the State is under human rights obligations in terms of the Constitution and international law to regulate companies and thereby give effect to human rights.[23] Thus, existing mechanisms must as far as possible be reformed to give effect to rights. Where possible, then, the judiciary must interpret legislation or develop the common law to give effect to substantive rights. Where the present regulatory regime cannot be interpreted or developed to give effect to rights, it must be

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[18] See chapter two part 2 4; D Bilchitz "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 125 *SALJ* 754 780-783, 786-789; C Samaradiwakera-Wijesundara "Business and Human Rights: To What Extent Has the Constitution Transformed the Obligations of Business? Conference Paper: Twenty Years of South African Constitutionalism" (14-11-2014) *New York Law School Law Review Papers* 4-5, 24 <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Samaradiwakera-Wijesundara.pdf> (accessed 25-09-2019); M Gwanyanya "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" (2015) 18 *PER* 3102; J Katzew "Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008" (2011) 128 *SALJ* 686; L Smit "Binding Corporate Human Rights Obligations: A Few Observations from the South African Legal Framework" (2016) 1 *Business and Human Rights Journal* 349.

[19] See chapter one part 1 1 3.

[20] See chapter two, and chapter three parts 3 3 5 and 3 4.

[21] Chapter two part 2 5 2.

[22] See chapter two part 2 3 and 2 5 2, and chapter three part 3 2.

[23] See chapters three and four.

declared invalid and systemically reformed. The potential nature of such systemic reform has already been considered above.[24] The implications for narrower reform of certain prominent mechanisms and doctrines, introduced earlier,[25] will thus be considered here.

Firstly, as concerns the corporate veil,[26] it is recommended that the remedy be developed so that human rights remedies can be ordered against those "behind" the company's veil.[27] This is the case for both the development of the common law remedy and the interpretation of the legislative remedy, in section 20(9) of the Companies Act.[28] This will allow for holding controlling parent companies liable, where subsidiaries infringe rights and cannot adequately provide compensation.[29] For example, where a subsidiary company is under the control of a parent company, and thus is run to provide profit for that parent company, it might infringe rights in the pursuit of that profit. As subsidiaries are smaller companies than their parents, the subsidiary may not possess the necessary funds to compensate victims for the harm it caused to them. As the parent company is a separate juristic person, no claim for harm could ordinarily be made against it. This "corporate veil" would thus ultimately allow the parent company to shield itself from liability and reduce the economic risks involved in profit-making. Normally, this would mean that the loss would remain with the victims, as there would be insufficient funds to compensate them. However, if the corporate veil can be pierced, the larger parent company may also be claimed against, and be made to compensate the victims and thus give adequate relief. The "unconscionable" abuse of juristic personality justifying the piercing of the veil in terms of section 20(9) of the Companies Act in this case would be the outsourcing of risk and loss to victims while retaining the profits. In the context of ordinary company law, Stevens has already argued for a limited rebuttable presumption that parent companies be conceived as a single economic and legal unit with their subsidiaries, rather than as separate legal

[24] See part 5 2 of this chapter.
[25] See chapter two part 2 4.
[26] See chapter two part 2 4 1.
[27] Katzew (2011) *SALJ* 700-704; Bilchitz (2008) *SALJ* 786-789; Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 10-11; Smit (2016) *BHRJ* 350-352.
[28] The common law and legislative forms of the remedy are discussed in chapter two part 2 4 1.
[29] Katzew (2011) *SALJ* 700-704.

persons.[30] Such a presumption would be extremely valuable in human rights matters as well, and would especially aid vulnerable victims in claiming relief.

Importantly, Katzew emphasises that the decision to pierce the veil is ultimately a normative one, and that the balance should weigh generally in favour of human rights and piercing the veil.[31] However, emphasis must also be placed on the multicentric human rights obligations that already fall on other business actors (such as directors, managers and shareholders).[32] That is, even in the ordinary presence of the corporate veil, all business actors are already under obligations to not infringe human rights.[33] The norm is not that shareholders and parent companies are shielded from human rights obligations *except where* the veil is pierced, but that they are *always* under human rights obligations. The conceptual focus should thus be less on formalistically finding a veil to pierce, and thereby reducing human rights obligations to reified company law concepts such as juristic personality. Rather, focus should be on the policy question of how an effective remedy can be given, and against whom it should be ordered. In other words, where it is appropriate from a human rights perspective to order that shareholders or parent companies pay compensation, this can and should be ordered, without having to assess the requirements for piercing at common law or statute. As discussed earlier, rights and effective remedy should be central to any analysis, rather than questions of duty-bearer.

A potentially more far-reaching reform concerns the duty of directors to act in the best of interests of the company.[34] Several authors have suggested that this provision must now be interpreted to mean that directors must prioritise human rights above the pure financial interests of the company.[35] As examined in this thesis, this means that companies cannot infringe on rights in the pursuit of profit, but also amounts to positive

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[30] RA Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* LLD dissertation Stellenbosch (2011) 281-288. Stevens gives an extensive survey and analysis of the principle of limited liability as it applies to groups of companies, and proposals for reform from a company law perspective.

[31] Katzew (2011) *SALJ* 703.

[32] See chapter three part 3 4, and chapter two parts 2 2 and 2 3 on the nature of legal personhood.

[33] Samaradiwakera-Wijesundara “Business and Human Rights” *NYLSLRP* 11-12.

[34] See chapter two part 2 4 2.

[35] Bilchitz (2008) *SALJ* 780-783; Samaradiwakera-Wijesundara “Business and Human Rights” *NYLSLRP* 7-11; Gwanyanya (2015) *PER* 3109-3111, 3120-3121; Katzew (2011) *SALJ* 691-694, 704-709.

duties being placed on companies, such as the duty to perform due diligence[36] or even positive duties to fulfil rights.[37] This reform is a necessary implication of the fact that companies and their actions arise entirely from the law, and the law is wholly subject to the Bill of Rights.[38] Accordingly, a company's best interests – as a product of the law – cannot extend to the infringement of rights. It thus follows that a company can have no legal financial interest in infringing rights. This is not to say, conceptually, that human rights obligations are somehow limiting the scope of company profits. Rather, profit itself can only legally exist once human rights obligations have been fully accounted for. In other words, there is no question of balancing profits against human rights, as profit arises from ordinary law and is thus itself wholly subordinate to human rights. If profit is given any priority, it is only through the justifiable limitation of rights (per section 36 of the Constitution), and such limitation must be closely scrutinised.[39] Bilchitz observes that this is not simply a question of imposing obligations on companies.[40] Rather, it is effectively a "radical" change in the nature of companies themselves, as they are no longer run for profit in the traditional sense[41] (at least in terms of law, if not presently in fact).

Two details concerning the director's duty must be noted here. First, directors can raise a defence in terms of the Act if it is claimed that they breached their duty to act in the company's best interests. In terms of section 76(4), directors are deemed to have acted properly if they have (amongst other conditions) taken reasonably diligent steps to become informed about the matter, and had a rational basis to believe the action was in the company's best interests. This "business judgement rule" protects directors from judicial interference in business decisions, and is a very forgiving threshold in its present incarnation.[42] This defence naturally cannot be interpreted to be a defence in human rights matters concerning directors' duties, unless this provision can be considered to be a justifiable limitation of rights in terms of section 36 of the Constitution. Regardless, a transformative approach to human rights claims should not

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[36] See chapter four part 2 5 2 2.

[37] See chapter three part 3 3 5.

[38] See chapter two part 2 3.

[39] Samaradiwakera-Wijesundara "Business and Human Rights" *NYLSLRP* 15-21.

[40] Bilchitz (2008) *SALJ* 780-781.

[41] Bilchitz (2008) *SALJ* 780-781.

[42] R Stevens & P de Beer "The Duty of Care and Skill, And Reckless Trading: Remedies In Flux?" (2016) 2 *SAMLJ* 250 254-264.

see them evaded with the defence of business judgement. Second, as discussed,[43] only the company can claim against the directors for breach of their duties. Other stakeholders can at best bring a derivative action in terms of section 165 of the Act, but this must still be to "protect the legal interest of the company".[44] As the company may have no incentive or interest in suing directors for breach, this leaves victims without a remedy. As there is less threat of legal action, there is less incentive for directors to act in the interests of human rights. It is thus likely necessary to broaden the basis of standing in terms of the duty. This can be achieved through legislative reform, or through interpreting section 218(2) of the Act for this purpose, as will be considered below.

Prioritising human rights above profit accords well with transformative constitutionalism, and is to be fully commended in the South African context of extreme economic inequality.[45] Further, the imposition of the duty on directors to prioritise human rights above company profits accords with the aforementioned multicentric approach to human rights regulation in the field of company law, where the company, directors, managers and shareholders are all equally under human rights obligations. The primary difficulty here lies in the lack of clarity in how directors are to prioritise human rights above profit. Due diligence, as required by international law,[46] would be a minimum standard that directors would have to meet when courts interpret the duty. However, due diligence itself does not adequately convey the extent to which directors must sacrifice profits in meeting their positive duties to fulfil rights, for instance. More importantly, the extent to which profits must be sacrificed for rights fulfilment is also a normative question.[47] It could be required of directors that they wholly sacrifice the financial viability of their companies and direct the full machinery of their capital towards the fulfilment of rights. It could equally be (as is currently the case in fact) that the profit motive and day-to-day operations of companies remain effectively unaffected by human rights considerations, except where companies commit extremely unconscionable offenses and they can be sued. There is no empirical method to decide one or the other – the question is rather one of normative judgment as decided by the State. In other words, it is for the State to decide and implement a policy effectively

[43] Chapter two part 2 5 2 2.
[44] S 165(2) of the Act.
[45] See chapter three part 3 2.
[46] See chapter four part 4 4 2 2.
[47] Bilchitz (2008) *SALJ* 779.

setting the extent to which companies are still "run for profit" in South Africa. The extent to which company law is transformed will thus ultimately be set by judges and legislators, in how they shape the law governing this directors' duty and decide how far profits must be subordinated to the pursuit of human rights. It is of course recommended that courts take a critical and transformative approach, centred on and prioritising rights foremost, rather than an approach that prioritises profits and prevailing capitalist-colonialist economic relations.

It is also recommended that the civil and criminal mechanisms under the Companies Act[48] be interpreted to actively give effect to rights and provide remedies. In particular, contravention of human rights where companies are concerned – whether committed by companies or related business actors like directors or managers – should be understood as also contravening the Act. Such an interpretation would ensure that some of the Act's remedies are able to be mobilised for human rights purposes, and thus brings the Act into greater compliance with the Bill of Rights. For instance, section 218(2) of the Act provides an action for loss or damage caused by any person who violates a provision of the Act. If infringing on rights is considered a violation of the purpose of Bill of Rights compliance in section 7(a) of the Act, section 218(2) would provide compensation for any human rights victims, as ordered against any person who caused the violation.[49] As noted above, for instance, this should allow for victims of human rights violations to claim against directors for breach of their duty to act in the best interests of the company (as interpreted to include human rights). Again, this supports a multicentric approach to duty-bearers, with the company, directors, managers and so on all equally bound by human rights obligations. Similarly, as discussed,[50] compliance notices are issued to any person who contravenes the Act or who benefits from such a contravention,[51] and non-compliance with such a notice is a criminal offence.[52] Following the interpretation given above, any human rights violation should amount to a contravention of the Act, and thus should lead to a compliance notice, with further non-compliance being a criminal offence.

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[48] See chapter two part 2 5 3.

[49] Samaradiwakera-Wijesundara "Business and Human Rights *NYLSLRP* 11; Katzew (2011) *SALJ* 707.

[50] See chapter two part 2 5 3.

[51] S 171 of the Companies Act.

[52] S 214(3).

An aspect that has not been adequately considered in the literature concerns the validity of company actions in the context of human rights. As discussed, companies and their actions arise entirely from the law, and the law is wholly subject to the Bill of Rights.[53] Accordingly, any acts of a company would be invalid if these infringed on human rights, unless it can be argued that the role of company law in enabling such acts amounts to a justifiable limitation of rights as per section 36 of the Constitution. This would extend to any acts by those who have legal relationships with the company in terms of company law, such as shareholders, directors, managers and employees. These acts would include, for example, internal procedures (such as voting), and any decisions taken by the directing minds[54] (such as the conclusion of a contract or internal restructuring). In effect, rather than simply holding that companies are prohibited from infringing on human rights, it could also be argued that companies and their related actors do not have the legal capacity to infringe on rights. In other words, companies and their related business actors can only legitimately act when doing so in accordance with rights obligations, and courts must be able to scrutinise the validity of company actions for their consistency with the Bill of Rights. The remedy for rights victims in such cases would arise from the invalidation of the company's acts. For example, if the company made a decision to pollute the local environment, that decision could be deemed invalid by a court. If the company contracted with another company to pollute, the contract could be deemed invalid – not strictly because the contract itself was inconsistent with the Bill of Rights,[55] but because the company could not have had the legal capacity to conclude a contract that led to rights being violated.

Similarly, any decision by the directors not to assign resources to the positive fulfilment of rights (where such a duty to fulfil exists) could conceivably be deemed an invalid decision. In all these cases, beyond the relief granted in the invalidating of the decision, compensation could be claimed against the company for harm caused by its illegal actions – through section 218(2) as considered above, for instance. The possibility that business actors' decisions may later be deemed invalid if they infringe on rights also acts as an incentive to avoid making such decisions. Once again, a multicentric duty-bearer approach would be supported by such a development, as the

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[53] See chapter two part 2 3.

[54] See chapter two part 2 2 2.

[55] The courts have held that a contract cannot be directly tested against the Bill of Rights: *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 23-30. This view has been heavily criticised: see, for instance, S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *SALJ* 762.

acts of all business actors – directors, shareholders, managers and so on – are equally subject to being declared legally invalid if they infringe on rights. As will be discussed below, however, reform covering the invalidation of such actions would likely be necessary here, as uncertainty may lead to a chilling effect on business dealings for fear of their later being invalidated.

Finally, as discussed, transformative constitutionalism demands the deep integration of international law into the domestic human rights regime.[56] The previous chapter has thus suggested a number of potential reforms that are supplied through integrating international law into the Bill of Rights, with implications for the State, companies and company law.[57] As discussed, the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[58] and the United Nations Guiding Principles on Business and Human Rights ("UNGPs")[59] in particular require a set of critical regulatory reforms. It is thus recommended that courts take active steps to deeply incorporate these instruments into all interpretations of the Bill of Rights, and reform company law accordingly. For instance, a system of corporate due diligence must be introduced by legislation, as advised below, but courts must in the meantime incorporate the standard into evaluations of directors' conduct (such as the duty to act in the "best interests of the company").[60] Importantly, a due diligence system must still allow for strict liability in certain cases, as even duly diligent companies must be ordered to provide remedies where it is deemed appropriate. Again, this would require an adequate normative standard being set by courts, and it is recommended that the normative standard be transformative and favour victims' rights foremost.

### 5 3 2 Recommendations for legislative intervention

While judicial interpretation and development in line with human rights is necessary and must be pursued as far as possible, it will likely not be sufficient in many of the above cases of reform. In all of these cases, judicial interpretation involves putting

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[56] See chapter four part 4 3.

[57] See chapter four part 4 4.

[58] International Covenant on Economic, Social and Cultural Rights (1966) *United Nations Treaty Series* 993 3.

[59] United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31.

[60] See chapter four part 4 4 2 2.

traditional company law conceptions and mechanisms to human rights uses – a purpose for which they were not initially conceived. As discussed, section 7(a) of the Companies Act – declaring that one of the Act's purposes was to promote Bill of Rights compliance – was only introduced late in the drafting process. Thus, while the provisions can and must be interpreted to allow for human rights regulation and remedies, tailor-made legislation that specifically reforms companies and company law in accordance with human rights would be preferable. This is especially necessary in light of the confusion surrounding the many ways in which non-state entities in South Africa could be affected by the Bill of Rights.[61] This lack of clarity, guidance and regulatory coherence is undesirable for all parties involved, and would not properly protect human rights norms. Further, as discussed, international law in the field of business and human rights is highly nuanced, with a great many technical implications for domestic regulation.[62] A significant legislative initiative will thus also be necessary to specifically incorporate international human rights law into company law. Without such an initiative, the State is unlikely to meet its own duties under the Bill of Rights and at international law.[63]

Finally, meaningful transformative changes to the economic structuring of South Africa are likely to be disruptive, and would require policy research and planning to an extent that courts cannot supply. This is especially the case if these are to be truly systemic changes, rather than merely atomistic. The scale of structural transformation needed to subordinate business to human rights is immense in a historically capitalist-colonialist political-economic system such as South Africa's.[64] Accordingly, it is recommended that reform of these company law mechanisms take place via legislation, rather than only through judicial interpretation.

Such a new human rights regime for companies should be holistic, and address at once all of the reforms necessary to better harmonise company law with the Bill of Rights. It is recommended that this regime follow a rights-centric approach with multicentric duties on the State, companies and other business actors (such as

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[61] See chapter three parts 3 3 5 and 3 4.

[62] See chapter four part 4 4.

[63] Of course, the State is always able to integrate international law into domestic regulation in any case, without the intermediate step of Bill of Rights interpretation. However, this thesis studies Bill of Rights obligations in particular, and thus focuses on the incorporation of international law through the Bill of Rights.

[64] See chapter one part 1 1 1, and chapter three part 3 2 2.

directors, shareholders, managers and external contractors) all at once. As discussed above, it must prioritise the substantive interpretation of rights and the provision of effective remedies and remedial mechanisms, both as informed by international human rights law.[65] Victims of violations should have easy access to courts, and have the necessary standing to claim effective remedies. This is especially important given the probable extreme inequality in litigation power between wealthy corporations and poorer victims.[66] Remedies should be able to be ordered against any of the relevant actors where it is deemed appropriate to vindicate the right – whether those actors be State or non-state. Multicentric duties thus supply a sort of human rights approach to corporate veil-piercing and the directors' duty to act in the "best interests of the company" both, as all business actors are equally bound to rights.

Further, specific regulatory mechanisms supplied by international law via the Bill of Rights – such as due diligence – must equally form part of this legislative initiative. These have been considered in some depth,[67] and so will not be repeated here. Critically, these reforms must not be perceived as transformative regulations lying parallel to company law, but must rather be considered as fundamental transformations of company law itself to give effect to the Bill of Rights and relevant international law, with existing legislation and the common law both implicated. This must produce a single transformed system of law, founded centrally on human rights.[68] It is thus recommended that the Companies Act be significantly amended. The statute should not merely have some of these reforms appended onto its existing form, but should be fundamentally restructured to have the Bill of Rights and human rights regulations at its centre, with all other regulations shaped around these. While remedies should naturally be supplied by courts, the regulatory bodies in the Act (such as the Companies Commission) should also be involved in the full enforcement of these provisions.[69]

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[65] See chapter four.

[66] See chapter four part 4 4 2 1; J Dugard "Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice" (2008) 24 *SAJHR* 214; S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 92-93.

[67] See chapter four part 4 4.

[68] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See chapter three part 3 2.

[69] These bodies are established in chapter 8 of the Act. D Davis & W Geach (eds) *Companies and Other Business Structures in South Africa* 3 ed (2013) 307.

The social and ethics committees of influential companies should also be reformed to play a far stronger role in making human rights part of day-to-day operational culture.[70] They should be given stronger powers in their respective companies, including, for instance, the power to compel directors to direct funding towards the positive fulfilment of human rights. They should themselves receive sufficient company funding to research and assess the human rights impact of their companies, and can thus play a strong role in the due diligence system. A limitation of these committees, however, is that they still amount to companies regulating themselves, rather than being externally subjected to human rights norms. Moreover, while these committees may be reformed to dilute the central power of the board of directors, this will still not distribute control to human rights stakeholders outside of the company. Thus, the reform of the social and ethics committees must be accompanied by the abovementioned substantive changes in company regulation generally, with effective remedies guaranteed to external victims. The goal should be that the very nature and daily operation of companies (and, by extension, South Africa's economic activity more broadly) be founded on, and conducted in line with, the Bill of Rights. Violations of rights must be prevented, on the one hand, but the active fulfilment of rights must also be facilitated.

A complication for these reforms is that many regulations are likely to be context-sensitive, depending especially on the extent to which their companies exert influence over rights victims. For example, it may be less appropriate to require that very small local companies provide housing and sanitation to their employees, while such standards would be wholly appropriate for large listed companies on whom entire communities depend. Such context-sensitive differentiation is already partly the case in South Africa, as social and ethics committees are only required for companies of certain degrees of influence.[71] However, far more detailed regulation would be needed to allow these contexts to be taken into account, for both regulatory effectiveness and certainty. For instance, it must be clear to directors how exactly they must go about meeting their positive duties to fulfil, depending on their operational context.

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[70] See chapter two part 2 5 2 2; HJ Kloppers "Driving Corporate Social Responsibility (CSR) Through the Companies Act: An Overview of the Role of the Social and Ethics Committee" (2013) 16 *PER* 166; Gwanyanya (2015) *PER* 3113-3114; M Havenga "The Social and Ethics Committee in South African Company Law" (2015) 78 *THRHR* 285.

[71] See chapter two part 2 5 2 2; Kloppers (2013) *PER*; Gwanyanya (2015) *PER* 3113-3114; Havenga (2015) *THRHR* 285.

Importantly, this context-sensitivity assumes a transformative rights-centric approach, focusing on the fullest interpretation of the right regardless of the nature or identity of the duty-bearer.[72] If a formalistic duty-bearer-centric approach is followed, such context is easily erased, and burdens on larger and wealthy companies may seem conceptually similar to those on smaller companies, or even natural persons.[73] Again, these are also normative questions – rather than questions of principle – which must be decided upon as a matter of effective policy by the legislature and courts. It is of course recommended that such policy be as transformative as possible, preferring meaningful change over the preservation of historical capitalist-colonialist economic relations. It is thus further recommended that these proposed regulatory changes be accompanied and underpinned by, and fully incorporate, the doctrinal and conceptual developments argued for in this chapter. In particular, these include a systemic approach to company regulation, and a normative shift prioritising human rights above legal-economic relations.

## 5 4 Conclusion

This chapter has provided an overview of the implications raised by the findings of this study. It has noted the lack of doctrinal clarity in the application of the Bill of Rights where companies are concerned, and recommended that coherence and consistency be sought in this regard. It has also recommended the full inclusion of international human rights law concerning companies into the interpretation of the Bill of Rights. Importantly, this chapter has specifically proposed a rights-centric approach to Bill of Rights application in the context of companies, which focuses on rights and effective remedy and leads to the multicentric binding of the State, law, companies and company-related actors. Critically, a systemic approach to companies and company law (and their effects on human rights) has been recommended as a necessary area of further development, with significant implications for the transformation of South Africa's political economy in line with human rights and democracy.

This chapter has also provided specific recommendations for courts on the interpretation and development of existing company law doctrines and mechanisms, following the preceding theoretical and doctrinal implications. Finally, this chapter has

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[72] See chapter three parts 3 3 5 and 3 4, and chapter four part 4 4 2 2.

[73] See chapter three part 3 3, especially concerning *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC).

noted that some reform by judicial interpretation or development may be possible, but that significant legislative intervention is necessary. It has thus broadly outlined the features of a potential future system of company law designed with the Bill of Rights at its centre, and incorporating international human rights law. Such a system is also in line with the proposed theoretical and doctrinal developments. These developments themselves ultimately rely on a normative shift in favour of human rights, however, and this shift has therefore been proposed as core to the meaningful transformation of South African society where companies are concerned.

# Chapter 6: Conclusion

This thesis examined the implications of the South African Bill of Rights for companies and company law. It specifically utilised the lens of transformative constitutionalism to consider how human rights obligations affect companies and corporate regulation in South Africa, while providing a theoretical analysis and recommendations for reform.

As products of the law, companies and company law itself are fully subject to the Bill of Rights of the Constitution of the Republic of South Africa, 1996 ("the Constitution").[1] The question is rather of how precisely the Bill of Rights applies where they are concerned. This study illustrates that the current business and human rights law literature generally follows an atomistic approach to understanding companies. This approach focuses on companies as individual entities capable of committing violations. As a result, dominant discourses in the relevant literature focus on interpreting and developing existing company law doctrines and mechanisms to give effect to rights.

However, South Africa's project of transformative constitutionalism is the core lens through which the Bill of Rights must be interpreted, and so it is through this lens that companies and company law must be assessed.[2] Transformative constitutionalism necessitates the fundamental restructuring of South African society, including its legal and economic relations. Without this restructuring, transformation will not be meaningful, and it is therefore central to the legitimacy of the constitutional project. This study finds that transformative constitutionalism requires a critical and contextual systemic understanding of companies as part of a holistic political economic system. Such a system implicates companies, company law, the wider economy and the State in an alternative paradigm that is more transformative than the atomistic approach.

Present jurisprudence and literature on the Bill of Rights identifies several constitutional provisions that are implicated where companies and company law are involved.[3] Section 7(2) of the Constitution is independently justiciable and places a general duty on the State to respect, protect, promote and fulfil the substantive rights in the Bill of Rights. Section 8 variously binds the State, law and non-state entities

[1] See chapter two.

[2] See chapter three.

[3] See chapter three.

(such as companies) to the Bill of Rights. Section 39(2) requires that courts interpret legislation or develop the common law according to the Bill of Rights' normative framework. Finally, section 239 of the Constitution allows companies to qualify as organs of state, and thus to accrue some of the State's human rights obligations. These constitutional mechanisms often overlap, and the jurisprudence on them is generally doctrinally unclear. However, recent cases indicate an early yet promising shift towards a transformative and rights-centric approach to business and human rights. The evolving jurisprudence in this regard will hopefully lead to a greater prioritisation of substantive rights, rather than formalist deference to "private" business practices. Additionally, this thesis advances that the implications of the Bill of Rights discussed herein likely extend to all actors involved in companies – such as directors, employees, shareholders and external contractors – as well as to other types of business structures.

International human rights law is critical where companies and company law are concerned.[4] In South Africa, a transformative approach to constitutional interpretation requires integrating international human rights law instruments as an inherent part of the fabric of the Bill of Rights. This thesis argues that the interpretation of the Bill of Rights where companies are concerned must involve the full consideration of these instruments, and that these instruments should be incorporated into the interpretation as far as possible. This study contends that the State must reform company law to ensure coherency with the Bill of Rights and international human rights law. This requires the introduction of a system of due diligence for companies, and the greater imposition of positive duties to fulfil on companies, amongst other specific reforms.

In light of this study's findings, there are significant theoretical implications for the field of human rights and business.[5] Critically, there is a need to address the lack of clarity in the present Bill of Rights application doctrine where companies are concerned. This thesis accordingly proposes a transformative rights-centric doctrinal approach with simultaneous multicentric binding of the State, companies, and law as a means of facilitating this process. This multicentric binding must extend to all business actors involved with companies, including directors, shareholders, parent companies, managers and even external contractors. A further recommendation is that a transformative, systemic approach to South African companies be prioritised over

[4] See chapter four.

[5] See chapter five.

the present atomistic human rights approach. The systemic effects of companies and South Africa's political economy on human rights and democracy should also be considered. Ultimately, these findings should be integrated into the human rights regime if it is to be meaningfully transformative. Importantly, the rights-centric approach lends itself well to systemic analysis, and vice versa. It is thus recommended that these be simultaneously implemented.

State intervention in several areas is also essential. Company law mechanisms and doctrines must be judicially reformed where possible, although legislative reform will be crucial to meaningful and effective regulatory transformation. This thesis thus sets out the contours of such legislative reform, following a transformative approach. Such an intervention must be rights-centric and systemic; informed by international law; include a due diligence system with provision for strict liability; be context-sensitive to company operations; and describe when companies must actively and positively fulfil rights. In addition to these interventions, South Africa's severe poverty and inequality rates must be practically addressed if the systemic nature of corporate violations and control is to be meaningfully transformed.

This thesis identifies several areas warranting further study. Most prominently, it is urgently necessary to study how systemic political-economic insights could be integrated into human rights law theory. Such an approach is critically necessary to rendering the Bill of Rights regime meaningfully transformative in the context of business activities. Further research is also needed on the material effect of South Africa's political economy on the implementation of the Bill of Rights, and on its effects on democracy more widely. Related thereto, this study emphasises that law is a historic and sociological product, and that there are thus deep historic links between the colonial-capitalist and neoliberal ideologies and the law. A critical area for further study thus concerns the effect of ideology on the law, and the role of the law in sustaining ideology. Finally, the extraterritorial application of the Bill of Rights represents a vital area warranting further research. Although this study is limited to human rights infringements committed within South Africa's borders, the question of extraterritorial human rights obligations – especially where multinational corporations are involved – is critically important in a time of global corporate dominance. Given the political and economic prominence of South Africa and its companies on the continent, further study of the extraterritorial application of the Bill of Rights is essential.

The field of business and human rights law in South Africa is rapidly evolving to meet the urgent need for real transformation twenty-five years after formal apartheid.

There is potential for such transformation to take place via the Bill of Rights, but the Bill of Rights must be actively put to this use if the constitutional project is to be meaningful and legitimate. Regrettably, the Companies Act 71 of 2008 has not provided the reform required by the Constitution. Accordingly, there must be a deliberate and significant effort to provide this transformation, reaching to the fundamental nature of the company in South Africa. Throughout this reform process, it must be borne in mind that companies and their profits are products of the law, and must be made wholly subject to the Bill of Rights. This will not only require a change in how the law and companies are conceived, but relies on a fundamental normative shift in favour of human rights foremost. While there have been some promising developments, the field of human rights and company law is still in its infancy, and requires substantial further development and academic study. It is hoped that this thesis provides a valuable contribution to this process, and that it has identified promising avenues for future research and meaningful real-world transformation.

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