A COMPANY IS A COMPANY BECAUSE OF OTHER PEOPLE

CORPORATE SOCIAL RESPONSIBILITY AND THE CONSTITUTION

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PREFACE

> The inability of governments worldwide to protect individuals from economic insecurity has led to a renewed interest and public expectation that corporations have public responsibilities in furthering the interests of the public or the public good.[1]

Corporate social responsibility is a serious and pressing concern for all members of the new South Africa. Recent reports of fraud and corruption in the corporate sphere, coupled with ongoing environmental disturbances and labour disputes, have exposed the dangerous and potentially disastrous effects which can be triggered by corporate abuse. Serious attention and reform in this sphere are critical to the preservation and promotion of a harmonious future. South Africa needs to develop a legislative framework tailored specifically towards the governance of corporate social responsibility in order to ensure that corporate disasters can be foreseen and prevented well in advance of their occurrence, an occurrence that will impact negatively on the well-being of the economy as a whole as well as on the rights of individual citizens.

Corporate social responsibility is not only a social imperative but also a constitutional mandate. Since the implementation of the Final Constitution in 1996, the South African Legislature has had a duty to bring the corporate sphere in line with the foundational principles of our new constitutional democracy, in particular with the Bill of Rights. To date, there has been no evidence of law reform in this regard. The new Companies Act[2], which was promulgated this year but which is only destined to come into effect in 2010, purports to impose greater restrictions and sanctions on the actions of corporate officers. However, the effectiveness of the proposed mechanisms has never been tested and is by no means guaranteed. What is required in order to comply with the constitutional mandate – in place of the present framework of disjointed fragments of legislation which have no unified or valuable effect – is a detailed study of the scope, content and practical implementation of corporate social responsibility jurisprudence, uniquely tailored to the South African context.

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[1] Vettori MS, "Corporate Social Responsibility" *University of Pretoria* (2005) at p 330.
[2] 71 of 2008.

> Corporations are vastly superior to humans in power, money, and resources. Without a clear reason for them to respect human beings, we will be at their mercy. We will have created monsters.[3]

Contemporary society is characterised, to a large extent, by commercial interchange and corporate supremacy. Companies control South Africa's markets and its economy. The vast majority of South Africans rely on these 'corporate giants,' directly or indirectly, for their livelihoods. In an era of corporate dominance it is the responsibility of all South Africans to ensure that sufficient controls and restraints are placed on companies in order to prevent them from perpetrating fraud or other forms of abuse in respect of the societies in which they operate. There is a wide variety of individuals whose entire futures fall to be ruined on account of reckless and irresponsible business practices. On one end of the spectrum are the company's direct participants – employees and creditors[4] – who will suffer direct and extensive financial loss through any malpractice on the part of the company. On the other end of the spectrum are various members of society who also have an interest, albeit an indirect one, in companies observing good business codes. For instance, where a company is polluting the environment of a specific community, every member of that community has an interest in ensuring that this matter is addressed and remedied. In addition, there are the consumers, who also have a direct interest in ensuring that companies observe high standards of care in their production processes and do not expose consumers to unnecessary product risks. Finally, the interests of all South Africans lie in the promotion and protection of the human rights enshrined in the Bill of Rights.

The costs of corporate disaster have been brought to light in recent years. In the United States in the late 1990's, the fall of Enron and associated corporate giants exposed the dire societal consequences resulting from corporate abuse: "Total corporate debt in the form of outstanding bonds and loans soared to $8 trillion after 1998...[5]" Americans insisted that the corporate officers responsible for this debt "...should be forced to part with their ill-gotten gains, which could then be used as reparation for employees who lost jobs and pensions because of the deception.[6]" However, in reality,

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[3] Schudt K, "Taming the Corporate Monster: An Aristotelian Approach to Corporate Virtue," *Business Ethics Quarterly* Vol. 10 No. 3 (July 2000) at p 711.
[4] Tolmie J, "Corporate Social Responsibility" *15 UNSW Law Journal 268* (1992) at p 270.
[5] Prins N, Other Peoples Money: The Corporate Mugging of America, *The New Press* (2004) at p 2.
[6] *Ibid* at p 22.

only a fraction of the losses were recovered and paid out to the affected parties. More recently, the subprime crisis and resultant credit crunch over the last year, beginning with the collapse of the Lehman Brothers in the latter part of 2008, have wrought economic ruin on large portions of the global society. The results have been devastating with many people losing jobs, pensions and livelihoods the world over. The underlying cause of this corporate catastrophe was irresponsible business practices, most notably the activity of trading in non-existent securities.

It is important to note that these corporate catastrophes originated in the United States, one of the wealthiest countries in the world. The results have been felt in South Africa, but we have managed to escape total financial ruin. However, if a similar disaster were to occur in South Africa alone, a significantly poorer country with far less advanced social welfare guarantees and virtually no means of supporting the financial burden of more insolvent citizens, it is unlikely that our foundling economy would be able to recover. "Susan George, author of *A Fate Worse than Debt* unambiguously demonstrates the inequity of the situation when she argues that Tanzania, a country with a gross national product of 2.2 billion dollars, has to share this between 25 million people; whereas Goldman Sachs, an investment firm ranking in annual profits of 2.2 billion dollars, shares these among 161 partners. "That's the world we're living in now," she says.[7]"

It is clearly necessary to put in place effective preventative protection mechanisms to avoid corporate abuse in advance. The term generally used to describe such mechanisms is 'corporate social responsibility:'

> ...an agreement between business firms (all productive cooperative enterprises) and society (individual members of a given society in the aggregate)... [and] the reciprocal expectations of the parties to the contract who were both assumed to be interested in maximizing the benefits (e.g. specialization, stabilisation of output and distribution, liability resources, increased wages) and minimizing the drawbacks (pollution, depletion of natural resources, destruction of personal accountability, worker alienation) of productive organizations.[8]

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[7] Farouk F, "Is South African Business Ready to Embrace Human Rights?" www.sacsis.org.za/site/article/166.1 [accessed on 23 June 2009].

[8] Dunfee TW & Donaldson T, "Contractarian Business Ethics: Current Status and Next Steps" *Business Ethics Quarterly Vol.5 No.2* (April 1995) at p 177.

In order to supply a foundation for the concept of corporate social responsibility that is rooted directly in South African culture, it is both useful and enlightening to have regard to the philosophy of group and community solidarity enshrined in the African value of 'Ubuntu.' The cardinal belief of Ubuntu is that a person can only be a person through other persons.[9] "The important values of Ubuntu are group solidarity, conformity, compassion, respect, human dignity and collective unity." It is clear that Ubuntu played a central role in the drafting of the South African Constitution, particularly in protecting human rights such as dignity, equality and freedom. However, in order to live up to the mandate of our constitutional democracy, it is necessary to continue to allow the values inherent in the Ubuntu culture to inform our decision-making and legislating. In particular, respect and support for the rest of one's community is fundamental to the sustainability of a peaceful and progressive South Africa. This value must inform every facet of South African life, including the corporate sphere. Companies must fulfil their role as members of the African community and, as such, must provide guarantees that they will work in the interests of the community at large and provide respect and support to all members of that community. This attitude is entirely different to the present corporate mindset, a mindset driven entirely by the objective of unimpeded profit-maximisation at the expense of all other interests. However, as shall be exposed in this dissertation, a purely money-driven corporate mindset is unsustainable and harmful to both South African citizens and the environment in which they live.

One of the interesting aspects of the value of Ubuntu is the fact that it is not an objective value against which Africans measure their actions but is instead an intrinsic part of every African, "entrenched and pervasive in virtually all aspects of their lives on a daily basis.[10]" This is exactly what is required in the sphere of corporate social responsibility. The entire corporate attitude must be altered so that respect and responsibility towards the South African community is not simply an ideal which may be promoted wherever possible in corporate action but is rather an intrinsic, fundamental and overarching principle which informs every decision and action on the part of the company. It is only through the achievement of this attitude that South Africans will be able to rely on companies behaving in a compliant and responsible

[9] Liwane N, "The Significance of Ubuntu in the Development of an ANC Cadre" www.anc.org.za [accessed on 29 August 2007] at p 1.
[10] Liwane (note 8) at p 1.

manner: strict adherence to the values enshrined in Ubuntu will prevent corporate disasters – financial, environmental or personal – from taking place at all. This is superior indeed to the alternative, which is to force companies to provide remedies and redress to affected persons only after the relevant corporate disasters have taken place. It is far better to develop a corporate ethos that will prevent and curb the advent of such disasters in advance. That companies should amend their attitudes and respect their role as mutually dependent members of the communities in which they operate is evidenced from the following quotation:

> No enterprise or corporation can survive without society. In fact business enterprises are a creation of society. Society is made up of what have been referred to as the 'stakeholders' of business. They include the community in which the corporation or business enterprise operates, its customers, employees and suppliers. Business and society are mutually dependent. In pursuit of wealth and profit maximisation, companies utilise human and other resources, and in so doing provide employment, investment, goods and services. Business therefore forms part of the fabric of society.[11]

The practical starting point for the development of a South African doctrine of corporate social responsibility is the stakeholder model of company law. The present corporate mindset is controlled by the interests of shareholders only and, consequently, is fundamentally driven by a hunger for ever-increasing profits. However, the King Report on Corporate Governance[12] suggests that companies should be required to promote the interests of all stakeholders, not merely the controlling shareholders. Clearly, this is the first step in ensuring that employees and creditors are protected from abuse, and that environmental activists and similar bodies are given the consideration and respect due to them. Such a model complies with the Ubuntu conception of mutual support and promotion, and with the mandate imposed by the Constitution that all South Africans should work together in pursuing the shared objective of a better life for all.

However, the stakeholder model of corporate law is by no means a blueprint for a South African doctrine of corporate social responsibility. It is merely a starting point. One of the problems which are not directly addressed by this model is the ominous

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[11] Vettori (note 1) at p 354.
[12] 2002, www.iodsa.co.za [accessed on 12 August 2009].

threat of fraud perpetrated by company officers. The new Companies Act[13] attempts to curb the opportunities for fraud by imposing an "almost-strict liability" sanction on company directors and managers who do not act in the best interests of the company at all times. If the stakeholder model of corporate governance is introduced then the 'interests of the company' will be the interests of all the stakeholders of the company. The Supreme Court of Appeal in the *Shaik*[14] criminal trial of 2006 emphasised the widespread and devastating results which fraud and corruption can have on the sustainable development of this country, and called for the Legislature to introduce even more stringent and powerful restrictions against such action. It is therefore necessary to evaluate the current position and determine the most effective mechanisms for dealing with corruption in the corporate sphere. This is an essential component of the principle of 'accountability' contained in the Preamble to the Constitution.

Up until recently, corporate social responsibility has been identified only in negative terms. It encompasses the obligation to refrain from fraud and corruption; to refrain from devaluing and abusing the interests of stakeholders such as employees, consumers and the like; to refrain from polluting the environment, and so on. But does the concept of corporate social responsibility amount to something more than this? Do the Constitution and the underlying African principle of Ubuntu require companies to take positive steps in the promotion and improvement of South Africans in general? The concept of corporate social responsibility could indeed be interpreted to impose positive duties on companies. Examples of what such duties would entail are numerous. Legislation may require that companies donate a portion of their profits to charity, or that all corporate officers and employees participate in *pro bono* work programmes. The affirmative action policies that are in place in most companies at present are an ideal example of an attempt to impose some level of social responsibility on companies and to force them to take part in the necessary redressing of the wrongs committed by the Apartheid State. The degree to which positive obligations may effectively be imposed on companies without inhibiting profit-maximisation is an issue requiring much more consideration and will be explored in more detail in this dissertation.

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[13] 71 of 2008.

[14] *Shaik v The State* (1) [2006] SCA 134 (RSA).

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INTRODUCTION

The argument of this dissertation is a simple one: South Africa requires specific, detailed and strict corporate social responsibility legislation in order to assist companies to comply with their Constitutional mandate.

The Constitution of the Republic of South Africa[15] has direct horizontal application in respect of all persons, both natural and juristic. Companies, as juristic persons, have a direct obligation to comply with the Constitution and to protect and promote the ideals of the Constitution. This dissertation seeks to explain the philosophies relevant to the development of corporate social responsibility legislation in South Africa, and to outline the overarching principles of such legislation. At the same time, a detailed breakdown of the South African Constitution and a critical analysis of existing corporate law in South Africa serve to identify the main tenets of the corporate social responsibility legislation that must be introduced in order to discharge the Constitutional mandate.

The forefathers of modern jurisprudence provide insight into the foundations for the introduction of a corporate social responsibility regime in the South African democracy. This dissertation focuses on the philosophies of the German Idealists, in particular Immanuel Kant, Georg Hegel and Karl Marx. The African philosophy of Ubuntu is discussed and married with the theses of Kant, Hegel and Marx, thereby creating a uniquely South African argument and groundwork for South Africa's corporate social responsibility legislation.

In order to create an argument for corporate social responsibility that is relevant to contemporary South African society, it is important to consider the opinions of South Africans who are currently involved in the promotion of corporate social responsibility in South Africa. During the course of the research that was carried out in support of this dissertation, interviews were held with the following persons: Mervyn King SC, Founder of the King Code on Corporate Governance; Dr David Biltchitz of the South

[15] Act 108 of 1996.

African Institute for Advanced Constitutional, Public, Human Rights and International Law; and Paul Kapelus, Founder of the African Institute for Corporate Citizenship. Christine Jesseman of the South African Human Rights Commission also provided insight into present-day case studies on corporate social responsibility. The contributions of these interviewees have provided a unique and up-to-date approach to the argument for corporate social responsibility.

The most important source for research into a South African model of corporate social responsibility is the South African Constitution itself. The Constitution mandates corporate social responsibility in various manners – with regard to environmental compliance, labour relations, and so on – but this dissertation focusses on the ways in which the Constitution requires corporations to uphold, protect and promote the rights contained in the Bill of Rights. Importantly, it is clear that the Constitution imposes positive obligations on companies to take steps to further the human rights of all South Africans. This is a novel and modern approach to corporate social responsibility, which involves a greater degree of action on the part of companies than previous notions of corporate social responsibility which were limited to negative obligations to refrain from violating human rights.

The Constitution will be compared and contrasted to various legislative tools and examples. In the first place, the provisions of the new Companies Act[16] will be analysed to highlight both the positive features and the shortcomings of South Africa's new corporate law. Furthermore, the influence and instruction of comparative jurisdictions will be studied, since it is useful to have regard to the experience of other countries in relation to corporate social responsibility initiatives. In this regard, the focus in this dissertation will be the corporate social responsibility laws of Scandinavia and England, as well as the OECD Guidelines and the United Nations Global Compact.

As stated above, the argument of this dissertation is that South Africa must implement and enforce specific corporate social responsibility legislation in order to discharge the Constitutional mandate. Despite various examples of good corporate governance models within the new Companies Act and in comparative jurisdictions and

[16] 71 of 2008.

international norms, these are insufficient to force companies to take the requisite proactive measures to protect and promote human rights. However, the teachings of jurisprudential thinkers, the input of modern South African thinkers, the unique African philosophy, and lessons learnt from existing South African and foreign legislation can all be used to create and foster an effective and efficient corporate social responsibility regime in South Africa.

CORPORATE SOCIAL RESPONSIBILITY JURISPRUDENCE: THE PHILOSOPHY OF CORPORATE SOCIAL RESPONSIBILITY

IMMANUEL KANT

Introduction

> Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists...Hence there rests on him a duty regarding the respect that must be shown to every other human being.[17]

The starting point of this dissertation is a study of the contribution that the philosophies of the German Idealists can offer to a corporate social responsibility jurisprudence in South Africa. The first such philosophy is that of Immanuel Kant. Kant considered human beings to be phenomenal creatures in the sense that they can control their impulses and desires and act on the basis of reason and of good will, characteristics which flow from the synthetic *a priori* judgment which all humans enjoy. As rational, phenomenal creatures, human beings are able to respect other human beings and to harmonise their interests with one another in the kingdom of ends.

> The moral law, as Kant understands it, basically requires each rational person to respect other rational persons... The perfect duties that this law recognizes, forbidding acts showing disrespect for other person's rights, are to be enforced by public law, while duties to have the morally obligatory ends of one's own moral perfection and the happiness of others, so cultivating the motives that will ensure dutiful action, are left to the enforcement of private conscience assisted by the expressed moral judgments of fellow persons.[18]

Respect for other individuals co-existing in the same society is exactly the maxim

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[17] Wright RG, "Treating Persons as Ends in Themselves: the Legal Implications of the Kantian Principle," *36 University of Richmond Law Review* (2002) at p 295 quoting Kant in *Groundwork to the Metaphysics of Morals.*

[18] Baier AC, "How Can Individualists Share Responsibility?" *Political Theory Vol 21 No. 2* (May 1993) at p 229.

> Absolute individualism would be civil anarchy. The individual must contract to limit himself by some outward form of universality in order to exist. Through this he learns that his own good can only come through the good of all, and comes to recognise that the concrete state is the good and true for him on earth...[41]

It is prudent at this stage of the discussion of Hegel's philosophy to introduce the notion of corporate social responsibility. Corporations are major players in modern communities. Whereas in the past a group of bankers or tradesmen or builders could make a bad business decision resulting in the bankruptcy of themselves and their families, the fall of a modern corporation would entail the complete annihilation of huge numbers of stakeholders including hundreds or thousands of employees, shareholders and smaller businesses whose entire livelihood relies on the continued existence of the corporation. Mervyn King SC[42] refers to the example of Standard Bank 'dying' as opposed to himself (Mervyn King) dying. If Mervyn King were to die this would cause unhappiness for his family and friends. However, if Standard Bank were to 'die' or to go into liquidation, this would cause widespread devastation for the millions of employees and investors whose livelihoods are secured by Standard Bank's continued existence. Furthermore, the modern corporation has the financial capacity to make decisions that affect not only its immediate communities but communities worldwide. A corporation that chooses to employ underage labourers for minimal pay has the power to exploit and dehumanise these persons and thereby to corrupt the freedom of all who are aware of this exploitation since they themselves cannot help to recognise or respect the freedom of those who have lost it. In not recognising or protecting the freedom of these child-labourers, the rest of society is robbed of its own freedom as well since the child-labourers, being unfree, are unable to recognise anyone else as free. This is the perfect example of the mutually destructive master-slave dialectic of which Hegel was so conscious. Similarly, a corporation that pollutes water supplies and destroys the air we breathe is restricting our freedom to continue the existence and enjoyment of our present freedom *ad infinitum* since the day will come all too soon when we are unable to exist on an under-resourced planet and can therefore not live to enjoy our rightful freedom.

It is not simply the actions but also the omissions of giant corporations that

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[41] *Ibid* at p 188.
[42] Interview with Mervyn King SC held at Johannesburg on 12 April 2009.

contort the Hegelian conception of freedom. By destroying our environment and resources, by exploiting humankind, and by committing these acts in the midst of communities that respect and promote individual rights and freedoms so that corporations are able to gain the individual power to make decisions of this nature, these corporations are benefitting from the Hegelian notion of a mutually beneficial community but are not providing anything to their immediate communities that qualifies as beneficial or as a respect for human freedom. Corporations are, in effect, behaving in a way that completely negates and counteracts the Hegelian concept of freedom as mutual recognition.

> We do not judge animals' behaviour in a moral sense because they do not weigh options and decide the best way to act, but people recognize that their actions may help or harm others, and they act in accordance with the decisions they make. Businesses do the same thing. They go through rational processes to decide on corporate behaviour, and because they consider the effects of their behaviour on others (even if they eventually disregard their interests), they have the same kind of moral responsibility that people have.[43]

It is this moral and social responsibility of the corporation as a player in the modern community that is encompassed by the term 'corporate social responsibility.' Modern communities can no longer allow corporations to act without conscience at the expense of human freedom. It is time – at the risk of devolving into a cliché – for the corporation to start 'giving back' to the community and respecting the freedom of all who form part of such community.

Hegel's philosophies can both explain and contribute to a contemporary model of corporate social responsibility. Firstly, it is necessary to identify the fact that the corporation enjoys the rights and freedoms that have been cultivated in the modern community and relies absolutely on these rights and freedoms for its continued existence and profitability. In this sense it in an 'individual' in Hegelian terms. What most corporations fail to realise, either at all or in any real sense, is the fact that they have a concomitant duty to respect and recognise the rights and freedoms of every other individual within their respective communities, whether such communities be

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[43] Altman MC, "The Decomposition of the Corporate Body: What Kant Cannot Contribute to Business Ethics" *Journal of Business Ethics, Springer* (2007) at p 254.

categorised on a local, regional, national or international scale.

> It seems the time has come to look for new and sustainable ways to build relationships that not only drive the company's profitability, but also strengthen the bonds between people within the company, and the communities that exist outside of its boundary.[44]

In Hegel's most renowned work, *The Philosophy of Right,* he introduces his own definition of the corporation. It must be noted at the outset that the Hegelian corporation is something completely different to the modern business corporation. For Hegel, a corporation was a group of persons with similar interests who worked together as a body corporate in order to maximise the realisation of their mutual interests. A good example of the Hegelian corporation is a guild of artisans merging together to foster their trade:

> Common interests of private concern occur within the civic community, and fall outside of the self-constituted and self-contained universal of the state. They are administered in the corporations of the societies, trades and professions, by their superintendents and representatives. The affairs, overseen by them, are the private property and interest of these particular spheres, whose authority depends upon the mutual trust of the associates, and confidence in the securities. Yet these circles must be subordinate to the higher interest of the state. Hence, in filling these posts generally, there will occur a mingling of the choice of the interested parties with the ratification of a higher authority.[45]

In order to understand the argument for a Hegelian model of corporate social responsibility it is necessary to consider the modern business corporation to be an 'individual' in the wide, albeit slightly stretched, Hegelian sense (an entity made up of individuals that are all capable of realising, executing and benefitting from the mutual recognition of freedom) rather than as a 'corporation' in the Hegelian sense of the word. Only the self-conscious individual can be considered to be free and to enjoy rights and freedoms in the extended Hegelian sense. However, despite the difference in definitions, some of Hegel's comments with regard to his own 'corporations' are relevant to the duties of modern business corporations. For instance, Hegel comments on the fact that a

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[44] Lehman G, "A Common Pitch and the Management of Corporate Relations: Interpretation, Ethics and Managerialism" *Journal for Business Ethics, Springer* (2006) at p 164.
[45] Hegel (note 37) at p 234.

corporation of persons sharing a common interest or goal is in effect similar to the family relationship. It follows that Hegel requires all persons involved as members of such a corporation to treat their co-members with the same respect and trust that they would treat other members of their families:

> In keeping with this view, the corporation, under the oversight of the public authority, has the right to look after its own clearly-defined interests, according to the objective qualifications of skill and rectitude to adopt members, whose number is determined by a general system, and to make provision for its adherents against fortuitous occurrences, and to foster the capacity necessary in any one desiring to become a member. In general it must stand to its members as a second family, a position which remains more indefinite than the family relation, because the general civic community is at a farther remove from individuals and their special needs.[46]

This simple guideline on how to behave as a member of a corporation would solve a number of problems inherent in the modern corporate structure. The precarious position of the average employee, labourer, shareholder or creditor of a company derives in the main from the fact that directors and other members of that company forge ahead with only their own interests at heart and fail to recognise the importance of the interests of all the other stakeholders in the company. If Hegel's advice was followed, and if every director tasked with making a decision was required, in making such decision, to give as much regard to the interests of the other stakeholders as he would give to the interests of members of his immediate family, then it would be near impossible for such a decision-maker to ignore the interests of all other stakeholders for the sake of his own benefit.

However, this insight amounts to nothing more than useless criticism unless it can be put into place in a practical and pro-active manner. It is idealistic to think that one may take a powerful director of a multi-national corporation aside and whisper into his ear that the way to get around all the suffering in the world is to treat his co-workers and employees like his family. The chances of him taking the time to even consider this proposition are minimal. However, Hegel's *Philosophy of Right* once again provides the answer to this problem. As has already been mentioned, Hegel believed that the State

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[46] Hegel (note 31) at p 192.

was all-powerful and was responsible for ensuring that men complied with their ultimate duty – that of recognising and respecting every other individual as free and equal – even when their personal inclinations would lead them otherwise. It is ultimately Hegel's notion of the State that can assist in creating a model for corporate social responsiblity in the modern world.

> The striving for a morality of one's own is futile, and by its very nature impossible of attainment; in regard to morality, the saying of the wisest man of antiquity is the only true one, - to be moral is to live in accordance with the moral traditions of one's country.[47]

The State itself must, according to Hegel, be responsible for ensuring that all individuals under its governance and direction comply with their moral duty to respect and promote the freedom of all others living within that community. The crucial question that must then be answered is how the State should go about ensuring that corporations live up to their social and ethical responsibilities. Hegel divides the State into three branches: the Executive, the Legislature and the Judiciary. This division is identical to the division of power contained in the Constitution of the Republic of South Africa.[48] The Executive and the Legislature are responsible for enacting and instituting rules and regulations in accordance with the individual's moral duty and the Judiciary is responsible for interpreting and enforcing these rules and regulations. Clearly, therefore, it falls to the Executive and Legislative branches of the State to initiate a corporate social responsibility regime. It follows that whatever regime is decided on in order to compel corporations to respect and further the freedom of all members of society, this regime must be introduced into the community by means of legislation. The legislation reflects the will of the State and thereby indirectly reflects the will of each free, right-bearing individual who has submitted to the authority and governance of the State.

Hegel's theories concerning legislation are different to modern conceptions. Modern man views leglislative rules and regulations as something man-made and created in order to control and regulate human behaviour. Hegel, however, saw legislation as something inherent in the community, deriving from moral and ethical truths and having an *a priori* existence to its written form:

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[47] Hegel, quoted in Macbride Sterret (note 36) at p 194.
[48] Act 108 of 1996.

> Who shall frame the constitution? This question seems intelligible at first glance, but on closer examination turns out to be meaningless. It presupposes that no constitution exists, but merely a collection of atomic individuals. How a heap of individuals is to obtain a constitution, whether by its own efforts or by means of others, whether by goodness, thought, or force, must be left to itself to decide, for with a mere mass the conception has nothing to do. If the question, however, takes for granted the existence of an actual constitution, then to make a constitution means only to modify it, the previous existence of the constitution implying that any change must be made constitutionally. But it is strictly essential that the constitution, though it is begotten in time, should not be contemplated as made. It is rather to be thought of as above and beyond what is made, as self-begotten and self-centered, as divine and perpetual.[49]

Hegel believed that there exists, in every individual, an *a priori* understanding of what is right and what is wrong, of how to act and how not to act in order to preserve and protect individual freedom. It is from this intrinsic understanding that all laws designed to regulate human behaviour derive and not the other way around. It is both interesting and important from a South African perspective that Hegel identifies the Constitution as the supreme, "divine and perpetual" form of legislation. The new South Africa has been designed and built in terms of the supremacy of the Constitution.[50] It is through the Bill of Rights contained in the Constitution that every individual is entitled to enjoy freedom amongst other things. It would appear, therefore, that the South African Constitution caters directly for Hegelian freedom and the means of protecting and furthering that freedom. This being so, it follows that the best way of implementing a corporate social responsibility regime in South Africa is directly in terms of this supreme Constitution. Moreover, the fact that the Constitution enshrines every individual's right to freedom means that the Constitution already mandates corporate social responsibility: a corporate "individual" is required to respect and promote the freedom of all South Africans in the same way as any other individual subject to the Constitution.

The precise parameters of a South African corporate social responsibility regime shall be explored and discussed elsewhere. At this juncture, however, it is important to understand Hegel's submissions in regard to why the State should be given the power to

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[49] Hegel (note 37) at p 221.
[50] Constitution of the Republic of South Africa Act 108 of 1996 at Section 1.

regulate and control the activities of corporations doing business within the State. Once again, we must proceed upon the assumption that the corporation is an 'individual' in Hegelian terms in order for the following analogy to be properly understood:

> Similarly, the community has the duty and right to take under its guardianship those who wantonly squander their subsistence and that of their family. In the place of this extravangance it substitutes their real end, which it seeks to promote along with the purpose of the community.
>
> *Addition* – It was a law in Athens that every citizen should give an account of his way of life. Our view is that this is no one's business. Of course every individual is in one way independent, but he is also a member of the system of the civic community. In so far as every man has the right to ask maintenance from it, it must also protect him against himself. It is not simply that starvation must be guarded against. The wider view is that there shall never arise a rabble, or mass. Since the civic community is obliged to support individuals, it also has the right to insist that individuals should care for its subsistence.[51]

The argument is a simple one. If a divorced father fails to pay maintenance in order to support his child, the State will compel him to do so via its judicial system. The same principle applies to a corporation. If a modern corporation chooses to do business, consume the community's money and resources, and benefit from the industrious nature of its employees, then it must also take responsibility for its actions by ensuring that its stakeholders' interests are nurtured and protected and that the community's economic and environmental resources are regenerated. If it fails to do this then, according to Hegel, the State has the authority to step in and force it to discharge these obligations. It is clear that modern companies, in general, are not complying with their duties as far as respecting the interests of their communities is concerned. Not only statistical data but mere common sense demonstrates that resources are being depleted at the expense of the majority of individuals living within a certain community. This is a direct violation of individual freedom. The time is therefore ripe, according to Hegel's analogy, for the State to take these corporations "under its guardianship" in order to ensure that the objectives of corporate social responsibility are prioritised.

The term "guardianship" is an important one in regard to the argument for a Hegelian model of corporate social responsibility. Inasmuch as the corporate

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[51] Hegel (note 37) at p 187.

"individual" is required to respect and promote the freedom of other individuals within the community, such other individuals – and the State who represents the combined will of all such individuals – have a concomitant duty to protect and further the freedom of that corporate "individual." Where it becomes clear that the corporate "individual" is squandering its freedom then it is the obligation of the State to take control and ensure that such activity is discontinued or redirected. The age-old argument is that if a corporation destroys all the economic and environmental resources in the community it will eventually deplete any hope of its own continuance because there will be no more money or resources left for it to use. Moreover, present mindsets are starting to appreciate the dangers and destruction that will result if corporations continue to deplete the world's resources and ignore the worth of humanity, and people are therefore making an effort to choose products and services that are environment-friendly and human-friendly:

> Whoever does not use his social power responsibly will lose it. In the long run those who do not use power in the manner which society considers responsible will tend to lose it because other groups eventually will step in to assume those responsibilities.[52]

The State introduction of a corporate social responsibility regime therefore serves the dual purpose of safeguarding the freedom of not only all the other individuals within the community but also the freedom of the corporation itself.

It is a great tragedy of the human condition that we only take things truly seriously in the face of an emergency. Last year's spates of xenophobic violence across the country serve as the perfect example of this fact. A huge number of South Africans gave up their time and money in order to help the victims of xenophobia when the crisis occurred. The irony is that the entire crisis could have been averted had those same South Africans taken the time and trouble to recognise the depraved, poverty-stricken state of their fellow South Africans and made an effort to work together towards the mutual recognition of each others' freedom and humanity. Hegel himself recognised this irony:

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[52] Davis, quoted in Garriga E & Mele D, "Corporate Social Responsibility Theories: Mapping the Territory" *Journal of Business Ethics, Kluwer Academic Publishers* (2004) at p 56.

> It is only in waging war for the state, Hegel says, that individual citizens recognise the relative unimportance of their own private goals, the universal and essential character of the state, and the community of interest which they share with all their fellow citizens.[53]

South Africa should not wait until corporations deplete all its existing resources and render it bare of any human dignity before stepping in to resolve the situation. We should not take account of the shortcomings of our society only when the situation becomes a direct war of human individuals against corporate "individuals." Rather it is necessary to take heed of the philosophical teachings of Hegel and start implementing a sustainable corporate social responsibility regime now. The exact parameters of this regime will be drawn from the provisions of the Constitution and from the unique climate of our African Ubuntu culture. These parameters are not Hegel's subject. Hegel is instrumental in setting out an ethical and logical framework that forms the foundations for, and the reasoning behind, the implementation of a corporate social responsibility regime. Hegel, in short, provides a strong argument for why any corporation should submit to the directions and regulations of the State in the first place. And, equally as important, Hegel highlights the rationale underlying any law that is put in place in furtherance of a corporate social responsibility regime, namely protection of and respect for individual human freedom. "There is no corporate maxim distinct from the maxims of the individuals who comprise the organisation.[54]" It is therefore the duty of every company or corporation member or stakeholder to comply with his obligations in terms of corporate social responsibility and thereby to benefit from the freedom inherent in the power of mutual recognition.

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[53] Nederman CJ, "Sovereignty, War and the Corporation: Hegel on the Medieval Foundations of the Modern State" *The Journal of Politics Vol. 49 No. 2, Cambridge University Press* (May 1987) at p 508.
[54] Altman (note 43) at p 256.

KARL MARX

Introduction

> ...capital has one single life impulse, the tendency to create value and surplus-value, to make its constant factor, the means of production, absorb the greatest possible amount of surplus labour.[55]

The modern world is in a state of economic recession. Anyone concerned with the theme of corporate social responsibility – or 'corporate sustainability' which seems to be one of the new catchphrases on everybody's lips – must surely question how companies allowed themselves to deteriorate into their present state of desperation, how glaring black holes in the economy were permitted to grow unobserved, and, most importantly, how to ensure that a similar economic crisis never be permitted to repeat itself. In order to understand the present economic climate and to inform corporations of how to avoid similar disasters in the future, attention must now turn to a study of the grandfather of capitalist criticism, Karl Marx. The focus of Marx's philosophy was outlining the weaknesses inherent in capitalism and promoting socialism as a healthy alternative. Whilst it is unlikely that the capitalist regime will ever be completely dismantled as Marx suggested, Marx's writings are a useful guideline for the problems associated with capitalism. Identification of such problems coupled with the introduction of a comprehensive corporate social responsibility regime to curtail the disastrous effects of potential economic crises will do much to dilute the dangers of capitalism which Marx highlighted.

The relevance of Marxism to modern capitalist society

Re-studying Marxist theories regarding capitalism is by no means a novel idea. Earlier this year, on 20 January 2009, an article by Peter Gumbel was published in *Time Magazine* entitled "Rethinking Marx: as we work out how to save capitalism, it's worth studying the system's greatest critic." Gumbel writes the following with reference to Marx:

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[55] Marx K, Das Kapital: A Critique of Political Economy (ed. F Engels), *Gateway Editions* (2000) at pgs 181-182.

> ...if you leave aside the prophetic, prescriptive parts of Marx's writings, there's a trenchant diagnosis of the underlying problems of a market economy that is surprisingly relevant even today. Marx, too, lived through an era of rapid globalisation...He was moved by glaring inequalities between rich and poor that are more topical than ever today. He thought work should bring personal fulfilment, and that labour should not be treated as a simple commodity – foreshadowing today's controversies over outsourcing and poor working conditions in developing countries. He wondered whether the middle class would be squeezed out of existence. And he identified how profits were taking an ever bigger share of the economy at the expense of wages, just as they are once again today.[56]

These elements of Marxist philosophy have once again reared their heads in the global economy: "...hovering out there in the fog, unavoidably, is the towering spectre of Karl Marx, the grandfather of political economists, whose damning critique of capitalism's inadequacies played an outsized role in world history for a century after his death in 1883.[57]"

Time Magazine is not the only modern publication to have recently taken cognisance of the important contribution which a study of Marx may offer towards solving the global economic crisis. On 14 January 2009 the South African newspaper *Business Day* published an article entitled "Historical blind spots of the Marxist Renaissance." According to Harold James writing for *Business Day:*

> The implication of Marx's renewed popularity is that capitalism is now universally accepted as being fundamentally broken, with the financial system at the heart of the problem. Marx's description of "the fetishism of commodities" – the translation of goods into tradeable assets, disembodied from either the process of creation or their usefulness – seems entirely relevant to the complex process of securitisation, in which values seem to be hidden by obscure transactions.[58]

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[56] Gumbel P, " Rethinking Marx: as we work out how to save capitalism, it's worth studying the system's greatest critic" *Time Magazine* (20 January 2009) at pgs 40-41.
[57] *Ibid* at p 40.
[58] James H, "Historical blind spots of the Marxist renaissance," *Business Day* (14 January 2009) at p 5.

Some of the similarities, identified in the abovementioned press articles, between the problems which Marx identified with the capitalist regime one hundred and fifty years ago and the problems which the global economy is experiencing today, will be discussed in more detail below. What is of significance at this point of this discussion with regard to a potential Marxist contribution to a 'corporate sustainability' regime, is the fact that these quotations show not only a widespread re-interest in Marx's contributions to the criticism of our present capitalist structure, but also expose a worldwide concern for our economic crisis and a global recognition of the need for change in order to avoid future economic crises.

> Discussions of the world economy typically talk about the globalisation of capital, the power of large multinational corporations and the ways international markets impinge on local conditions, longstanding Marxist themes going back to Marx.[59]

Marx and the Subprime Crisis

The following passage from Marx's *Das Kapital* is a useful starting point for a discussion of the ways in which Marx identified long ago the source of the problems which have led to our present economic downfall:

> It is not money that renders commodities commensurable. Just the contrary. It is because all commodities, as values, are realised human labour, and therefore commensurable, that their values can be measured by one and the same special commodity, and the latter be converted into the common measure of their values, ie into money. Money as a measure of value, is the phenomenal form that must of necessity be asssumed by that measure of value which is immanent in commodities, labour-time.[60]

To Marx, the worth of a commodity lay in its use-value to the person making or exchanging it and in the 'labour of love' which went into creating it. Bar these two intricately connected qualities, a commodity has no value and cannot therefore be converted into money. In hindsight this is precisely where the structures of modern capitalism began to crack. Companies and businessmen traded in worthless

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[59] Burawoy M & Wright EO, "Sociological Marxism," www.ssc.wisc.edu/~**wright**/Soc**Marx**.pdf [accessed on 21 February 2009] at p 3.
[60] Marx (note 55) at p 72.

commodities, in things that had no actual value. The subprime crisis is a result of money changing hands in return for things which don't exist. Marx would point out that since a thing that does not actually exist has not had any labour power devoted to it, it is therefore impossible to attach a value in money to such a 'thing.' Nonetheless modern capitalists succeeded in exchanging these 'non-things' for money for a significant period of time and through a complicated series of transactions involving various different parties, with the result that their recklessness has wrought its devastating effect on not only a national but a global scale. *Time Magazine* quotes Rowan Williams, the Archbishop of Canterbury, who made the following statement after the collapse of Lehman Brothers: "Marx long ago observed the way in which unbridled capitalism became a kind of mythology, ascribing reality, power and agency to things that had no life in themselves, he was right about that, if about little else.[61]" Ascribing true values to the objects of our exchange – whether that value be measured in labour or some other alternative – would appear to be the first lesson which Marx has taught us, albeit in a retrospective manner.

Two American students have written a thesis entitled "Sociological Marx" wherein the following excerpt appears:

> Exploitation of workers and competition among capitalists are the fundamental causes of the most salient properties of capitalist development: the steady increase in its productive capacity, the expansion of its global scope, the increasing concentration and centralisation of capitalist production. This development dynamic, however, contains internal contradictions, contradictions which mean that capitalism has inherent tendencies to generate periodic, intensifying economic crises. Traditional Marxist crisis theory is complex, and there are many different kinds of causal processes in play in explaining the disruptions of capitalist accumulation. The two most important of these for the eventual fate of capitalism in classical Marxism are the long term tendency for the aggregate rate of profit to fall and, particularly as argued by Engels, the tendency for capital accumulation to lead to evermore serious crises of overproduction.[62]

With reference to this interpretation, I would like to refer back to the opening quotation of this chapter which provides the underlying theme hereof – "...capital has one single life impulse, the tendency to create value and surplus-value, to make its

[61] Gumbel (note 56) at pgs 42-43.
[62] Burawoy & Wright (note 59) at p 10.

constant factor, the means of production, absorb the greatest possible amount of surplus labour.[63]" What the study of "Sociological Marx" highlights, and what Marx himself identifies in this statement, is the fact that pure capitalism is an uncontrolled monster of constant production and profit and surplus. What the present economic crisis highlights is the fact that this form of pure unbridled capitalism can have catastrophic consequences due to profit and production being priorised above the human stakeholders. The main victims of the credit crisis are the investors who have lost their savings, the elderly who have lost their pensions, the workers who have lost their jobs. Corporations will be able to pick themselves up, write off their losses and jump straight back into the revolving capitalist gyroscope. The human element will suffer the most from this setback. It is here that Marx can be associated with the notion of corporate social responsibility. Corporations have the power to wreak havoc and destruction on human society in their race for more and more profit: this much has been exposed by the recession. It is now more important than ever that corporations should not be allowed to exercise and exploit this power. Sustainability initiatives must be introduced, socially responsible behaviour on the part of corporations must be adhered to.

Marx, Humanism and Human Rights

> On the basis of capitalist production, however, this necessary labour can form only a part of the working day; the working day itself can never be reduced to this minimum. On the other hand, the working day has a maximum limit. It cannot be prolonged beyond a certain point. This maximum limit is conditioned by two things. Firstly, by the physical bounds of labour-power. Within the 24 hours of the natural day a man can expend only a definite quantity of his vital force. A horse, in like manner, can only work from day to day, 8 hours. During part of the day this force must rest, sleep; during another part the man has to satisfy other physical needs, to feed, wash, and clothe himself. Besides these purely physical limitations, the extension of the working day encounters moral ones. The labourer needs time for satisfying his intellectual and social wants, the extent and number of which are conditioned by the general state of social advancement. The variation of the working day fluctuates, therefore, within physical and social bounds. But both these limiting conditions are of a very elastic nature, and allow the greatest latitude. So we find working days of 8, 10, 12, 14, 16, 18 hours, i.e. of the most different lengths.
>
> The capitalist has bought the labour-power at its day-rate. To him its use-value belongs during one working day. He has thus acquired the right to make the labourer work for him during one day. But what is a working

[63] Marx (note 55) at pgs 181-182.

restore the balance between Marx's labour-value approach and capitalism's profit-driven approach in order to ensure that human rights are protected:

> The capitalist mode of production (essentially the production of surplus-value, the absorption of surplus-labour), produces thus, with the extension of the working day, not only the deterioration of human labour-power by robbing it of its normal, moral and physical conditions of development and function. It produces also the premature exhaustion and death of this labour-power itself. It extends the labourer's time of production by shortening his actual life-time.[67]"

With reference to the fact that Marx spent an important period of his life in Paris, *Time Magazine* quotes the present French President, Nicolas Sarkozy as saying, "I believe in the creative force of capitalism, but I am convinced that capitalism cannot survive without an ethic, without respect for a number of spiritual values, without humanism, without respect for people.[68]" Ingrained herein is a global awareness of and move towards corporate social responsibility and, more specifically, towards responsible corporate behaviour in light of the economic crisis.

As a postscript to the above discussion, it should be noted that Marx's writings on the capitalist exploitation of the labourer can be supplanted into a number of other fields of corporate social responsibility and sustainability. For instance, the 'capitalist as the personification of capital' concern is equally applicable to environmental considerations. In the same way as corporations exploit the labour force, they also exploit natural resources and excrete extortionate quantities of pollutive substances in the never-ending race for profit. Global warming is but one of the many issues that must be addressed in corporate sustainability leglislation.

<u>What can we learn from Marx today?</u>

> Marx, for his part, simply thinks it impossible for capitalist firms to act in non-profit oriented ways. One cannot expect capitalist enterprises to pursue any goal other than profit maximisation, to act on any other basis

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[67] Marx (note 55) at p 188.
[68] Gumbel (note 56) at p 42.

than that of self interest.[69]

Marxist philosophy can never be used as a basis from which to draw up rules and ideals for a reform of capitalism and the introduction of corporate social responsibility initiatives in the future. The reason for this is that Marx did not think that capitalism was at all capable of controlling itself and promoting human rights and values. A corporate sustainability regime based on Marx's ideas would be a contradiction in terms. However, armed with the insight which Marx's criticism provides us into the deep dark canals of capitalist greed and appetite, it is possible to identify the weaknesses in capitalism and, hopefully, to overcome those weaknesses. This approach to Marx has been referred to as "building Marxism:"

> Marxism is an analytically powerful tradition of social theory of vital importance for scientifically understanding the dilemmas and possibilities of social change and social reproduction in contemporary society. Particularly if one wants to change the world in egalitarian and emancipatory ways, Marxism is indispensable. This does not mean, however, that every element within Marxism as it currently exists is sustainable. If Marxism aspires to be a social scientific theory it must be continually subjected to challenge and transformation. Building Marxism also means reconstructing Marxism. Marxism is not a doctrine, a definitively established body of truths. But neither is Marxism simply a catalogue of interesting insights. If the goal is to enhance our ability to understand the world in order to change it, building Marxism is a pivotal task.[70]

How then should we go about 'building Marxism?' According to the authors of "Sociological Marx," "...the first fundamental sociological thesis of Marxism predicts that where capitalist class relations are stable, an array of complex institutional devices will exist to reproduce those relations. The conditional form of this prediction is important. The claim is not that capitalist class relations will always be stable, but simply that such stability, where it occurs, requires active institutional supports.[71]" To this extent, Marx provides a foundation upon which to build a system of corporate sustainability. As has been exposed by the economic crisis, one of the basic institutional support structures necessary on the modern capitalist stage is a well-structured corporate

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[69] Angelo Corlett J, "A Marxist Approach to Business Ethics," *Journal of Business Ethics Vol. 17 No. 1* (January 1990) at p 570.
[70] Burawoy & Wright (note 59) at p 2.
[71] *Ibid* at p 28.

social responsibility regime. The term 'institutional supports' is important in the sense that it demands state institutions to intiate and control adherence to the principles of corporate sustainability. Corporate social responsibility initiatives can no longer simply be introduced on an incentives level but must be properly legislated and regulated in order to curtail the effects of reckless capitalism: "Thus, legal regulation, and legal regulation alone, can force inherently selfish corporations to act in more socially beneficial ways, with the firm hand of government...[72]"

Marx's contribution to Corporate Social Responsibility in South Africa

> When economic activity starts up again after a deep recession, it will not be as a consequence of people having been compelled to channel financial resources into the projects selected as politically desirable, but as a result of new ideas.[73]

The Marxist concern for capitalist structures reinforces the argument that it is not sufficient that a few large corporations make a few small donations to a few randomnly selected charities. Corporate social responsibility must be a complex and well-structured regime that is enforced throughout the country and the market in order for it to have the desired effect of curtailing the reckless and potentially hazardous ramifications of unbridled capitalism. The Marxist critique of capitalism provides important insight into those areas of corporate behaviour that need to be addressed and regulated. Marxists in 2009 may be more disposed to "...exploring the middle ground between market fundamentalism and socialism and...accepting the feasibility and desirability of promoting among corporations an expanded sense of social responsibility.[74]" A study of Marx is therefore directly relevant to conceptualising corporate sustainability in the modern world.

[72] Angelo Corlett (ntoe 69) at p 570.
[73] James (note 58) at p 5.
[74] Angelo Corlett (note 69) at p 569.

> reciprocated (ukuhlonishwana kabile). Becoming a person through one's relations with others (umuntu umuntu ngabantu); creating harmonious world relations with others (ukulingisa endaweni ubuhlobo babantu) also form part of the ancient African philosophies that relate to communication.[76]

'Umuntu umuntu ngabantu' – a person is a person because of other people – is a well respected principle in South African society. Indeed, the rights contained in the Bill of Rights seek to promote and protect this principle by ensuring that all people are protected in their right to dignity, freedom and equality (in stark contradiction to the apartheid philosophy of promoting the rights and interests of a powerful few at the expense of all other citizens). According to Andrew West, "Traditional African society is generally agreed to be communitarian in nature.[77]" The Constitution protects the communitarian nature of South African society by protecting the rights and freedoms of all people. West points out that, as a result of this communitarian approach to society:

> ...it is argued that duties take precedence over rights. Gyekye believes that this priority of duties over rights is evident from the 'natural sociality' of the person – the fact that each person is born into relation with others. This is obviously not unique to African societies, but he believes that the fundamental awareness of others within communitarian ethics will then 'obliterate the distinction between duties and so-called supererogatory acts or acts of charity, and consider all of them as moral duties.'... This is an ethic that is inconsistent with the existence of corporations which seek to further only their owners' interests (duties only to shareholders) or which take cognisance of the community in the course of furthering only their owners' interests.[78]

The theory of corporate social responsibility arose in response to the fact that super-powerful corporations were and, to a large extent, still are able to act purely in their own interests in the unbridled pursuit of profits. It is common knowledge that corporate social responsibility regimes and initiatives seek to curtail this power and to force corporations to take account of the interests of the societies in which they operate. The philosophy of Ubuntu can be relied upon in the South African context as a basis upon which to assert that being corporate social responsibility compliant and furthering the human rights of all members of society is not merely an act of benevolence on the part of a company, but is in fact an inherent duty to which any and every South African

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[76] *Ibid* at p 245.
[77] West A, "Theorising South Africa's Corporate Governance," *Journal of Business Ethics 68:433-448* (2006) at p 438.
[78] *Ibid* at p 439.

investment' to divert attention from calls on business to redress the results of its historical contribution to the apartheid system.[82]" The attempt to place corporate responsibility or "investment" initiatives in a positive light by changing the terms of reference thereof should not be derailed or disencouraged if it achieves its aim of promoting interest and activity in corporations to comply with their ultimate "responsibilities" in this sphere. However, it is improper to separate the notion of corporate responsibility from the spectre of the past completely, since it is ultimately due to South Africa's apartheid history that inequality persists in our democracy today, and it is therefore due to this history that companies, like all other citizens, are required to fulfil their constitutional obligations to promote and protect the freedom, dignity and equality of all South Africans to the greatest degree possible.

Specific Aspects of Traditional African Culture which should be Weaved into the Corporate Social Responsibility Regime

> In South Africa, the importance of the community is evident in the common philosophy of 'ubuntu.' The term can be loosely translated as 'I am, because we are; and since we are, therefore I am.'...The implications for corporate governance in Africa lie in the effect that this has on the choice of an appropriate model. The Anglo-American corporate environment, and shareholder and instrumental stakeholder theory rely on the privacy of individuals' rights to private property. Such a model would then be inappropriate in a society that traditionally holds communal rights at least equal in value to, if not greater than individual rights.[83]

The benefit of incorporating the philosophy of Ubuntu into corporate social responsibility theory has been discussed. However, African philosophy and culture can make other contributions to a South African corporate social responsibility regime, beyond the general principle of Ubuntu. In particular, the incorporation of African traditions into the corporate responsibility initiatives will ensure that these initiatives are specifically tailored to the South African context and it is this unique feature that will increase the probability of the overall success of such initiatives in achieving the goals for which they were intended.

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[82] *Ibid.*
[83] West (note 77) at p 439.

> organisational infrastructures and facilities. This is so that each may contribute to the process, and finally obtain consensus and commitment on a plan of action.[87]

It may be argued that this type of forum for community development is impractical from a corporate social responsibility perspective since it is particularly time-consuming. This is the second feature of African culture that must be understood in order for corporate activity in this arena to achieve its desired ends: African communities have a different conception of time to the strict twenty-four hour Western watch. Time literally moves more slowly in Africa. Corporations need to appreciate these differences in order cater for a model of corporate social responsibility that will be beneficial to Africans. If time constraints are problematic and company directors cannot afford to invest too much time into these initiatives, then a company may have to consider employing someone purely to implement corporate social responsibility projects slowly and successfully in the relevant South African community. The focus must be on community development, and if it is only by means of a time-consuming round-table process that such development can be attained, then this must be built into the South African model of corporate social responsibility:

> A tangible sense of the experience and satisfaction of teamwork, community effort and labour in a concrete form is assisted by creating ongoing opportunities for evaluation by the community. Continuous formal recognition of achievements in a stage by stage form becomes an important motivating factor and confidence builder for the participants...Using this type of approach, the process shifts from being simply the means of providing a financial resource to a truly developmental process. It shifts from *ad hoc* project support to encouraging the dynamics necessary to the regeneration of a civil society. It may be that the process becomes more important than the product itself, since it facilitates communities in becoming responsible for their own development.[88]

Criticism of King 2

South Africa enjoys worldwide esteem on the corporate social responsibility scale. This esteem is due largely to the introduction and implementation of the King Report on

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[87] *Ibid* at p 242.
[88] Mersham & Skinner (note 75) at p 243.

Corporate Governance.[89] Mervyn King SC and his team created a code of corporate governance that has revolutionalised the approach to directors' fiduciary duties as well as other facets of corporate governance in South Africa. The King 3 Report[90] was recently published and the new Companies Act[91] - which was promulgated earlier this year and will be reviewed and analysed in detail later on in this dissertation – has incorporated much of the King 2 Code into South Africa's new company law. However, in spite of the undeniable developments in the realm of corporate governance as a consequence of the King Reports, there has also been criticism in the sense that the reports fail to pay due and proper consideration to the contribution which African philosophy and culture can make to the South African model of corporate governance. Roussow, writing on the King Report, points out the following:

> The African worldview is then attended to in section 38 where the point is made that a governance system should reflect *"the value system of the society in which it operates."* In the discussion of the African worldview, some of its characteristics like an inclination towards consensus rather than dissension, humility towards others, non-discrimination, co-existence, trust and high standards of morality are introduced. Although it undeniably is true that these features, that are later in the Report called *"the Ubuntu philosophy"* are closely aligned to the inclusive approach to corporate governance, it is doubtful whether they played a significant role in the formulation of the King II view of the corporation. Both the late introduction of the African worldview in the discussion, and the fact that it is not directly integrated into the discussion on the modern corporation and its obligations, reinforces the impression that it only serves as a contextual background at best, or a superficial attempt to Africanise the Report at worst. It thus seems that it did not have the same impact on the Report's understanding of the present-day corporation and its moral obligations than the other philosophical debates.[92]

It should be of concern to the proponents of corporate social responsibility that the 'blueprint' for corporate governance development in South Africa – the King Report on Corporate Governance – fails to take account of the unique requirements of South African communities: "There is little consideration then of what corporate governance in South Africa should look like from a South African viewpoint and the impact on corporate governance that South African cultural values and philosophies may have has

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[89] 2002, www.iodsa.co.za [accessed on 12 August 2009].
[90] 2009, www.iodsa.co.za [accessed on 3 May 2009].
[91] 71 of 2008.
[92] Roussouw GJ, "The Philosophical Premises of the Second King Report on Corporate Governance," *Koers 70(4)* (2005) at p 742.

not yet been seriously considered.[93]" It can only be hoped that this deficiency in the three King Reports that have been published thus far will be addressed in the next edition of the King Report. However, since elements of the existing reports have already been incorporated into legislation, it is of paramount importance that the legislators should be made aware of this oversight and should make every attempt to amend the existing legislation to cater for African needs and values as soon as possible.

In spite of the problems outlined above, the King Report on Corporate Governance has had a very important consequence from the point of view of corporate social responsibility in South Africa. Critics of corporate social responsibility argue that the implementation of legislation and other means to enforce corporate social responsibility objectives will deter foreign investors from doing business in South Africa. This *laissez faire* argument has been used to prevent development in the corporate social responsibility arena for many years, and corporations have therefore benefitted from the opportunity to pursue profits at the expense of the societies in which they operate. However, the King Code introduced corporate governance into South Africa, both into its legislation and its practices. And it did so without deterring foreign investment or stifling economic activity in South Africa, thereby dispelling the *laissez faire* myth:

> A common response to any proposed moves away from Anglo-American corporate structures is that they would alienate international investment and reduce international competitiveness, which would be detrimental to current attempts at reducing poverty and unemployment and undermine long-term economic growth. While the likely effects on international investment should undoubtedly be considered, the modifications to the Anglo-American model that have already occurred (the Employment Equity Act, the Broad-based Black Economic Empowerment Act, and elements of King II) have not met with significant resistance or condemnation internationally and it would be premature to assume that all legal or regulatory changes would have disastrous consequences.[94]

The King Code therefore serves as the first step in introducing a complex corporate social responsibility regime into the South African democracy.

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[93] West (note 77) at p 438.
[94] West (note 77) at p 444.

> In Africa, we strongly argue that CSR must be part of the national development philosophy. The concept of social responsibility includes an organisation's relationship to the society in which it operates, and its involvement in problems of national significance that face that society...Another aspect of the development planning in the CSR context requires that attention be given to the establishment of partnerships between the organisation and the community in need of development. The way that impoverished and underskilled African communities can be given opportunities to contribute has to be carefully facilitated so that the authenticity of the process is maintained.[95]

An example of an "Africanised" corporate initiative is the South African *stokvel.* The stokvel is a vehicle for community investment. There are approximately eight hundred thousand stokvels in South Africa: "Stokvels are joint undertakings or collective enterprises, such as savings clubs, burial societies and other (often formally registered) cooperatives. The term refers to a wide range of community-based financial arrangements according to which resources are pooled and then again disbursed to members as either (interest-free) loans or payouts...Profits are shared on an equal basis. Making a profit is important, but never if it involves the exploitation of others. Or, as the Sepedi (Northern Sotho) saying dictates: *Feta kgomo o tshware motho* i.e. "if and when one is faced with a decisive choice between wealth and the preservation of the life of another human being, then one should opt for the preservation of life."[96]" The stokvel was created in order for people with little or no money to pool their resources together in order to ensure that, as a group, there were funds available to help group members when such help was most needed. The stokvel example provides insight into how corporate investment and finance can be used for community development in a manner that directly benefits the community itself. Much of the resistance to corporate social responsibility initiatives is the direct result of the distrust that companies share in regard to whether or not financial investment in the community will ever actually being used for the purpose for which it was intended. However, once corporate social responsibility is aligned with the interests and needs of the South African community, then such distrust can be annihilated by ensuring that South African companies invest in South Africans. The stokvel is one such means of investment and there are many, many others.

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[95] Mersham & Skinner (note 75) at p 241.

[96] Louw, DJ 2002. Ubuntu: And the challenge of multiculturalism in post-apartheid South Africa, *Utrecht: Zuidam and Uithof* (2002) at p 9.

> Ubuntu defines the individual in terms of his/her relationship with others. According to this definition, individuals only exist *in* their relationships with others, and as these relationships change, so do the characters of the individuals. Thus understood, the word "individual" signifies a plurality of personalities corresponding to the multiplicity of relationships in which the individual in question stands. Being an individual by definition means "being-with-others."...Ubuntu unites the self and the world in a peculiar web of reciprocal relations in which subject and object become indistinguishable, and in which "I think, therefore I am" is substituted for "I participate, therefore I am."[97]

The importance of developing a corporate social responsibility regime that incorporates the philosophy of Ubuntu and that is tailored to the South African context cannot be underemphasised. Only once such provisions have been made in the relevant legislation will it be possible to develop corporate initiatives that can truly fulfil the constitutional mandate of protecting and promoting human rights: "A macroeconomic strategy which relies on the 'trickle-down' effect of free-market capitalism to meet developmental goals is at odds with an ethics that insists on urgent human needs taking priority over profit maximisation.[98]" As has been outlined above, "...because of the large base of support it enjoys, a solution based on African Ubuntu-style consensus decision-making will usually be more successful at the implementation stage.[99]"

> Ubuntu is an important concept for harmonious co-existence and sustainable development in a multicultural society such as South Africa. It is the *sine qua non* in the reconstruction and development of society and its institutions...As a cohesive moral value that is inherent in all humans, once revitalised in our heart and minds, it will go a long way towards alleviating most humanly created vicissitudes of life...Ubuntu, like existentialism, is a people-centred philosophy of life. It is an acknowledgement of the human status of another person. You and I are members of one and the same race, namely, the human race. The essence of man lies in the recognition of man as man, before financial, political and social factors are taken into consideration. Man is an end in himself and not a means.[100]

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[97] Louw (note 96) at p 9.

[98] West (note 77) at p 441.

[99] Mangaliso MP, "Building competitive advantage from *ubuntu:* Management lessons from South Africa," *The Academy of Management Executive (1993), Vol. 15 No.3, Themes: Insights from Sports, Disasters and Innovation* (2001) at p 27.

[100] Venter E, "The Notion of Ubuntu and Communalism in African Educational Discourse," *Studies in Philosophy and Education 23: 149-160, Kluwer Academic Publishers* (2004) quoting Teffo LJ in "Both/ubuntu is a way forward for contemporary South Africa" at p 159.

This marks the end of the discussion of the philosophical foundations of corporate social responsibility in South Africa. It is useful at this juncture to pause and reflect on a summary of the contributions which Kant, Hegel, Marx and the African philosophy of Ubuntu have made to the study of corporate social responsibility.

Kant provides the categorical imperative, which requires that all persons act at all times only in such a way that they would will their actions to become universal maxims. A company may therefore only act in such a way that would be appropriate and sustainable for all other companies and all other members of society, and may at no time ignore this rule and pursue activities that cannot be justified in terms of this categorical imperative. Secondly, Kant teaches that all persons must be treated as ends in themselves, never merely as a means to an end. This rule complements and corroborates the Constitutional mandate that the human rights of all South Africans must be upheld, promoted and protected at all times by all persons, including juristic persons such as companies.

Hegel's definition of freedom as mutual respect is important from a corporate social responsibility perspective. Moreover, Hegel provides a philosophical foundation for compliance with the laws of the State and with the supreme Constitution. In terms of Hegelian philosophy, corporate social responsibility must be legislated in order to be effective, although such legislation must never be viewed as having been 'created' but rather as a concrete codification of *a priori* rules of societal interaction.

Karl Marx's critique of capitalism identifies the dangers of unbridled profit-maximisation in a purely capitalist system. Whilst Marx cannot be used as a source of inspiration for corporate social responsibility in a capitalist system on account of the fact he preferred a purely socialist counter-approach, the idea of 'Building Marxism' can be used to inform legislative reform in the corporate social responsibility sphere, since he clearly identifies the greatest potential risks and dangers of the capitalist system.

Finally, the philosophy of Ubuntu, of existing in harmony with all members of society and of owing duties and obligations towards such members of society, forms the foundation of the Bill of Rights in the South African Constitution, and must be incorporated into any and all South African corporate social responsibility legislation.

Rights.[104]"

South African Case Studies on Corporate Social Responsibility and the Bill of Rights

A study conducted by the South African Human Rights Commission (the "SAHRC") into the corporate responsibility concerns of Anglo Platinum's mining activities in the Potgietersrus platinum mines in the Limpopo province[105] provides insight into the practical implementation of corporate social responsibility initiatives that comply with the constitutional mandate. In the introduction to the Report, the SAHRC states that "By placing this report in context, the SAHRC acknowledges the specifically situated and lived experiences of communities in communal land tenure and aspires to confirm their human dignity as one of the core values entrenched in the Bill of Rights.[106]" The language of this statement is in the affirmative, and emphasises the fact that corporate social responsibility in the constitutional era has moved beyond a merely negative obligation to refrain from activities that violate human rights, to a positive obligation to protect and promote the human rights of all members of the community in which a company conducts its business. The Report was sparked by accusations that the resettlement of communities on account of Anglo Platinum's mining activities had resulted in direct human rights violations. Whilst the SAHRC did not make any findings to suggest that Anglo Platinum was guilty of such direct human rights violations, the Report did conclude that the resettlement process had left many people deprived of basic supplies such as water and sanitation, and most importantly that the uprooting of the community had disturbed the inherent trust and dignity structures of the community. These findings emphasise a change in the approach to corporate social responsibility in South Africa in the sense that companies are not only required to comply with minimum standards in relation to protecting the environment in which they operate and ensuring safe working conditions and adequate pay for their employees, but are in fact expected to go beyond these minimum requirements under the new constitutional dispensation and protect the dignity, equality and freedom of all members of the community in which they operate: "The fundamental observation made

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[104] Havenga MK, "The Company, the Constitution and the Stakeholders," *Juta's Business Law* (1996) at p 135.

[105] Report on mining-related observations and recommendations_Anglo Platinum, affected communities and other stakeholders in and around the PPL mine, Limpopo, www.sahrc.org.za/sahrc_cms/publish/cat_index_41.shtml [accessed on 5 July 2009].

[106] *Ibid* at p i.

by the SAHRC is the need for companies to move beyond legal compliance and push for the development of processes and institutional structures which actually identify and manage the multitude of risks associated with resettlement. The current impasse can only be breached and trust regained through meaningful, open and multi stakeholder engagement.[107]"

Having identified the obligations of companies in relation to protecting and promoting the human rights of all South Africans, the next important step is to educate the companies themselves about these obligations. It is common knowledge that South Africa is governed by the supreme law of the Constitution. It is furthermore a widely accepted principle that the Bill of Rights has direct horizontal application and protects each South African citizen to an equal degree. However, whether due to a real and valid lack of knowledge or to an attempt on the part of South African corporations to "play dumb" until such time as they are forced to comply with the constitutional mandate, it would appear that companies are not aware of their obligations in this regard. It is for this reason that I conclude (as will be more comprehensively discussed at a later stage in this dissertation) that legislation detailing the specific obligations of companies in relation to developing and promoting the rights enshrined in the Bill of Rights would be the most effective means of regulating the constitutional compliance of companies, since most companies respect legislation and the duties imposed thereunder. As Klaus Leisinger, the Special Advisor to the UN Secretary General on the Global Compact explains it, "The challenge – both intellectually and politically – lies in working out a meaningful and broadly accepted package of corporate human rights responsibilities and implementing them in the day-to-day business of different sectors through appropriate management processes.[108]" It is submitted that legislation is the most effective means for introducing this 'package of corporate human rights responsibilities' into the corporate sphere.

One of the noteworthy aspects of any attempt to research corporate social responsibility in terms of the South African Constitution is a glaring lack of reported case law dealing with these concerns. This deficiency cannot be glossed over on the

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[107] *Ibid* at p ii.

[108] Leisinger KM, *On Corporate Responsibility for Human Rights,* Basel 2006 www.novartisfoundation.org/platform/apps/Publication/getfmfile.asp?id=612&el=812&se=1054374318&doc=46&dse=5 [accessed on 5 July 2009] at p 5.

assumption that there are no complaints relating to corporate responsibility across the whole of South Africa. Indeed, the example of the SAHRC investigation into the Anglo Platinum mining business highlights the existence of exactly such concerns and complaints. A simple search on the SAHRC's website exposes the large amount of human rights complaints based on corporate action or inaction. The shortcomings lie not in the inability of affected persons to communicate their problems, but in the fact that such persons have no direct basis upon which to litigate their grievances. A legal scholar versed in the Constitution may be able to postulate an argument for corporate responsibility in relation to the rights enshrined in the Bill of Rights, but the ordinary man does not have the legal tools and insight readily available to be able to concoct such an argument. It is therefore necessary to introduce clear and detailed legislation which lays out ascertainable and strict standards of corporate social responsibility. The result of this development will be two-fold: on the one hand companies will be able to understand and implement their corporate social responsibility obligations under the Constitution; on the other hand, those persons who should be benefitting from these initiatives will have a defined legislative tool with which to measure the corporate responsibility compliance of South African companies, and will be able to bring direct legal action against those companies that fail to adhere to these legislative requirements.

International approaches to corporate social responsibility and human rights

> In view of such shameful realities as 2.5 billion or so people facing a daily struggle for survival on $2 a day or less, more than 10 million children dying every year before they reach their fifth birthday, and 500 000 women dying annually due to pregnancy and birth complications, it is obvious that not only the State and the international community have a legal duty to do all in their power to promote human development but also other organs of society have a moral obligation to support such endeavours. Corporate contributions to respect, promote, protect, and fulfil human rights of this generation become reality mainly through doing business with good management principles.[109]

It is naïve to suggest that a model of corporate social responsibility which is concerned with protecting and promoting all of the rights contained to the Bill of Rights is a uniquely South African concept emanating from the uniquely South African direct

[109] Leisinger (note 108) at p 6.

horizontal application of the Bill of Rights. Whilst the direct horizontal application of the Bill of Rights is indeed a novel and groundbreaking approach to the protection of Constitutional rights, the marriage of corporate social responsibility and human rights is a topical and controversial issue across the world. Klaus Leisinger points out that one of the fundamental principles of the United Nations Declaration of Human Rights is "...that freedoms and rights may not be exercised and realised without corresponding responsibilities and obligations: human beings are not only born free and equal in dignity and rights, but are also endowed with reason and conscience and should act towards one another in the spirit of brotherhood.[110]"

In his report - "On Corporate Responsibility for Human Rights[111]" - Leisinger divides human rights into three categories and then attempts to define the parameters of corporate responsibility in respect of each of these three categories. The first-generation rights are the 'civil and political rights' such as the right to life, the right to non-discrimination and the right to freedom from bodily harm. Leisinger delegates the protection and promotion of these rights as the responsibility of the state and states that "...the overriding obligation for companies with regard to the first generation of human rights is to respect and support them in their sphere of influence and make sure that the company is not benefitting from violations of third parties.[112]" The concept of corporate social responsibility is more important and applicable in relation to second-generation rights, categorised by Leisinger as follows:

> Economic, social, and cultural rights (such as the right to an appropriate standard of living that guarantees health and well-being for a family, including food, clothing, accommodation, and medical care) form the second generation. These are positive rights that usually require resources in order for them to be fulfilled – resources, for example, to ensure non-discriminatory access to basic medical care and to guarantee a living standard that allows all people to fulfil these rights. Sometimes, of course, they merely require refraining from interference with the enjoyment of such rights.[113]

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[110] *Ibid* at p 4.
[111] *Ibid.*
[112] Lesinger (note 108) at p 5.
[113] *Ibid* at p 5.

> one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth (s 9). In addition, everyone has the right to an environment that is not harmful to his or her health or well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (s 24)....Public policy will probably demand broader consideration of concerns not dealt with directly in the Constitution.[115]

Simply put, the promotion of shareholders' interests at the expense of all other facets of society can no longer be justified in our constitutional democracy: "The view of profit-sacrificing social responsibility forms the essence of the stakeholder theory of corporate governance. Instead of the company's interests being identified with its shareholders' financial interests, the company is seen as a separate entity in which many conflicting interests should be accommodated, such as those of its shareholders, creditors, and employees, as well as consumers and the environment.[116]" The Constitution mandates a stakeholder approach to corporate social responsibility which demands positive participation in the development of human rights. In this respect, it is useful to have regard to the United Nations Global Compact which is an initiative to increase awareness and monitor corporate social responsibility on a global scale:

> The idea was and still is that international companies in particular should commit themselves not only to observe and exceed certain *minima moralia* in terms of employment conditions, environmental protection, and the fight against corruption, but also to comply in their sphere of influence with two important principles: to support and respect the protection of international human rights; and to ensure that they do not become complicit in the human rights abuses of others.[117]

There are numerous ways in which to cater for the stakeholder model of corporate governance mandated in terms of the Constitution. As has already been stated, the most important and effective step in this regard is the introduction of legislation that sets out the parameters of corporate social responsibility. The next enquiry is what type of obligations should be contained in such legislation.

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[115] Havenga (note 104) at p 136.
[116] *Ibid* at p 136.
[117] Leisinger (note 108) at p 7.

> ...it is important to understand the corporate human rights engagement not [as] a "project" that on command is started and then finishes once the objective has been achieved. It is more of an open-ended process that, once launched, may provoke changes in basic corporate practices. Companies – especially large multinational conglomerates – are increasingly faced with questions of responsibility that lie beyond the conservatively defined "normal" day-to-day business routine. Examples include particular claims related to the economic, social, and cultural human rights realm, such as the "right to health" claim against the pharmaceutical industry. Against the background of persistent mass poverty and associated diseases, successful companies will see themselves increasingly confronted with new demands that amount to an ever-growing substitution of the obligations of the state and the international community.[118]"

The value of monetary contributions to human rights development programmes cannot be overemphasised. In a country where a large portion of the population lives below the poverty line, money is a crucial element in alleviating the struggle of many South African citizens to enjoy their basic human rights. It may be argued that companies already contribute to the state's monetary resources by paying taxes that the state uses to assist those most in need of assistance by providing them with basic housing and access to healthcare. However, it is overwhelmingly obvious that tax-based initiatives are not sufficient to overcome the economic inequalities of the South African population. It may be possible to introduce something in the nature of a "constitutional tax" or a "human rights tax," over and above the ordinary taxes paid by companies which the state uses for existing purposes. This "constitutional tax" could be calculated in proportion to the company's profits, and could be ring-fenced for purely human rights-related initiatives, such as housing and the improvement of health care services for the general public. Experience teaches us, however, that companies (like all other citizens) resent the obligation to pay taxes, and it may therefore be more beneficial to introduce this payment obligation through an alternative means. These issues should be debated by the legislature in order to determine the most effective means of implementing what are in effect obligatory corporate social responsibility payments to the community. The overriding principle is that companies cannot simply enjoy unlimited profits without contributing to the welfare of the society in which they operate.

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[118] Leisinger (note 108) at p 12.

company which means that the assessment cannot be swayed by the influence which company directors and stakeholders may have over internal employees. An objective assessment tool is preferable.

In order to achieve the desired result, those drafting the legislation should take account of the traditions and cultures of those persons who are most in need of human rights protections, namely the ethnic South Africans who were oppressed during the apartheid era. In order to cater for the needs of such persons, it may be necessary to develop and implement a process whereby the ultimate beneficiaries of corporate social responsibility initiatives can identify their needs by way of the traditional round-table format with which they are accustomed and can thereby work together with companies to develop and implement human rights protections. The incorporation of such a decision-making mechanism (where applicable) into corporate social responsibility legislation will help to prevent similar problems to those which were identified by the SAHRC in the Anglo Platinum Report: "The perceived removal of agency amongst affected communities to determine the progress of their own resettlement appears to have translated into a mistrust of all stakeholders engaged with PPL on the relocation including Mapela Tribal Authority.[120]" Ongoing communication with the beneficiaries of corporate social responsibility initiatives will also help to ensure that the money and resources that are contributed by corporations are in fact being used for the desired purposes.

Two important observations need to be made at this juncture. The first observation is that it must be emphasised that this thesis does not intend to criticise the current activities of companies in general, but rather to improve them in response to the need to align corporate interests with human rights interests in order to discharge the constitutional mandate in South African society. Corporations already make an enormous contribution to economic activity in South Africa. As Leisinger points out:

> As far as *second-generation* human rights are concerned, the normal business operations of a company form the main corporate contribution to the preservation of these rights: it is the basic social function of companies to produce products and services in a legal way and to sell these on to the market. To this end, they hire employees of an adult age who work of their

[120] PPL Mine Report SAHRC (note 105) at p iv.

> own volition in exchange for pay as defined in legally binding contracts or collective bargaining agreements. In addition, companies pay contributions into the social security system. In this way, they enable their employees to secure their own economic human rights. Companies purchase goods and services, pay market prices for them, and thereby engender economic linkage effects. Last but not least, companies make a financial contribution towards the community through taxes and duty. This enables the state to fulfil its tasks.[121]

Current corporate activity is therefore a crucial component in ensuring the health and survival of the South African economy. Corporate responsibility initiatives are not designed to curtail this activity in any way, provided of course that such activity does not undermine or threaten the basic human rights of South African citizens. Corporate activity that harms, oppresses or exploits individuals or the environment in direct contravention of constitutional principles cannot be condoned for any economic reason. However, in the current social environment it is less the violation of human rights (since this has been curtailed to a large extent in South Africa over the last fifteen years) than the lack of corporate initiative to promote and protect human rights that forms the basis of corporate social responsibility. Corporate social responsibility philosophy is designed to ensure that all companies are "good companies" and that no single corporation has the power or the opportunity to forge ahead in the selfish desire for profits at the expense of all other sectors of the community and without paying due consideration to its duty as a juristic citizen to protect and promote the rights contained in the Bill of Rights.

> Economic deprivation is a standard feature of most definitions of poverty, and no social phenomenon is as comprehensive in its assault on human rights as poverty. Economic development is the single most important element to alleviate poverty. The private sector contributes to poverty alleviation by contributing to economic growth, job creation, and poor people's income. Thus, encouraging corporate activities and unleashing entrepreneurship is so important. Sustainable responses to the facets of poverty do not violate human rights in the pursuit of economic growth. On the contrary, sustainable responses to poverty alleviation involve securing and enlarging freedom, increasing choices, and enabling empowerment. The promotion of human development and the fulfilment of human rights share, in so many ways, a common motivation and reflect a fundamental commitment to promoting the freedom, well-being, and dignity of individuals in all societies. Good companies are part of the solution of filling

[121] Leisinger (note 108) at p 10.

these aspirations with living content.[122]"

Another important observation relating to corporate social responsibility is that initiatives in this regard are not entirely foreign to most modern companies. There has been ongoing debate over the past few years as to how best to implement corporate social responsibility objectives. Financial contributions are not the sole method of ensuring that corporations make a contribution to human rights projects in accordance with the Constitution. Alternative options include skills-based community development, where specialists in particular fields contribute to human rights by using their skills and education to assist and advise those who cannot afford such assistance in the normal market. For instance, a lawyer may provide free legal advice to the poorer members of the community in which he or she works, and a doctor may provide free medical care to those who require it; architects may use their skills to develop housing initiatives and businessmen can give business advice to local entrepreneurs, and so on. Leisinger provides insight into other corporate responsibility alternatives: "Companies – seeing themselves as good corporate citizens – may provide additional services of their own volition. They may, for example, offer products in special cases at special conditions (such as differential pricing of medicines for poverty-related and tropical diseases or product donation programs), finance philanthropic foundations, do pro bono research, make donations, and, on a case-by-case basis, contribute to the fulfilment of economic, social, and cultural rights in other ways.[123]" The problem with these alternative methods of corporate social responsibility investment is that it is difficult to set standards across the market. Corporations that do not operate on a skills-based basis cannot contribute skills to the community; mining companies cannot provide cheap medicine or food. The human rights audit suggested by the SAHRC may provide a means by which to measure and compare the different human rights contributions made by different types of companies, but other than this there is presently very little that the drafters of corporate social responsibility legislation can do to implement and monitor these diverse activities. However, the importance of the abovementioned contributions to the protection and promotion of the dignity, freedom and equality of all South Africans is obvious, and it is necessary for legislators and academics to apply their minds in order to create a vehicle for enforcing and monitoring this type of human rights promotion and corporate social responsibility compliance.

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[122] Leisinger (note 108) at p 18.
[123] *Ibid* at p 10.

> Unique to South Africa, the Bill of Rights also applies horizontally between private actors. Section 8(4) provides that juristic persons (i.e. companies) can be the holders of rights to the extent that the nature of the right permits. However, section 8(2) provides that juristic persons are also the bearers of obligations and are bound by the provisions of the Bill of Rights "if, and to the extent that, it is applicable, taking into account the nature of any duty imposed by the right."[124]

The South African model of corporate social responsibility must be carefully aligned with the requirements of the Constitution. The Constitution itself was implemented with a view to protecting and promoting the human rights of all South African citizens, and it is therefore a blueprint basis for corporate social responsibility legislation that seeks to further the same objectives. In summary of this chapter, there are four main considerations which must be addressed in order for corporate social responsibility to discharge its constitutional mandate. The first is that corporations, like the state and the citizens of the state, have a duty to uphold the rights enshrined in the Bill of Rights: "Generally, the SAHRC does not consider the human rights obligations of juristic persons as entrenched in the Bill of Rights to exist to the same extent as the obligations of the State. However, the clear horizontal application of the Bill of Rights is clear.[125]" The notion that a company must uphold the Constitution is a novel one: "One consequence of the assumption that protecting and enhancing human rights was a government responsibility, however, was a *de facto* division of responsibilities between governments and the private sector. The private sector assumed responsibility for generating wealth while the public sector accepted responsibility for ensuring respect for human rights including freedom from "fear" and "want."[126]" This line has now become blurred so that corporations and individuals must, in addition to generating wealth, also ensure respect for human rights under the new Constitutional dispensation.

Secondly, South African corporations need to appreciate the fact that South Africa is a struggling foundling economy which means that the potential for human rights abuse is ripe in the sense that a large number of South Africans still live below the

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[124] PPL Mine Report SAHRC (note 105) at p 2.
[125] *Ibid.*
[126] Cragg W, "Human Rights and Business Ethic: Fashioning a New Social Contract," *Journal of Business Ethics* 27: 205-214, (2000) at p 206.

poverty line. The relevance of this second consideration is explained in the following quotation:

> Nicolas Howen (International Commission of Jurists) recommends that companies "look for the warning signs. The closer you are to victims, the more you have a responsibility to watch out for the impact of your actions. The closer you are to those who commit the violations, the greater the danger. And the more systematic the nature and scale of the violations, the more dangerous they are." He continues: "Do not be limited by the law. The law is a vital test of accountability and will give clarity to what is acceptable and unacceptable behaviour. But we're all forced to swim in a much rougher and more profound see of morality and public policy, and that's how it should be."[127]

Therefore, the jist of this second point is that the fact that many South Africans are still deprived of basic human rights such as housing, food and healthcare, and are thereby deprived of the enjoyment of the rights of freedom and dignity, means that corporations in South Africa have to devote more resources to corporate social responsibility initiatives than their first-world counterparts.

The third important consideration is that the best vehicle for enforcing compliance with corporate social responsibility standards in terms of the Constitution is through specific corporate social responsibility legislation. "We can all agree on the profound inadequacy of voluntary and self-regulatory mechanisms to address these issues.[128]" Corporations will only react when social responsibility becomes law. Without this crucial development in the realm of corporate responsibility, there will be no certain tool with which to measure the constitutional compliance of any given company. The courts' arms will be tied. As Havenga points out in her article on directors' fiduciary duties, "It is, in any event, debatable whether, in view of the existing authorities favouring the company as the beneficiary of directors' duties, courts of law are the proper forum for the wider recognition of this obligation. In the interest of legal certainty, such recognition, if thought desirable, should be provided for in legislation.[129]"

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[127] Leisinger (note 108) at p 13.
[128] Peek B, "Dismantling the power of corporations – building peoples' rights" www.groundwork.org.za [accessed on 23 June 2009].
[129] Havenga (note 94) at p 138.

The fourth and final consideration in aligning corporate social responsibility with the Constitution is that the Constitution requires a leap from the previous notion of corporate social responsibility as a negative obligation to refrain from doing harm to a positive obligation to protect, promote and further human rights: "Avoiding human rights problems is one thing. Affirmative action with benefits for the safeguarding of human rights is another – namely, the more positive and constructive alternative.[130]" Affirmative responsibility is not a concept that is foreign to South African companies. The introduction of so-called 'affirmative action' to increase opportunities for black South Africans was the first step in equality legislation under the new Constitution. However, 'affirmative action' must now be applied in respect of all persons in all circumstances in South Africa, since the Constitution protects the human rights of all South Africans.

[130] Leisinger (note 100) at p 17.

CURRENT ATTITUDES TO CORPORATE SOCIAL RESPONSIBILITY

Corporations cannot be studied and analysed solely by means of books and libraries and scholarly literature. The corporation is alive and active in today's society, its powers and influence are developing and expanding at an ever-increasing rate. A study of corporate social responsibility must therefore adopt a topical and interactive approach, and must address the needs of modern society as and when they arise. It is for this reason that my research into the subject of "Corporate Social Responsibility and the Constitution" involves a number of interviews with key figures in South Africa's move towards a jurisprudence of corporate social responsibility. These individuals include Mervyn King SC, founder and chairman of the King Code on Corporate Governance which has had a groundbreaking influence on the regulation of corporate governance in South Africa; Paul Kapelus who is the founder and former CEO of the African Institute for Corporate Citizenship; and Dr David Bilchitz, a Senior Researcher at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law. A discussion of the works of these individuals together with anecdotes and ideas gleaned from the interviews conducted with them, sheds some light on the issues and debates that surround the subject of corporate social responsibility in South Africa at present.

The third edition of the King Code on Corporate Governance ("King 3") was published in February 2009.[131] The predecessor to this report, King 2, had a remarkable influence on the development of corporate governance in South Africa, to the extent that the Johannesburg Stock Exchange now requires compliance with certain of the provisions of the King 2 Code in order for a company to be listed on the stock exchange. Mervyn King SC, the Chairman of the King Committee on Corporate Governance, writes in the Preface to King 3 that "The third Report on Governance in South Africa (King III) became necessary because of the anticipated new Companies Act...and the changes in international governance trends.[132]" One of the most hotly debated issues that arose during the interviews conducted with King, Bilchitz and Kapelus was whether corporate social responsibility objectives were best achieved by way of legislation or by other means. King is adamant that corporate governance and

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[131] King 3 (note 90).
[132] *Ibid* at p 6.

corporate social responsibility cannot be solely legislated:

> There is an important argument against the 'comply or else' framework: a 'one size fits all' approach cannot logically be suitable because the scales of business carried out by companies vary to such a large degree. The cost of compliance is burdensome, both in time and money. Further, the board and the management become focused on compliance rather than the business of the enterprise. It is the duty of the board of a trading enterprise to undertake risk for reward and to try to improve the economic value of the company. If the board follows a narrow focus on compliance, the board's responsibility towards enterprise and its ultimate responsibility, namely performance, may be diluted.[133]

Paul Kapelus agrees with King that legislation cannot be the sole means of achieving corporate social responsibility objectives and that legislation often has the effect of stifling and curtailing innovation in the sphere of corporate social responsibility. He states that "You can't legislate a lot of things. You can't legislate how a company should make a contribution to a community's well-being.[134]" However, Kapelus concedes that legislation is necessary in certain areas because "...you can't trust all companies to operate in a way that does no harm.[135]" In his Preface to King 3, King cites Professor Ribstein of the Illinois Law School who states that "Even the best regulators might err and enact regulation that is so strong that it stifles innovation and entrepreneurial activity. And once set in motion, regulation is almost impossible to eliminate.[136]"

Dr David Bilchitz holds the opposite view to King and Kapelus. According to Bilchitz, a voluntaristic approach to corporate social responsibility is entirely misplaced as it gives the impression that compliance with corporate social responsibility objectives is voluntary rather than obligatory.[137] Bilchitz criticises King 2 for its voluntaristic approach to corporate social responsibility, and points out that "...whilst these proposals have sought to encourage recognition of the wider social responsibilities of corporations, they fall short of the notion that such responsibilities impose binding obligations with enforceable consequences.[138]" Personal experience of the way in which

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[133] King 3 (note 90) at p 7.
[134] Interview with Paul Kapelus held at Johannesburg on 20 March 2009.
[135] *Ibid.*
[136] King 3 (note 90) at p 7.
[137] Interview with Dr David Bilchitz held at Johannesburg on 19 April 2009.
[138] Bilchitz D, "Business and Human Rights: The responsibilities of corporations for the protection and

companies approach social responsibility obligations leads me to agree with Bilchitz in this regard. Whilst clerking in a law firm, I have listened as well-known South African corporates refuse to make provision in their commercial contracts for compliance with any Black Economic Empowerment ("BEE") initiatives that do not have legislative force. If this reluctance is already evident in the corporate attitude towards BEE, which serves not only social responsibility purposes but in fact assists companies in obtaining governmental and reputational superiority to their own advantage, then it is highly unlikely that companies will, of their own accord, choose to spend time and money in promoting and protecting human, social and environmental rights unless they are compelled to do so by means of specific legislation.

Perhaps the divergent views on this topic result from differing ideas as to what corporate social responsibility entails. King, Kapelus and Bilchitz all agree that corporate social responsibility involves the protection of the 'triple bottom line' of economic, social and environmental interests. Both King and Kapelus made reference during the interviews to the 'supply chain' element of corporate responsibility that has arisen over recent years. Kapelus refers to the 'Responsible Jewellery Initiative' which arose in response to stakeholder and customer concerns over the source of diamonds and other jewels. The mines, the manufacturers and the jewellers therefore had to restructure the way in which the whole jewellery supply chain operated in order to satisfy customers that the human rights of everyone involved in that supply chain was being protected. As King states, "In the real world, the ultimate compliance officer is not the company's compliance officer or a bureaucrat ensuring compliance with statutory provisions, but the marketplace.[139]" King and Kapelus both recognise that the protection of human rights is an important element of corporate social responsibility. They view this element primarily as a negative obligation not to cause harm to human rights.

Bilchitz adopts a different approach, namely the imposition of positive obligations on companies to develop and further human rights in the communities in which they operate. This positive obligation to develop human rights is exactly what is required under the broad mandate of the South African Constitution. It is this innovative

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promotion of human rights," *South African Institute for Advanced Constitutional, Public, Human Rights and International Law* (2008) at p 21.

[139] King 3 (note 90) at p 8.

approach to corporate social responsibility that will revolutionise the concept of corporate social responsibility in the twenty first century. In this regard, Biltchitz refers to Professor John Ruggie's research into some of the issues relating to corporations and human rights at the instance of the United Nations Human Rights Commission – the 'Ruggie Framework.[140]' Bilchitz concludes that this framework is focussed mainly on negative obligations on the part of corporations, and states that "...it may be questioned whether a duty to respect does not place the bar too low for business, failing to articulate the manner in which powerful corporate actors actually have certain duties to make positive contributions towards the fulfilment of human rights in the societies in which they operate. What the framework lacks is a specification of factors that would govern the imposition of stronger positive obligations upon corporations in particular contexts.[141]"

Central to the debates surrounding what obligations corporations should adhere to, is the question of what type of entity the corporation is. Under South African law, a company has separate legal personality in its own right. King writes that "Because the company is so integral to society, it is considered as much of a citizen of a country as is a natural person who has citizenship. It is expected that the company will be directed to be and be seen to be a decent citizen. This involves social, environmental and economic issues – the triple bottom line. Boards should no longer make decisions based only on the needs of the present because this may compromise the ability of future generations to meet their own needs.[142]" The concept of the 'good corporate citizen,' as outlined by King, strengthens the argument for Constitutional compliance, since every citizen under the Constitution is required to respect and promote human rights. King emphasised, both during the interview and in the King 3 Report itself, that companies must regularly report to their stakeholders on both the positive and negative impacts which they have had on their societies, and that "Efforts should be made to enhance these positive effects and to eradicate or ameliorate the negative effects.[143]" Further to this, King argues as follows:

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[140] Bilchitz (note 137) at p 15.
[141] *Ibid* at p 17.
[142] King (note 90) at p 15.
[143] *Ibid* at p 23.

> Good corporate citizenship is the establishment of an ethical relationship of responsibility between the company and the society in which it operates. As good corporate citizens of the societies in which they do business, companies have, apart from rights, also legal and moral obligations in respect of their social and natural environments. The company as a good corporate citizen should protect, enhance and invest in the wellbeing of society and the natural ecology.

One of the questions that arose during the interviews was how South Africa's performance in relation to corporate social responsibility objectives measures up on the global scale. Kapelus was of the view that South Africa is doing well in this regard. King writes in his report that "South African listed companies are regarded by foreign institutional investors as being among the best governed in the world's emerging economies and we must strive to maintain that strong ranking.[144]" Bilchitz was less enthusiastic, and was of the view that whilst a number of companies have been involved in very noble and worthwhile initiatives in South Africa, this does not qualify as widespread compliance with corporate social responsibility objectives as he views them. Furthermore, Bilchitz is of the view that the new Companies Act, 71 of 2008, fails to adequately address corporate social responsibility concerns in South Africa save for a general clause at the beginning of the act which outlines the company's duty to have due regard to human rights which Bilchitz views as a poor attempt to deal with this important issue in what should be groundbreaking new legislation.

Whilst King, Kapelus and Bilchitz agree that the company has a responsibility to protect social, environmental and economic interests, they have differing attitudes towards the best way to ensure that this responsibility is upheld. As indicated by the title of the King Code on Corporate Governance, King's focus is mainly on corporate governance – ensuring that the internal controls of the company prevent abuses by officers within the company. King states that "The philosophy of the Report revolves around leadership, sustainability and corporate citizenship.[145]" The King Code focuses on the duties of the Board of Directors of the company. In simplified terms, the King Code provides a guide for directors on how to comply with their fiduciary duties and their duties to act in the best interests of the company, as required by the Companies Act and supporting legislation. The fiduciary duties of directors are indeed an important

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[144] *Ibid* at p 9.
[145] King (note 90) at p12.

Doctors, lawyers and other professionals are already required by law to expend part of their knowledge and skills in assisting with community service initiatives. It is submitted that the same standard should be applied to corporations in order for them to earn the title of 'good corporate citizens.' The rights laid out in the Bill of Rights are at the forefront of our constitutional democracy, and the Constitution requires all citizens to promote and protect these rights. As succinctly stated by Kapelus during the course of the interviews, "Philanthropy is the way you spend your money on Sunday when you go to church. Corporate social responsibility is how you make your money from Monday to Friday."

The United Nations Global Compact provides that "business should support and respect the protection of internationally proclaimed human rights... [and] make sure that they are not complicit in human rights abuses.[147]" The interviews with King, Kapelus and Bilchitz exposed the fact that the South African model of corporate social responsibility requires something more than mere adherence to this Global Compact and an undertaking not to prejudice the social and environmental rights of its citizens, but that it should rather impose an obligation on corporations to take positive steps to promote and further human rights in South Africa. Furthermore, the content of this obligation needs to be clearly set out for companies to follow, and the most effective means of setting out the content of this obligation is via legislation with which companies are forced to comply. The voluntary approach to corporate social responsibility cannot be sustained. As summarised by Bilchitz, "If corporations have responsibilities for human rights protection, then effective mechanisms need to be developed to ensure that they comply with their duties.[148]" This approach mirrors the global transition towards a new model of corporate social responsibility. The norms set out in the Ruggie Framework on behalf of the United Nations state that "...within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law.[149]"

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[147] United Nations Global Compact www.unglobalcompact.org [accessed on 15 May 2009].
[148] Bilchitz (note 137) at p 8.
[149] Quoted in Bilchitz (note 137) at p 12.

CORPORATE SOCIAL RESPONSIBILITY AND THE NEW COMPANIES ACT

The new South African Companies Act, 71 of 2008 was published and promulgated earlier this year, but will only come into force during 2010 once all of the necessary framework regulations connected therewith have been put into place. According to the Memorandum[150] published in conjunction with the Companies Bill (the predecessor to the Act which was circulated for comment during the course of 2007), the Department of Trade and Industry drew up the draft bill in order to review South African company law: "The objective of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and open economy.[151]" In view of this objective, the new Companies Act provides the perfect legislative platform upon which to build a uniquely South African corporate social responsibility regime, as well as being the perfect enforcement mechanism in regard to corporate social responsibility objectives.

However, although certain provisions of the Companies Act do appear to support corporate social responsibility principles in an indirect way, there is a glaring lack of direct recognition and enforcement of a corporate social responsibility framework in the Act itself. The most obvious deficiency is the fact that the Preamble to the Companies Act fails to make reference to any corporate social responsibility initiatives or aims. The Preamble states that the Act's purpose is to "define the relationships between companies and their respective shareholders or members and directors." This interpretation is in direct conflict with a stakeholder interpretation of corporate responsibility in the sense that it suggests that the only important relationships of the company are those with its shareholders and directors, not with the creditors, consumers, employees and general community in which it operates. In a country plagued by poverty, unemployment, crime and disease, it is to be expected that new legislation should attempt to address social responsibility issues where possible, and that this objective should be outlined in the preambles of all new acts and bills. No such objective is outlined in the Preamble to the Companies Act. Nor does any other provision of the Act make direct and specific reference to corporate social responsibility per se. This is a glaring oversight on the part of the legislature, and it is hoped that amendments to the Act will incorporate due regard

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[150] www.dti.org.za [accessed on 27 August 2008].
[151] *Ibid.*

to the importance of corporate social responsibility initiatives.

In the interview with Dr David Bilchitz, he mentioned that as a result of continuous pressure and campaigning on his part and on the part of various other activists, the legislature incorporated a reference to the Bill of Rights into the new Companies Act. Section 7 of the Act, which outlines the Purposes of the Act, states that "The purposes of this Act are to – (a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law..." Bilchitz condemned this inclusion as immaterial since no other reference is made to human rights in the remainder of the Act, which means that it is impossible to measure or test a company's compliance with this overarching principle. Section 7 of the Act also makes reference to "(b) (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation..." The reference to corporate governance is a direct reference to the King Code of which many facets, particularly those relating to directors' fiduciary duties, have been incorporated into the new Act. It would appear, therefore, that although the Preamble makes no reference to any corporate social responsibility concerns, the Act's purpose provision makes reference to both the promotion of human rights and to corporate governance, and therefore indirectly identifies corporate social responsibility compliance as one of the purposes of the new Companies Act. However, a more detailed study of the provisions of the Act is necessary in order to determine whether or not Bilchitz is correct in asserting that this purported purpose is no more than a mere sentiment that does not find proper footing throughout the main provisions of the Act.

Certain provisions of the new Companies Act do correspond with particular areas of corporate social responsibility concerns. To begin with, Section 22 of the Act protects the interests of stakeholders by forbidding and constraining reckless conduct on the part of company officials that may have a negative effect on the wider society in which the company operates. Section 22 is entitled "Reckless trading prohibited" and provides as follows:

22. (1) A company must not –

(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or

(b) trade under insolvent circumstances.

(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying its business, or to trade, as the case may be.

Section 22 requires businesses to act in a socially responsible manner inasmuch as they are prohibited from acting recklessly or with gross negligence. The result of this provision is that all shareholders and stakeholders, and possibly even members of the public at large, are protected from corporate actions that are reckless or grossly negligent. For instance, where it can be shown that gross negligence caused an oil spill, the negligent company will bear responsibility for its negligence. Section 22 is definitely a step in the right direction as far as corporate social responsibility objectives are concerned. However, the operation of the provision will no doubt be weakened on account of the fact that the 'definitions section' of the Companies Act does not define what is meant by the terms "recklessly" or "with gross negligence." The lack of definitions in this regard is likely to result in confusion and uncertainty, which environment makes it easier for companies to avoid their obligations in this sphere. Companies will be able to avoid liability on the basis that they were not aware that their actions constituted reckless or grossly negligent actions if there is no clear-cut definition of these principles. It is therefore imperative that the legislature insert all-encompassing definitions into the 'definitions section' in order to avoid uncertainty in this regard and so that Section 22 can be stringently enforced from the moment that the Companies Act comes into force next year.

There is an argument to be made in favour of extending the application of Section 22 to include positive obligations as well as negative obligations. Presently, Section 22 contains only negative obligations: companies may not act recklessly and may not act with gross negligence. However, the section has the potential to be transformed into an enforceable proactive corporate social responsibility provision by simply amending the wording to include the requirement that "a company must act *responsibly*." In this way, Section 22 could become the enabling provision for an entire corporate social responsibility legislative framework. Specific legislation could be enacted in terms of Section 22 to define the ambit of the terms "not recklessly," "without gross negligence" and "responsibly" and such terms could be defined in relation to employees, shareholders, the environment, the general public, and so on. The Commission referred to in Section 22(2) (the Companies and Intellectual Property Commission which will be established in terms of the Companies Act) could then enforce the corporate social responsibility objectives and ensure that companies act "responsibly." This objective could be achieved by the Commission in the same manner as it is tasked with ensuring that companies do not act recklessly or with gross negligence. The establishment of an enforcement body is a crucial element of ensuring that companies comply with their corporate social responsibility duties, and this is another reason why Section 22 seems so suitable to meet this objective.

Before considering the remainder of the provisions in the Companies Act that are relevant, in one way or another, to the promotion and enforcement of corporate social responsibility and thereby the promotion and protection of human rights, it is important to note that Section 22, like many other provisions of the Companies Act, has the potential to be amended to properly incorporate corporate social responsibility objectives, but that without such amendment is has no power to promote compliance with these objectives. In other words, the Act as it stands now does not adequately cater for corporate social responsibility and the promotion of human rights, in spite of the allegation to this effect in the purpose provision. Since the Act has not yet come into force, it is of the utmost importance that the shortcomings in this area be communicated to the Legislature as soon as possible, so that necessary amendments can be made thereto before the coming into force of the Act next year. The fact that the Act has to await the implementation of a regulatory framework to support its provisions before it comes into force, allows a much-needed grace period for the purposes of amending the

Act to cater properly for the needs of the new South African Constitutional democracy.

It is clear that certain provisions of the Companies Act can be easily and sensibly adapted to make provision for the enforcement of a corporate social responsibility regime. Another such section is Section 86 which requires that every company appoint a company secretary on a mandatory basis. Section 86 provides as follows:

> 86. (1) A public company or state-owned company must appoint a person knowledgeable or experienced in relevant laws as a company secretary.

It is therefore a requirement of the new South African corporate law that every company have in its employ a person with substantial knowledge and / or experience of South African law to advise the company on applicable laws and to ensure that the company complies with such laws. Should specific corporate social responsibility legislation be enacted under the ambit of Section 22 of the Companies Act as outlined above, then the company secretary will also be responsible for ensuring that the company complies with relevant corporate social responsibility laws. The company secretary, knowledgeable in law, will monitor and advise the company on how to comply with the requirement that it act responsibly in relation to the promotion and protection of human rights. There are, of course, certain additional considerations which will need to be dealt with in the applicable legislation in order for the company secretary to effectively manage and promote corporate social responsibility compliance. For instance, it will be necessary for the company secretary to enjoy security of tenure in order for such individual to administer any form of power as regards forcing the company to comply with South African law and thereby to effectively implement corporate social responsibility and human rights objectives into the company's agenda. Without such security of tenure, the company secretary may be unduly influenced in carrying out his or her duties, or may simply lack confidence in requiring the company to comply with its legal and Constitutional mandate. Section 89 of the Companies Act governs the resignation or removal procedure for company secretaries and stipulates that a company secretary can be removed from office by the company's board. It is submitted that this arrangement will prove to be ineffectual in the sense that as soon as a company is displeased with the company secretary's advice in regard to complying with

companies, but all companies have a responsibility in this regard, and no company can escape this responsibility because it does not constitute a "public company" or a "state-owned company." After all, so-called "private companies" often enjoy even greater profits than their public or state-owned counterparts and should therefore be making an even greater contribution to the South African community. Chapter 3 of the new Companies Act fails to address the needs of corporate social responsibility legislation in this regard.

One of the most modern and innovative amendments to corporate law in the new Companies Act is the introduction of a 'business rescue' procedure to assist companies in financial distress. Chapter 6 of the Act governs "Business Rescue and Compromise with Creditors." The concept of business rescue aims to assist businesses on the verge of liquidation or financial ruin and to place them under emergency management in order to salvage the business of the company instead of placing it into liquidation. Section 128 of the Companies Act defines "business rescue" as follows:

> **"business rescue"** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
>
> (i) the temporary supervision of the company, and the management of its affairs, business and property;
>
> (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
>
> (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

Business rescue is clearly an incredibly significant system from a corporate social responsibility perspective. It serves to protect the interests of employees, creditors, shareholders, and stakeholders, all of whose interests could be severely prejudiced by the hasty winding up of a company. Such prejudice is often so severe that, particularly in the case of a company's employees or its larger creditors, such stakeholders' entire livelihoods could depend upon the continued existence of the company.

Business rescue has been enforced in many international jurisdictions, but has never been a part of South African law. In terms of Section 131 of the Companies Act, any "affected person" may apply to Court to initiate business rescue proceedings in respect of a specific company. Section 128 defines an "affected person" as:

(i) a shareholder or creditor of the company;

(ii) any registered trade union representing employees of the company; and

(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

The definition of an "affected person" is wide enough to enable not only the board of the company itself, but also other stakeholders with a legitimate interest in the continuation of the business of the company, such as employees and creditors, to initiate business rescue proceedings to protect their own interests. The advantage of being placed under business rescue as opposed to liquidation is the fact that the company does not surrender any of its assets or cease business and thereby cease making profit. Instead, the company's activities continue to the benefit of the company and its shareholders and stakeholders, whilst an independent and experienced person or group of persons attempts to administer the affairs of the company in such a way that it is capable of overcoming its financial distress.

The concept of business rescue appears to have corporate social responsibility objectives at its core. At the heart of business rescue is the protection of company stakeholders who do not ordinarily have any power over the administration and

management of the company. The extent to which these interests are protected is highlighted by specific provisions of the Companies Act relating to business rescue proceedings. In terms of Section 135, an employee's claim to his remuneration trumps a creditor's claim to satisfaction of his debt. Thus, the claim of individual employee whose livelihood depends on the salary he receives from the company is given preference over all other claims, which advances the corporate social responsibility value of protecting the interests of weak and powerless individuals over those of large controlling corporations. Secondly, Section 145 of the Act promotes participation by creditors in the re-structuring of a financially distressed company. The creditors are given an opportunity to make proposals as to how the company should discharge its obligations whilst still meeting standard liquidity requirements (Section 145(2)). Since business rescue proceedings require debt re-structuring, Section 145 gives the very bodies whose interests may be prejudiced by such proceedings – the creditors – an opportunity to participate in the proceedings in order to protect their interests.

The severe consequences of companies going into liquidation have been highlighted all too recently by the worldwide repercussions of the subprime crisis. According to Brian Kantor writing for the financial mail:

> The markets hopelessly underestimated the risks of providing mortgage finance in the US and shareholders are paying a heavy price. Some senior managers have escaped the carnage with their bonuses. Many more have seen the value of their restricted shares, often a large proportion of their remuneration over the previous five years, evaporate along with their jobs. Markets are proving capable of exacting their own revenge. The damaged shareholders are almost all members of pension and retirement funds.....The cause of the bank failure was the search for ever higher earnings in a world of abundant savings and yield compression, without proper regard to the extra capital at risk. The search for, and the share market acceptance of, earnings growth flew in the face of everything that should be well-known about the cost of capital and the dangers of pursuing accounting earnings without regard to capital at risk. One hopes this lesson will have been learned well enough to protect capital markets in the future.[153]

This extract highlights various aspects of the subprime crisis with regard to corporate social responsibility. On the one hand it illustrates the reckless activities of large companies and the need to implement corporate social responsibility legislation in

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[153] Kantor B, "Capitalism in Action," *Financial Mail* (3 October 2008).

order to place limits upon a company's ability to annihilate itself in such a manner. Secondly, the extract emphasises the implications that the financial distress of a company has on its stakeholders: employees and shareholders relying on the company for financial support during their old age have been ruined together with the company. According to Absa Capital's Jeff Cable commenting on the subprime crisis in October 2008, "The situation is very serious. Unless something is done soon we are looking at the most challenging period in global growth since the Great Depression.[154]" Claire Bisseker writes that "If the US doesn't table a rescue plan fairly quickly, many countries will be plunged into recession.[155]" Indeed, by mid-2009 many countries had been declared to be in a state of recession. However, the US has, to a large extent, tabled a rescue plan by injecting funds into financially distressed companies. South Africa does not have unlimited funds to hand over to unstable corporations: it is submitted, however, that the business rescue provisions of the Companies Act will rescue South African companies in the future, since business rescue allows for a delay in debt repayment and a independent re-structuring of the company's management mechanisms. The subprime crisis has exposed the fact that it is not only the environment or the poorer levels of society that suffer at the hands of large corporations with no social conscience: even major shareholders and employees at the top levels of management may be financially ruined by reckless trading activities on the part of companies. Corporate social responsibility initiatives are required to protect all members of society.

Mervyn King SC has expressed doubt as to whether the business rescue provisions in the new Companies Act will effectively serve the purpose for which they were intended. King is sceptical about the risks associated with allowing a judicial manager – being someone with no experience of the company – to be allowed to unilaterally take over the management of the company when it is in financial distress. No doubt King's fears will prove true in some respects, since any new venture of this nature will take a few attempts in order to smooth out the cracks. However, the fact that things might 'take some getting used to' cannot deter the overall aim of ensuring that corporate social responsibility objectives are introduced and maintained through legislation. King himself concedes that, properly applied, business rescue can be of benefit to South African company law.

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[154] Bisseker C, "The House is on Fire," *Financial Mail* (3 October 2008).

[155] *Ibid.*

Wiseman Khuzewayo writes that "South Africa is among the pace setters in public policy that promotes corporate social responsibility (CSR), according to a study that puts the country in the company of more developed economies like the US, France and Germany.[156]" In order to uphold this reputation, it is submitted that it is imperative that South Africa enact specific legislation that governs corporate social responsibility and make the abovementioned amendments to the Companies Act in order to cater for such legislation.

> The challenge for corporate social responsibility (CSR) in developing countries is framed by a vision that was distilled in 2000 into the Millennium Project Goals – 'a world with less poverty, hunger and disease, greater survival prospects for mothers and their infants, better educated children, equal opportunities for women, and a healthier environment' – UN, 2006;3[157]

These challenges are felt acutely in the South African context. Corporations must not only be prevented from worsening the state of the South African economy by trading recklessly and with gross negligence as highlighted by Section 22 of the Companies Act, but must also bear the obligation of acting responsibly in relation to the society in which they operate, and must take pro-active steps to better this society. It is submitted that the Companies Act, once amended in accordance with the abovementioned outline, does contain the base mechanisms for introducing a successful corporate social responsibility regime into South African company law. Together with specific corporate social responsibility legislation enacted under the Companies Act, the prospects for the successful implementation of such a regime are optimistic.

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[156] Khuzwayo W, "SA rubs shoulders with the First World on CSR policy," *Business Report* (23 May 2008).

[157] Visser W, "Corporate Social Responsibility in Developing Countries" http://www.waynevisser.com/chapter_wvisser_csr_dev_countries.pdf [accessed on 27 August 2208].

> welfare-state society like Finland, community activities are typically viewed by companies as the responsibility of the state and that the high tax structure contributes to the maintenance of the welfare state.[160]

It is evident from the above quotation that corporate social responsibility in Scandinavia is something entirely different to the South African model. In South Africa, corporate social responsibility entails the promotion and protection of the values and rights enshrined in the Constitution. This level of corporate social responsibility is necessitated by the injustices and inequalities of South Africa's past. The Scandinavian countries do not share this past, and the level of corporate social responsibility required from companies in these countries is therefore far less than in South Africa. Governments in Scandinavia have sufficient resources to protect and promote the human rights of their citizens without additional input and resources from corporations. It is no wonder then that Scandinavian countries rank so high on the scale of corporate social responsibility if the level of responsibility on the part of companies in these countries is based so low.

> Of course, it is true that we often see that companies sponsor national teams and theatre pieces or that they donate funds on what appears to be an altruistic basis. However, in most cases there will be a sound business judgment behind this and only in a very few cases do we find that companies act in a purely altruistic manner. This behaviour of using the company's funds in ways which suggest a social responsibility rather than a 'profit-only' approach, but doing this only as long as such acts in a longer perspective benefit the shareholders is widely regarded as fully justifiable. The theory underlying this approach, monism, has been acknowledged for years in the *Western world.*[161]

It is clear that the well-known and accepted model of 'negative obligation corporate social responsibility' is the benchmark in Scandinavia. Companies are not required to promote human rights to any further degree than the standard negative obligation not to partake in human rights violations. Any act in excess of this purely negative obligation is regarded as an act of charity rather than the discharge of a responsibility or obligation. South Africa's needs are entirely different and infinitely more demanding in this sphere.

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[160] Panapanaan MV, Linnanen L, Karvoven MM, Phan VT, "Roadmapping Corporate Social Responsibility in Finnish Companies," *Journal of Business Ethics 44, Kluwer Academic Publishers* (2003) at p 142.

[161] Broberg (note 150) at p 617.

> CSR relates to the Finnish way of thinking that one should be responsible and should behave ethically in business. Such thinking is hinged on the northern European high regard for morality. So, it is not surprising to hear many Finnish managers claim that their companies have been acting and behaving ethically in dealing with their employees, customers, business partners and the community around them because such moralistic attitude is expected of them.[162]

There is no reason to belittle the importance of maintaining ethical, moral and sound business practices. Indeed, these virtues form the basis of corporate social responsibility ideals. Harking back to the theories of Kant, Hegel and Marx, all share the same view that behaving in an ethical, moral manner is of paramount importance in relation to respecting the individual, or any company (in the context of this dissertation.) The companies of Finland and the rest of Scandinavia are to be applauded for the high levels of success that they have achieved in this regard. And South African companies should strive to attain equal levels of ethical and moral conduct. However, this is not the only standard for corporate social responsibility in South Africa, since the South African Constitution places additional obligations on South African companies which have been discussed in detail above.

Broberg, in his discussion on corporate social responsibility initiatives in Scandinavia, highlights the following potential risk with the Scandinavian approach to corporate social responsibility: "Scandinavian and European history has shown that times of laissez-faire have led to very high levels of externalisation. Though such periods might lead to increased wealth, it is very doubtful whether they also lead to increased welfare. Further, certain externalised costs such as pollution might remain "unpaid" for a long period thereby leaving it to posterity to pay the price.[163]" In light of this insight, it is possible that these countries will have to rethink their approach to corporate social responsibility in order to ensure that the sustainability of corporate practises in these jurisdictions conforms to modern expectations and, at the very least, to the principles contained in the OECD Guidelines and the UN Global Compact which will be discussed hereinafter.

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[162] Panapanaan at al (note 152) at p 137.
[163] Broberg (note 150) at p 618.

CORPORATE SOCIAL RESPONSIBILITY IN ENGLAND

A number of articles on corporate social responsibility practices in comparative jurisdictions suggest that England has implemented a number of important and useful corporate social responsibility initiatives. According to an article by Aaronson and Reeves entitled "The European Response to Public Demands for Global Corporate Responsibility," "...more than almost any other government, the British government has also adopted a wide range of policy initiatives to promote CSR... As a result, Britain is leading the rest of the world on CSR initiatives.[165]"

Two interesting features of corporate social responsibility in England fall to be discussed here. The first is the fact that "In March 2000, the British Government became the first (and still only) government to appoint a minister for corporate social responsibility. Minister Kim Howells was tasked not only to help make a business case for CSR, but to coordinate CSR policies across the government.[166]" The appointment of a minister for corporate social responsibility is an initiative that could usefully be replicated in the South African context. The possibility of forming a monitoring body to ensure that corporate investment meets its objectives has already been discussed, as have the benefits of appointing company secretaries to oversee corporate responsibility initiatives on a company scale, and the introduction of a 'human rights audit' requirement. Appointing a minister for corporate social responsibility would afford South Africa a means by which to oversee and control these various responsible parties and responsibilities by means of a single overseeing body, namely the Department of Corporate Social Responsibility. Surely, in light of the enormous economic and political powers that large corporations enjoy, there can be no reason not to appoint or create a governmental department charged with overseeing and managing such power. South Africa should therefore follow Britain's example in relation to the creation of this important governmental post.

The second initiative that has been implemented in England is the implementation of strict reporting requirements for companies with large turnovers:

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[165] Aaronson AS & Reeves J, "The European Response to Public Demands for Global Corporate Responsibility," *National Policy Association* (2002) at p 23.

[166] *Ibid.*

> In our opinion, the most influential action taken by the British government is its decision to require UK pension trustees to disclose how they take account of social, environmental and ethical factors in their investment decisions. As a result, the pension funds soon started to require more information from the firms they invested in, which forced greater numbers of these firms to publicise information on their social and environmental performance. It became increasingly fashionable for firms listed on the main British stock exchange, the FTSE, to do triple bottom line reporting (social/environmental, as well as profit reporting).[167]"

The concept of triple bottom line reporting is not unique to England. In fact, South Africa's own stock exchange, the Johannesburg Stock Exchange ("JSE"), has implemented a system by which companies are rated on the basis of their 'Social Responsibility Index ("SRI").' SRI-rated companies are listed separately in order to allow investors the opportunity to invest in socially responsible companies. The SRI is based on triple bottom line reporting. South Africa is therefore on a par with England in relation to socially responsible reporting initiatives. These initiatives should be promoted across all corporate sectors. It would be beneficial to enforce compliance with these reporting standards in relation to all companies, not only those who wish to be SRI-rated in order to enhance their own reputations.

In the interview conducted with Mervyn King SC, however, he pointed out the inherent problem in relation to this type of reporting, namely the potential that a company has to "greenwash" its activities in order to obtain a high rating in respect of the triple bottom line. "Greenwashing" refers to the practice of producing company sustainability reports simply in order to keep stakeholders happy but which in fact do not reflect the actual activities of the company in question. In order to avoid this undesirable outcome in relation to SRI-ratings and triple bottom line reporting initiatives, it will again be necessary to employ a body to monitor or investigate the activities of companies in this sphere, to ensure that what is reported is in fact a true reflection of what actually occurs in the company's activities. Such monitoring or investigatory body should report directly to the Minister of Corporate Social Responsibility. South Africa can therefore improve its existing corporate social responsibility initiatives with reference to the British example.

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[167] Aaronson et al (note 165) at p 26.

THE OECD GUIDELINES

In addition to country-specific corporate social responsibility initiatives, there are also a number of codes of good practice that have been developed in relation to corporate social responsibility. The Organisation for Economic Co-operation and Development has developed the OECD Guidelines for Multinational Enterprises:

> The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.[168]

A number of countries have aligned themselves with the OECD Guidelines. South Africa itself is not an OECD member country. The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.[169] However, in spite of the initial enthusiasm in relation to these Guidelines, there has been very little adherence thereto to date in most of the member countries. The main reason for the lack of strict adherence to these Guidelines is the fact that "Observance of the Guidelines by enterprises is voluntary and not legally enforceable.[170]" The voluntary nature of the Guidelines proved ineffectual in practice, and this provides even more fuel for the argument that corporate social responsibility principles in South Africa should be strictly legislated and regulated in terms of such legislation:

> Yet, according to the representatives of civil society, few view the OECD Guidelines as the key tool that will press business to adopt more responsible behaviour in their global actions. They believe that they must press for EU wide rules and sanctions to govern the behaviour of

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[168] OECD Guidelines for Multinational Enterprises www.oecd.org [accessed on 8 July 2009]at p 9.
[169] *Ibid* at p 10.
[170] *Ibid* at p 12.

multinationals.[171]

The OECD Guidelines provide a useful basis upon which to analyse global attitudes towards corporate social responsibility policies. The Guidelines are divided up into various categories such as Competition Guidelines, Labour Guidelines and so on. There is no specific category dealing with corporate social responsibility in relation to human rights, but reference is made thereto under the 'General Policies' section of the OECD Guidelines, according to which companies are advised to:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community...
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.[172]

There are some important features of international corporate social responsibility trends evident in these four principles. The first principle is evidence of the fact that there is a global movement towards companies being required to make some form of affirmative positive 'contribution' to the societies in which they operate as opposed to mere negative obligations to refrain from doing harm. In terms of the second principle, companies are furthermore charged with respecting the human rights of their communities. These two principles directly reflect the obligations imposed on South African companies by the Constitution. The third principle, that of building and developing local communities, bears a strong resemblance to the Ubuntu method of working together with affected communities to ensure the sustainable development of the community in which the company operates. The fourth principle, namely 'human

[171] Aaronson et al (note 165) at p 29.
[172] OECD Guidelines (note 168) at p 14.

capital formation' identifies the fact that corporate social responsibility in the new millennium involves direct human investment.

In spite of the positive ideals that gave rise to the OECD Guidelines, "...many activists and even corporate officials have grown frustrated with the aspirational codes, because most of them have no mechanism for accountability or follow-up.[173]" The Guidelines have, in other words, failed to achieve their desired outcomes because companies have failed to comply with these non-obligatory standards. Interestingly, the framework outlined by the Guidelines provides the necessary mechanisms for enforceability, in the sense that monitoring and reviewing bodies are set up in each of the OECD member states:

> The negotiators created a national and multinational government process to monitor and encourage business to "do the right thing." Each of the 33 nations that agreed to the Guidelines committed to the development of a national contact point, which could be a staff unit or a committee. The national contact point (NCP) works to publicise and implement the Guidelines and to resolve disputes over corporate behaviour.[174]

The National Contact Point therefore serves as an ideal vehicle to implement and monitor compliance with corporate social responsibility legislation were the OECD Guidelines to have the force of law. South Africa may have regard to the mechanisms and experience of the various National Contact Points around the world to gain insight into how best to implement a monitoring body of this nature in order to control and enforce corporate social responsibility in South Africa. The best examples in this regard would be Canada, Britain, France, Sweden, Belgium and Holland in light of the following information:

> But some governments, including Canada and Britain, moved quickly to put the Guidelines on the web and to educate citizens about them. The French, Swedish and Belgian governments have several cases under review at their national contact point. The Dutch government took the strongest action, linking the Guidelines to taxpayer subsidies. In December 2000, the Dutch Parliament requested the government to link the OECD Guidelines to government subsidies for international trade and investment as well as export credits. The government simply asked all

[173] Aaronson et al (note 165) at p 7.
[174] Aaronson et al (note 165) at p 12.

> applicants for export subsidies to state that they were aware of and working to comply with the Guidelines.[175]

Obviously, the South African context may make certain features of the experience of these jurisdictions impractical. For instance, in a country still struggling with poverty, there may be no benefit in permitting tax subsidies to socially responsible companies. In fact, as was highlighted above, there may be a need to impose additional taxes on South African companies in order to achieve the overall aim of protecting and promoting human rights. However, it is nevertheless important to be aware of the experiences of other jurisdictions and to study these experiences in detail in order to develop a sensible and workable approach to enforcing corporate social responsibility in South Africa. The Outline of the OECD Guidelines itself concedes that "Obeying domestic laws is the first obligation of business.[176]" Thus in order for corporate social responsibility to enjoy its desired status and thereby achieve the required outcomes, it must form part and parcel of South Africa's legislative status.

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[175] *Ibid* at p 15.
[176] OECD Guidelines (note 167) at p 39.

THE UN GLOBAL COMPACT

Corporate social responsibility has been publicised over recent years through the implementation of the United Nations Global Compact:

> Launched in July 2000, the UN Global Compact is both a policy platform and a practical framework for companies that are committed to sustainability and responsible business practices. As a leadership initiative endorsed by chief executives, it seeks to align business operations and strategies everywhere with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.[177]

The Ten Principles of the United Nations Global Compact concern various areas of corporate social responsibility, including labour and the environment, but for present purposes only those relating to human rights are listed:

HUMAN RIGHTS

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.[178]

The UN Global Compact therefore addresses the two major features of human rights under a modern corporate social responsibility regime. To begin with, companies must refrain from activities which violate human rights. This is a widely accepted standard of behaviour in respect of global companies in the twenty first century. However, the UN Global Compact goes further than this and introduces the notion that companies and businesses have an obligation to 'support and respect' human rights. This is similar to the Constitutional mandate to promote, protect and uphold the rights contained in the Bill of Rights, although it is submitted that the Constitution places an even greater affirmative duty on corporations than the UN Global Compact. It is clear, however, that the notion of a positive duty to respect and support human rights is not a

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[177] Corporate Citizenship in the World Economy, "What is the UN Global Compact?" *United Nations Global Compact* www.unglobalcompact.org [accessed on 8 July 2009].

[178] *Ibid.*

concept unique to the South African context, but is in fact an idea propagated by the United Nations itself.

In spite of the optimistic ideals that gave rise to the UN Global Compact, the practical implementation thereof has unfortunately mirrored the example of the OECD Guidelines in the sense that companies have failed to address their obligations because the UN Global Compact is not a compulsory or enforceable set of legal principles, but merely a voluntary list of principles:

> In 1999, Kofi Annan, UN Secretary General, challenged business leaders to enact the Global Compact based on nine internationally accepted principles on labour standards, human rights, and environmental protection. By having companies sign the Compact, he hoped to improve global governance without demanding national or international regulation. But the compact has no mechanisms for accountability. Companies are simply asked to demonstrate their adherence by taking some corporate action and publicising this action through reports posed on the UN Web site and in their annual reports.[179]

The lack of effective implementation of the UN Global Compact does not detract from the fact that this initiative is direct proof of the incorporation of human rights principles into the global corporate social responsibility regime. There is a link on the UN Global Compact website to the "Vote Human Rights[180]" initiative, which encourages participants to consider the importance of corporate accountability for human rights, and to suggest appropriate methods of implementing a human rights programme in the sphere of corporate social responsibility. So whilst the global corporate social responsibility codes and guidelines which have been introduced over the past few years may not provide an ideal example of the procedure and enforcement mechanisms necessary to guarantee the success of corporate social responsibility on account of their overall voluntary nature, these codes and guidelines nevertheless provide a basis upon which to introduce a form of corporate social responsibility legislation that makes corporations directly accountable for the protection and promotion of human rights. South Africa must implement measures based on the same general principles but with enhanced accountability and enforcement mechanisms in order to discharge the Constitutional mandate pertaining to corporate social

[179] Aaronson et al (note 165) at p 9.
[180] http://human-rights.unglobalcompact.org/ [accessed on 8 July 2009].

responsibility.

CONCLUSION

WHERE WERE YOU WHEN THE GREAT CONSUMPTION STARTED?

Modern global attitudes, current South African viewpoints, ancient African culture, jurisprudential philosophies, the foundations of the new Constitutional democracy: all of these share in common an innate understanding of the fact that corporations have a direct and positive duty to protect and promote human rights in the societies in which they operate. The philosophies of Kant, Hegel and Marx provide a complex groundwork argument for why profit-maximising companies must be restrained in their purely capitalist activities and must adhere to their responsibility in regard to promoting the freedom and dignity of all other persons within the community. Ubuntu philosophies explain how to tailor corporate social responsibility initiatives to suit the South African context. Contemporary South African corporate social responsibility activists such as Mervyn King SC, Paul Kapelus, and Dr David Bilchitz provide important insight into the requirements of corporate social responsibility in the new Constitutional dispensation. Lessons from comparative jurisdictions and from global codes and guidelines are a vital source of input towards formulating a South African corporate social responsibility regime. Existing legislation provides a basis upon which to build and foster this regime. And, fastening together all of these disjointed segments and providing the ultimate source of the corporate social responsibility mandate, is the Constitution of the Republic of South Africa and the Bill of Rights contained therein.

Corporations are under severe pressure from all sides. Not only does the Constitution mandate socially responsible behaviour, but the present economic crisis has fuelled scepticism, doubt and distrust on the part of all corporate stakeholders who are now also placing pressure on companies to act responsibly. It is submitted that this socially responsible corporate behaviour must be legislated in detail in order to provide clear-cut guidelines for companies on how to properly discharge their constitutional obligations in this sphere. Such legislation must make provision for positive, affirmative obligations on the part of companies. South Africa is in a state of crisis economically, environmentally and socially. The time is ripe for companies to take responsibility for these problems to at least some extent. After all, as Mervyn King SC points out, no one

wants to look back twenty years from now and ask, "Where were you when the Great Consumption started?"

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Corporate Social Responsibility and the Constitution

by

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DECLARATION

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