BUSINESS AND HUMAN RIGHTS: TO WHAT EXTENT HAS THE CONSTITUTION TRANSFORMED THE OBLIGATIONS OF BUSINESS[1]?

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I INTRODUCTION

The Constitution[2] boldly mandates Constitutional supremacy. A significant aspect of this supremacy is the application of the Bill of Rights not merely between the state and persons but between persons, including juristic persons, *inter se*. This intended permeation of the Bill of Rights of the Constitution ("Bill of Rights") into all aspects of law and between all legal subjects appears to challenge the traditional public law and private law dichotomy.

This recognition of the rights in the Bill of Rights as emphatically fundamental is especially relevant in the context of a society riddled with systemic inequalities. Entrenched practices that directly or indirectly violate human rights contribute to the perpetuation of systemic inequality. The composite manifestation of these systemic inequalities may be described as poverty. The Constitutional values of human dignity, equality and freedom cannot exist in harmony with poverty. In order to live these Constitutional values and meaningfully respect, protect and promote the rights in the Bill of Rights the systemic nature of poverty necessitates a solution that does not simply address the symptoms of poverty but rather the system, and the actors within that system, that contribute towards its perpetuation.

The capacity of non-state actors, more particularly business, to impact human rights both negatively and positively through direct and indirect actions has been receiving growing local and international attention. The massive wealth and influence attributable to many local and international business entities (including international financial institutions and multinational companies), which sometimes equals to or exceeds that of many states, has brought into sharp focus the manner in which business conducts itself in the process of deriving its wealth and influence.[3] This influence may manifest in the ability of such business entities to influence a countries foreign policy in order to attract that multinationals foreign direct investment in pursuit of that countries own economic growth or wealth. Moreover the accountability, or absence of thereof, of business towards the persons and communities affected in this process has been brought in to sharp focus.

This paper intends to reflect on Constitutional Court of the Republic of South Africa's ("Constitutional Court"), interpretation of section 8(2) of the Constitution, read with sections 8(3) and 39(2), in outlining the obligations of

[1] The terms business, companies, corporations and juristic persons are used interchangeably in this paper to refer to definition of "company" contemplated in section 1 of the Companies Act No. 71 of 2008.
[2] Constitution of the Republic of South Africa, 1996 ("Constitution").
[3] Danwood Mzikenge Chirwa 'In Search of philosophical justifications and suitable models for the horizontal application of human rights' (2008) 8 *African Human Rights Law Journal* 294.

business entities in respect of the Bill of Rights. In so doing this paper will attempt to engage with the assumptions made by the doctrine of state responsibility, amongst other prevalent assumptions associated with state centricity of human rights obligations, and whether the Constitution supports or rejects such assumptions in light of the dynamics between government, business, affected persons and communities as stakeholders operating amidst the reality of systemic inequality.

Furthermore the extent of the horizontal application of the Bill of Rights as between business entities and affected persons and communities will considered against Companies Act, 2008 (and regulations), being the primary piece of legislation that regulates business entities in South Africa. The Companies Act, 2008 makes specific provision for compliance with the Bill of Rights in the application of company law. The practical implications of this will be considered in relation to the extent to which the Companies Act[4] provides mechanisms for holding business accountable for violations of rights in the Bill of Rights. Particular consideration will be given to the extent to which these mechanisms provide effective remedies for affected persons and communities.

This paper shall approach the components of the above question by first attempting to place the obligations of companies, through the duties of directors, in the context of the South African Companies Act and Constitution. Pursuant to which the significance of the horizontal application of the Bill of Rights will be analysed. The partial codification of the duties of directors in the Companies Act shall be explored and systematically consideration will be given to the prominent provisions pertaining to accountability and enforcement thereof.

We shall then proceed to consider the role of the company in contemporary South African society through considering the nature of the company and challenging the traditional conceptions thereof before briefly considering the impact of the concept of the sphere of influence on the duties of directors. Finally we shall reflect on the manner in which fundamental rights are approached by considering the nature of fundamental rights in the balancing of interests process and reflect on the current vocabulary of corporate social responsibility before taking a moment to take note of (without expanding on) the importance of binding obligations of business for human rights.

The paper will ultimately attempt to assess the extent to which the Constitution has transformed the obligations of business in respect of the Bill of Rights, and broadly consider what effective mechanisms exist for the enforcement of these obligations by affected persons and communities towards meaningfully addressing systemic poverty.

II PLACING OBLIGATIONS OF BUSINESS IN CONTEXT

(a) A South African Companies Act for a Constitutional South Africa

There appears to be a growing international cognisance of the impact that non-state actors have, or have the capacity to have, on human rights both at a domestic and an international level. Increasingly the voluntary basis upon which companies in particular appear to take cognisance of human rights norms, although encouraging in the historical scheme of human rights and business discourse, is emerging to be regarded by jurists and academics world the over

[4] Companies Act No. 71 of 2008 ("Companies Act").

as being inadequate. The respect, protection and promotion of fundamental human rights, must be binding and enforceable obligations in order to be effective against powerful transgressors.[5] On this basis we may, for the purpose of this paper recognize but set aside both national and international voluntary mechanisms that seek to place human rights obligations on companies, in favour of consideration of the binding mechanisms that may be in existence within South Africa.

The Constitution is the supreme law of South Africa and any law or conduct inconsistent therewith is unconstitutional and invalid in terms of section 2 thereof. All law in South Africa derives its force from and is subject to the control of the Constitution.[6] With Constitutional supremacy being our point of departure we may turn to consider the nature of the company and its capacity to bear rights and corresponding obligations. Section 8(1) of the Constitution provides that the Constitution applies to all law. This distinctly collapses the notion that human rights operate only within the public sphere and unequivocally extends the applicability and protections thereof to the traditionally private sphere.[7] Section 8(2) of the Constitution crisply provides for the horizontal application of the rights in the Bill of Rights as such a right *"bind*[s] *a natural or a juristic person ,if and to the extent that,* [such right] *is applicable, taking into account the nature of the right and the nature of the duty imposed by the right"*.[8] It has been argued that the circularity of this provision limits the extent to which it assists us in establishing the precise rights in the Bill of Rights that are applicable, or are capable of application, to, and as against, juristic persons.[9] It may be submitted that an alternative interpretation of the provision is that it is deliberately flexible in response to the context specificity of the applicability of rights and obligations to juristic persons.

The Constitutional Court has recognized the direct horizontal application of the rights in the Bill of Rights and suggested that the following be considered when assessing the appropriateness of such application –

(i) the importance of the right in the Constitutional project (the "intensity of the right");
(ii) the potential for invasion of the right by persons other than the state; and
(iii) the nature of the parties to which the right relates (and the importance of the right to them).[10]

Section 39(2) of the Constitution requires that *"when <u>interpreting any legislation</u>, and <u>when developing the common law</u> or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*." (own emphasis)

It has been submitted that section 8(2) of the Constitution facilitates the direct horizontal application of the Bill of Rights and section 39(2) of the Constitution provides for the indirect horizontal application towards achieving the

[5] David Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *SALJ* 754, 769.
[6] *Pharmaceutical Manufactures of South Africa: In re ex Parte President of the Republic of South Africa* 2000 (2) SA 647 (CC) 44.
[7] Deeksha Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *SAJHR* 351,364.
[8] Under the Interim Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution") there was no provision for the horizontal application of the Bill of Rights nor was the judiciary empowered to develop the common law in line therewith. Consequently the common law was not regarded as being subject to the Bill of Rights in the case of *Duplessis v De Klerk* 1996 (3) SA 850 (CC) (para 44-46) and a vertical approach to traditionally private law matters was reflected by the Constitutional Court.
[9] Bilchitz (note 5 above) 775.
[10] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) 33.

broader value based objectives of the Bill of Rights through the development of the common law and interpretation of legislation. Furthermore the interpretation that indirect horizontal application is contemplated by section 39(2) of the Constitution is complementary to the interpretation that direct horizontal application is contemplated by section 8(2) and read with section 8(3) of the Constitution.[11]

It can be contended that the Companies Act is the first piece of South African legislation regulating juristic persons which reflects a truly South African character (and thereby departing from traditionally English company law concepts of juristic personality).[12] The purposes of the Companies Act stated in section 7 thereof are to –

> *(a) Promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;*
> *(b) Promote the development of the South African economy by—*
> *(I) encouraging entrepreneurship and enterprise efficiency;*
> *(ii) creating flexibility and simplicity in the formation and maintenance of companies; and*
> *(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;*
> *(c) promote innovation and investment in the South African markets;*
> *(d) reaffirm the concept of the company as a means of achieving economic and social benefits;*
> *(e)continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;*
> *(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;*
> *(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;*
> *(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;*
> *(i) balance the rights and obligations of shareholders and directors within companies;*
> *(j)encourage the efficient and responsible management of companies;*
> *(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and*
> *(l) provide a predictable and effective environment for the efficient regulation of companies.*

It may be submitted that the purposes of the Companies Act read with the aforementioned Constitutional provisions provide that the Companies Act cannot be read in isolation of the Bill of Rights and forms part of the broader Constitutional project. The above emphasized provisions distinctively make companies part of the Constitutional project in not only achieving compliance with the Bill of Rights but reaffirming the concept of the company as a means of achieving social and economic benefits. Importantly these two objectives are presented as being mutual and not mutually exclusive. Also relevant is that the creation and use of companies in a manner that enhances the economic welfare of South Africa is regarded separately to reaffirming the concept of the company as a means or tool of achieving both economic and social benefits. This may allude to the socio-economic responsibilities of companies or rather the perception of companies as instruments for the realization of socio-economic rights. The

[11] Bhana (note 7 above) 372.
[12] Tshepo Mongalo 'South Africanizing company law for a modern, competitive global economy' (2004) 121 *SALJ* 93, 98-89.

spreading of risk (which as will be discussed below is a traditional feature of company law) is specifically qualified as being economic risk. This warrants a detailed consideration of what constitutes economic risk, but noteworthy for the purposes of this paper is that it is the "spreading" and not the dissipation or avoidance of all risk that is contemplated.

The balance of the purposes contained in section 7 of the Companies Act appear to speak to the more traditional objects of company regulation including the facilitation for economic efficiency, entrepreneurship and effective mobilization of capital. It must be noted further that the purpose of promoting the rights contained in the Bill of Rights serves to benefit the company as well as other persons capable of bearing rights in terms of section 8(2) of the Constitution.

For our current purposes the purposes of the Companies Act outlined in section 7 serve as contextual anchors for the interpretation of the provisions of the Companies Act in terms of section 5 thereof. Katzew suggests that the purposes outlined require that a company *"strike a balance between the needs of the company and a recognition of the broader human rights concerns within which the company operates."* Suggesting further that this does not contradict the enlightened shareholder approach, that Katzew submits that the Companies Act inculcates, but rather that the directors duties to act in the best interests of the company alone persist situated within the parameters of the Constitutional dispensation within which those companies operate.[13]

During the course of this paper we will consider the appropriateness of entertaining the notion of balancing the companies traditionally profit driven interests (championed traditionally by the shareholders) against the human rights affected by the company in its pursuit of such interests.

(b) The significance of the horizontal application of the Bill of Rights

Under the natural rights theory we may conceptualise the origins of human rights recognition and the concomitant duty to respect, protect and subsequently promote human rights as having evolved overtime stemming from the concept of the social contract. We may submit that this evolution has crystallised two assumptions that continue to permeate human rights discourse. The first assumption is that human rights operate in a domain where there is a vertical relationship between the rights bearer and the state (essentially the doctrine of state responsibility and subsequently protection). The basis of this assumption, it may be argued, is that in entering into the social contract rights bearers submitted to the authority of the state who would, in exchange for this submission, balance competing interests while protecting the fundamental interests of individuals. This assumption presupposes that the state acts in the interests of rights bearers and is unfettered in its ability to do so. The second assumption is that there is a sphere in which the state may intervene in order to protect human rights (the public sphere) and that there is a sphere that is outside of the aforementioned scope within which rights bearers co-exist (the private sphere) (effectively the public

[13] Judith Katzew 'Crossing the Divide between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *SALJ* 686, 694.

law and private law binary). We may contend that the basis for this assumption is that all persons are born equal, free and have access to equal opportunity. [14]

When critically reflecting on the basis of the abovementioned assumptions it can be argued that the doctrine of state protection, albeit fundamental, is insufficient to protect human rights. This is because rights bearers may be vastly unequal and consequently capable of systemic violation of the human rights of other rights bearers. Furthermore the state is not always positioned to protect against such violations and, even if it is, may be influenced/prevented from doing so by such rights bearers who are also violators.[15]It has been suggested that this conception of the operation of the human rights framework has been bolstered by legal positivism to the extent that positivism perpetuates the binary of spheres through centralising the source of human rights and concomitant protection thereof on the state (to the extent that human rights and the mechanisms of enforcement and protection thereof emanate from positive law). [16]

Chirwa submits that the state-centric approach to human rights protections is a function of a context that has been superseded.[17] Within a changing global context it is necessary to critically reflect our assumptions and the appropriateness of our approaches to human rights protection. Noteworthy is the fact that the presence of binding human rights obligations on non-state actors is not exclusive of placing the primary duty of human rights protection on states.[18] This is particularly relevant within the context of South African society. The preamble together with section 1 of the Constitution reflect the values of the society envisaged by the Constitution with an emphasis on the foundational values of human dignity, equality and freedom. The fundamental human rights and values of this envisaged society is deeply rooted in the knowledge of a society of the past entrenched with the absence of the protection of those rights and the presence of those values. A society fashioned out of apartheid and the systemic inequalities stemming from and co-existing therewith required that the Constitution place substance over form in the respect, protection and promotion of human rights in order to meaningfully redress and address these deeply embedded inequalities while simultaneously guarding against the re-emergence or re-design of social inequalities and injustice.[19]

Bhana submits that "*the law cannot tolerate a perpetuation of the apartheid legacy by virtue of continuing pre-constitutional socio-economic power relations in the private arena*". [20] The aforementioned sentiments reflect the Constitutional intolerance of the perpetuation of such a legacy through, *inter alia*, the horizontal application of the rights in the Bill of Rights. The indirect horizontal application of the Bill of Rights requires that legislation and the common law be interpreted through a Constitutional lens in order to give effect the rights contained in the Bill of Rights together with the values of the Constitution. This is as opposed to the direct application of the Bill of Rights which contemplates that the rights in the Bill of Rights are directly enforced against any law or conduct inconsistent

[14] Chirwa (note 3 above) 295-296.
[15] Chirwa (note 3 above) 306.
[16]Chirwa (note 3 above) 298-9.
[17] Chirwa (note 3 above) 310.
[18] Chirwa (note 3 above) 310.
[19] Bhana (note 7 above) 352.
[20] Ibid 353.

therewith.[21] Fundamentally, the latter application would generate new remedies out of the Constitution even in the absence of existing remedies in terms of legislation or common law. Bhana suggests that the former application contemplates an analysis of the constitutional assessment and potential development of the law which would subsequently apply to conduct. Whereas the later application would analyse and assess the conduct itself (and by implication the actor). [22] The dual nature of the horizontal application of the rights in the Bill of Rights begins to emerge upon closer consideration of the company law of South Africa.

(c) Codified duties of directors and the practical implications of imposing human rights obligations on companies

A director is defined in section 1 of the Companies Act as *"a member of the board of a company, as contemplated in section 66, or an alternate director[23] of a company and includes any person occupying the position of a director or alternate director, by whatever name designated"*. (own emphasis) We may view directors as the entry point into the consciousness of a company as being the body that both formulates and implements the strategy of a company.

Importantly it is the substance of the function of the natural person who occupies the office of director that makes him/her such and not a mere tittle. Section 69(7)(a) of the Companies Act prevents juristic persons from being directors of a company. It may be submitted that this is a deliberate initiative to ensure that the board of directors is constituted of natural persons each of which are capable of applying their minds to decisions and consequently each of which are liable to the extent of the contribution of their decisions towards liability engendering consequences for the company. There is, it may be submitted, an implicit recognition of the importance of ultimately holding a natural person to standards of conduct and duty on the basis of decisions made on behalf of the company having been made by a body of such natural persons thinking and acting together.

The duties of directors of a company have been partially codified in the Companies Act.[24] As section 76 of the Companies Act does not expressly exclude the Common Law, those duties that are contained in the Common Law that are not expressly amended nor are in conflict with the provisions contained therein are still good law. Therefore the duties of directors may develop through the development of the Common Law. [25] Our jurisprudence supports the notion that the Common Law duties of directors evolve over time to meet the prevailing demands of society.[26] This position is in fact mandated by the duty that the Constitution, in terms of section 39(2).

Section 76 of the Companies Act deals specifically with the standard of conduct of directors. The term directors in this context extends to prescribed officers[27] and members of board committees regardless of whether or not such

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[21] Currie & De Waal *The Bill of Rights Handbook* 5 ed (2005) 35.

[22] Bhana (note 7 above) 356.
[23] In terms of section 1 of the Companies Act an ''alternate director'' means a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company.
[24] Cassim et al *Contemporary Company Law* 2ed (2012) 507.
[25] Piet A. Delport & Quintus Vorster *Henochsberg on the Companies Act* (2011) 288-289.
[26] Minal Ramnath 'Interpreting Director's Fiduciary Duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into consideration' 2 (2013) *Speculum Juris* 98,102.
[27] The Companies Act Regulations

persons are also members of the board of directors.[28] This provision ensures that the persons who are in reality responsible for the actions of the company are duty bound in terms of the Companies Act.

Section 76(2)(b) of the Companies Act obliges a director to –

> *"communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director—*
>
> *(i) reasonably believes that the information is—*
>
> *(aa) immaterial to the company; or*
>
> *(bb) generally available to the public, or known to the other directors; or*
>
> *(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality."*

The abovementioned provision is important in placing responsibility on the board of directors for decisions taken by it on behalf of the company. Directors when acting collectively as the board are required to do so on an informed and applied basis. A failure of one of the directors of the board to disclose material[29] information to the board, which may have an impact on a decision made by the board, would result in that non-disclosing director breaching a fiduciary duty to the company thus exposing that director to liability. We may submit that this provision prevents directors from insulating each other from material information with view to narrowing the scope of liability for decisions on the basis of absence of knowledge. This is particularly relevant in the context of the making of decisions that may have adverse human rights impacts (or that have the capacity to have positive human rights impact).

Section 76(3)(a)-(c), which is subject to section 76(4)-(5), of the Companies Act provides that a –

> *"director of a company, when acting in that capacity, must exercise the powers and perform the functions of director*
>
> *"(a)in good faith and for a proper purpose;*
>
> *(b) in the best interests of the company; and*
>
> *(c) with the degree of care, skill and diligence that may reasonably be expected of a person—*
>
> *(i) carrying out the same functions in relation to the company as those carried out by that director; and*
>
> *(ii)having the general knowledge, skill and experience of that director."*

"38 (1) Despite not being a director of a particular company, a person is a "prescribed officer" of the company for all purposes of the Act if that person—

(a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or

(b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

(2) This regulation applies to a person contemplated in sub-regulation (1) irrespective of any particular title given by the company to—

(a) an office held by the person in the company; or

(b) a function performed by the person for the company."

[28] Delport & Quintus (note 25 above) 289.

[29] Section 1 of the Companies Act provides that *""material", when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is—*

(a)of consequence in determining the matter; or

(b)might reasonably affect a person's judgement or decision-making in the matter;"

Section 76(3)(a)-(b) of the Companies Act codifies some of the fiduciary duties owed by the director to the company in terms of the Common Law. The duty to act for a proper purpose refers to the duty not to exceed the bounds of the authority of the director nor that of the company. The bounds in which the power was conferred must objectively appear not to have been exceeded in the context of the surrounding circumstances and the awareness of the director of the purpose for which that power was granted and the facts relevant to the exercise of that power.[30] It may be submitted that the power granted to the directors cannot have been granted by the company for the purpose of engendering conduct that is offensive in terms of the Constitution. Therefore if the directors were to use their powers to engender such conduct it may be submitted that they would be breaching their duty to act in good faith and for a proper purpose.

At Common Law the "interests" of the company are the interests of the company as an independent legal entity and those of its body of shareholders (as opposed to individual shareholders).[31] When considering whether this duty has been discharged the test is not the correctness of the decisions made by the director but rather the propriety of the decision making process. That there is a reasoned basis for making that decision taken in the best interests of the company, even if that decision is flawed in retrospect, appears to be sufficient to discharge this duty.[32] It may be submitted that a failure to identify the human rights impact of the company's operations and taking precautions to mitigate against any possible human rights violations would amount to a breach of this duty.

The test of the exercise of a degree of care, skill and diligence presented in section 76(3)(c) of the Companies Act contains both a subjective component (relating to the general knowledge skill and experience of that particular director) and an objective component (relating to what a reasonable director in the position of that director would have done in the circumstances).[33] The potentially complex nature of the managerial structure of companies renders it conceivable that a director would have to rely on the veracity of information provided to him/her without being able to personally assess such veracity (as so doing in many instances would be impossible and contrary to the delegation of duties with view to efficient functioning of the company). Notwithstanding this due to the fact that by virtue of holding office as a director, directors are responsible for making decisions for the company, it would defeat the purpose of imposing duties on directors if they could escape their responsibility by merely delegating their authority. As such sections 76(4)-(5) appear to introduce the business judgment rule which allows for directors to delegate their authority and power but prevents such delegation from abdicating directors from the responsibility of their office including the responsibility to remain informed. We may submit that the business judgment rule provides a balance on the check that is the duties of directors in order to facilitate the efficient functioning of a company without neutralising the fundamental responsibilities of the directors.[34]

[30] Delport & Quintus (note 25 above) 296(1)-296(2).
[31] *Alexander v Automatic Telephone Co* [1900] 2 Ch 56 (CA) 67 and 72.
[32] *Levin v Felt & Tweeds Ltd* 1951 (2) SA 592 (A) 414-415.
[33] Delport & Quintus (note 25 above) 295.
[34] Ramnath (note 26 above) 112-113.

A duty not expressly outlined in section 76 of the Companies Act is the duty of directors to exercise unfettered or independent discretion.[35] Even if nominated or appointed by a shareholder, irrespective of the extent of the shareholding of such shareholder or capacity in which the director is related to such shareholder, the director has a duty to exercise unfettered discretion in the interests of the company.[36]

The duties of directors codified in section 76 of the Companies Act do not operate in isolation. In addition to the relevant provisions of the Constitution we may submit that section 76 of the Companies Act should be viewed through the interpretive lens of the purposes of the Companies Act contained in section 7 thereof. This may suggest that the Companies Act requires a more pluralist approach to interpretation which departs from the premise that relationships incidental to the optimal function of the company require and therefore permit the consideration of the interests of all relevant stakeholders including but not limited to shareholders (as opposed to the contemporary adversary to this approach being the enlightened shareholder approach which provides that shareholder interests are paramount and the interests of other stakeholders are to be considered only the extent that they impact the long term interest of shareholders).[37]

It is pertinent to note that the Companies Act does not expressly state that the interests of the company are represented by or give primacy to the interest of the shareholder nor that directors duties are owed to the company alone. We may further submit that the shareholder (this term is used inclusive of security holders as contemplated in section 57 of the Companies Act) protections contained in the Companies Act cannot alone be the grounds upon which an inference is drawn that the shareholder's interests are primary.[38] We may on the contrary submit that the extent of these protections suggest that legislature has placed a balance on the check on companies that is the pluralist approach in the form of those protections.

Katzew appears to submit that the Companies Act favours the enlightened shareholder approach but that the duty to act in best interests of the company, when situated in the Constitutional context, requires those interests to be informed by the Bill of Rights. Therefore the directors must "*take into account the impact of their decisions on the human rights of all those affected by their decision…*" when seeking to act in the best interests of the company.[39]

The question that remains is if we accept that the directors' duty to act in the best interest of the company places a duty on the directors to prioritize the interests of shareholders (as their interests primarily represent the interests of the company) then to what extent may directors take into account the interests of other stakeholders? If we adopt the enlightened shareholder approach we would have to concede that the extent of the directors' consideration of other shareholders' interests would be only to the extent that those interests align with the long term interests of

[35] Delport & Quintus (note 25 above) 296.
[36] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) 163.
[37] Ramnath (note 26 above) 106-108.
[38] John Folson 'South Africa moves to a global model of corporate governance but with important national variations' in Tshepo Mongalo (ed) *Modern Company Law for a Competitive South African Economy* (2010) 219, 220.
[39] Katzew (note 13 above) 704-705.

shareholders (i.e. that it is in the interests of making profit and that the potential reputational risk or cost of litigation that exists when stakeholder interest are not accounted for are financially adverse).[40]

We may submit, however, that the above suggested approach does not align with the aforementioned provisions of the Constitution and the abovementioned provisions of the Companies Act to the extent that the activities of companies, through actions orchestrated by directors, have the potential to seriously impact fundamental rights in the Bill of Rights of various stakeholders (who hold a stake by virtue of the consequences of the conduct (both positive and negative) of the company on such persons). This is especially true if we consider the essence of the notion of fundamental rights (see discussion below).

(d) Accountability and enforcement

If the Companies Act contemplates or allows the imposition of the duties on directors in respect of stakeholders other than the shareholders, more especially the bearers of rights in the Bill of Rights, then it is conceivable that the Companies Act would contain provisions enabling such stakeholders to hold the directors accountable for the breach of those duties through enforceable mechanisms.[41]

Section 218(2) of the Companies Act provides that *"[a]ny person who contravenes any provision of* [the Companies Act] *is liable to any other person for any loss or damage suffered by that person as a result of that contravention."* We may submit that this provision provides for the direct enforceability of loss suffered as a result of the breach of a duty towards a stakeholder by the director (should we concede that such duties of directors contained in the Companies Act extend to all stakeholders).[42] This provision provides a sweeping mechanism for "any person" to hold "any other person" accountable for the breach of the Companies Act. This conceivably could include groups of stakeholders taking action against either the company as a legal entity or the directors in their personal capacity for breach of the Companies Act. It follows that it may be possible for rights bearers that have suffered damage as a result of the directors breach of their fiduciary duties towards them as stakeholders (should that interpretation of the duties be adopted) to seek compensation for the loss or damage engendered thereby.

Section 20(9) of the Companies Act provides that –

> *(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—*
>
> > *(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and*
> >
> > *(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).*

[40] Ibid 706.
[41] In a manner similar to the mechanisms that have historically been available to shareholders for holding directors accountable for breach of their fiduciary duties (see section 161 of the Companies Act on application to protect rights of security holders).
[42] Katzew (note 13 above) 707.

Katzew refers to the substantially similar wording of section 163(4) (as prior to the amendments in terms of section 13 (d) of the Companies Amendment Act, No. 3 of 2011) in considering whether the provision could be interpreted to suggest that the use of the company to avoid human rights obligations would amount to an "unconscionable abuse of juristic personality" thus presenting a mechanism to enforce such human rights against the directors responsible for orchestrating such unconscionable conduct.[43]

The action of the courts looking past the fiction (see discussion below) of the separate corporate identity in order to hold the directors liable for the reprehensible conduct of the company for which they are responsible has been referred to the act of "piercing" or "lifting the corporate veil".[44] Resort to the doctrine of piercing the corporate veil ultimate confirms rather than detracts the inherent truth contained in the doctrine being the recognition of the reality that the actions of the company are engendered by those who are responsible for its control (i.e. the directors). It may be submitted that rather than entertaining the fiction by the application of a metaphor (i.e. the corporate veil) we should look to the what it is the fiction was designed to protect and whether this metaphoric concession is still the most appropriate manner of looking past the fiction to the reality and holding the real rather than fictitious perpetrators liable. In so doing we may suggest that section 20(9) be interpreted not as a degree of codification of the Common Law doctrine of piercing the corporate veil but rather as a mechanism designed to enable stakeholders to hold directors liable in their personal capacities for failing to observe their duties towards stakeholders.

Ramnath submits that section 165 of the Companies Act on derivative actions *"opens the possibility for stakeholders (whose rights have been infringed) to have legal standing".*[45] We may submit that this may be so, however that the position is slightly more nuanced than Ramnath appears to suggest. Section 165 (2)(b) provides that "*[a] person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person— …*

> *(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or*
> *(d)has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person."*

The rights of persons other than the company to take action on the company's behalf in accordance with the Common Law are abolished in terms of section 165(1). The action contemplated in the entirety of section 165 appears to be required to be taken *"in the best interest of the company"* (and not primarily in the interests of the stakeholders) in order to "*protect the legal interests of the company*". This may be reconciled with Ramnath's aforementioned suggestion to the extent that the best interests of the company are interpreted in accordance with the pluralist approach or alternatively to the extent that the interests of the company correlate with those of the party seeking to rely on section 165.

[43]Ibid 693.
[44] Katzew (note 13 above) 702-703.
[45]Ramnath (note 26 above) 108.

The extent to which the aforementioned provisions may be used to enforce the rights of stakeholders has not been tested by the Constitutional Court. It may be submitted that potential value of these provisions in making directors, and companies, accountable to stakeholders for human rights violations or failings is conceivably significant. This significance extends beyond the imperatives of the Constitution into the manner in which companies and their role in contemporary South African society is to be perceived.

The Constitution provides mechanisms for rights bearers to enforce rights contained in the Bill of Rights. It may be submitted that these mechanisms may be available against companies. Section 38 of the Constitution provides –

> *Enforcement of rights.—Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group or class of persons;*
>
> *(d) anyone acting in the public interest; and*
>
> *(e) an association acting in the interest of its members.*

Furthermore the nature of power exercised by or function performed by the company may be relevant in placing the company in the same realm of Constitutional scrutiny as organs of state in terms of section 239 of the Constitution which provides that –

> *"organ of state" means—*
>
> *(a) any department of state or administration in the national, provincial or local sphere of government; or*
>
> *(b) any other functionary or institution—*
>
> *(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation,*
>
> *but does not include a court or a judicial officer;*

In terms of the definition of organ of state in terms of the Constitution the power performed by or function exercised by the entity can bring it within the realm of Constitutional provisions applicable to organs of states.[46] Critically, it is conceivable, that business entities may on account of the powers they exercise or functions they preform become

[46] Currie & De (note 21 above) 47.

primarily, or at the very least jointly with the state, obligated towards the protection and promotion of rights in the Bill of Rights and consequently liable for failures in relation thereto.

Despite appreciating the merits in the argument for deference or avoidance that would prefer the indirect horizontal application of the Bill of Rights in order to develop the law in accordance with the Constitution,[47] we must appreciate that the systemic entrenchment of inequalities often mean that the presence of Constitutional laws and policies do not always translate into the practical deconstruction and address of these entrenched systemic inequalities. Where access to justice is limited or the black letter law does not address the practical realities of individuals the significance of the direct application of the Bill of Rights, especially to juristic persons, cannot be underestimated.

In a recent case the Constitutional Court held that a juristic person has a negative obligation not to impair rights in the Bill of Rights. On summation of the basic facts the case involved a trust (which in terms of the Companies Act falls under the definition of a "juristic person") which had given the Member of the Executive Committee for Education for the Province of Kwa-Zulu Natal ("MEC") permission to run a public school on its private property. After the elapse of time and he souring of relations between the juristic person and the MEC the former sought the eviction of the public school from its property. The order was granted in favour of the juristic person and confirmed on appeal to the Supreme Court of Appeal. [48]

The Constitutional Court acknowledged that "*over emphasis on the difference between the exercise of public and private power often sheltered private power used for public purposes*."[49]The Constitutional Court contended that there was no primary obligation on the juristic person to provide basic education in terms of section 29(1)(a). Nor was there an obligation on the juristic person to make its private property available for the conduction of a public school. [50] The Constitutional Court did not attempt to rely on the juristic person being defined as an organ of state by virtue of preforming a public function in accordance with section 239 of the Constitution but rather sought to consider the direct horizontal application of the rights in the Bill of Rights.

The Constitutional Court stressed that the purpose of section 8(2) of the Constitution is not to interfere with the rights and freedoms of private persons or encumber such persons with the obligations of the state to protect the rights contained in the Bill of Rights. Rather that it exists to protect the rights in the Bill of Rights from interference by private persons. Once the juristic person had consensually agreed to allow the running of a public school from its premises it had a duty to minimise interference with the rights of those learners to basic education. Furthermore that seeking an eviction order of the school failed to take into account the best interests of the child mandated by section 28(2) of the Constitution. The Constitutional Court recognised that had been generally accepted that socio-economic rights (such as that to basic education) may be negatively protected from improper invasion. [51] It may be submitted that this judgement is significant in that it elucidates that general acceptance of a negative obligation not to invade a

[47] Ibid 50 and 75.
[48] *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) para 1-15.
[49] Ibid 57.
[50] Ibid 55.
[51] Ibid 58 and 62.

right can result in a positive duty to act (i.e. directly for the juristic person not to seek eviction until the rights of the learners could be appropriately provided for, but indirectly compelled the juristic person to allow for the continued use of the private property by the learners). This is especially so in the instances where the conduct of the juristic person places itself, allows itself to be placed, or finds itself placed in a position to where it can influence or interfere with rights in the Bill of Rights.

III THE ROLE OF THE COMPANY IN CONTEMPORARY SOUTH AFRICAN SOCIETY

(a) Confronting the fiction

It may be submitted that the fiction of the company was initially designed to provide for the consolidation of capital from various sources to support the entrepreneurial ventures of individuals or groups of individuals. Central to this fiction was the separation of ownership (by those who invested in the company thereby bearing the risk of losing that investment in exchange for the potential growth of that investment) and control (by those who's investment was not at stake but who stood to gain from the beneficiation of the company that would be achieved off of their effective management of resources). The incentive of the shareholders to invest was presented by the limitation of risk to the extent of the initial investment (notwithstanding what liabilities may be engendered by those charged with growing the investment) and the corresponding potential for growth. The relationship of trust between agent (directors) and principal (shareholders) translated into efforts to maximize the yields obtainable from the investment by the shareholders on the initiative of the directors.[52]

Traditionally the primacy of the duty of directors to act in the best interests of the company (as interpreted as being parallel to the interests of the shareholders of profit maximization) is accepted to be limited only by the 'rules of the game' as being the framework of the 'free market' and prohibition of deliberate acts designed to circumvent the functioning of the 'free market'.[53] The fiction of the company was therefore designed to avoid liability (by vesting such liability in the legal fiction of the company) in order to attract investors as well as to encourage entrepreneurs at the prospect of gain in the context of diluted consequence.[54] We may contend that this concept can no longer be taken for granted as accurate and appropriate in the context of the Constitutional dispensation. It is consequently not that the conception of the company and its function must change to meet the requirements of the Constitution but rather that the advent of the Constitution has fundamentally changed the conception of what the function of a company is or at the very least the parameters within which that function may be sought to be achieved.

In terms of section 1 of the Companies Act a company is defined to be a juristic person including a domestic company. A juristic person is further defined to include a foreign company and a trust. A domestic company is defined as a foreign company whose registration has been transferred to South Africa in terms of the Companies Act and a foreign company is defined as a company that operates within South Africa having been incorporated outside

[52]Ramnath (note 26 above) 98-99.
[53] Douglas G. Baird and M. Todd Henderson 'Other People's Money' (2008) 60 *Stanford LR* 1, 2.
[54] Bilchitz (note 5 above) 779-780.

of South Africa. In summation the Companies Act applies to all companies carrying on business within South Africa and all companies that have been incorporated in South Africa.[55]

(b) Challenging the traditional conception of the company

Katzew contends that the "core function of a company is the pursuit of profit and it is within that function that the determination of human rights obligations must be made".[56] We may note that, albeit common, this sentiment is concerning especially in the context of the progress of society in respect of human rights (especially in relation to South African society in the presence of the Constitution). This, we may suggest, is due to the fact that the sentiment presupposes that a company's function is and continues to be a "neutral" or "amoral" profit making.[57] Furthermore it presupposes that it is the company that is the frame of reference though which human rights obligations are perceived and not *vice versa*.

Vast numbers of companies operate within a global context and as such an analysis into the role of the company in contemporary South African society would not be complete without brief consideration of this context. Globalisation, which we may view simplistically as the expansion of companies in size, influence and territorial presence is often referred to as a neutral and inevitable process despite the effect of the concentration of economic and political power that appears to result from it. The rhetoric of the existence of a neutral and self-regulating market has been used to support arguments for deregulation of trade, privatisation of ownership and the provision of social services. Globalisation is often advocated as being a force for economic stability and growth which consequently result in the improvement of standards of living and access to justice. The roles and interests of multinational corporations, governments and financial institutions are often, if not neglected, represented as being neutral and subject to the system rather than as instrumental thereto.[58]

When reflecting on the nature and scope of the obligations, if any, of states and companies to alleviate poverty we often depart from the point of global poverty being *status quo* without consideration of how *status quo* came to be. It has been submitted that poverty has not organically arisen but rather is a result of the systematic structuring and entrenchment of both formal and informal domestic and international institutions.[59] O'Connel asserts that globalization is a zero-sum game that of necessity subordinates the interests of some in favour of the interests of others and submits that prevailing poverty in the context of globalization is institutionalised in "*the very structures of global economic, political and legal status quo."*[60]

In the context of South African society we may reflect on the impact of the partial or whole privatisation of services that impact fundamental rights (such as education, healthcare, housing, food and sanitation) and the consequence of

[55] The Constitution applies only within the territory of South Africa according to the Constitutional Court in *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC) 36.
[56] Katzew (note 13 above) 695.
[57] Beth Stephens 'The amorality of profit' (2002) 20 *Berkeley J of International Law* 45, 46.
[58] Paul O' Connel Brave New World? Human Rights In The Era of Globalisation in Baderin and S. Senyonjo (eds) *International Human Rights Law: 60 Years after UDHR* (2010) 195, 202.
[59] Thomas Pogge 'Introduction' in Pogge (ed.) *Freedom from Poverty as a Human Right* (2007) 3.
[60] O' Connel (note 58 above) 205-207.

turning entitled rights bearers into paying consumers that are by virtue of the functioning of the market subject to supply.[61] We may submit that when reflecting on the role of the company and the institutionalisation of the company in modern society the pervasiveness into every element of our existence as natural persons is conspicuous. This is evident from the food we that we consume, the water that we drink, clothes that we wear, pharmaceuticals that we depend on, jobs that provides us with incomes for sustenance and the very manner in which these elements of everyday life are made available to us to name but a few.[62]

It has been submitted that the institutional design of global economics is such that it cannot and will not facilitate the access to socio-economic rights to all people. What is fundamental in recognizing the structural flaws of globalization (on a macrocosmic level) and commerce (on a microcosmic level) is the appreciation of the ability of societies such as our own to change the manner in which the system is structured and operates. This has been demonstrated throughout history through the reconstruction of societal norms and corresponding practices such as slavery and child labour.[63]This we may submit will only occur through a paradigm shift in the perception of what the role of company is in our society as well as what the limitations of its entitlements and extent of its responsibilities are within the Constitutional framework.

Leisinger describes the recognition of inalienable human rights as a default rather than as requiring conference by a state or any other party as one of the greatest achievements of civilization. He proceeds to reflect on article 1 of the United Nations Declaration of Human Rights that provides that rights cannot be realized or exercised without corresponding responsibilities. Without delving into the international regime regarding human rights and business it must be appreciated that the prevailing sense that the nation state bears the primary responsibility for ensuring that human rights are respected and protected does not detract from the existence of responsibilities of other participants in the lives of human rights bearers including companies.[64] This is especially so when such participants derive their benefit, directly or indirectly, from these rights bearers (whether as employees, consumers, inhabitants of the environment or any other).

(c) A brief consideration of the sphere of influence concept

If we are to contend that the directors owe duties to persons other than the company an important consideration is to whom those duties are owed and the extent of those duties. Stakeholders thus far have been framed in reference to rights bearers that may be impacted by the conduct of the company. In terms of South African company law each company is a separate legal entity despite any affiliation or operation within a group of companies.[65] This alone does not preclude the directors of the parent company from attracting liability of the subsidiary to the extent that ultimate beneficiation and/or control can allude to the existence of a relationship between the parent and subsidiary that would allow for the transfer or imputation of liability from the one to the other. For example the conception that the

[61] Ibid 208.
[62] Chirwa (note 3 above) 295.
[63] O' Connel (note 58 above 208-210.
[64] Klaus M. Leisinger 'Corporate Responsibility for Human Rights' in Benjamin K. Leisinger & Marc Pobst (eds) Human Security and Business (2007) 44, 48.
[65] Cassim (note 24 above) 551.

subsidiary company may be acting as an agent of the parent company and thus the consequences of the actions of the agent being imputable to the principal.[66] It may be submitted that the mechanisms available to situate duties and concomitant liability in respect of human rights at its true source despite legalistic barriers to a large extent depends on the willingness of the courts to depart from legal formalism/traditionalism in light of their Constitutional mandate and authority to do so. An example of such departure is the Delaware Supreme Court's recognition that a holding company owes a fiduciary duty to its subsidiary and furthermore that duties ordinarily incumbent of directors may be vested upon a shareholder where that shareholder dominates the company and the selection of that company's board of directors.[67]

However we may construct the conception of the sphere of influence of a company, what is fundamental is that the operations of a company should not be permitted to incidentally or overtly result in the infringement of fundamental human rights. It may be suggested that the sphere of a company's influence is relative to the size of its operations and the resultant economic power that it yields. The greater the influence the greater the ability to influence the policies and decision making of a range of actors (who in turn have the capacity to impact human rights either positively or negatively) from governments to related/dependent/associated company's locally or abroad. The understanding of the notion of complicity is important in this context and in its simplest form can be described as the direct or indirect enabling of actions by other parties that infringe human rights.[68] It may be submitted that the complexity of company structures may have been used as a tool to reduce proximity to the company of actors that commit human rights violations. Furthermore that the matter of proximity or lack thereof cannot supersede the act of enabling together with knowledge required to attribute liability to the enabler.

It may be submitted that the duty of care, skill and diligence of directors encompasses the responsibility to define the company's sphere of influence and resultant obligations and test its perception of the scope thereof against that of affected stakeholders.

IV BALANCING, PRIORITIZATION AND THE NATURE OF RIGHTS

(a) Brief rights analysis: the operation of rights through the lens of the limitations clause

Despite the supremacy of the Constitution enshrined in section 2 thereof, the rights in the Bill of Rights are not absolute, to the extent that regarding anything as absolute tends to neglect the complexities of the operation of that thing in a dynamic and evolving context where it is required to engage with a host of factors. It is therefore relevant for us to consider whether the application of the Constitution to company law in South Africa (as discussed above) facilitates the duties of directors extending beyond the company to other stakeholders (being rights bearers as discussed above).

The Constitutional Court has presented a two stage enquiry when testing conduct against the Bill of Rights. The first stage requires establishing whether a right in the Bill of Rights has been violated by the conduct. If the first stage is

[66] Eric J. Gouvin 'Resolving the subsidiary directors dilemma' (1996) 47 *Hastings Law Journal* 287, 332.
[67] Ibid 287,334.
[68] Leisinger (note 64 above) 63-66.

answered in the affirmative, the second stage of the inquiry requires consideration of whether the conduct can be justified in terms of the section 36 of the Constitution.[69] Bilchitz submits that the manner in which rights are limited lends significantly to the perception of rights themselves in South Africa. The notion of balancing rights has become common parlance in South African law and generally involves the balancing of rights against competing interests which often manifest on the form of policy goals.[70]

The supremacy of the Constitution and entrenchment of the rights in the Bill of Rights venerates these rights to the status of superior norms to which other law and policy is subordinate. Therefore we may submit that the nature of rights are such that an empirical cost benefit analysis cannot be used to justify their subordination to other interests.[71] The nature of a fundamental right is such that it is protected from being summarily compromised by utilitarian policy considerations. As such we accept that a high normative weight is attached to fundamental rights in relation to competing interests. It is within this context that the balancing of rights exercise denoted in the limitations clause, of section 36 of the Constitution, necessitates a proportionality analysis. We may draw on this analysis when considering the broader dynamic of interests of the company as against the rights of its stakeholders. The presence of weighted normative considerations on the balancing scale suggests a qualitative rather than quantitative analysis must be undertaken. In order to do this, these competing normative considerations must be assigned weightings based on their substantive utility.[72]

Bilchitz appears to suggest that the balancing of rights theory is premature as it pre-supposes the existence of a consistent substantive normative ideology in order to function. Fundamentally the balancing notion is merely a metaphor that is symbolic of far more complex underlying normative reasoning. Bilchitz notes that this metaphor is used by the courts to formalize an inherently substantive exercise thereby avoiding and obscuring the substantive content of rights analysis.[73] We may contend that there appears to be an aversion to substantive considerations in favour of supposedly empirical reasoning. The concern is, however, beyond the neglect of substantive normative considerations that form the basis of fundamental rights entrenched on our Constitution is the illusion of the empirical, or fact based, nature of other considerations (that is the illusion of objectivity that is not as readily available when considering conspicuously normative fundamental rights).

For example section 36 of the Constitution requires that there be a close connection between the limitation of the right and the purpose that the right seeks to achieve. This is also referred to as the suitability requirement as it inquires how suitable the limitation is to achieving its set purpose in light of the extent of the infringement that it occasions. We may submit that the popular/traditional acceptance of a state of being does not in itself speak to the factual accuracy of the description or conception of that state of being. When confronting the importance of facilitating the traditional role of a company in society as balanced against the protection and furtherance of fundamental rights (that this role tends to be considered to be inimical to) it is important to accurately assess what

[69] *S v Makwanyane* 1995 (3) SA 391 (CC) 78.
[70] David Bilchitz 'Does Balancing Rights Adequately Capture the Nature of Rights?' (2011) 25 *SAPL* 423.
[71] Dworkin 'Rights as trumps' in Waldron Theories of rights (1984) 153, 192.
[72] Bilchitz (note 70 above) 425.
[73] Ibid 426.

the role of the company is, what it achieves and what conduct is acceptable in pursuit of such. Furthermore consideration must be given to whether this role is necessarily inimical to human rights or whether it is has simply been more convenient to accept that this role is necessarily inimical to human rights in order to avoid attempting to engage with human rights considerations rather than changing the manner in which the role is fulfilled. Bilchitz attributes this acceptance to the fact that the concept of profit maximization in an economic context has a clear meaning whereas rights optimization which is not quantifiable in the same manner.[74]

Although we may concede that the two concepts may not be quantifiable in the same manner, we may contend further that we too readily accept the clarity of meaning and accuracy of even the economic concepts. That is to say that there are a range of assumptions and pre-conditions (that are often untested and often practically untestable) that serve as accepted assumptions that make analysis seemingly empirical and consistent (for example models that operate within the assumption that all things remain equal/static/assumed certain but for deliberately identified variables). Were similar assumptions and pre-suppositions to be as readily accepted in the human rights context then the concept of rights maximization could plausibly become an empirical exercise (for example, without submitting an argument on the merits of the assumption, were there to be unconditional global consensus that fundamental human rights can never be subordinated to other interests due to the fundamental nature thereof).

It is submitted that the greater the inroad into the fundamental right the more certain the justification for the inroad must be. Therefore mere speculation, however widely prescribed to, cannot be justification for an inroad into fundamental rights.[75] Therefore we may submit that the assumption that acceptance of the binding nature of human rights obligations on companies will severely and possibly fatally undermine the business project is one such speculation. Even if we were to accept that business' sole prerogative is profit maximization, such endeavour may conceivably be pursued in accordance with the Constitution without inevitably collapsing industry and the socio-economic benefits that are made accessible to people as a result of it.

An additional consideration imposed by section 36 of the Constitution requires us to reflect on the necessity of the limiting conduct to achieve its purposes. This implies that there may be ways of achieving the interests represented by the infringing conduct that do not interfere with the right or only interfere to a lesser degree. In the broader context of the obligations of companies towards human rights respect, protection and promotion this analysis may be helpful in demonstrating the point that companies should not be able to rely on conducting business in a manner that infringes rights, directly or indirectly, no matter how imperative the interests of business are, because it is arguably never necessary to infringe rights in order to achieve profit maximization (or conversely that profit maximization alone can never be a justification for infringing rights). Furthermore that the role of companies can be achieved, through the exercise of innovation, without infringing on rights and conceivably with view to protecting and promoting them. The necessity contemplated in section 36 operates within the context of physical possibility and thus, it may be submitted that this, does not impose an overly onerous standard for compliance. What is required

[74] Ibid 433-434.
[75] Ibid 432.

fundamentally is a qualitative judgment on the permissible extent of infringement of a right and the availability and appropriateness of less intrusive alternatives.[76]

As fundamental as the notion of balancing and proportionality is in the context of the competing interests in a society in pursuit of justice and equity is the notion of the inalienability of rights. As Bilchitz suggests, for society *"[t]o develop an adequate conception of fundamental rights, it is thus necessary to have an understanding of their substantive justification, role and purpose within the constitutional scheme...they relate to the most basic elements of our lives – the necessary conditions of our freedom, the resources we need to live lives of value, and to function adequately. Rights have a form of urgency that flows from the impact that they have on our ability as individuals to lead lives of value to us."* [77] If we accept that the inalienable nature of rights is a factual entitlement and default state that is entrenched and protected by the Constitution we must accept that it is the fundamental rights that form the frame of reference when measured against competing interests and not the reverse.

(b) Corporate entitlement and perplexing vocabulary of corporate social responsibility dialogue

Notwithstanding the enactment of the Constitution, it has been submitted that it would be difficult for directors to weigh competing interests if they owed duties to anyone other than the company and that the absence of substantive provisions to resolve competing interests may result in directors losing effective control of the company.[78] We may respectfully submit that this reasoning suggests an inflexible attachment to the concept that a company exists to further the interests of its investors to the greatest extent possible while shielding them from the liability arising as a direct or indirect consequence of the actions employed by directors in the course of this pursuit.

Ramnath submits that the advent of Constitutional supremacy *"requires the reconsideration of the dimensions of companies' social responsibilities."* It may be suggested that it is not consideration of a potential change but rather awareness of a change that has been engendered as a result of the Constitution (and the evolution of society) that must take place.

Section 8(4) of the Constitution allows companies to enjoy rights contained in the Bill of Rights. A company benefits from society by virtue of its separate legal existence which allows it to participate in society as well as through the use of human and natural resources in order to function. Juristic persons are essentially a composite of natural persons each of which bear human rights. The Constitutional Court has recognised that juristic persons are used for the exercise of collective rights of natural persons.[79] The corollary of this is that the natural persons that constitute a juristic person bear corresponding responsibilities and obligations in relation to other natural persons failing which companies would be merely parasitic institutions. There is in effect ideally a "mutually beneficial relationship between company and community." This line of reasoning affirms not only the negative obligation to

[76] Ibid 436.
[77] Ibid 442.
[78] Michelle Havenga 'Directors's fiduciary duties under our future company law' (1997) Merc LJ 310,360.
[79] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,1996* 1996 (4) SA 744 (CC) 57.

refrain from harming but positive obligation to promote human rights.[80] Furthermore this appears to suggest that the greater the company's power to over people's access to socio-economic rights and the greater the size and resources of the company allow for the performance of such duties the more such duties should be extended onto them. This it may be submitted is in line with the flexible wording of section 8(2) of the Constitution.

The supremacy of the Constitution makes the existence of a negative duty of corporations not to infringe rights in the Bill of Rights unequivocal. We may thus contend that first generation rights being civil and political rights are protected from infringement by *inter alia* companies. This requires a commitment from companies not to infringe such rights which typically requires less resource than rights that require positive action.[81]

Second generation or socio-political rights and the obligations of companies in relation thereto are more controversial due to the resources required to fulfil them, however are equally in need of protection from either direct or indirect interference. The Constitution recognizes the practical resource limitation that may frustrate the immediate realization of these rights while recognizing that resource limitation is only an excuse within the context of genuine efforts towards the progressive realization of these rights. *"In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems."* [82]

It follows that part of this progressive endeavour entails increasing the supply of resources available in order to realize these rights. Companies, as intimated in section 7 of the Companies Act, are well placed to mobilize resources and skill and through innovation in order to efficiently utilize and enhance existing resources and generate new resources. The reality of the manner in which our global economy is structured is that those who have access to monetary resources are better able to enjoy and enforce their rights. The question of how the current functioning of the global economy and the meaning of and distribution of wealth impacts human rights is beyond the scope of this paper. I submit notwithstanding this, that the notions of capitalist wealth generation and distribution and the role of companies within a system that is awakening to human rights imperatives may be relevant when considering the duties of companies in respect of human rights.

Third generation human rights which contemplate collective rights such as that to peace and social development are increasingly receiving attention in relation to the massive power yielded by multinational companies. Other than the contribution towards economic growth and the implications thereof on stability the manner in which companies interact with and within states, in the context of their massive economic leverage, suggests that companies have significant influence on third generation rights. We may, without expanding on this point, recognize that the role of companies in contemporary South African society do not operate in isolation and the broader business and human rights regime is essential to the protection of the integrity of all human rights.

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[80] Katzew (note 13 above) 695-696.
[81] Klaus M. Leisinger 'Corporate Responsibility for Human Rights' in Benjamin K. Leisinger & Marc Pobst (eds) Human Security and Business 44 (2007) 50.
[82] *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) 43.

Bilchitz crisply states that *"[t]he observance of human rights is not a voluntary matter but one of legal obligation"*.[83]It is this understanding, especially in the South African contest in light of the Constitution, that it must be appreciated that allowing companies to avoid taking cognisance of human rights or to do so on their own terms (and only to the extent of their own profit driven interests) would be contrary to the function of the observance of human as being rudimentarily to afford protection to the weak from the power of the strong. It is not, we must contend, that company's must be accommodating of the Constitution and human rights bur rather that the Constitution and application of human rights that should be accommodating, to the appropriate extent if at all, of the legitimate function and interests of companies. The Constitution and the Bill of Rights should serve as the frame of reference when expounding on the scope and extent of the human rights obligations of companies and the corresponding obligations of directors. The Constitution by serving as a frame of reference appears to suggest that a more communitarian than capitalist approach may be the way forward for conceptualizing the role of companies and how they discharge that role in South Africa.[84]

(c) The bigger corporate social responsibility picture: importance of an effective global corporate social responsibility regime

Bilchitz makes a case for the extraterritorial application of laws enshrining human rights obligations as being a matter of state co-operation rather than discord.[85] It may be submitted that this is emphasized by the fact that the more consistent the awareness and enforcement of the human rights obligations of business are the more likely the success of the efforts to protect human rights globally will be. This is especially apparent in the context of avoiding ease in which companies may move their operations, or parts thereof, to less regulated countries resulting in a competitive advantage being given to both companies and countries that have the means and allow for the disregard of human rights. (This argument pre-supposes that it is necessarily far more costly for companies, at least at the immediate juncture, to be cognisant of human right obligations.)

Notwithstanding this, it may be submitted that South African society the Constitution and Companies Act is charting new territory through mandating enforceable human rights obligations of companies ahead of strides taken by the rest of the world in this direction and in so doing is presenting itself not only as the society founded on the values of human dignity, equality and freedom as envisaged in the Constitution but as an investment opportunity that is abreast of the global movement towards the recognition of the binding and enforceable human rights obligations of business.

V CONCLUSION

It is in light of the preceding arguments that we may contend that the role of the company in contemporary South African society is an evolving concept as much as that of the company itself is. This evolution can be seen as occurring within a habitat in which the priorities of society are reflected, protected in the Constitution and are

[83] Bilchitz (note 5 above) 789.
[84] Eric J. Gouvin 'Resolving the subsidiary directors dilemma'(1996) 47 *Hastings Law Journal* 287,313.
[85] Bilchitz (note 5 above) 785.

protected by legislation such as the Companies Act. It is therefore submitted, that the provisions of the Companies Act rooted in the relevant principles of the Constitution, have caused the traditional duties of directors to be extend beyond the company to stakeholders whose rights are or have the potential to be impacted by the company (whom the company in corollary are sustained by). This extension, we may contend, is not as a result in a change of the perception of the company occasioned gradually but rather an occasion of the change of substance and the perception thereof necessitated by the Constitution. The advent of the Constitution has therefore transformed both the obligations of companies and consequently the role that they play in contemporary South African society.

Fundamentally the reality of systemic poverty and the emerging power and influence of companies necessitates the transformation of the role of the companies within society in both facilitating transformation and opening up to transformation towards correcting imbalances in power that are the legacy of, most recently, apartheid with view to the achievement of substantive equality, human dignity and freedom.

A company may have neither a soul to be damned nor a body to be broken but the Constitution reminds us that the natural persons that represent its conscience do. [86]

[86] Edward, First Baron Thurlow (1731–1806) quoted in John C Coffee Jr 'No soul to damn; no body to kick: an unscandalized inquiry into the problem of corporate punishment' (1980–1981) 79 Mich L Rev 386 at 386. Katzew (note 13 above) op cit Katzew note 37 at 695.