

**PHILANTHROPIC CORPORATE SOCIAL RESPONSIBILITY AS A TOOL FOR
ACHIEVING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA**

**A DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE
LLM DEGREE**

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Declaration

I, OBISANYA TEMITOPE AYOMIKUN, student number 11601287, hereby declare that this dissertation submitted by me in fulfilment of the requirements for the LL.M degree at the University of Venda hereby submitted by me, has not been submitted previously for a degree at this or any other university, and that it is my own work in design and execution, and that all reference materials contained herein have been duly acknowledged.

Signature.....

Date.....

Dedications

To my parents Mr and Mrs Alaba Obisanya

Acknowledgements

This research study would have not been a success but for the assistance and support of my supervisors Dr. AO Jegede and Ms PP Letuka for their sterling job. I would also like to use this medium to appreciate the Directorate of Research and Innovation -University of Venda for funding this research project. Finally I give God the glory for giving me the grace to conclude this programme.

Abstract

Scholarship on the subject of Corporate Social Responsibility (CSR) highlights its four components: economic, legal, ethical and philanthropic responsibility. In South Africa, while the economic, legal and ethical components of CSR are regulated and attract punitive measures for erring corporations who fail to adhere to such demands, the application of the philanthropic aspect of CSR is problematic. The application of philanthropic responsibility suffers normative, institutional and accountability deficiencies in South Africa. Hence, corporations do not conscientiously direct philanthropic responsibility towards achieving core socio-economic needs of their host communities. In the light of international human rights standards relevant to CSR, this research attempts to examine domestic laws which regulate the practice of CSR in South Africa and advance how the philanthropic aspect of CSR can be developed to achieve the realisation of socio-economic rights, in particular, the rights to access to health care, water and social security, education, housing and clean environment. The argument is made that through the formulation and application of an appropriate legal framework, philanthropic CSR can play a contributory role to the realisation of socio-economic rights recognised under the 1996 South African constitution.

The implications are that in appropriate cases socio-economic rights do not only bind the state and consequently apply to the "vertical" relationship between individuals and the state, but could also apply "horizontally", in respect of the relationship between private entities. This is a controversial issue and its full implications have not yet been resolved.

Key words: CSR, Human Rights Law, Philanthropic CSR, Socio-Economic Rights and South African constitution.

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List of Abbreviations and Acronyms

LIST OF ABBREVIATIONS

- **BBE ACT:** Broad- Based Black Economic Empowerment Act
- **CPA:** Consumer Protection Act
- **CSI:** Corporate Social Investment
- **CSR:** Corporate social responsibility
- **DMR:** Department of Mineral Resources
- **ELP:** Eastern Platinum Ltd
- **EITI:** Extractive Industries Transparency Initiative
- **FET:** Further Education and Training
- **FRSC:** Financial Reporting Standards Council
- **GRI:** Global Reporting Initiative
- **HRC:** Human Rights Council
- **ICCPR:** International Covenant on Civil and Political Rights
- **ICESCR:** International Covenant on Economic, Social and Cultural Rights
- **IIRC:** Integrated Reporting Framework by the International Integrated Reporting Council
- **ILO:** International Labour Organisation
- **(IoD):** Institute of Directors in Southern Africa
- **KOSH:** Klerksdorp, Orkney, Stilfontein and Hartebeesfontein area
- **NCPS:** National Contact Points
- **NGO:** Non-Governmental Organisation
- **OECD:** Organisation for Economic Co-operation and Development
- **OHCHR:** Office of the United Nations High Commissioner for Human Rights
- **SAPS:** South Africa Police
- **SADC:** Southern African Development Community
- **SAHRC:** South African Human Rights Commission
- **SAIFAC:** South African Institute for Advanced Constitutional Public, Human Rights and International Law
- **SEC:** Social and Ethics Committee
- **SETAs:** Sector Education and Training Authorities
- **SERAC:** Social and Economic Rights Action Centre
- **SLP:** Social and Labour Plan

- **UN:** United Nations
- **UNGCP:** United Nations Global Compact Principles
- **UDHR:** Universal Declaration of Human Rights
- **WLP:** Western Platinum Limited

TABLE OF LEGISLATION AND POLICY GUIDELINES

- Alien Tort Claims Act of 1789,
- Broad- Based Black Economic Empowerment Act 53 of 2003
- Basic Conditions of Employment Act 75 of 1997
- Companies Act 71 of 2008.
- Companies Regulation 2011
- Competition Act 89 of 1998
- Constitution of the Republic of South Africa Act 108 of 1996
- Consumer Protection Act 68 of 2008.
- Employment Equity Act 55 of 1998
- Indian Companies Act of 2013
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- King Report March 2002
- Labour Relations Act 66 of 1995
- Mineral and Petroleum Resources Development Act 28 of 2002
- Mine Health and Safety Act 29 of 1996
- National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007
- National Water Act 36 of 1998
- National Environmental Management Act No. 107 of 1998
- Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights
- Occupational Health and Safety Act No. 85 of 1993
- OECD-guidelines for multinational enterprises, drafted in 1976 and revised in June 2000
- Skills Development Act 97 of 1998
- South African Companies Act 71 of 2008
- Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (adopted in 1977 and revised in 2000)
- UN Global Compact Principles, GRI Global Reporting Initiative GRI/ Sustainability Reporting Guidelines
- United Nations Global Compact Principles

- Universal Declaration of Human Ri

CHAPTER 1

INTRODUCTION TO THE STUDY

*'What is utopian is the notion that poverty can be overcome without the active engagement of business.'*¹

- Kofi Annan.

1.1 Background statement

States as duty bearers of human rights are generally obliged to respect, protect, promote and fulfil the observance of human rights within their jurisdictions.² As human rights are interdependent, these obligations do not only apply to civil and political rights³ but also to economic and socio-cultural rights.⁴ However, even with a progressive constitution, states' realisation of socio-economic rights especially in developing countries is an enormous burden due to financial constraints.⁵ The dilemma that states encounter in the actualisation of socio - economic rights is exemplified by South Africa; a nation that is signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has included some specific socio- economic rights in its constitution.⁶ Nevertheless, the realisation of socio- economic rights remains a huge challenge as the government struggles with the socio - economic needs of its population.

The challenge of government to realise socio-economic rights is exemplified by the presentation once made by the Minister of Water and Sanitation, Nomvula Mokonyane, on behalf of the presidency which indicated that the target of eradicating the bucket system by December 2014

¹K Annan 'The private sector as a means for poverty reduction and empowerment' available at www.enterprise-development.org/page/quotes-on-PSD (accessed 08 August 2014).

² International Covenant on Civil and Political Rights General Comment 31 Adopted on 29 March 2004. See also the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60(ACHPR 2001) 44.

³Universal Declaration Adopted 10 December 1948, UNGA Res 217 A (III).

⁴The International Covenant on Economic, Social and Cultural Rights (ICESCR). Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

⁵ M Harrison & C Coussens 'Global Environmental Health in the 21st Century: From Governmental Regulation to Corporate Social Responsibility' available at <http://www.nap.edu/catalog/11833.html> (accessed 10 July 2014)84. See also EM Ekanayake & D Chatrna 'The Effect of Foreign Aid on Economic Growth in Developing Countries' (2010) OC09003 ,*Journal of International Business and Cultural Studies*; Constitution of the Republic of South Africa Act 108 of 1996

⁶The Constitution of the Republic of South Africa, 1996, Secs 24, 26, 27& 29.

had not been met due to financial constraints.⁷ In addition, a United Nations(UN) survey on the access to clean portable water in South Africa reveals that due to a lack of water infrastructure in rural settlements, 74 percent of all rural people are entirely dependent upon groundwater and 33 percent do not have basic sanitation services. The survey further shows that over 26 percent of all schools (urban and rural), and 45 percent of clinics, have no access to portable water.⁸ Improvement of access to housing is equally one of the great challenges faced by the South African government. In a National census conducted in 1996 it was found that South Africa still had 1.4 million informal dwellings, meaning that out of the existing 9 million households 16% were illegal shacks. The amount of illegal dwellings had risen to 1.9 million by the year 2011.⁹ To date insignificant improvements have been made regarding access to housing in South Africa as a result of huge demand for housing.¹⁰

It is not surprising then that realising that states in developing countries alone cannot meet the challenge of actualising socio-economic rights, global attention has shifted to the need for involving non-state actors. For example, underscoring the need for their involvement, Kofi Annan submits that 'it is utopian to assume that poverty can be overcome without the active participation of corporate institutions'.¹¹ Robinson also observed that, "It is not a question of asking business to fulfil the role of government but of asking business to promote human rights in its own sphere of competence."¹² These views are reinforced by scholars who have noted that private corporations remain some of the best placed institutions that could make a significant positive contribution towards the realisation of socio economic rights.¹³

⁷Bucket system eradication target overambitious available at <http://www.infrastructurene.ws/2014/08/29/bucket-system-eradication-target-wont-be-met/> (accessed 20 Nov. 2014).

⁸United Nations 'Water a Shared Responsibility' available at <http://unesdoc.unesco.org/images/0014/001454/145405e.pdf#page=519> (accessed 20 June 2015). See also Water Access in South Africa available at <http://12.000.scripts.mit.edu/mission2017/case-studies/water-access-in-south-africa> (accessed..... Statistics South Africa available at <http://www.statssa.gov.za/Publications/P0318/P0318April2012.pdf> (accessed 13 June 2014).

⁹K Wilkinson 'Factsheet: The housing situation in South Africa' available at <http://africacheck.org/factsheet-the-housing-situation-in-south-africa>(accessed 15 April 2015).

¹⁰R Brand & M Cohen 'Where the heart is: South Africa's post-apartheid housing failure' available at <http://mg.co.za/article/2013-08-02-where-the-heart-is-south-africas-post-apartheid-housing-failure> (accessed 15 April 2014).

¹¹Annan 'The private sector as a means for poverty reduction and empowerment' (note 1 above). See also SB Banerjee *Corporate Social Responsibility: The Good, the Bad and the Ugly* (2009) 1.

¹²M Robinson 'The business of case for human rights' in Malcolm McIntosh (ed) *Visions of Ethical Business* (1998), quoted D Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibility for Corporations' (2008) 125 *SA Law Journal* 754.

¹³W Visser *The age of responsibility: CSR2.0 and the New DNA of business* (2011) 8. See also O Falck& S Iteblich 'corporate social responsibility: Doing well by doing good' (2007) 50 *Business Horizons* 249, W Visser 'Revisiting Carroll's CSR Pyramid: An African Perspective' in ER Pedersen & M Huniche (ed) *Corporate Citizenship in Developing Countries*, Copenhagen: *Copenhagen Business School Press* (2006)31; B Nwete 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?'(2007) 08 No.04 *German Law Journal* 328; W Visser 'Corporate Social Responsibility in Developing Countries' in A Crane, A

Thus far, some non-state actors, particularly businesses, have included as part of their contribution to national life, the notion of Corporate Social Responsibility (CSR).¹⁴Hence, the focus of this dissertation is on using CSR as a tool for the realization of socio-economic rights. However, some basic concepts merit definition.

1.1.1 The concept of CSR

Scholars and institutions consider the concept of CSR in different ways. For example, Blowfield and Frynas define CSR as:

an umbrella term for a variety of theories and practices all of which recognize the following: (a) that companies have a responsibility for their impact on society and the natural environment, sometimes beyond legal compliance and the liability of individuals; (b) that companies have a responsibility for the behaviour of others with whom they do business (e.g. within supply chains); and (c) that business needs to manage its relationship with wider society, whether for reasons of commercial viability or to add value to society.¹⁵

The European Commission also defines it as not only being socially responsible and “fulfilling legal expectations, but also going beyond compliance and investing ‘more’ into human capital, the environment and the relations with stakeholders”.¹⁶ However, there is no universally accepted definition of CSR.¹⁷ The present researcher subscribes to the explanations made by Ghalib and Agupusi who noted that the diversity in the concept of CSR can be seen from a corporation’s responsibility and relationship with its internal stakeholders, with the state both locally and nationally and finally with its host community where they operate which have legal consequences.¹⁸ In addition, the definition suggested by the European Commission, which shed

McWilliams, D, Matten, J, Moon & D Siegel (ed) *The Oxford Handbook of Corporate Social Responsibility*, Oxford: Oxford University Press (2008) 478 & 484; BU Ihugba ‘Compulsory Regulation of CSR: A Case Study of Nigeria’ (2012) 5 No. 2, *Canadian Centre of Science and Education* 61; M Flores-Araoz ‘Corporate Social Responsibility in South Africa: More than a nice intention’ available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=835:corporate-social-responsibility-in-south-africa-more-than-a-nice-intention&catid=82:african-industry-a-business&Itemid=266 (accessed 07 July 2014).

¹⁴McKinsey & Company ‘CEOs on strategy and social issues’ available at http://www.socialinnovationexchange.org/sites/default/files/event/attachments/McK_Strategy-social-issues.pdf (accessed 05 August 2014).

¹⁵M Blowfield and JG Frynas ‘Editorial: Setting New Agendas - Critical Perspectives on Corporate Social Responsibility in the Developing World’ (2005) 81 *International Affairs* 3, 503.

¹⁶European Union ‘Promoting a European framework for corporate social responsibility’ available at http://www.csr-in-commerce.eu/document_library.php/en/717/green-paper-quotpromoting-a-european-framework-for-corporate-social-responsibilityquot-com200136r6-fi (accessed 05 August 2014).

¹⁷AK Ghalib & P Agupusi ‘How socially responsible are multinational corporations? Perspectives from the developing world’ (2011) 32 *Development Working Paper Series* 5.

¹⁸*Ibid.*

light on fulfilment of the legitimate expectation of stakeholders is also embraced. In the light of the above explanation of the concept of CSR, this research adopts the combination of the definitions proposed by Ghalib, Agupusi and that of the European Commission considering the dynamic nature of CSR and the role and responsibilities corporations have towards their stakeholders. A combination of these definitions sees CSR as a relationship with other stakeholders, which have legal consequence in the light of human rights. This definition simply suggests that corporate entities and the state alike are jointly responsible for the realisation of stakeholders' legitimate expectations. CSR can best be understood by appreciating the dynamic nature of human rights and the changing relationship between business and society. Hence, the state together with corporate institutions has the responsibility to ensure the realisation of socio-economic rights.

1.1.2 Socio- Economic Rights

Socio-economic rights are second generation of rights which originate from the (ICESCR).¹⁹ They are adopted and enshrined in the South African constitution. The purpose of engraving the rights in the South African constitution is to afford the government the opportunity to formulate policies towards the actualisation of socio-economic rights which in turn will equip courts to intervene when such rights are infringed upon or implemented unsatisfactorily. In theory, using South Africa as a focal point, these rights allow citizens to, *inter alia*, demand basic socio-economic rights from the government such as;

(1) "Right to an environment that is not harmful to their wellbeing and to have it protected for the benefit of present and future generations".²⁰

(2) "Right to have access to adequate housing which the government must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of the right".²¹

(3) "Right to health care, water and social security".²²

(4) "Right to education".²³

However, the inclusion of rights in the constitution often does not translate into action. Hence, the researcher's arguments an approach that will aid the progressive realisation of these rights. It is worthy of note at this juncture that the researcher's focus is mainly on using CSR to actualise the right to adequate housing, health care, water and social security, clean environment and finally

¹⁹Globalization101 'Three Generations of Human Rights' available at <http://www.globalization101.org/three-generations-of-rights> (accessed 27 March 2015).

²⁰Constitution of the Republic of South Africa (note 6 above) sec 24.

²¹*Supra* Sec 26.

²²*Supra* Sec 27.

²³*Supra* Sec 29.

right to education. The researcher is of the opinion that according to Abraham Maslow, the above socio-economic needs represent the basic needs of life.²⁴

1.1.3 Carroll's CSR model

For the purpose of this dissertation, the concept of CSR is adopted from Carroll's CSR model. It is worth noting that Carroll's model has been criticised by scholars such as Visser that the model lacks conceptual clarity, descriptive accuracy and it is not a true representation of CSR in developing countries.²⁵ Nevertheless, Carroll's CSR model to date is cited by most scholars and it is generally assumed that his model is useful to illustrate how CSR is manifested in a developing country. Carroll's CSR model depicts corporate responsibility in four different forms. These are economic, legal, ethical and philanthropic responsibilities.²⁶

1. Economic responsibility

Carroll's economic responsibility depicts that non-state actors demonstrate their responsibility by *inter alia* creating wealth on behalf of the company, being profitable as much as possible, maintaining a strong competitive position, effectiveness and efficiency in corporate operations and a commitment to maximizing earnings per share.

2. Legal responsibility

Under the platform of legal responsibility, Carroll points out that non-state actor obey domestic and international laws meant to regulate corporate operations. This responsibility extends to providing goods and services that at least meet minimal legal requirements.²⁷

3. Ethical responsibility

Under the theme of ethical responsibility, Carroll suggests that corporate entities conform with societal mores and ethical norms.²⁸ Hence, it is essential for corporations to recognise and respect new or evolving ethical moral norms adopted by society and to do what is expected morally or ethically.

4. Philanthropic responsibility

²⁴Abraham Maslow theory depicts that humans firstly aspire to satisfy the basic needs of life, then moves to another level of needs. The first need that is crucial for existence are biological and physiological needs. These needs are air, food, drink, shelter, warmth, sex, sleep, etc. if the Biological and Physiological needs are met, their needs would move to Safety needs and other needs.

²⁵Visser 'Revisiting Carroll's CSR Pyramid: An African Perspective' (note 13 above) 45.

²⁶AB Carroll 'The Pyramid of Corporate Social Responsibility': Toward the Moral Management of Organizational Stakeholders (2013) 86 *Chicago-Kent Law Review* 349-373. See also A Voiculescu&, H Yanacopulos *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (2011) 2.

²⁷*Ibid.*

²⁸*Ibid.*

Philanthropic responsibility encompasses company's participation in voluntary and charitable projects within their local communities which is intended to enhance a community's "quality of life". Projects embarked upon may include rendering assistance to the private and public institutions such as schools, hospitals and provision of basic amenities of life.

An overview of Carroll's CSR model from South Africa's perspective suggests that economic, legal and ethical corporate responsibility in addition to being effectively regulated also carry along with it punitive measures for erring corporations who fail to adhere to such demands.²⁹ However with regards to philanthropic responsibility,³⁰ corporate operations are administered on a discretionary basis. For that reason, the focus of the present study is on one aspect of Carroll's model, namely philanthropic CSR.

1.2 Statement of problem

Hitherto, CSR has been carried out largely through philanthropy. The problem associated with philanthropic responsibility is that corporations do not conscientiously direct philanthropic responsibilities towards achieving core socio-economic needs which will help alleviate poverty. Considering its self-regulatory nature, philanthropic responsibility in South Africa suffers normative, institutional and accountability deficiencies. In relation to normative deficiencies, while there are legislation such as the Companies Act,³¹ Companies Regulation 2011, Broad- Based Black Economic Empowerment Act (BEE Act)³² and the Employment Equity Act (EE Act)³³ which are aimed at improving the social and economic standing of the society, the provisions are weak in that there are no meaningful sanctions prescribed for non-compliance. Corporate philanthropic responsibility also suffers institutional deficiency in that the Social and Ethics Committee (SEC) as an institution created by Companies Regulation 2011³⁴ is not constituted in such a manner that encourages its directors to be committed to CSR as an aid to socio-economic rights. Finally, in

²⁹ The Occupational Health and Safety Act No. 85 of 1993, Mine Health and Safety Act No. 29 of 1996, Labour Relations Act No. 66 of 1995, Basic Conditions of Employment Act No. 75 of 1997, National Water Act No. 36 of 1998, Competition Act No. 89 of 1998 (amended in 2000), Consumer Protection Act or CPA] assented to on 24 April 2009 commenced on 31 March 2011. Employment Equity Act No. 55 of 1998, National Environmental Management Act No. 107 of 1998 just to mention a few. An example of corporate ethical responsibility is the National Black Economic Empowerment Act No. 53 of 2003. In terms of the BEE Act, companies that fail to comply with the Act would be denied the rights to win government contracts and licenses to operate.

³⁰ Philanthropic responsibility is solely left at the discretion of corporate directors. Corporate directors decide the nature of CSR to embark on if they so desire. Examples of corporate philanthropic responsibility are organising social functions such as beauty pageants, sporting activities, building classrooms and hospitals, donations etc.

³¹ Act 71 of 2008.

³² Act 53 of 2003.

³³ Act 55 of 1998.

³⁴ It provides that every state owned company, listed public company and any other company that has in any two of the previous five years, scored above 750 points in terms of regulation 26(2) must have a Social and Ethics Committee.

relation to accountability, the existing laws and institutions mentioned therein do not adequately address the issues of corporate accountability and transparency with regards corporate philanthropic responsibility. For instance, if corporate institutions fail to fulfil their mandate of being philanthropically responsible, can they be sued? Who can sue them and what relief should be sought in court? Likewise, which entity the SEC should be accountable to if it fails to fulfil its mandate as provided for in Regulation 2011 remains largely unclear.

A failure to address these issues undermines the legitimate expectation that businesses can contribute meaningfully into the realisation of socio- economic rights. Hence, the focus of this study is to examine whether and how the notion of CSR in the form of philanthropic responsibility can be developed as a tool for the realisation of Socio-Economic Rights in South Africa.

1.3 Aim and objectives

The aim of this research is to examine how the notion of CSR in the form of philanthropic responsibility can be developed as a tool for the realisation of Socio-Economic Rights in South Africa.

The objectives of this dissertation are to;

1. Evaluate the general notion of CSR and its limitation
2. Describe relevant international human rights obligations relevant to CSR.
3. Assess the adequacy or otherwise of relevant domestic instruments on CSR in the light of international human rights obligations and prescribe the way forward.

1.4 Research questions

The following research questions are addressed;

1. What are the emerging standards in international human rights law in relation to human rights obligations on CSR?
2. What are the present corporate laws and practices on CSR in South Africa and their implications in terms of human rights obligations and realization of socio-economic rights?
3. What normative and institutional framework developments are necessary to advance corporate philanthropic gestures as a tool of realising socio-economic rights in South Africa?

4. How can the normative and institutional frameworks be used to enhance the realisation of socio-economic rights?

1.5 Hypothesis

This research is based on the assumption that a mandatory regulation of CSR will improve the realisation of socio – economic needs of the communities in which the companies operate.

1.6 Scope of research

CSR in this dissertation is viewed from the confines of corporate philanthropic responsibility. The research focuses on basic socio-economic rights of communities such as; (1) Right to an environment that is not harmful to their wellbeing and to have it protected for the benefit of present and future generations, (2) Right to have access to adequate housing which the government must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of the right, (3) Right to health care, water and social security, and (4) Right to education.

1.7 Literature review

While there is considerable literature largely portraying that the link of CSR and human rights of individuals and peoples within a given state exists, this notion has been fiercely contested by scholars. This is discernible in the early debate around the notion of CSR in the 1930s between Professor Adolph A. Berle of Columbia Law School and Professor Merrick Dodd of Harvard Law School. Berle asserts that;

all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.³⁵

In contrast to Berle's preposition is the ideology of Professor Dodd who argues that company directors are "guardians of all the interests which the corporation affects and not merely servants of its absentee owners". Dodd further submits that corporations should be seen as economic institutions having 'profit – making' (for its shareholders) and social service (for its stakeholders)

³⁵A Berle 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049.

functions respectively.³⁶ However, the debate ended by Berle's acknowledgement of the validity of Dodd's opinion that management should extend their responsibility to other stakeholders by accepting the responsibilities that come with their power. Berle further suggests that failure to acknowledge such responsibility would lead to government having to intervene in order to protect other stakeholders.³⁷

In the 1970s, the shareholder versus stakeholder debate was once again rekindled by scholars notably Freidman and Freeman. Freidman, a proponent of shareholder supremacy, argues that there is only one corporate responsibility and such responsibility is to use its resources to maximise profits for shareholders so long as it stays within corporate rules. Corporate's responsibility beyond that of shareholders according to Freidman would amount to taxation of shareholders.³⁸ Supporting Freidman, Jensen and Meckling submit that shareholders are principals who hired directors as their 'agents' to maximise their wealth.³⁹ However, contrary to these views, Freeman contended that if organizations want to be effective, they have to pay attention to all stakeholders especially those that can affect or be affected by the corporate achievements.⁴⁰ Although, scholars from the former school of thoughts acknowledge the need for government to intervene when corporations act irresponsibly, the notion of CSR was not envisaged from a human right perspective.

Lately around the world, scholars and institutions have supported the notion that CSR should not only encompass the recognition of other stakeholder in corporate governance but also be viewed from a human rights perspective.⁴¹ This has informed the adoption of International instruments such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD-guidelines) for multinational enterprises, UN Global Compact principles which addresses issues such as consumer rights. Most scholars view CSR from a human right perspective only when corporate operations have negative impact on other stakeholders which portrays corporate responsibility from the lens of Legal, economic and ethical

³⁶ME Dodd 'For whom are corporate managers trustees' (1932) 45 *Harvard Law Review* 1145.

³⁷ D Chandler & WB Werther *Strategic Corporate Social Responsibility: Stakeholders, Globalization, and Sustainable Value Creation* (2013) 28. See also A Berle, 'The 20th century capitalist Revolution' (1954) 169.

³⁸ The Social Responsibility of Business is to Increase its Profits available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> (accessed 20 Nov. 2014).

³⁹ M Jensen & W Meckling 'Theory of the Firm: Managerial Behavior Agency Costs and Ownership Structure' available at <http://www.sfu.ca/~wainwrig/Econ400/jensen-meckling.pdf> (accessed 14 Nov. 1914)7.

⁴⁰RE Freeman and J McVea 'A Stakeholder Approach to Strategic' 2001(1) *Darden Business School Working Paper* 12.

⁴¹JG. Ruggie 'Just Business: Multinational Corporations and Human Rights' available at <http://watson.brown.edu/events/2014/john-g-ruggie-just-business-multinational-corporations-and-human-rights> (accessed 18 July 2015).

responsibility respectively failing to visualise corporate philanthropic responsibility from a human right point of view.

Carroll's CSR model depicts that corporate responsibility generally is in the form of economic, legal, ethical and philanthropic responsibility.⁴² An itemisation of his model portrays firstly that a greater part of corporate responsibility takes the form of economic responsibility which includes; providing investment, creating jobs and paying taxes. Next in line is legal responsibility which depicts that corporations obey the law that regulates their conduct. Thirdly, ethical responsibility, which is an obligation not to cause harm and do what is right, just and fair and finally philanthropic responsibility which summarises the facts that corporations should give back to the community so as to improve the quality of life. Although the model sheds light on the nature of corporate responsibility, it has been strongly criticised by Visser on the basis that, it lacks clarity. For example, corporate economic responsibility may overlap and be considered as legal responsibility.⁴³ On the suitability of the model for global application as claimed by Carroll, Visser and Frynas submit that only corporate philanthropic responsibility is predominant in developing countries based on the notion that the legal infrastructure in developing countries amongst others is poorly developed, often lacking of independence, resources and administrative efficiency.⁴⁴ What is certain is that while philanthropic aspects feature in the debate by authors, neither the model by Carroll nor its critics has shown how human rights can be used as a tool for addressing the challenges related to corporate philanthropic responsibility. This research hopes to elucidate the probable solutions to address the shortfall of corporate philanthropic responsibilities and to channel such responsibility to actualise socio-economic needs.

Notwithstanding the fact that the notion of CSR is a new construct in South Africa, dedication to the idea is of antiquity in the Eastern and Western hemisphere, premised on the conviction that accrual of fortune is principally engineered toward social boon. This element of corporate ethics has its foundations in the 19th century works of philanthropists such as Robert Owen as well as the Quaker-controlled enterprises. The Quakers excelled in commerce because they produced superior commodities and interacted with people in a dignified manner and offered true value for money in addition to giving back with honesty.⁴⁵

⁴² AB Carrol 'The pyramid of CSR: Toward the moral management of organisational stakeholders' (1991) *Business Horizons* 42.

⁴³Visser 'Revisiting Carroll's CSR Pyramid: An African Perspective' (note 13 above) 45-47.

⁴⁴ W Visser & N Tolhurst *The World Guide to CSR: A Country-By-Country Analysis of Corporate* (2010) 2.

⁴⁵J Samuel & A Saari '*Perspectives on corporate social responsibility*'(2008) 153-155

In South Africa, the notion of CSR came into light in the post-apartheid era. During the apartheid era, corporations rarely engaged in CSR.⁴⁶ Corporations consider responsibilities related to socio-economic needs as the sole responsibility of the government.⁴⁷ This conception changed during the post-apartheid era, when the ruling government tried to address social imbalances by engaging in social projects and programmes in the country.⁴⁸ Thereafter, corporations took cognisance of their responsibility to other stakeholders in the form of philanthropic gestures.⁴⁹

Visser and Neil noted that CSR in South Africa is motivated by the concept of *Ubuntu* which had reinforced corporate philanthropic responsibility as self-regulatory.⁵⁰ In contrast, Roussouw *et al* observed that addressing the injustices of the past has been a significant driver for CSR, hence the enactment of laws such as the B-BEE Act, EE Act just to mention a few.⁵¹ According to Frynas, misconceptualisation of corporate responsibility and the extent to which legal instruments can be used to regulate corporate responsibilities tend to complicate corporate governance and management. Frynas further submits that corporations would prefer to be bound by a predetermined corporate responsibility policy/framework that takes account of the trends and nature of rights in this present dispensation and societal legitimate expectations.⁵² Nwete submits that the problem associated with philanthropic responsibility is that it leaves a wide gulf between expectations and results due to the vagueness of a predetermined regulatory framework. For example corporations may declare their corporate responsiveness to community's socio-economic needs but at the end of the day evade such responsibility because no law compels or regulates their operations. According to the author, the notion of corporate philanthropic responsibility has reinforced corporate irresponsibility, lack of accountability and transparency in corporate operations although it encourages innovativeness in CSI initiatives which the mandatory regulation of CSR cannot do. Nwete further suggested an equilibrium should be struck between both ends through bequeathing the 'corporate philanthropy' feature of CSR to the commands of commercially-propelled autonomous governance, albeit fundamental concerns of

⁴⁶Golden Gate Consulting 'Corporate Social Responsibility Course Handbook' available at http://www.fasset.org.za/downloads/CSR_Handbook_Review.pdf (accessed 20 July 2014).

⁴⁷*ibid.* See also M Flores-Araoz 'Corporate Social Responsibility in South Africa: More than a nice intention' (note 13 above) 5.

⁴⁸*ibid.*

⁴⁹*ibid.* See also P Kotler & N Lee *Corporate social responsibility: Doing the most good for your company and your cause* (2004) 144. It is important to note that not all corporate responsibilities are philanthropic gestures. For example there are legal, economical and ethical obligations which are imposed on corporations based on their status as juristic persons.

⁵⁰ N Kirby 'What's really right? Corporate Social Responsibility as a legal obligation in South Africa' (2014) 2. *Legal Brief*.

⁵¹ A Fourie & T Eloff 'The Case for Collective Business Action to Achieve Systems Change: Exploring the Contributions Made by the Private Sector to the Social, Economic and Political Transformation Process in South Africa' (2005) 18 *Journal of Corporate Citizenship* 39–48.

⁵² *ibid.*

ecological dilapidation, human rights violations and corruption have to be subjected to the test of mandatory laws.⁵³ Unfortunately, most CSR studies are broad- not directed towards identifying the extent to which legal instruments may be used to regulate CSR especially in the South Africa's legal context. In addition, the concept of human rights is only envisaged when corporate operations have negative impact on the environment. Hence, from a human right perspective, this research intends to elucidate ways in which corporate philanthropic responsibility may be regulated to achieve socio-economic rights.

Nwete, opines that the dividing line between self-regulation and mandatory regulation of CSR is often vague but the efficacy of mandatory regulation in inducing compliance need not be overlooked particularly in instances where government effected robust national structures for supervision and implementation. To ensure corporate participation in addressing the injustices of the past, the South African government created state institutions⁵⁴ and compels companies to establish SEC which is mandated to monitor and report corporate CSR practices. Kloppers observes that the functions of SEC in the current regulations with regards to its power and efficacy to monitor and report CSR practices are vague and inadequate to address CSR challenges in that it is reliant on soft international instruments⁵⁵ rather than on available national instruments such as the King Reports on Governance which to an extent mandates CSR. In conclusion, Kloppers' work suggests more studies need to be done with regards to whether companies' stakeholders have or should have a right to compel companies to act responsibly. Consequently, this research therefore intends to build on Kloppers' preposition and elucidate the feasibility of the proposed notion of a mandatory CSR.

1.8 Research methodology

Research methodology entails a comprehensive understanding of the research and formulation of a structured pattern which would assist the researcher to achieve the set objectives. A good research methodology, according to Marshall, should not be about presenting accurate research results but for such research reports to be effectively interpreted and analysed for the benefit of the society.⁵⁶ Thus, this research has conscientiously structured the themes to be discussed in

⁵³B Nwete 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?(note 13 above) 317.

⁵⁴For example the Public Protector and the Human Rights Commission.

⁵⁵ HJ Kloppers 'Driving corporate responsibility (CSR) through the Companies Act: An Overview of the role of the Social and Ethics Committee' (2013)16 *Potchefstroom Electronic Law*185-187. The international instruments relied on are the Global Reporting Initiative (GRI) and the United Nations Global Compact Principles (UNGCP).

⁵⁶T Marshall 'Guide to research' available at <http://www.law.umaryland.edu/marshall/researchguides/tmllguide/chapter1.pdf> (accessed 02 Sept. 2015).

subsequent chapters towards achieving the set objective of this study. Generally researches in social sciences require the extensive use of empirical method of data collection.⁵⁷ Using this method, data are gathered with the aid of experiments, questionnaires and interview. However, research study in law is mostly confined to the use of doctrinal method. The reason is that legal research is inductive in nature. In the light of the above discussion on the best methodology to apply in this research, the researcher employed solely the doctrinal method (the Black-letter law) in addressing the issues identified in this research.

1.8.1 The doctrinal approach

The researcher used the doctrinal approach for the analysis of pre-existing works of scholars to aid the investigation of the research questions for the purpose of corroboration of ideas. Information gathered for this research emanates from the analysis of journal articles, books, cases, legislation, newsletters and corporate annual reports. Grix highlights the fact that pre-existing literature are written with a purpose, based on assumption and presented in a certain way or style.⁵⁸ Hence, the present researcher made use of primary and secondary data in the form of domestic legislation and other legal instruments and materials of academics that are well versed in the scope of the study. In the light of the above, the doctrinal method in this research enabled the researcher to discover, analyse and elucidate the relevant legal position on CSR which will direct corporate philanthropic responsibility towards actualisation of socio-economic rights in South Africa.

1.9 Definition of technical terms

i. Self-regulation

This entails corporate integral decisive measures on the nature of responsibility to embark upon, for example building of health care facilities, giving scholarships to students etc. It refers to corporate independence of governmental supervision or binding legal frameworks.⁵⁹

⁵⁷ Writing a Postgraduate Dissertation in Law at Masters Level available at <http://conlawfiles.org/dissertation/> (accessed 02 Sept. 2015).

⁵⁸ J Grix *Demystifying Postgraduate Research, Birmingham* (2001).

⁵⁹ Self-regulation 'American psychological association' available at <http://www.dictionary.com/browse/self-regulation> (accessed 02 Feb. 2017).

ii. Mandatory regulation

Mandatory regulation refers to legislative enactments or judicial judgments prescribing roles and sanctions.⁶⁰

iii. Stakeholders

According to Freeman stakeholders are “those groups and individuals who can affect, or are affected by the achievement of an organisation’s purpose”.⁶¹

iv. Shareholders

Shareholders according to the Companies Act mean ‘the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be’.⁶²

1.10 Ethical consideration

Ethical consideration is a critical part of a research work which entails amongst others; the moral principles that guide a research work, the ethical issues that influence the selection of the research work, how such ethical considerations affect the conduct of the research from the beginning of the research work to its ending.⁶³ This research made use of the doctrinal approach. The researcher is also cognisant of the concept of plagiarism and has, to the best of his knowledge, eschewed unethical issues such as misrepresentation, academic dishonesty and theft of intellectual property.

1.11. Overview of chapters

Chapter one

It highlights the key frameworks for the proposed study. These include; background of the study, problem statement and questions, aim and objectives, methodology, definition of key terms, limitation of study, preliminary literature review and ethical considerations.

⁶⁰The European Union and Corporate Social Responsibility ‘Can the EU contribute to the Accountability of Multinational Enterprise?’ available at <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP32e.pdf> (accessed 20 March 2014).

⁶¹ RE Freeman *Strategic management: A stakeholder approach* (1984) 246.

⁶²Companies Act 71 of 2008 Sec 1.

⁶³The Ethics of Social Research ‘Why Is Ethical Practice Important?’ available at www.sagepub.com/upm-data/34088_Chapter4.pdf 59 (accessed 08 August 2014).

Chapter two

This chapter examines international human rights instruments and standards relevant to CSR practice in South Africa. It then discusses the emerging trend of CSR in relation to human rights from an international context.

Chapter three

This chapter appraises the adequacy or otherwise of relevant domestic instruments on CSR in the light of international standards and the provisions of South Africa constitution. It further evaluates the arguments for and against self-regulation and mandatory CSR and submits the best regulatory framework suitable for the realisation of socio-economic needs in South Africa.

Chapter four

This chapter addresses the question of what legal framework can be developed to advance corporate philanthropic gestures as a tool of realising socio-economic rights in South Africa. It also examines how the CSR legal framework can be used to actualise the progressive realisation of specific socio-economic rights such as; right to have access to adequate housing, right to health care, water and social security, clean environment and right to education.

Chapter five

This chapter represents a synthesis of the former chapters and the general thoughts and ideas of the present researcher with regards to the best CSR practice identified in the research. It proffers suggestions on future scope of study and recommendations on how corporate philanthropic responsibility can be sustained.

Chapter 2

Philanthropic Corporate Social Responsibility and Human Rights Obligations under International law

2.1 Introduction

In the previous chapter, the researcher laid the foundation of the research which fundamentally dealt with preliminary issues such as the research background, aim and objectives, scope and reviews of scholars' contributions to the study. In the chapter, the researcher also dealt with the methodology, an overview of the successive component chapters, and limitations of the study. This chapter attempts to: describe the concept of CSR holistically and connect it to socio-economic rights development; identify prevailing international human rights standards relevant to CSR, relative to states and corporate institutions; the respective obligations/responsibilities appropriate for human rights; and discuss relevant international soft and hard laws applicable to CSR activities which oblige and/or establish human rights standards on both states and corporate institutions. Additionally, the chapter focuses on the applicability of international socio-economic rights frameworks within the South African context.

2.2 Contemporary models of CSR practices

The notion of CSR is a subject of intense debate across the globe.⁶⁴ Critics and proponents of CSR practices are always at loggerheads on the nature, scope and an understanding of the role and purpose of corporations in the society.⁶⁵ For example one would wonder what could be regarded as a CSR: and, whether it is a corporation's initiative not to deteriorate the environment or conservation of endangered species (environmental management), or taking care of employees welfare (labour rights), or an act of building classrooms/hospitals for the host community, sponsoring beauty pageant or sponsoring sporting codes (corporate philanthropy) and/or embarking on research to address health issues. The answers to these questions are essential for a rational system to be devised in order to respond adequately or appropriately to the challenges raised in the CSR debate which is primarily focused on how CSR should be

⁶⁴ B William 'Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profits and Human Rights' available at SSRN: <http://ssrn.com/abstract=991241> or <http://dx.doi.org/10.2139/ssrn.991241> (accessed 17 Feb. 2015) 1.

⁶⁵U Idemudia& UE Ite 'Corporate–community relations in Nigeria's oil industry: challenges and imperatives' (2006) 13 *Corporate Social Responsibility and Environmental Management Journal*194–206.

enforced at the United Nation (UN), regional, sub-regional and national levels. Hence, the need to critically analyse what scholars and institutions consider as CSR.

As said in the previous chapter, this research adopts a combination of explanations made by Ghalib and Agupusi⁶⁶ and the European Commission. A combination of these definitions sees CSR as a responsibility towards the state and other stakeholders, which has legal consequence in the light of human rights. This definition simply suggests that corporate entities-be it state owned or privately owned are jointly responsible for the realisation of socio-economic rights.

For clarity on the nature of what corporate responsibility entails, the researcher accepts Carroll's CSR model as a guide. Carroll's CSR model covers the whole range of economic, legal, ethical, and philanthropic expectations that society requires from corporations to be socially responsible at a given point in time. Hence, CSR maybe considered as a dynamic and evolving concept that changes according to societal expectations and cognisance of human rights. This premise cannot be overstressed considering societal clamour that corporations should act responsibly and the huge debate both at the international and National levels that CSR be regulated by law.

In relation to Carroll's CSR model, corporate legal responsibility points out that corporations obey domestic and international laws meant to regulate corporate operations⁶⁷. Under International law, the absence of hard laws to directly regulate CSR has encouraged corporations to act indifferently towards human rights. Nevertheless, to check corporate gross abuses of human rights, International courts through the Alien Tort Act have found corporations liable for human rights abuses.⁶⁸ On the domestic sphere, states have adopted international covenants which seek to protect human rights and have enacted laws which regulate core corporate operations that may relate to human right abuses. For example, there are labour and consumer protection laws aimed at regulating irresponsible corporate operations.

Carroll's CSR model on corporate economic responsibility depicts that corporations demonstrate their responsibility by *inter alia* creating wealth on behalf of the company, being profitable as much as possible, maintaining a strong competitive position, effectiveness and efficiency in corporate

⁶⁶AK Ghalib & P Agupusi 'How socially responsible are multinational corporations? Perspectives from the developing world' (note 17 above).

⁶⁷AB Carroll 'The Pyramid of Corporate Social Responsibility': Toward the Moral Management of Organizational Stakeholders' (note 26 above).

⁶⁸See the case of KenSaro-Wiwa against Royal Dutch Shell, United States District Court for the Southern District of New York under the Alien Tort.

operations and a commitment to maximizing earnings per share.⁶⁹ As presented in the previous chapter, corporate economic responsibility at the domestic level enjoys more recognition in corporate governance and it tends to overshadow other forms of corporate responsibility. The reasons are because company internal laws such as the company constitutions and policies are geared towards creation of wealth for the company's shareholders. In addition, the companies' constitutions and policies are crafted in a manner in which underperforming directors may summarily be dismissed by the shareholders if they are not productive.

In relation to ethical responsibility, Carroll suggests that corporate entities conform to societal mores and ethical norms.⁷⁰ Hence, corporations are expected to identify and respect new or evolving ethical moral norms adopted by society and to do what is expected morally or ethically. For example, a liquor company will be acting irresponsibly if it decided to establish its production unit and sales in a community where the religious morals in such communities eschew consumption of such products.

Finally, semblance to corporate ethical responsibility is the philanthropic CSR which encompasses companies participation in voluntary and charitable projects within their local communities⁷¹. These initiatives are aimed at enhancing a community's "quality of life". Scholars suggest philanthropic CSR derives its bases from human dignity and the African principle of *Ubuntu*, which is seen as a voluntary responsibility both at the International and domestic level.⁷² It is worthy of note that the core focal point of the present study is on philanthropic CSR. Yet, there are international standards of human rights which are generally related to CSR.

2.3 International human rights frameworks and CSR

The significant development of human rights and CSR as mentioned in the previous sections amongst other reasons made the international community aware of the need to formulate soft laws. The insertion of human rights frameworks at the international, regional and national levels between states and corporate entities connote the justifiability of human right frameworks and their efficacy in the said field. The legal standing for the development of human rights frameworks applicable to corporate entities originates from international treaties and conventions in the form of hard laws and guidelines in the forms of soft laws. The UN has developed a plethora of

⁶⁹AB Carroll 'The Pyramid of Corporate Social Responsibility': Toward the Moral Management of Organizational Stakeholders (note 26 above).

⁷⁰*Ibid.*

⁷¹*ibid*

⁷²An exception with regards to CSR being a voluntary initiative at the domestic level is the enactment of Indians' Companies Act which mandates the practice of CSR. Hence in India, CSR is no longer a voluntary practice.

declarations, codes, guidelines, conventions and treaties that interpret general human rights obligations as they relate to states and corporate responsibilities.

2.3.1 Connection between philanthropic CSR and human rights

Generally, there is no distinction between different forms of CSR under international human rights law. When instruments and commentaries discuss corporate responsibility, the set standards affect different shades of CSR including philanthropic CSR. Hence, the general obligations discussed in the ensuing paragraphs also apply to philanthropic CSR. States are the duty bearers of human rights and are generally obliged to respect, protect, promote and fulfil the observance of human rights within their respective jurisdictions.⁷³ Nevertheless, it can be implied that through states legal obligation to respect, protect and fulfil human rights as set out in the international human rights conventions they ratify, similar responsibilities are extended to corporate institutions. This notion is based on the premise that individuals and corporations alike also have important roles to play in supporting and respecting human rights.

From a historical point of view, the nexus between corporate governance and human rights came to light in the early 1970s. In the past corporations had operated freely in the global economy until their unethical and illegal operations were uncovered which had a negative impact on human rights.⁷⁴ In an effort to curb the negative trend of corporate operations and make them accountable, most countries embark on self-help in the form of boycotts of usage or utilisation of services rendered by erring multinational corporations.⁷⁵ It was against the background of increased mobilization and growing discontent across the globe, that the UN in the 1970s established the UN Commission on Transnational Corporations. Its objective is to investigate the effects of transnational corporations (TNC) on human rights and to strengthen the negotiating

⁷³ International Covenant on Civil and Political Rights General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant 31 Adopted on 29 March 2004. See also the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (note 2 above) 44.

⁷⁴P Feeney 'Business and Human Rights: the struggle for accountability in the UN and the future direction of the advocacy agenda (2009) 6 *International Journal on Human Rights*162; See also J SALZMAN 'Decentralized Administrative Law in the Organization for Economic Cooperation and Development; Law and Contemporary Problems' available at [http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+189+\(summerautumn+2005\)#H2N1](http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+189+(summerautumn+2005)#H2N1) (accessed 10 July 2015). Corporate tendency to infringe on or impact negatively on the enjoyment of socio-economic rights were uncovered via their involvement in the International Telephone & Telegraph (ITT) and other US companies in the 1973 Chilean coup and the bribes paid by Lockheed to Japanese officials to obtain military contracts.

⁷⁵ H Joseph 'Independent Expert Study Group on the Evaluation of the Application and Impact of Sanctions Against South Africa'. (1990) *the Sanctions Report - Documents & Statistics*. It was reported that in South Africa, in the 1970s and 1980s, activism aiming at business actors often took the form of boycotts, particularly of companies and banks that provided economic support to the Apartheid regime in South Africa. Companies that supplied military equipment to regimes engaged in systemic human rights abuses were also targeted during this time.

capacity of countries in which they operate.⁷⁶ Subsequently, other initiatives emerged such as the UN Global Compact; the OECD Guidelines for Multinational Enterprises and the Norms.

Lately, in the light of corporate insensate human rights abuses, scholars call for more binding obligations on corporations for the realisation of human rights.⁷⁷ For example, Bethel, Utting and Wettstien have argued that CSR is akin to promotion of fundamental human rights, hence it is prudent to argue that CSR is ethically necessary, morally obligatory and within the sphere of compulsory regulation.⁷⁸ Feeney also submits that corporate and human rights issues came to the limelight unaided owing to the rising cognisance of the budding human rights responsibilities of private entities; the growing acknowledgement of socio-economic rights; and, counter movements independent of the UN practice in the face of damaging disposition of corporate activities.⁷⁹

2.3.2 International CSR standards

Thus far, the debate on the need to establish an expected CSR standard globally due to corporate incessant abuse of human rights and how corporate institutions should relate with the society have brought about the emergence of various international norms and codes which seek to regulate CSR practices internationally. Corporate abuse or tendencies to abuse human rights has prompted the international media and civil society to demand for a much more regulated and controlled corporate activities, especially in relation to human and environmental rights.⁸⁰ For instance Coca-Cola a bottling Company having plants spread over the globe was allegedly involved in countable cases of human rights abuse in various locations. Notably, in India Coca-Cola damaged local agriculture through privatisation of India's water resources. Additionally, the company exhausted extant ground water bringing to a standstill, all agricultural operations and bringing about shortage of water in Plachimada, Kerala and a local community where it operated.⁸¹

⁷⁶P Feeney 'Business and Human Rights: the struggle for accountability in the UN and the future direction of the advocacy agenda' (note 74 above) see also; S Jerbi 'Business and Human Rights at the UN: What Might Happen Next?' (2009) *Human Rights Quarterly* 31.

⁷⁷ D Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibility for Corporations' Available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/soaf125&div=62&id=&page=Pg754> (accessed 24 March 2015).

⁷⁸ F Wettstien 'Beyond voluntariness, beyond CSR: Making a case for Human Rights and Justice' (2009) *Business and Society Review* 114. See also; P Utting 'Rethinking Business Regulation: From Self-Regulation to Social Control Technology' (2005) *Business and Society Programme Paper* 15; UI Bethel 'Compulsory Regulation of CSR: A Case Study of Nigeria' (2012) 5 *Canadian Center of Science and Education*.

⁷⁹ P Feeney 'Business and Human Rights: the struggle for accountability in the UN and the future direction of the advocacy agenda' (Note 74 above). See also P Raynard & M Forstater 'Corporate Social Responsibility, Implications for Small and Medium Enterprises in Developing Countries' report prepared for UNIDO (2002) iii

⁸⁰*ibid*

⁸¹Case against Coca-Cola Kerala State: India available at <http://www.righttowater.info/rights-in-practice/legal-approach-case-studies/case-against-coca-cola-kerala-state-india/> (accessed 20 April 2017).

Coca-Cola took out 1.5 million litres of deep well water in the above community and traded the bottled water under the names of Dasani and Bon-Aqua to the disadvantage of the local community. Owing largely to the removal of the ground water, it was stated that the remainder of the groundwater got polluted with high chloride and bacteria levels, culminating in scabs, eye problems, and stomach aches upon usage. It was also claimed that Coca-Cola unfairly segregates its employees who are African-American. In the year 2,000 approximately 2000 employees filed law-suits against the company for its continuous human rights abuses.⁸²

Pfizer, another widely known company; purportedly took advantage of infected HIV/AIDS patients by hogging the trade in and access to HIV/AIDS treatment. Pfizer together with Viagra, Zoloft, Zithromax and Norvasc manufactured an anti-fungal drug name fluconazole for AIDS treatment branded as Diflucan, and sold it at escalated prices making it inaccessible to the indigent people. The corporation denies various governments' generic licenses of fluconazole in states like Brazil, South Africa, or Dominican Republic, where patients are compelled to pay an exorbitant \$20 for a weekly dosage, albeit the average national income is only \$120 per month. Amongst the claims was that in 2005, with the aim of increasing financial gain Pfizer discontinued scientific research on a new range of AIDS medicine named CCR5 inhibitors and opted to place an untested CCR5 inhibitor in the European market devoid of furnishing critical facts concerning the drug's side effects.⁸³

These emerging trends of incessant human right abuses in relation to CSR have led to development in the form of soft and hard international instruments which arguably provide human rights standards on both corporations and states. It is important to note at this juncture, that there is no specific law whatsoever under international law that mandates or imputes human rights obligation on corporate entities, nevertheless, in the United States (U.S.), through the Alien Torts Act, corporate directors' have been sued in tort for human rights related abuse perpetrated

⁸² Coca-Cola lawsuit (re racial discrimination in USA) available at <https://business-humanrights.org/en/coca-cola-lawsuit-re-racial-discrimination-in-usa> (accessed 20 April 2017).

⁸³Corporate watch 'Pfizer Inc: Corporate Crimes available at <https://corporatewatch.org/company-profiles/pfizer-inc-corporate-crimes#phil> (accessed 20 April 2017).

abroad. Hence, corporate institutions may be delictually⁸⁴ or criminally liable⁸⁵ if they interfere with the enjoyment of human rights.

The obligation of States under the Charter of the United Nations is, however, to promote universal respect for and observance of human rights within their jurisdiction and states are required to protect individuals against human rights abuses by third parties, including corporations. In line with this view, Andrew and Scott suggest that although corporations have agreed to take on greater responsibility in the human rights field, they do not have the same legal duties as states under international law and cannot be expected to substitute for the role of states.⁸⁶ Contrary to these views, Alexandra submits that human right obligation is traditionally made by States and for States to respect, promote and fulfil human rights but argues that international human rights law has made some progress towards imposing human rights duties on non-state actors.⁸⁷ According to guideline 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,⁸⁸ hereafter Maastricht Guidelines, human rights obligations imposed on states are in three different forms. These are states obligations to respect, protect and fulfil human rights. Failure to perform any one of these three obligations constitutes a violation of such rights.

Lately in *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*, (Ogoni case) states obligation to promote human rights.⁸⁹ The Ogoni case was based on the premise that the Nigerian military regime had candidly participated in imprudent oil expansion activities in the Ogoni locality. The Nigerian National Petroleum Company (NNPC), a state enterprise, engaged Shell Petroleum Development Corporation (SPDC) in a joint-venture of which SPDC's operations in the Ogoni region allegedly precipitated in ecological damage and health concerns upon the Ogoni population. The African Commission on Human and Peoples'

⁸⁴ Monash University 'Human Rights Translated A Business Reference Guide' available at <http://www.law.monash.edu.au/castancentre> (accessed 12 November 2015). See also Bilchitz Corporate Law and the Constitution: Towards Binding Human Rights Responsibility for Corporations' note (77 above)766; D Kinley & J Tadaki 'From Talk to Walk': The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law*993-994.

⁸⁵UN Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development : noted by the United Nations High Commissioner for Human Rights, 17 November 2008, A/HRC/10/24, available at: <http://www.refworld.org/docid/49a5223b2.html> (accessed 6 Feb 2016) 14.

⁸⁶ A Clapham & S Jerbi 'Categories of Corporate Complicity in Human Rights Abuses' Based on a background paper for the Global Compact dialogue on the role of the private sector in zones of conflict (2001) 339.

⁸⁷A. J. C. Gatto 'The European Union and Corporate Social Responsibility: Can the EU Contribute to the Accountability of Multinational Enterprises for Human Rights'? (2002) 32 *Institute for International Law*.

⁸⁸ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were agreed upon by a group of experts on the occasion of the 10th anniversary of the Limburg Principles in 1997. The Maastricht Guidelines can be found in UN Doc. E/C.12/2000/13, 20/3 *Human Rights Quarterly* 691-704.

⁸⁹*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (note 2 above); Communication 137/94,139/94,154/96,161/97(joined), International PEN and Others (on behalf Of Saro- Wiwa) Vs Nigeria (2000)AHRLR 212 (ACHPR 1998).

Rights uncovered human right abuses in the said case from the lenses of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights. Accordingly, it appealed to the new political regime in Nigeria to wholly encourage and safeguard the ecosystem, well-being and sustenance of the Ogoni population. As a result of the Ogoni case, it has generally been accepted that under international human rights law, states have the duty to 'respect', 'protect', 'fulfil' and 'promote' human rights.⁹⁰ These obligations apply equally to all rights, depending on the circumstances.⁹¹ It is important to note that while the obligations to respect, protect, fulfil and promote human rights are state based, there is an emerging position, as shall be made manifest in the ensuing section, that directly or indirectly corporations as legal entities have similar responsibilities.

The section below highlights the soft and hard laws which obligate and/or recommend states and corporations to respect, protect, fulfill and promote human rights. Under the UN level, the Universal Declaration of Human Rights (UDHR),⁹² the International Covenant on Civil and Political Rights (ICCPR)⁹³ and (ICESCR)⁹⁴ exist as hard laws while instruments such as the United Nations Global Compact (UNGC),⁹⁵ the Guiding Principles on Business and Human Rights (Guiding principle)⁹⁶ exists as soft laws. International instruments under the Regional level also exist as soft laws and these include; the OECD guideline and the Extractive Industries Transparency Initiative (EITI). Under the African regional system, the African Charter of Human and People's Rights, represents one of the primary instruments ratified by all member states of the African Union.⁹⁷

Most African countries have increasingly signed and adopted these Regional instruments. For example, Burkina Faso, Liberia, Ghana, Mozambique, Niger, Nigeria, Madagascar, the United Republic of Tanzania and Zambia have adopted the EITI principles.⁹⁸ Some countries, notably Liberia and Nigeria, have taken a step further and developed legislation to require the adoption

⁹⁰ See for example the OECD Guidelines for Multinational Enterprises 2011 Edition, the UN Global Compact (UNGC) and The Guiding Principles on Business and Human Rights (Guiding principle).

⁹¹ H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy*(1980) 52

⁹² Adopted 10 December 1948, UNGA Res 217 A(III).

⁹³ Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

⁹⁴ Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3

⁹⁵ The Global Compact of the United Nations, is an initiative launched in 2000 by Secretary General Kofi Annan, is based on nine major principles encompassing human rights, labour standards and environmental sustainability, integrating as well the ILO's Declaration on fundamental principles and rights which is qualified this way as universal social standard

⁹⁶ The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

⁹⁷ C Heyns 'Human Rights in Africa' (2004)1

⁹⁸ United Nations Economic and Social Council Committee on Food Security and Sustainable Development E/ECA/CFSSD/6/7 29 Sept 2009. 7

of EITI principles. Unfortunately, South Africa is yet to adopt the EITI principle but have adopted the OECD Guideline. Regrettably, these initiatives are largely voluntary and depend upon the interest and will of countries to assimilate and enforce the standards and rules that emanate from them.

At sub-regional level, there are concrete steps towards harmonizing the regions national policies, laws and regulations and developing common standards to create a uniform platform to regulate CSR. The researcher, however, limits the scope of study to Southern African Development Community (SADC) because South Africa, which is the focal point of study, is a component of SADC.⁹⁹

In 2006, SADC adopted a Framework for the Harmonization of Mining Policies, Standards and Regulatory Frameworks.¹⁰⁰ The framework emphasises the need to have uniform governance and CSR standards which will encourage public participation and benefits that accrues from mining operations. The framework advances women participation in the mining sector, based on the SADC Gender Protocol. The SADC Industrial Development Policy Framework is premised on the following guiding principles: Responsiveness which requires that regional interventions and measures should be aligned to the broader SADC objectives of reducing poverty, creation of employment and sustainable livelihoods.¹⁰¹ The policy is focused on industrial development as opposed to providing mechanisms wherein states and corporate institution alike will respect, protect, fulfil and promote the actualisation of socio-economic rights. It is worthy of note that at the UN and Regional level, the guiding principle and the new OECD guidelines represent the most recent and non-penal attempt, at bringing corporations in line with international human rights, corporate transparency and accountability. Hence, in the light of the above summations which present an overview of international instruments that designate both states' and corporations' obligation to respect, protect, fulfill and promote human rights, below, the researcher reviews the above-mentioned instruments in connection with states and corporate institutions' human rights obligations.

⁹⁹ The Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS) and the Economic and Monetary Union of West Africa (UEMOA).

¹⁰⁰ Southern African Development Community Secretariat Implementation Plan for the harmonisation of Mining Policies, Standards, and Legislative and Regulatory Frameworks in Southern Africa ECA/SA/Tpub/2008/01 April 2008

¹⁰¹ *Supra*12

2.3.3 Obligation to respect human rights

The obligation to respect human rights requires states to desist from participating in or encouraging conduct that has the effect of encroaching on the people's honour or encroaching on their liberties therein in relation to the utilisation of substantial or supplementary resources at their disposal in a manner they find fitting to satiate their economic, social and cultural freedoms.¹⁰² Danilo Türk prescribes that states are obliged, regardless of their level of economic development, to ensure respect for minimum subsistence rights for all.¹⁰³ In addition, the Maastricht Guidelines suggests that scarcity of resources should not relieve states of certain minimum obligations in respect of the realisation of socio-economic rights.¹⁰⁴ States obligation to respect human rights should protect citizens from arbitrary interference with the enjoyment of socio-economic rights.¹⁰⁵ For example, it is essential that states respect its citizens by not arbitrarily evicting them from their houses/land. In support of this notion on arbitrary evictions, CESCR General Comment No 4 on the right to adequate housing prescribes that states forced evictions are *prima facie* incompatible with the requirements of the CESCR,¹⁰⁶ and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.¹⁰⁷ The said provision on forced eviction was further expanded in the committees General Comment No. 7 which affirms that “the state itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions”. In this way, by not evicting anyone arbitrarily, states are ensuring respect for that individual's right to adequate housing. States that ratify the ICCPR Covenant are obliged to respect the rights it articulates. Article 1(3) provides that:

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories shall promote the realization of the right of self-determination, shall respect that right, in conformity with the provisions of the Charter of the United Nations.

People have the right of self-determination to pursue their economic, social and cultural development and it is the duty of the state to firstly respect such rights.

¹⁰²UN Economic, Social and Cultural Rights Handbook for National Human Rights Institutions (2005) *Professional Training Series* No.12

¹⁰³Special Rapporteur Danilo Turk, The New International Economic Order and the Promotion of Human Rights, Realization of Economic, Social and Cultural Rights, Progress Report Prepared by Mr. Danilo Turk, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1990/19 (July 6, 1990).

¹⁰⁴ Limburg Principles 25-28, and confirmed by the developing jurisprudence of the CESCR

¹⁰⁵ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (note 85 above). guideline 10.

¹⁰⁶ CESCR - The Committee's General Comment No. 4 on the right to adequate housing (1991)

¹⁰⁷ *Supra* 18

The proposition that states have the primary responsibility for ensuring respect for human rights, including ensuring that transnational corporations and other business enterprises respect human rights is likewise reaffirmed by soft laws related to CSR. For example, the draft norm recognises that the primary responsibility to respect human rights is incumbent on states but that corporations and other business enterprises as well bear this duty “within their respective spheres of activity and influence.”¹⁰⁸ Guiding principle recommends that states should promote respect for human rights through their business transactions with corporate institutions.¹⁰⁹ For example, before signing into contract or an approval for sites for corporate project, states must enquire whether corporations had consulted with other stakeholders whose rights may be infringed. It is also essential for states to educate foreign corporations on domestic laws which relates to the rights and obligations of the host community to ensure that corporations respect human rights. Guiding principle 7 prescribes that states should help ensure that corporations are not involved in human right abuses especially in conflict affected areas. In addition, in anticipation that both state and corporations respect human rights, a new OECD guideline was introduced in 2011. The new OECD guideline recommends as follows:¹¹⁰

A new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework;

A new and comprehensive approach to due diligence and responsible supply chain management representing significant progress relative to earlier approaches.

Important changes in many specialised chapters, such as on Employment and Industrial Relations; Combating Bribery, Bribe Solicitation and Extortion, Environment, Consumer Interests, Disclosure and Taxation.

Clearer and reinforced procedural guidance to strengthen the role of the NCPs, improve their performance and foster functional equivalence.

A pro-active implementation agenda to assist enterprises in meeting their responsibilities as new challenges arise.

¹⁰⁸*ibid*

¹⁰⁹Guiding principle 6

¹¹⁰OECD Guidelines for Multinational Enterprises, OECD Publishing. available at <http://dx.doi.org/10.1787/9789264115415-en>(accessed Aug.2014) 3

Although states are the duty bearers of the obligation to respect human rights, in June 2008 the United Nations Human Rights Council underscored the importance that corporations similarly have similar responsibility. This notion is expressed in the UDHR which prescribes that:¹¹¹

Every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...”

While proponents against CSR may argue that they are not ‘organs of society’ or present arguments such as corporations are strictly for “business” and maximization of profit on behalf of the shareholders just to preclude the above binding provision, corporations should bear in mind that they do not operate in a vacuum and as such they are fundamentally part of society.

Similarly, the African Charter also does not have an express provision which directly regulates CSR. Nevertheless, it may be argued that non-state actors have legal duties which they are required to fulfil. Article 28 of the Charter prescribes that “(E)very individual shall have the duty to respect and consider his fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance”.¹¹²The South African Institute for Advance constitutional Public, Human Rights and International Law(SAIFAC) have argued that the Charter’s express inclusion of the duties of individuals in regard to the realisation of human and people’s rights as well extends to corporate entities.¹¹³It was further suggested that the African Charter could be interpreted in such that corporations may be bound directly to fulfil their human rights responsibilities, using regional mechanisms. For example The Working Group on Extractive Industries, Environment and Human Rights Violations, a special body under the African Union mandated to *inter alia* “inform the African Commission on the possible liability of non-state actors formulate recommendations” and “make proposals on appropriate measures and

¹¹¹ The preamble of the Universal Declaration of Human Rights (UDHR)

¹¹² African Charter on Human and Peoples Right Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986

¹¹³South African Institute for Advance Constitutional Public, Human Rights and International Law “The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System2010,;31-32. Other institutions and scholars’ have argued the existence of corporate obligation to respect, protect, promote and fulfil socio-economic rights. See the following; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/8/5, 7 April 2008 para 55 (the SRSG’s 2008Report). Recently the SRSG published the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/11/13 22 April 2009 (the SRSG’s 2009Report);S.Danailov ‘The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations’ (1998(10) *Sulgenbachstrasse*.33-34.O Olufemi ‘Corporate Social Responsibility of multinational oil corporations to host communities in Niger Delta Nigeria’ (2010)18*Ife Psychologia*. 25-26.

activities for the prevention and reparation of violations of human and peoples' rights by extractive industries."¹¹⁴ This suggest that the issue of CSR may fall within the mandate of working group.

A significant amount of soft laws in the form of international instruments have come to the fore, which elucidate corporate operational standards. Amongst these instruments is the draft Norm on the Responsibilities of Transnational Corporations and Other Business Enterprises hereinafter, draft norm. The draft norm is the first attempt to establish an international framework for mandatory CSR standards. The draft norm 10 recommends that international businesses as well as other corporations shall acknowledge and respect the relevant standards of international and domestic legal regimes; regulations; administrative observances; the rule of law; the shared interest; advancement goals; socio-economic programmes counting openness, responsibility, and a stop to corruption; and power of the states wherein the companies undertake their commercial activities.¹¹⁵The mentioned soft laws represent internationally acclaimed human rights standards expected to shape corporate governance and practices. It is expected that corporations shall apply and incorporate CSR norms in their contracts or other arrangements and dealings with other stakeholders.

In support of the position that corporations have a responsibility to respect human rights, The UNGC principle 1 read together with the Guiding principle¹¹⁶ recommends that all corporate institutions regardless of their size, geographical location, and activity should respect human rights.¹¹⁷ This recommendation brings to light the fact that irrespective of nature or power of corporate institutions, the necessity that these institutions respect human rights cannot be overemphasised. Guiding principles 11, 12 and 13 further prescribe that corporate institutions respect human rights and they should not infringe on the enjoyment of socio-economic rights of their host communities.¹¹⁸

The UNGC principle 2 in line with the Guiding principle 13 brought in a new concept wherein corporate institutions may disrespect human rights by partaking in human rights infringements. Complicity is referred to as conduct or omission to act by an enterprise, or an agent of an enterprise, having the effect of abetting another in perpetrating human rights breaches, with the

¹¹⁴The Working Group on Extractive Industries, Environment and Human Rights Violations available at <http://www.achpr.org/mechanisms/extractive-industries/> (accessed 08 Feb. 2017).

¹¹⁵Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003). Para E.10

¹¹⁶ Guiding principle 11, 12 and 13

¹¹⁷ Guiding principle 14

¹¹⁸ *Ibid*

corporation's awareness that such intervention could be of assistance¹¹⁹ Scholars have suggested that the definition of corporate complicity should be viewed under the guiding light of International law as a development of international criminal law to obligate respect for human rights. Transnational corporations have been found complicit for the abuse and or the infringement of the enjoyment of human right under international law through the principle of corporate complicity. For example, in *Doe v Unocal Corporation*,¹²⁰ the case involved several oil companies which in 1990 embarked on a joint-venture together with the Burmese government and the state oil company, Myanma Oil and Gas Enterprise (MOGE). MOGE was charged with the duty to supply labour and security for the erection of the gas pipeline project. Moge allegedly made use of forced labour and child labour to erect the pipeline, and was responsible for multiple encroachments, counting torture, and forced relocation committed during the period of clearing and security in the area. Even though Unocal as an associate was not a direct role actor in perpetrating these infringements itself, all the same its supposed participation in the pipe-line construction activities alongside the Burmese government and MOGE resulted in it being accountable for the violation of internationally recognised and protected human rights standards. The victims of forced labour and further gross human rights infringements in Burma filed a lawsuit against Unocal Corp. on grounds of the company's association with the Burmese military regime in a petroleum pipeline construction venture in terms of the U.S. Alien Tort law, which permits United States District Court of California to preside over matters involving foreign citizens for breaches of international human rights law. Unocal averred that international law is only applicable to states. The court in the said case observed, on the other hand that Unocal was claimed to have performed in terms of the State's power. The learned judge furthermore dismissed Unocal's defence by stating that customarily the slave trade was regarded as a breach of international law be it occasioned by an act of the state or a private entity.

The court held that, albeit corporations could be legally responsible in terms of the ATCA, Unocal was not legally responsible, as the plaintiffs were unsuccessful in furnishing proof to the extent that Unocal had intentionally contributed in the human rights abuses by the military. The plaintiffs appealed this decision, but Unocal decided to settle the matter before the trial for a considerable

¹¹⁹The commentary to Principle 17 of the Guiding Principles on Business and Human Rights. See also; Global compact 2; Human Rights Translated: A Business Reference Guide xvii; A Clapham & S Jerbi Categories of Corporate Complicity in Human Rights Abuses (note 83 above)

¹²⁰ *Doe v. Unocal Corp.*, (1996) 110 F. Supp. 2d 1294, 1306-07, (C.D. Cal. 2000)

undisclosed amount, compensating the Burmese inhabitants.¹²¹ Businesses can, therefore, be indirectly complicit in human rights violations.

In *Ken Saro-Wiwa v Royal Dutch Shell*,¹²² hereafter referred to as the Wiwa case was brought in the US under the Alien Tort Claims Act ¹²³by Ken Saro-Wiwa's relatives, the company (together with Nigeria's then military regime) which was accused of participating in a campaign "to discredit MOSOP leaders" and of using "force and intimidation to silence any opposition to their activities in Nigeria". Shell was likewise accused of complicity in the government's decision to execute MOSOP leaders, including the writer and co-founder Ken.

Accusations of complicity can arise in a number of contexts:¹²⁴ firstly from the lens of direct complicity, a company may be blameworthy when it provides goods or services that it knows will be used to carry out the abuse. Secondly, a company may be accused of being complicit if it benefits from human rights abuses even if it did not positively assist or cause them.¹²⁵ For example, instances where security forces suppress and oppress citizens on a legitimate peaceful protest against business activities and/or the use of repressive measures while guarding company facilities. Finally, a company may be accused of silent complicity when the company is silent or inactive in the environs of a systematic or continuous human rights abuse. (This is the most controversial type of complicity and is least likely to result in legal liability).¹²⁶ Strengthening this position, Bilchitz observes that most corporations often operate in states that violate human rights and hence suggested that corporations should not only be held accountable if they are complicit-directly in human right abuses and/or infringement of the enjoyment rights but also when they are silent in the instance of human right abuses.¹²⁷ In support of Bilchitz's premise, Ruggie similarly submits that silence complicity is tantamount to a substantial contribution to a crime signifying

¹²¹ *ibid*

¹²² *Ken Saro-Wiwa v Royal Dutch Shell*, (note 68 above)

¹²³ The Alien Tort Claims Act stands as the contemporary codification of a provision of the Judiciary Act of 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Thus, for subject matter jurisdiction to vest, three elements must exist: (1) the plaintiffs must be aliens, (2) the claim must be for a tort, and (3) the tort must violate the law of nations or treaties of the United States. the United States (U.S.), directors' duties are informed by the wider legal liability landscape, which includes such statutes as the Alien Tort Statute, used so far in over 40 cases to sue companies in tort in US courts for human-rights related abuse abroad.

¹²⁴ Global Compact Principle two

¹²⁵ Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibility for Corporations' (note 77 above). See also J Ruggie Promotion and protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights to development; Clarifying the Concepts of "Sphere of influence" and "Complicity" Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, A/HRC/8/16
15 May 2008.

¹²⁶ Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibility for Corporations' (note 77 above) 787

¹²⁷ *ibid*

that a company may be an accomplice when it knowingly legitimises or encourages the perpetration of the crime.¹²⁸

2.3.4. Obligation to protect human rights

The obligation to protect human rights requires states and its agents to prevent the violation of any individual's rights through the enactment of law or by adopting other indirect measures such as monitoring and prohibiting harsh or intolerable working conditions within their jurisdictions. It is expected that states should not only be reactive in thwarting violations and/or preventing the enjoyment of human rights but likewise should take pro-active measures in curbing human right abuses. States should similarly guarantee access to legal remedies for any victims of human rights abuses. For example, states are obliged to protect communities on instances where corporate institutions extensively utilize scarce resources such as water at the detriment of the local communities or utilize minors for labour purposes. Article 7 of the ICESCR prescribes that States ought to safeguard the right to an income that enables employees to obtain fair income and remuneration commensurable to the services provided. Furthermore, that income need also be sufficient for them to afford a modest life for them and their kin. A minimum wage has to be 'fair' and facilitate families' to enjoyment rights relevant to ideal life conditions counting acceptable nutrition, apparel and shelter. Moreover, the state ought to enact statutes that secure corporations' adherence to international employment benchmarks, while checking for compliance with these yardsticks by way of a labour inspection service. The Maastricht Guidelines¹²⁹prescribes that:

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which the exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

The Commentary to the Maastricht Guidelines prescribes that states should be held responsible for corporate human right abuses if it fails to exercise due diligence in controlling corporate behaviour. Likewise, the Committee on Economic, Social and Cultural Rights (CESCR)¹³⁰ stated in its General Comment No.12 on the right to adequate food that the obligation to protect requires

¹²⁸ J Ruggie 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights including the right to Development'(note 122 above)

¹²⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights(note 85 above) guideline 18.

¹³⁰ The general comments of the Committee on Economic, Social and Cultural Rights and of other United Nations human rights treaty bodies are to be found in United Nations document HRI/GEN/1/Rev. 6.

states to take measures to ensure that corporate institutions or individuals do not deprive individuals of their access to adequate food.

In relation to states obligation to protect its citizens from forced evictions, the CESCR on the right to adequate housing¹³¹ urges states to ensure that it enacts laws and take alternative strategies sufficient to avert and, if fitting, penalise involuntary evictions done short of correct precautions, by non-state entities. Premised on the above, it was proposed that the domestic human rights entities are significant role actors in securing and encouraging socio-economic and cultural freedoms. The Guiding principle 25 correspondingly proposes that as an aspect of states' obligations to safeguard liberties from encroachment by third parties, in this case businesses, states need to adopt suitable means to guarantee, via judicial, administrative, parliamentary or alternative ways that in case of violation of rights inside their jurisdiction the victims will can obtain sturdy redress. The guiding principle¹³² in this sense suggests the creation of institutions that will monitor and implement the recommendations as contained in the guiding principle. Examples of such institutions recommended include courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions and National Contact Points under the Guidelines principles, ombudsmen, supporting officials and government-run complaints offices. In the Ogoni case, it was held that the Nigerian government failed to regulate, monitor and investigate the behaviour of the oil companies in Ogoni land. Hence government failed to protect the Ogoni people from the harmful activities of third parties.¹³³

Like-wise in relation to company's responsibility to protect human rights, companies' may directly or indirectly fail to protect the life and safety of their employees or the environment if they fail to take preventive measures in addressing their negative impact. For example, if corporations indiscriminately dispose their waste products in the environment which may lead to the death of living organisms in the environment. In addition, corporations may impact the right to privacy if for example IT or telecommunications companies fail to protect their clients' information from unauthorized users. In 2006, it was reported that America Online (AOL) failed to protect the rights to privacy of its users. AOL through its activities exposes confidential information of over 650,000

¹³¹ General Comment No. 7: The Right to adequate housing (art.11, para.1 of the Covenant on forced evictions (1997);

¹³² Guiding principle 25

¹³³FonsCoomans 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 International and Comparative Law Quarterly, 749-760.

of its users relating to their names, social security numbers, and information on medical conditions.¹³⁴

2.3.5 Obligation to promote human rights

States obligation to promote human rights requires states to enlighten the public of their rights and the manner in which they can exercise such rights in longer term. This can be done through teaching and public education of their rights and responsibilities.¹³⁵ Hence the OECD guideline suggested that there is a necessity for domestic human rights bodies to uphold socio-economic rights. In upholding human rights, domestic human rights bodies serve multiple roles fitting the security and preferment of rights, namely: management of grievances, conducting inquiries, checking the discharge of responsibilities espoused in human rights agreements, give advice to the government on the internal relevance of international human rights agreements, proposing policy modifications and rendering guidance and communal edification. On the other hand, in order to effectively focus on socio-economic rights, domestic human rights bodies require a detailed appreciation of the legal character of such freedoms and pertinent State duties stemming from international and national regulations. These bodies additionally must delve into the scope of their directives, evaluate their core and exterior means and remedy the issues connected to the execution of socio-economic rights actualisation.

The ICESCR provides in article 11 that states are obliged to promote adequate standard of living for members of the society. This obligation covers the right to adequate food, clothing and housing, access to water and sanitation and to the continuous improvement of living conditions. States have to intervene in corporate affairs in the light of corporate abuses or potential abuse of human rights of host communities and take appropriate steps to mitigate the impact of such abuse. Article 12, 13 to 14 like-wise mandates states to promote the right to good health and education respectively. These rights include; adequate nutrition, housing, safe and potable water, adequate sanitation, medical supplies, healthy working conditions and a healthy environment. To promote human rights entails the encouragement of corporate institutions to contribute meaningfully to the enjoyment of rights through their philanthropic gestures. For example, their philanthropic responsibility should be channelled towards actualising basic socio-economic needs rather than beauty pageants and the likes and such charity should be monitored. Instances where there are conflicts of rights, for example right to cultural development and right to clean portable

¹³⁴Monash University Human Rights Translated (note 81 above).

¹³⁵*Supra* 74.

water, a scale of preference as to which rights are paramount at a point in time should be considered.

Like-wise, corporate institutions are encouraged to promote human rights. Efforts at advanced CSR are approaching a period where the span underlying obligations is getting reshaped. Within the area of human rights, there is an increased belief that companies must try by all means necessary to advance international human rights ideals.¹³⁶ Robinson accordingly notes that the issue of concern is calling upon corporates to advance human rights in their areas of influence as opposed to corporates usurping the function of the state.¹³⁷ For example, companies may promote enjoyment of the right by educating the public in appropriate circumstances, about laws that curtail their rights. A critical look at the preamble of UDHR prescribes that:

every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance

It is worthy of note that corporations do not operate in vacuity, they are fundamentally not just part of the society but furthermore an organ of the society. Hence, they have a moral and social obligation to respect and promote the universal rights enshrined in the UDHR.

2.3.6. Obligation to fulfil human rights

States obligation to fulfil human rights means that state must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood. Obligation to fulfil can be viewed from two perspectives.¹³⁸ Firstly the obligation to fulfil means to "facilitate" the enjoyment of human rights. Hence, states are required to take positive measures that will enable it to assist individuals and communities to enjoy socio-economic rights¹³⁹. Secondly, obligation to fulfill human rights may also mean that states provide socio-economic needs such as; the right to education, clean environment, access to adequate housing and health care, water and social security.¹⁴⁰ Ultimately, the obligation to fulfill is constituted by effective mechanisms employed by the state to essentially ensure that all individuals within its territory is afforded a chance to enjoy all socio-economic freedoms that cannot be actualised solely by own endeavour.

¹³⁶ A Clapham & S Jerbi 'Categories of Corporate Complicity in Human Rights Abuses' (note 83 above).

¹³⁷ M Robinson 'The business of case for human rights' (note 12 above) 754.

¹³⁸ UN Economic, Social and Cultural Rights Handbook for National Human Rights Institutions (note 100 above) 18-19.

¹³⁹ *Ibid.*

¹⁴⁰ *ibid*

In relation to states obligation to fulfil (facilitate), states may under the domestic sphere of operation, embark on positive measures such as undertaking parliamentary and policy evaluation of every regulatory regimes bearing adverse effects on the actualisation of socio-economic rights. Article 2 enshrines the universal duties of states apropos of the actualisation of the above-mentioned rights while recognising that not all states are endowed with sufficient resources to guarantee maximum actualisation of all rights, nevertheless, states are employed to progressively realize basic socio-economic rights.¹⁴¹

In relation to states obligation to fulfill (provide) socio-economic rights, states are required to allocate adequate proportion of public spending towards gradual actualisation rudimentary socio-economic necessities like infrastructure, water, energy, hygiene, warmth, waste management, drainage, transportation infrastructure, health-care amenities and crisis facilities. To achieve this, state with the assistance of corporate institutions have to develop targeted plans of action and strategies on actualising socio-economic rights, within specific time frames.

In similar fashion to states, it may be argued that corporations also have the responsibility to fulfill human rights. Danilo Türk, the former Special Rapporteur on the realisation of economic, social and cultural rights opines that all actors (corporations included) should ensure that the policies, projects, perspectives and programmes embarked upon do not prejudice the actualisation of socio-economic rights or prevent states from fulfilling the realisation of such rights. Corporations are expected to make a meaningful contribution towards the fulfillment of socio-economic rights, by supporting human rights-related initiatives in the communities where they operate. For example CSR should be aligned with states efforts to fulfill basic socio-economic rights such as the right to health, adequate housing etc. Hence, states efforts towards the protection of individuals against corporate interference of the enjoyment of socio-economic rights may necessitate the review of corporate laws, policies, regulations or other directives which may have any negative influence on the fulfillment of socio-economic rights.

Corporate institutions have disingenuously resorted to philanthropic gestures over the years to superficially contribute to the actualisation of socio-economic rights. Such is the problem with philanthropic gestures that corporations benefit from claims to have been socially responsible while on the face value such claims of being socially responsible are only seen on papers. In

¹⁴¹ *Ibid*

addition, such philanthropy is not directed towards the fulfillment of core socio-economic rights and lastly, most CSR initiatives are bias and unbeneficial to the rural communities. It is an undisputed fact that corporate institutions have identified with philanthropic CSR, and have engaged in philanthropic gestures. Nonetheless, the challenge is the absence of a mechanism to monitor the implementation of philanthropic initiatives.

Given the inadequacy of laws and mechanisms that can hold corporations directly accountable for the actualisation of socio-economic rights under international law, it is then pertinent that more focus should be directed at states under domestic law to protect and promote the actualisation of socio-economic rights as established in international covenants and CSR standards. States have the right to prescribe under domestic laws, the conditions under which corporate institutions may operate within their jurisdictions.

2.4 Application of international human rights standards in the South African domestic context

Owing to the efforts of human rights advocates, the international community has at present increased focus on socio-economic rights and their relevance to national law acknowledging the inadequacy simply of merely stating the significance and indispensability of socio-economic rights to human dignity. So as to internalise international human rights law South Africa has to ratify international conventions, adopt them in its domestic laws safeguard the rights and provide strong domestic and international remedial mechanisms.¹⁴²Lately, in an effort to domesticate International laws, the South African government ratified the ICESCR on 12 April 2015. Ratifying the Covenant represents an important step in reinforcing the need for the progressive actualisation of socio-economic rights as entrenched in the South African constitution.¹⁴³It has further adopted other instruments at the UN level such as the UNGC) in the Companies Regulation 2011 hereafter called Regulation 2011.¹⁴⁴The Guiding Principle came into force after the enactment of Regulation 2011, hence its exclusion in Regulation 2011.

At the Regional level, the South African government is a member of the OECD and has enshrined the OECD principles and its CSR standards in the Regulation 2011.¹⁴⁵At the sub regional level,

¹⁴²*Ibid.*

¹⁴³ESCR-Net International Network for Economic, Social & Cultural Rights The Government of South Africa ratifies the ICESCR available at <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (accessed 02 Feb 2017).

¹⁴⁴Adopted through National instruments.

¹⁴⁵Companies Regulation 2011 No. 34239 Government Gazette, 26 APRIL 2011.Regulation 43,

South Africa falls under the SADC which in 2006 adopted the Framework for the Harmonization of Mining Policies Standards and Regulatory Frameworks that relates amongst others to corporate governance, environmental management and social/people-based issues in the mining sector.¹⁴⁶

The application of International law in South Africa's legal system is reinforced by Section 39 1(b) of the constitution which stipulates that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. The said section contains peremptory provisions which denote that when interpreting the Bill of Rights, a court, tribunal or forum must make value judgments that are aimed at promoting the values which underlie an open and democratic society based on human dignity, equality and freedom), and must have regard to international law. Section 233 of the constitution also prescribes that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". For example in *Glenister v President of the Republic of South Africa and Others*¹⁴⁷ Ngcobo CJ enunciated the significance of international law to the constitution as follows:

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.¹⁴⁸

In *S v Makwanyane*, the constitutionality of the death penalty was challenged on behalf of the accused on the bases that the imposition of the death penalty for murder was cruel, inhuman and degrading. Relying on the use of international law to deliver the judgment in the said case, Chaskalson P referred to the European Court of Human Rights and the United Nations Committee on Human Rights whose deliberations are informed by *travaux preparatoires* as described by article 32 of the Vienna Convention on the Law of Treaties¹⁴⁹ and the Vienna Convention on the Law of Treaties.¹⁵⁰

¹⁴⁶ Southern African Development Community Secretariat Implementation Plan for the harmonisation of Mining Policies, Standards, and Legislative and Regulatory Frameworks in Southern Africa (note 98 above).

¹⁴⁷ 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

¹⁴⁸ *Supra* para 97

¹⁴⁹ *S v Makwanyane* 1995 6 BCLR 665 (CC) para 16 and 17.

¹⁵⁰ *S v Makwanyane* 1995 6 BCLR 665 (CC). See also M Olivier 'Interpretation of the Constitutional provisions relating to international law (2003)6 *Potchefstroom Electronic Law Journal* 2.

Like-wise, the judgments by the Cape High Court and the constitutional Court in *Harksen v President of the Republic of South Africa and Others* reinforced the application of International law in South African courts. In the said case, the Federal Republic of Germany requested that Harkson a German citizen residing in South Africa be extradited to face charges of fraud. Both states acquiesced to the inexistence of an extradition agreement between them. Nevertheless, section 3(2) of the South African Extradition Act 23 contains a stipulation for extradition involving South Africa and foreign states where no effective extradition treaty exists. In a High Court judgment¹⁵¹, Van Zyl J dealt with the issue of whether the consent of the President in terms of section 3(2) of the Extradition Act is tantamount to an international treaty for in so far as section 231 of the constitution is concerned. With broad reliance on the teaching of publicists to elucidate on connotation of an international treaty, Van Zyl J held that in order to appeal to a legally enforceable treaty, the parties must intend to establish mutually binding responsibilities. The above synopsis resulted in the court's conclusion that given the noticeable lack of aim to establish mutually binding rights and duties in this instance, section 231 was not enforceable. The constitutional Court in confirmed the decision of the High Court in finding that the extradition resolution under section 3(2) was nothing beyond a national deed, which was at no time converted into a treaty through swapping diplomatic records.¹⁵²

Hence in relation to actualizing socio-economic rights in South Africa, relevant international law dealing with CSR that obligates states and corporate institutions alike should apply in South Africa and the legislative environment should reflect it. That this is indeed required can be buttressed by the applicability of the Bill of Rights to corporate institutions which is feasible in section 8(2) of the constitution. The section provides that 'the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

2.5 Conclusion

Considering the dynamism of International human rights law, it may be argued that the concept of human rights now transcends beyond the aspiration that states alone respect, protect, fulfill and promote socio-economic rights. Scholars and institutions in the modern human rights era, have argued that individual rights and the human rights system is constantly evolving in relation to corporate responsibilities towards the actualisation of socio-economic rights. To reinforce this

¹⁵¹Harksen v President of the Republic of South Africa and Others 2000 1 SA 1185 (CPD).

¹⁵²Harksen v President of the Republic of South Africa and Others 2000 2 SA 825 (CC).

notion, the chapter presented Carroll's CSR model which encompasses legal, economic, ethical and philanthropic CSR to explore the nexus between CSR and human rights and observed that indeed the concept of human rights cuts across all spheres of CSR including philanthropic CSR.

The chapter further examined relevant international human rights instruments under UN, regional, sub regional levels that are in the forms of hard and soft laws to evaluate states obligation to respect, protect, fulfill and promote socio-economic rights and the expected CSR international standards anticipated from corporate Institutions to actualise socio-economic rights. The chapter concludes on the notion that international human rights law generally does not impose direct legal obligations on business enterprises. Hence the premise that while states are the principal duty bearers of human rights, emerging standards in international human rights law reveals that corporate institutions also to an extent have similar responsibility. Also, through reference to the constitution and judicial practice, the chapter submits that International Human rights law is applicable to both the states and non-state actors alike- corporations included. The provisions relating to the applicability of International law is evident under section 231 233 and 39 respectively.

The next chapter examines relevant domestic normative and institutional frameworks in an attempt to evaluate their adequacy in relation to both corporate and government's obligation to respect, protect, fulfill and promotes the actualisation of socio-economic rights in the Republic of South Africa.

Chapter 3

Domestic legislation on human rights obligations with a focus on Philanthropic CSR

3.1 Introduction

Having dealt with international human rights standards relative to the domestic standards that are relevant to CSR activities, and the applicability of those standards within the South African domestic context, this chapter examines the adequacy or otherwise of current normative and structural CSR frameworks as a tool for the actualisation of socio-economic rights and its implications for a range of socio-economic rights and the State human rights obligations. This aids the ascertainment of the nature and extent of normative and institutional developments needed for CSR to be a means for adequate actualisation of fundamental rights.

3.2 Normative and institutional frameworks on CSR

In response to the growing public unease about the role of companies in relation to their social responsibility and the call for normative and institutional frameworks to guide CSR practices, the normative and institutional frameworks relevant to CSR are examined having in mind that the frameworks may most often overlap. Under the platform of normative framework, the researcher looked at the following; the pre and post constitutional era of the Republic of South African,¹⁵³ Companies Act,¹⁵⁴ Companies Regulations, 2011,¹⁵⁵ EE Act,¹⁵⁶ BEE Act,¹⁵⁷ Mineral and Petroleum Resources Development Act,¹⁵⁸ Mine Health and Safety Act,¹⁵⁹ Skills Development Act and the National Environmental Management Act.¹⁶⁰ The researcher placed more focus on SEC as an institutional framework.

3.3 An overview of legislative environment of CSR in South Africa

In apartheid South Africa, companies barely engage in CSR.¹⁶¹ This conception changed after 1994, when the ruling government tried to address the social imbalances by engaging in social projects and programs in the country.¹⁶² Thereafter, private and public sectors began to embrace philanthropic CSR initiatives on a self-regulatory basis. The need to regulate corporate

¹⁵³ The Interim constitution and the final Constitution of the Republic of South Africa.

¹⁵⁴ Companies Act (note 62 above).

¹⁵⁵ Companies Regulation 2011 (note 150 above)

¹⁵⁶ Employment Equity Act 55 of 1998

¹⁵⁷ Broad-Based Black Economic Empowerment Act 53 of 2003

¹⁵⁸ Mineral and Petroleum Resources Development Act 28 of 2002

¹⁵⁹ Mine Health and Safety Act 29 of 1996

¹⁶⁰ Skills Development Act 97 of 1998

¹⁶¹ Golden Gate 'Consulting Corporate Social Responsibility Course Handbook' (note 46 above) 5.

¹⁶² *Ibid.*

responsiveness came to lime light in 1992 when the South African Institute of Directors (IoD) issued the King Report on Corporate Governance in South Africa. The publication in question was the principal universal business governance code to deliberate on the concerns of stakeholders and about responsibility transcending the delimitation to shareholders. The King Committee acknowledged that “a proper balance needs to be achieved between freedom to manage, accountability and the interests of the different stakeholders.”¹⁶³The authors of the King Report on Governance for South Africa accordingly noted that in the African setting that corporate moral responsibility are encapsulated in the *Ubuntu*. Basically, in CSR context, *Ubuntu* translates to corporate communal support and respect for individuals, and the essence of interdependence in the communities it operates.¹⁶⁴

Subsequent developments include a review of the King I report in line with human right issues brought in the revised King II report.¹⁶⁵The King II report became the foremost universal business administration code to contain a section about combined viability reporting, necessitating that corporations report yearly about the scope and character of its social, change, principled, security and well-being as well as ecological management plans and activities. The report also reinstated the need for a good corporate code that describes what is meant by the term “Triple Bottom Line Reporting.” the concept which requires that profit, planet and people were taken into consideration when reporting on performance.

In 2009, the King Report was further revised into what is now King III. It is worthy of note that King I, II and III policies respectively emphasised the need for companies to acknowledge all stakeholders.¹⁶⁶ To strengthen this preposition, King III policy took a bolder step to compel listed companies¹⁶⁷ to embrace CSR or justify why they fail to do so.¹⁶⁸ Since the release of the King III, there have been significant global developments in corporate reporting, notably the release of the Integrated Reporting Framework by the International Integrated Reporting Council (IIRC) in 2013.

¹⁶³ D Sonnenberg, M Reichard & R Hamann ‘Sustainability Reporting in South Africa: Findings from the First Round of the JSE Socially Responsible Index’ (2004). *Interdisciplinary CSR Research Conference, Nottingham, International Centre for Corporate Social Responsibility*. See also; R Hamann, “Mining Companies’ Role in Sustainable Development,” (2003) *Development Southern Africa*, 238; G. J. Rossouw, A. van der Watt, & D. P. Malan, “Corporate Governance in South Africa,” (2002) *Journal of Business Ethics* 209.

¹⁶⁴The King Report on Governance for South Africa 2009, 61

¹⁶⁵*ibid*

¹⁶⁶ M Flores-Araoz ‘Corporate Social Responsibility in South Africa: More than a nice intention’ (note 13 above). See also Golden gate Consulting Corporate Social Responsibility Course Handbook (note 46 above) 5; Visser ‘Revisiting Carroll’s CSR Pyramid: An African Perspective’ (note 13 above) 44.

¹⁶⁷Companies listed in the Johannesburg stock exchange.

¹⁶⁸ M Flores-Araoz ‘Corporate Social Responsibility in South Africa: More than a nice intention’ (note 13 above).

The integrated reporting framework subscribes that corporations disclose their performance as it relates to how it has positively or negatively affected the economy, society and the environment.¹⁶⁹ While there is no formal requirement to apply the IIRC's Integrated Reporting Framework in corporate governance the concepts and principles introduced by the IIRC have been reaffirmed in the draft King IV Code.¹⁷⁰

The new draft king IV report reinforced the need for the establishment of SEC as best practice for all organizations.¹⁷¹ The King IV report recommends that the role of this committee should go beyond the functions listed in the Companies Act, and be extended to include matter as; ethical behaviour and ethics management, the role of stakeholders in the governance process and consider the legitimate and reasonable needs, interests and expectations of stakeholders and as a matter of interest active stakeholders are required to hold the Board and the company accountable for their actions which relates to CSR. Interestingly, SEC has been further tasked to oversee fair and responsible executive remuneration practices in light of overall employee remuneration.

Nonetheless, the amendments made to the Kings reports as a whole seems overreaching. The reasons are not farfetched; the functions and role of SEC as indicated in the Kings report are vague and far from guiding corporate governance towards the actualisation of socio-economic rights. More so, the reporting, monitoring and implementation structures are not legislatively obliged or empowered to ensure that corporations streamline their corporate objective not only for profit making but also for the purpose of actualising socio-economic rights.

Aside from the foregoing, there are legislative interventions which although are not directly linked to philanthropic CSR but relate to CSR. The legislation are discussed as follows:

1. Constitutional framework

The advent of the constitution brought in a transformation of corporate governance code. It is important to note under South African law, that the Bill of rights takes prominence and applies to

¹⁶⁹The International Integrated Reporting Council available at The International<IR>Framework <http://integratedreporting.org/resource/international-iir-framework> (accessed 19 Aug 2016).

¹⁷⁰The Institute of Directors in South Africa Draft king IV Report on Corporate Governance for South Africa(2016). 15.

¹⁷¹*Supra*20 & 56.

all laws¹⁷² and all institutions either private or public.¹⁷³ Hence both natural and juristic persons have rights and obligation considering the nature and duty imposed by the right. These rights and obligations exist as vertical and horizontal relationships. Vertical relationships exist between a State and individuals (Juristic or natural persons) while horizontal relationships exist between private entities and natural persons.

The 1996 constitution does not have any reference to CSR, let alone how philanthropic CSR can be used to realise the actualisation of socio-economic rights. However as mentioned in the previous chapter, section 8(2) of the constitution provides as follows:

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

The provision of section 8(2) has direct bearing on the application of the bill of rights to natural and juristic persons. Arguably, in so far as the constitution recognises the application of International Human rights law and the application of the bill of right to natural and juristic persons, then the obligations pertaining to CSR under international human right law applies to juristic persons including corporations. Despite this argument, it is clear that there is no specific provision that addresses CSR issues in the constitution. Hence, the actualisation of socio-economic rights through constitutional provisions will be challenging let alone relying on philanthropic CSR to actualise socio-economic rights. Aside from the constitutional provisions, there are other legislative interventions which although are not directly linked to philanthropic CSR but relate to CSR. The legislation are discussed as follows:

i. Employment Equity Act (EE Act) Act No. 55 of 1998

It is important to note at this juncture that the EE Act is only binding on businesses that engage above 50 employees or companies within the Agricultural industry with yearly revenue greater than R2 million.¹⁷⁴The above statute is targeted at upholding rational and uniform action towards every individual. The statute stipulates that businesses formulate a work-place equity policy mapping the corporations' strategy to ensure occupational parity and render a year on year

¹⁷² Sec 8(1) of the South African Constitution prescribes that The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

¹⁷³ Sec 8(1)

¹⁷⁴Equity Act No. 55 of 1998 Schedule 4.

account of its developments in this respect.¹⁷⁵Section 24(1) of the Equity Act gives a directive to businesses to designate one or more high-ranking administrators assume the function of effecting and supervising the equity strategy. Nevertheless, the EE Act has no provision for a committee which will monitor and report issues relating to employment equity. The introduction of the EE Act is a welcoming development since it ensures that employers protect the rights to dignity and self-actualisation of their employees as part of their social responsibility. Nevertheless, the EE Act only addresses issues that relate to corporate economic responsibilities, aspect of philanthropic CSR which can actualise socio-economic rights is completely ignored.

ii. **National Black Economic Empowerment Act 53 of 2003**

The above Act establishes a national framework for the promotion of BEE and the Black Economic Empowerment Advisory Council. Additionally, it authorises the Minister to provide codes of good practice on BEE, as well as a scorecard to measure accomplishments, and encourage sector-specific BEE agreements that are considered to be in conformity with the aims of the Act. In an attempt to reinforce the functionality of the BEE Act, the IoDs in Southern Africa released a Practice Note on Broad-Based Black Economic Empowerment which provides guidance to a board of directors on how to integrate BEE and social transformation into its governance and established a committee similar to SEC to monitor social transformation.¹⁷⁶However significant this Act may look to CSR and efforts by the IoDs to empower black entrepreneurs, in view of the aims of the present study, the BEE Act does not make it imperative that companies participate in CSR undertakings let alone use philanthropic CSR to actualise socio-economic rights. The BEE Act has no provision whatsoever that directly mandates the practice of CSR. It is also unclear from the relevant legislation (BEE) Act and companies Regulation 2011), the committee that would be responsible for the monitoring and reporting of matters relating to Black empowerment and how the BEE Act will aid the actualisation of socio-economic rights. This presents a huge challenge with regards to socio- economic growth.

iii. **Mineral and Petroleum Resources Development Act 28 of 2002**

The Mineral and Petroleum Resources Development Act accords all mining rights to the State and necessitates that mining establishments reapply for mining permits, with Black economic

¹⁷⁵*ibid.* See also Employment Equity Act Sec 20. It stipulates the objectives to be reached for each year of the plan (sec 20(2)(a)) together with the procedures to be followed in order to monitor and evaluate the progress of the plan (sec 20(2)(f)).

¹⁷⁶ Kloppers 'Driving corporate social responsibility (CSR) through the Companies Act: An overview of the role of the social and ethics committee' (note 55 above) 174

empowerment enterprises being given preference. As such, mining corporations must exhibit due diligence in social and environmental issues, and directors may be held accountable for environmental destruction. Within the context of CSR, the most vital objective of the Act is Section 2(i) which obliges mining companies to fund the socio-economic advancement of the areas in which they carry out their business activities. The point to which businesses opt to conform to the statutory provisions is voluntary and is apparent in the extent of their CSR activities. Nevertheless, the Act does not create an ambiguous roadmap towards the achievement of socio-economic ideals. The researcher is of the opinion that this statute, like most statutes, is sector-specific and does not create a general imperative upon companies to contribute towards CSR activities and broader socio-economic development and resultantly, the meaningful adoption of the purport of the Act is at the discretion of the industry.

iv. Mine Health and Safety Act 29 of 1996

The above statute focuses on the need to decrease the amount of work-related injuries and deaths in the mining trade. It provides for multilateral structures that include business, labour and government, at all platforms of the industry in order to implement and monitor health and safety organisational schemes, over and above the determination of causes of accidents. This Act just like the Mineral and Petroleum Resources Development Act is industry-specific and does not cater for the broader socio-economic development which is encompassed by the framework proposed under this study.

v. National Environmental Management Act 107 of 1998

The preamble of the Act set down basic tenets that places an obligation on the State to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities. In an effort to achieve this aim, section 28(1) amongst others prescribes that

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring

The words “every person” as indicated by the provisions is vague. It may be argued that corporate institutions do not fall under the words “every person,” as such corporations will not be directly obliged to prevent pollution or the degradation of the environment. Hence, the vagueness in the

said provision will encourage corporations to pollute the environment and the hope that such provision will aid the actualisation of socio-economic rights.

vi. Skills Development Act 97 of 1998

Alongside the Skills Development Levies Act 9 of 1999, this Act requires companies to contribute a percentage of their total payroll to the National Skills Fund, which is controlled by 25 Sector Education and Training Authorities (SETAs). This statute aims at the actualisation of education related rights. Nevertheless the implementation of this Act leaves little room for utilisation of CSR contributions towards general access to education objectives as it places more emphasis on development of job-related skills.

3.4 The new Companies Act

Lately, large strides in terms of redefining how corporations engage in CSR came to light by the introduction of the new Companies Act.¹⁷⁷ The new Companies Act made no express provisions mandating corporations to embrace CSR. Read together, sections 66(1) and 76 of the new Companies Act,¹⁷⁸ imply that corporate governance are solely under the discretion of the company's board of directors and they are to act in the best interest of the company – that is to maximise wealth on behalf of the shareholders. The above provisions are fraught with problems in that it places no responsibility on corporate directors to respect, protect, promote and/or fulfill the enjoyment of socio-economic rights having in mind that corporate operation directly or indirectly impact negatively on the enjoyment of such rights.

In an attempt to regulate CSR, Section 72 of the new Companies Act authorises the Minister of Trade and Industry through the use of regulatory mechanisms to mandate corporations to establish SEC, which would monitor corporate governance and implementation of philanthropic CSR projects. On the 26th of April 2011, the Minister acted on this mandate and on 26 April 2011 released the Regulation 2011. ¹⁷⁹ Unfortunately, Regulation 2011 did not adequately address issues relating to CSR. In the said Regulation introduced new requirement that every state owned company, every listed public company, and any other company that has in any two of the previous five years, scored above 750 points in terms of Regulation 26(2) or would have so scored if the

¹⁷⁷71 of 2008.

¹⁷⁸Companies Act (note 62 above).

¹⁷⁹ It provides that every state owned company, listed public company and any other company that has in any two of the previous five years, scored above 750 points in terms of regulation 26(2) must have a Social and Ethics Committee.

Act had been in effect at that time must have a SEC.¹⁸⁰ Regulation (43)(5)(ii)(bb) mandates SEC to monitor corporate contribution towards community development and to record all forms of corporate philanthropy such as sponsorship, donations and charitable giving. In spite of the above legislative CSR framework and the creation of SEC, their power to implement the provisions of the regulations are relatively weak and inept to address philanthropic CSR challenges.

A holistic view of CSR under the platform of institutional deficiency reveals a number of problems. The first problem is that SEC as an institution is not constituted in such a manner that encourages its directors to be committed to philanthropy CSR. Regulation 43(4) provides that SEC must constitute at least three directors or prescribed officers of the company and other committee members. It is unclear from the wording of the regulation whether other members of the committee will be from the same company having different portfolios or other stakeholders (the community, state agencies, NGO and others). If the regulation is read as it stands the composition of SEC will only be the company directors and/or employees. Thus, if section 76(2) of the Companies Act binds company directors to be loyal to and act in the best interest of the company, it would be a daunting task for SEC directors/committee members to instruct the board on what to do with the company's profits.

The second problem of SEC relates to normative and accountability deficiencies. Regulation 2011¹⁸¹ provides that SEC is to: monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to:

- (i) social and economic development, including the company's standing in terms of the goals and purposes of—
 - (aa) the 10 principles set out in the United Nations Global Compact Principles; and
 - (bb) the OECD recommendations regarding corruption;
 - (cc) the Employment Equity Act; and
 - (dd) the Broad-Based Black Economic Empowerment Act;
- (ii) good corporate citizenship, including the company's—
 - (aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;
 - (bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
 - (cc) record of sponsorship, donations and charitable giving.

¹⁸⁰Sec 72 (4) to (10).

¹⁸¹Companies Regulation 2011(note 143 above) Reg 43(5).

The existing laws and institutions mentioned therein do not adequately address the issues of corporate accountability and transparency with regards philanthropic CSR. For instance if corporate institutions fail to fulfill their mandate of being socially responsible, can they be sued? Who can sue them and what relief should be sought after in court? Likewise, who should SEC be accountable to if it fails to fulfill its mandate as provided for in Regulation 2011?

Finally, the role of SEC raises some institutional challenges with regards to monitoring and reporting philanthropic CSR. Regulation 43(5) (bb) and (cc) requires SEC to monitor and report company's activities such as corporate sponsorships, donations and charitable or philanthropic gestures in communities where they operate. The provision further prescribes that SEC's reporting should be done through one of its members, to the shareholders at the company's annual general meeting. Logically, company shareholders are profit oriented and their primary goal is to maximise profit returns for their investments. Hence, SEC reporting in the absence of a law which is meant to regulate philanthropic CSR will amount to mere talk which would yield no fruitful result but rather advance CSR as a philanthropic gesture.

A failure to address these issues render SEC a mere toothless bulldog and the legitimate expectation that businesses can contribute meaningfully into the realisation of socio- economic rights remains uncertain. Even so, the existing laws mentioned above and mechanisms to monitor the implementation of the laws are inept to address the challenges philanthropic CSR concerns. For example, Kloppers through a website survey of major agricultural companies operating in the North-West Province indicated that none of the companies observed have SEC operating at an executive level nor do they have directors with a dedicated CSR portfolio.¹⁸²This oversight indicates that CSR has not yet been fully integrated into corporate governance. The foregoing, in addition to its negative implications for the engagement of philanthropic CRS as a tool of achieving socio-economic rights, can undermine the delivery of the State's obligations towards socio-economic rights in South Africa. In view of the above, one may argue that the Companies Act which serves as the main legislative instrument that regulates corporate governance is inadequate to address CSR challenges. The actualisation of socio-economic rights through philanthropic CSR will remain uncertain. The next section discusses the implications of the inadequate legislative environment on CSR for socio-economic rights in South Africa.

¹⁸²Kloppers 'Driving corporate social responsibility (CSR) through the Companies Act: An overview of the role of the social and ethics committee' (note 55 above) 167.

3.5 Implications of legislative environment for Socio-economic rights

Socio-economic rights are justiciable rights enshrined in the South African constitution. It facilitates the access to basic needs of life which are vital for human continued existence and to lead a dignified life.¹⁸³ Socio-economic human rights may be sub divided into two categories: rights that concern the provision of goods and services that are targeted to meet societal needs for example, nutrition, shelter, health care, education and rights that are related to the provision of goods and services aimed at meeting economic needs for example, work and fair wages and an adequate living standard.¹⁸⁴The state and in certain instances, non-state entities, can be found liable for neglecting to respect, protect, promote and fulfill fundamental liberties.¹⁸⁵In other words, the state ought to desist from actions that increase the challenges encountered by individuals when enjoying such liberties and it ought to secure persons from infringement of their liberties and furthermore aid these individuals in satiating their rudimentary necessities. Legal measures need to afford sturdy redress in case of encroachment of these liberties.

Conversely, socio-economic rights do not only bind the state but could also apply in respect of the relationship between private entities that is corporate entities and private individuals. This premise is often a debatable issue and its full inference has not yet been resolved globally. Nevertheless, in the light of human rights, private individuals and corporations alike should not abuse and or infringe on the enjoyment of socio-economic rights. For example in *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd and Another*,¹⁸⁶ the plaintiff Lascon Properties (Pty) Ltd was in terms of a notarial lease agreement leased a particular structure. In accordance with the above-mentioned agreement the risk of damage to the leased infrastructure lay with the plaintiff. The first defendant Wadeville Investment Co (Pty) Ltd was the owner of a structure neighbouring the building rented by the plaintiff. It was common cause that the second defendant allowed acidic water to run-off from the structure of the first defendant resulting in damage to the building of the plaintiff contrary to the provisions in regulation 5(9) (2) of the Regulations decreed in line with the Mines and Works Act 27 of 1956 (which was still enforceable through s 68(2) of the Minerals Act 50 of 1991). The defendants opposed the plaintiff's claim for compensation on the grounds that the plaintiff was unsuccessful in proving that the defendants acted with either intention or negligence in letting acidic water runoff as prescribed by Regulation 5(9)(2). The presiding judge was called upon to address the issue as to whether the plaintiff

¹⁸³S Khoza *Socio-Economic Rights in South Africa: A resource book community law center*(note 139 above)20

¹⁸⁴C Heyns& D Brand 'Introduction to socio-economic rights in the South African Constitution' *Law, Democracy and Development* 2009

¹⁸⁵ S Khoza *Socio-Economic Rights in South Africa: A resource book community law centre*(note 139 above)20.

¹⁸⁶ 1997 4 SA 578 (W).

needed to aver and successfully prove fault as contemplated in regulation 5(9)(2). The defendants contended that simply barring an act does not create grounds for a claim for injury or compensation except where it is stated in unambiguously or by necessary implication by the law-makers. Its significant is limited to the ascertainment of the wrongfulness of the act.¹⁸⁷ With reference to the works of Professor McKerron and the Mines and Works Act,¹⁸⁸ the judge held that that regulation 5(9)(2) initially passed in order to enable the protection of the land-owners of polluted land as a consequence of the conduct of a mining corporation.¹⁸⁹ The court also found that it was not a requirement that fault be averred and proven.

The actualisation of socio-economic rights in South Africa is paramount because it caters for the vulnerable and disadvantaged groups in the society who most often than not are exploited by third parties and excluded from gaining access to resources, opportunities and services in society.¹⁹⁰ As will be pointed out in the preceding discussion, the failure of the government and corporations alike to respect, protect, promote and fulfill the actualisation of socio-economic rights have a negative impact on the right to an environment that is not harmful to their wellbeing, the right to have access to adequate housing, right to health care, water and social security and finally right to education. Hence, the implications of legislative environment for the substantive rights which form the core focus of the present study are discussed below

i. Environment

In terms of section 24 of the South African constitution every individual has the right to an environment that is not detrimental to their health or well-being.¹⁹¹ Additionally, the section provides that, everyone has a right to have the environment secured, for the benefit of current and coming generations, by way of reasonable statutory and other mechanisms designed to: avoid pollution and environmental dilapidation; encourage environmental preservation; and protect environmentally viable growth and utilisation of raw materials that encourages acceptable socio-economic advancement.¹⁹² This way, the constitution creates an imperative to strive for sustainable development which can be attained through methods that prevent environmental hazards as well as rehabilitate already damaged environment. In order to appreciate the scope of South Africa's environmental rights and how the current state of affairs regarding the actualisation of environmental rights complies with prevailing international human right standards,

¹⁸⁷ *Suprapara* 581G.

¹⁸⁸ 27 of 1956

¹⁸⁹ *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd and Another* (note 186 above) para 583C – D

¹⁹⁰ *ibid*

¹⁹¹ Act 108 of 1996 Sec 24(a)

¹⁹² *ibid*

one needs to examine the relevant international frameworks. To this end, environmental rights are subject to wide-ranging protection. According to the UDHR, nothing in the instrument may be construed as bestowing on any state or private entities any right to partake in any conduct targeted at damaging or violating any of the rights and freedoms enshrined in the instrument, or their limitation to an extent that exceeds the boundaries established by the Covenant.

The UDHR contains further safeguarding: the advancement of all facets of ecological and industrial sanitation; and, the combating, remedying and managing of epidemic, endemic and occupational ailments.¹⁹³ Cullet posits that it must however be mentioned that the achievement of what is pursued in the acknowledgement of environmental rights will by no means occur save for it being covered in a wider plan of action. Chiefly, the close distinction between the various branches of international law is not favourable to constructive exchanges between environmental and human rights law. Additionally, it is apparent at UN level that the most significant portion of the actualisation of environmental rights has to be undertaken by functional agencies.¹⁹⁴ In essence, the legal regimes governing environmental rights at international level are more specific in scope whereas in the South African domestic context it is left mostly to courts' interpretation of the relevant laws if one is to decipher the scope of environmental rights. Environmental challenges that have been experienced by South African include: extreme climate change due to high carbon emission; poor access to water and sanitation; increase in solid waste due to poor waste-disposal capacity, soil degradation which is resulting in lower agricultural yields, destructive intrusion of biodiversity, decline in air quality; and depletion of coastal and marine resources.¹⁹⁵

These problems continue to exist despite the existence of environmental protection laws such as the National Environmental Management Act 107 of 1998 and the Mineral and Petroleum Resources Development Act 28 of 2002. This is partly attributable to the fact that some of these laws only apply to particular industries as well as the fact that some enterprises are not willing to go beyond compliance with the minimum legal standards set. One may argue that the legislative framework as it relates to the protection of the environment has hitherto encouraged corporate incessant abuse of the environment.

¹⁹³ UDHR Article 5(b) and (c)

¹⁹⁴ P Cullet 'Definition of an Environmental Right in a Human Right context' *Netherlands Quarterly of Human Rights* (1995)13, p. 25.

¹⁹⁵National Planning Commission *National Development Plan 2030 Our Future-make it work; the Presidency Republic of South Africa* (2012)47.

The South African courts have attempted to address issues that relate to corporate responsibility as regards the environment but have not addressed in their judgements the issues of philanthropic CSR and how defaulting corporations can actualise the realisation of socio-economic rights since their negative impact on the environment extensively affect the community. In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company*¹⁹⁶Hussain J reinstated the need for corporations to act more responsibly as it relates to their social responsibility. The above case tackled matters concerning the prevention of water contamination in mining activities. The respondents were corporations that had previously or at that particular time worked on the gold mines in the Klerksdorp, Orkney, Stilfontein and Hartebeesfontein location (also referred to as KOSH). The mining operations involving the first and the sixth to tenth respondents in that area gave rise to state of affairs whereby the water below ground would have been contaminated if it were not drawn above ground and taken care of appropriately, ultimately leading to contamination of treasured water reserves. The Court observed that exercising strong business administration is vital to the health of a business and safeguards the fundamental concerns on the advancement of the Country's economy making it appealing to other investors. The said Judge placed much emphasis on corporate ethical leadership and corporate citizenship as highlighted in the King III policy declaring that the Board of Directors are expected to be exemplary to effective leadership. Hence, relying on the King Report on Corporate Governance to deliver its judgment, the court submitted that the respondent acted irresponsibly because they failed to take cognisance of the impact of water pollution in the community.

An overview of the above case indicates a positive step in making corporations accountable for degradation or pollution of the environment. Nevertheless, one may argue that the unfateful event may have not occurred if there was an efficacious legislation guiding corporate operations.

ii. Housing

Section 26 of the constitution guarantees every individual's right to have access to adequate housing.¹⁹⁷ The section provides that the state must take reasonable statutory and other measures, within its accessible resources, in order to attain the progressive realisation of the right to adequate housing.¹⁹⁸In as much as the wording of section 26 may seem to appeal more to vertical application of rights, that is state obligation towards its citizenry, one may argue that the section does not preclude corporate bodies from assuming responsibility for the progressive

¹⁹⁶Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company[2006] ZAGPHC 47 at para 16.7-16.9).

¹⁹⁷*Ibid*

¹⁹⁸ Act 108 of 1996 Sec 26 (2).

fulfillment of the right to adequate housing more so in the South African socio-economic context. A reading of the right to adequate housing significantly advocates that the duty to deliver sufficient housing may affect the state as well as other private entities in society and legislation must allow for the realisation of these ideals. The state ought to generate an environment that enables or promotes access to sufficient housing for persons of different socio-economic positioning.

This means that the state as the law-making authority can use legal means that enable private actors to contribute to the actualisation of rights of other private entities. This approach is known as the indirect horizontal approach. In terms of this approach, the application of fundamental rights in interactions between the state and private persons also caters for relationships between private individuals, based on an objective value system.¹⁹⁹This gives leeway for application of CSR efforts towards the realisation of fundamental rights.

However, there are fundamental difference in the scope and content of the right to adequate housing in international law and in South African domestic law. The case of Grootboom to be discussed below, illustrates this sentiment as well as the reluctance of South African courts to fully apply international human rights standards. As a precursor to the discussion of the above case, the researcher will now highlight the relevant human rights provision to this end, namely article 11 of the CESC. Article 11 of the CESC is of significance in understanding the positive obligations created by the socio-economic rights in the constitution as it relates to right to adequate housing. The Covenant provides that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

In an effort to interpret provisions of the South African constitution in line with article 11 of the CESC, Yacoob in *Government of the Republic of South Africa and Others v Grootboom and Others*,²⁰⁰ hereafter Grootboom case, positioned the interpretation of section 26 aside article 11 of the CESC and observed that there are two significant distinctions between the wording of section 26(1) of the South African constitution and the CESC which are essential to the

¹⁹⁹B Anand'Fundamental Human Rights- Vertical or Horizontal' (2008) *Lawyers' Club India*1.

²⁰⁰ 2001 (1) SA 46; 2000 (11) BCLR 1169.

ascertainment of the scope of application of the content of the Covenant and how the Covenant may influence the reading of Bill of Rights apropos the right to adequate housing.²⁰¹ In the said case, Mrs Irene Grootboom and fellow respondents were at the start of the cold, windy and rainy Cape winter, involuntarily ejected from their unsanctioned accommodation located on personal property reserved for official low-cost accommodation municipally funded. Amongst the claims was that the respondents' houses were demolished and set alight plus their belongings damaged prematurely and inhumanely before any formal consultative processes. The learned judge mainly observed that section 26 does not enshrine the right to adequate housing per se, but simply a right to have access to sufficient housing. This clearly goes to show that South African courts are willing to embrace international law but will not go as far as applying the minimum standards required by international law. This is because for the right to access adequate housing to qualify, there needs to be a right to housing in the first instance; and, if the sentiment holds true, then the above distinction by Yacoob J becomes unnecessary and an indicator of unwillingness to commit to a minimum standard on the part of South Africa. In this vein, the researcher opines that the idea of having a set minimum standard in human rights development helps us measure our progress in relation to the established standard, identify any gaps or discrepancies in terms of human rights actualisation deficits and gauge the extent of contribution that may be required in order to address such gaps.

The above court suggested that although the Covenant makes it imperative for signatory states to adopt 'appropriate steps' to actualise the right to sufficient living conditions, section 26 of the constitution states that the South African State ought to adopt 'reasonable legislative and other measures' in order to actualise the right to have access to sufficient housing.²⁰² Yacoob J also rejected the contention by friends of the Court (Amici) that the court should apply the minimum core principle of the ESCR Committee on the grounds that there was not enough facts at the court's disposal for the court to determine the minimum standards applicable to the right to housing.²⁰³ Accordingly, Bilchitz posits to the contrary that the comprehensive facts required by the above court were not essential to the summation of the universal intellectual ideals which delineate rudimentary housing necessities. To further support the above author's view, the unwillingness of the court to commit to a minimum standard on the right to housing, the learned judge ignored the point that the ESCR Committee had by that time made considerable developments in delineating the minimum standard of housing in one of its General Comments

²⁰¹At para 584

²⁰² At para 587.

²⁰³ At Paras 27- 36.

plus the government of South Africa had by that time conceded to the interpretation of 'adequate housing' in the Housing Code (a critical document in summarising South Africa's policy on housing). In illuminating the meaning of adequate, the above Code provides that the text pertaining to housing delivery is conversant with the provision in the CESC. According to that perspective, adequate housing is gauged through specific core considerations, which include: legal security of tenure; accessibility of amenities; resources, means and infrastructure; affordability, habitability, ease of access, location and cultural sufficiency. It is therefore arguable with a high degree of success that Yacoob J's reading of the substantive content of the right to housing has more limitations than the construal embraced by the National Department of Housing.

Granting that courts have the discretion to prescribe a constitutional standard below the one espoused in state policy, the courts approach on this matter points towards the court's lack of assessment of the policy at its disposal limiting its ability to have a balanced comprehension of the substance of states policy before making judgements on such policy's reasonableness or unreasonableness.²⁰⁴ The stance also indicates more about the courts unwillingness to address the issues relating to the substantive meaning of section 26 and less about the discrepancy between the contents of the constitution and that of the CESC.²⁰⁵ Yacoob J proceeded to distinguish the content of the right to adequate housing in the South African constitution and that in the CESC by initially describing what constitutes adequate housing in lieu of what adequate housing means. He later on delves into the idea of adequate housing wherein his reading apparently accommodates a wider view of adequate housing, stating out-rightly in the process that: the rights defined in section 26(1) is different from the one espoused in the CESC. The learned judge elucidates this sentiment by advancing the point that the distinction is important in that it acknowledges that the notion of housing transcends beyond bricks and cement, as it demands the availability of land, apposite amenities such as the delivery of water and waste management and the financing of all the above, in addition to the actual construction of the house. Therefore access to land is counted in the right to access sufficient housing. This also arguably shows the irony of the court's reluctance to apply the core minimum principle whereas the same court is willing to outline factors relevant to the quantification of the right to adequate housing.

The court thus acknowledged that the state's duty must be fitting to the situation, meaning planned policy ought to accommodate the rich as well as the destitute that need assistance in in providing

²⁰⁴ At para 592.

²⁰⁵ At para 593.

sufficient housing for themselves. In the same vein, some thought needs to be given to the geographical positioning of the persons in need of such support, for instance whether they are situated in rural areas or they are situated in developed urban areas and the fundamental discrepancies between the towns and cities.

In dealing with section 26(2) the learned judge held that the provision bestowed a positive duty on the part of the State to construct a detailed and pragmatic strategy to satisfy or discharge its obligations and that responsibility entailed that the State to adopt rational statutory and additional means for the purpose of actualisation of the rights enshrined in section 26(1) of the Bill of Rights.²⁰⁶ According to Yacoob J the above obligation is qualified in two primary approaches: firstly, it has to fall within the state's extant resources; and, it must be actualised on a gradual basis

In deciphering the meaning of 'reasonable measures, the learned judge omitted to reflect on the principles of the ESCR Committee which advocates that the state needs to prove that it indeed adopted intended, solid and specifically tailored measures to the actualisation of such right.²⁰⁷ The Court referred to General Comment 3 of the ESCR Committee in holding that the South African constitution carried a similar meaning to that in the CESCR.

The Court observed that this stipulation did not imply that the state could merely prolong deliberately, the actualisation of the right and the state had to act speedily and robustly towards the achievement of that objective.

Lastly, the learned judge noted that the duty upon the state to adopt rational steps is on the condition that there exists resources that enable the achievement of these objectives. Fundamentally, the condition that the state necessarily not simply satisfy the right within existing resources is distinct from the text of article 2(1) of the CESCR which stipulates that a state needs to adopt measures 'to the maximum of its available resources'²⁰⁸

In a debate on the make-up of signatory states' responsibilities in terms of article 2(1) the Committee contended for a 'minimum core obligation' so as to discharge the 'minimum essential levels of each of these rights' in CESCR. This therefore means that so as to comply with its duties

²⁰⁶ At para 595.

²⁰⁷ At para596.

²⁰⁸ At para604.

at international human rights law member states need to show that all possible attempts have been made to employ all available resources to actualise the pertinent rights.

South Africa has not been without issues in relation to housing and basic housing services. According to statistics from the Strategic Framework for Sustainable Development in South Africa, in 1994 there was a projected backlog of not fewer than three million houses, predominantly in urban areas, and that demand was projected to increase by about 200,000 yearly.²⁰⁹ Simultaneously, about 12 million of the houses were short of access to water and a further 21 million were short of sanitation amenities. Notwithstanding the state's important strides in providing houses, the amount of informal settlements doubled to 1.3 million in the 1995, 1999, and 2000 period; the infrastructural deficit was stagnantly in the range three and four million units. Correspondingly, regardless of developments in water and hygiene deliver, 40% of non-urban houses were short of water supply in 1999.²¹⁰

The above statistics ultimately shows that the legislative environment as it relates to provision of adequate housing units in South Africa are ineffective to aid the actualisation of socio-economic rights let alone encourage or compel corporations to be actively involved in the actualisation of socio-economic rights.

iii. Education

Section 29 of the South African constitution may be classified as a "hybrid" form of right due to the dynamic nature of rights embedded in the provision.²¹¹ In other words, while section 29(1) subsists as a socio-economic right and prescribes that "everyone has the right (a) to a basic education, including adult basic education" sections 29 (2) and (3) connote civil and political rights respectively. Additionally, as a civil and political right, section 29 (2) declares the freedom of choice, meaning right to decide on the language of teaching in state schools, while section 29(3) gives the right to choose in relation to private and public education through acknowledging the freedom to set up and manage autonomous educational bodies. The constitution guarantees every individual the right to a basic child education, adult basic education and to further education. The same clause places the State under an obligation to take rational steps in order to ensure

²⁰⁹ K Wilkinson Factsheet: The housing situation in South Africa (note 9 above).

²¹⁰ United Nations Global Compact Network (2007) 2.

²¹¹ Veriava and Coomans "Right to Education" 60. S 29(1) of the Constitution provides: "Everyone has the right (a) to a basic education, including adult basic education, and (b) to further education, which the state through reasonable measures, must make progressively available and accessible." As a civil and political right, the right to education provides freedom of choice, as s 29(2) confers the right to choose the language of instruction in a public educational institution, whereas s 29(3) grants the freedom of choice between private and public education by recognising the right to establish and maintain independent educational institutions.

gradual availability and accessibility.²¹²The subsequent clause accords every individual the right to obtain education in any of their preferred official languages in public educational establishments where that education is understandably feasible. With the purpose of ensuring the access to, and operation of, this right, the State must take into account all practical educational options, as well as single medium institutions, in view of equity, feasibility and the necessity of remedying the consequences of historical racially-prejudicial laws and actions. Hence, the hybrid nature of the constitutional right to education makes it so delicate in that it is far reaching and allows for extensive protection of the right to education.

Beyond the confines of South African domestic human rights law, the right to education is also guaranteed in international law. Article 26 of the UDHR provides that "everyone has the right to education" and that "education shall be free, at least in the elementary and fundamental stages." It further states that "[e]lementary education shall be compulsory." Article 13(2) of the ICESCR, in (a) and (b), obliges states parties to make primary education compulsory and free, whereas secondary education "shall be made generally available and accessible". The right to education furthermore enjoys extensive protection in South Africa judicial system. In the *Governing Body of the JumaMusjid Primary School & Others v Essay N.O. and Others*²¹³, the Court noted that it is paramount to have an understanding on the nature of the right to "a basic education" as enshrined in section 29(1)(a) of the South African constitution. In contrast to certain socio-economic freedoms, the above right is instantly attainable. There hardly any inherent restraint stipulating that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a rudimentary education in section 29(1)(a) may solely be restricted by dint of legally enforceable rules which are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". It follows from the above that the right is different from the right to "further education" enshrined in section 29(1)(b). Under this right the state ought to adopt rational means to ensure that further education is gradually delivered and is obtainable.¹²⁵

While all these instruments and judicial precedents reinforce the importance of actualising socio-economic rights, none of the instruments expressly illustrate how the right to education may be achieved through philanthropic CSR. It is unacceptable that the realisation of the right to education still stands as a mirage in South Africa as a result of the state's financial constraint. The Minister

²¹²Act 108 of 1996 Sec 29 (1).

²¹³ *Governing Body of the JumaMusjid Primary School & Others v Essay N.O. and Others* 2011 7 BCLR 651 (CC).

of Education, Angie Motshekga publicly conceded that South African educational institutions are in an emergency predicament. She observed that approximately 213 000 learners were unsuccessful in their grade 12 examinations in 2015 from an aggregate of about 800 000 added to huge amount of drop-outs. Learners were getting crammed into mini-buses and transported over long distances (with others exceeding 30km) to academic institutions in previously exclusively-white locations. Ms Motshekga intimated to BBC reporters that even twenty years after apartheid, the country has remained with the apartheid legacy. She stated further that, "we still have teachers who were not trained for the future".²¹⁴

The magnitude of the crises in the educational sector is more revealing from a World Bank research carried out in rural Limpopo in 2010.²¹⁵The research questioned 400 12-year-old learners to solve 7×17 . In doing this, the learners began by drawing 17 sticks and tallied them seven times. Around 130 from a group of 400 were successful. Over and above the broken-down condition of the education structure in the country, Professor Servaas van der Berg noted from the 1.2 million seven-year-olds that registered for Grade 1 in 2002; marginally below half proceeded to pass their grade 12 exams 11 years later.²¹⁶South Africa has a significant dispersed rural population for which it is difficult to provide satisfactory education services.²¹⁷There is poor infrastructure in many rural areas, where schools still operate in unsatisfactory buildings with poor facilities.²¹⁸The constitution of the Republic of South Africa provides for access to education for disadvantaged students (who traditionally are historically disadvantaged) through a uniform system for the organization, governance, and funding of Higher education.

However, the government has not fully subsidized education, even when students qualified for fee exemptions. In addition, parents who were poor had difficulty paying for the university fees, accommodation, feeding and other necessary supplies.²¹⁹The weight of evidence supporting the premise that there is an on-going crisis in South African education, and that the current system is failing the majority of South Africa's youth is the "fees must fall saga."²²⁰Responding to the question asked by the Democratic Alliance party on the state of the Higher educational system in the country and the "fee must fall saga," the Higher Education Minister Blade Nzimande noted

²¹⁴ Milton Nkosi 'Is South Africa's education system really 'in crisis'? BBC News, Johannesburg 29 January 2016

²¹⁵ *ibid*

²¹⁶ *ibid*

²¹⁷ *ibid*

²¹⁸ *ibid*

²¹⁹ *ibid*

²²⁰ *ibid*

that the nationwide Fees Must Fall protests was an unfortunate event which had resulted in over R300m in damages.²²¹ The Minister further indicated that the universities had so far not confirmed "from which university budgets these damages will be recovered."²²² While there have been some recent improvements in governments policy innovations towards funding or supporting higher education level, the picture that emerges time and again is that the government is not doing enough to actualise the realisation of free quality education it promised years ago. As it stands, the South African education system is grossly inefficient, severely underperforming and egregiously unfair.

The current education-related problems faced by South Africa include: poor management of the education system which has been exacerbated by excessive bureaucracy; lack of competence and capacity amongst school principals; poor teacher performance; a Further Education and Training (FET) system which is ineffective, too small and is characterised by poor output quality; greater disparities within the higher education system whereby the performance of existing institutions varies from world-class to mediocre; poor research and development capacity due to low personnel retention capacity of tertiary institutions.²²³

What emerges as the foregoing is that the legislative frameworks that aims at actualising the right to education in South Africa is not effective. While the government has called upon institutions to voluntarily channel their CSR efforts towards educational development, the nature of CSR and or who the beneficiary of the CSR initiative will be is unclear. For example section 29(1) as a socio-economic right obliges the State to make education available and accessible to everyone. As promising as the provision may appear for the fulfilment of the right to education, scholars such as Arendse and Veriava have argued that the South African constitutional Court is yet to uncover the scope and content of the right to a basic education.²²⁴ Arendse submits that the constitutional Court's interpretation accompanied by the country's international law obligations requires an appreciation of section 29(1)(a), which ensures free rudimentary education for needy children primarily, prior to its extension to more advantaged children.²²⁵ Hence, in line with the above summation, instances where corporations channel their CSR initiative towards developed schools

²²¹ *ibid*

²²² *ibid*.

²²³ National Planning Commission 'National Development Plan 2030 Our Future-make it work; the Presidency Republic of South Africa' (2010) 50

²²⁴ *Supra* Veriava and Coomans "Right to Education" (note 209 above)61-62.

²²⁵ L Arendse 'The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective' (2011) *Potchefstroom Electronic Law Journal* 34.

leaving out the children in the remote areas without access to education is unacceptable, meaning that arguments for a regulated CSR for the remedying of the above discrepancies are well-placed. For instance, during the period from 2012 to 2014, it was reported that Anglo American Platinum paid out ZAR 100 million (\$9.4 million) on education programmes in the provinces of Limpopo and North West. One may tend to wonder how the fund was utilised and who were the beneficiaries of such CSR initiatives? This argument is not to down play the true act of corporate good gestures but instances where such gestures lacked transparency and accountability then the progressive actualisation of socio-economic rights will be difficult.

iv. Health care, food, water and social security

Section 27 guarantees every person the right to have access to: health care services, counting reproductive health care; sufficient food and water; and social security, as well as, those who are not capable of providing for themselves and their dependents, suitable social support.²²⁶It provides further that, no person may be denied emergency medical treatment.²²⁷In keeping with these values the section places the State under an obligation to take rational statutory and additional means, within its existing resources, in order to actualise all the rights pertinent to the above section.²²⁸On issues as it pertains the right to health, Article 16 of the African Charter reads “Every individual shall have the right to enjoy the best attainable state of physical and mental health” and that the “States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick”.

Article 24 of the African Charter bestows on every individual the right to a universal acceptable environment that is encouraging to their advancement." The rights acknowledge the significance of a sanitary and secure environment which is tightly connected to socio-economic rights in as much as it bears an influence on a person's living standards and security.²²⁹Article 12 of the ICCSCE prescribes that “the States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Unfortunately in *Soobramoney v Minister of Health, KwaZulu-Natal*, the actualisation of the right to health was denied on the bases that the Court held that it could neither interfere with the *bona fide* resolutions of state entities and health officials apropos the distribution of public funds and key agendas nor

²²⁶ Act 108 of 1996 Sec 27 (1) (a), (b) & (c).

²²⁷ *Supra* Sec 27 (3).

²²⁸ Act 108 of 1996 Sec 27 (2).

²²⁹ See also General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural rights

could the appellant's right be construed to connote that the medication of terminal ailments should be ranked higher than other types of medical treatment like precautionary medication.

The facts of the case are as follows: Soobramoney a 41 year old unemployed man was terminally ill, suffering from ischaemic heart disease and cerebro-vascular disease. His kidneys had failed in 1996 and to rely renal dialysis for survival. After depleting his resources on private health care, he sought for free dialysis treatment in Addington Hospital, a state-funded institution in Durban. The state institution had rejected him on the basis that the hospital can only provide dialysis treatment to a limited number of patients and that the renal unit had 20 dialysis machines available to it. It was disclosed that some of the machines were in poor condition and that more trained nursing staff are needed but the hospital budget does not make provision for such expenditure. Soobramoney brought an application to the Durban High Court for an order that Addington give him the needful treatment based on section 27(3) of the 1996 constitution which provides that "No one may be refused emergency medical treatment" and section 11 which prescribes that "Everyone has the right to life." Upon appeal to the Constitutional Court against the court a quo's dismissal of his claim, the Court held that Addington's standards to be rational and in Soobramoney's situation justly enforced. Accordingly, the Court through unanimous judgement dismissed the appeal premised on the point that his non-treatment did not amount to an infringement of his freedoms. While the court confirmed the state's constitutional duty to provide care, it found that, were Soobramoney to be given the full benefit of this, everyone else in his position would have to benefit as well; and that the state's limited resources could not accommodate such a burden.

Also in *Minister of Health v. Treatment Action Campaign*²³⁰, which involved the right to access to particular medication which may aid in averting mother-to-child spread of HIV, the court held that the government had not rationally dealt with the necessity to lower the threat of HIV-positive mothers' post-natal infection of their children. In particular, the court held that government had conducted irrationally in (i) declining to avail an antiretroviral medicine called "nevirapine" public health confines where the on-duty doctor deemed it medically specified and (ii) neglecting to establish a period for a national agenda to avoid mother-to-child HIV infections²³¹.

Despite the legislative and judiciary intervention to ensure that the right to social security is guaranteed, the South African society is fraught with challenges in terms of provision of health-care. The UN global network noted that the occurrence of HIV among women going to pre-birth

²³⁰ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

²³¹ *Supra* para 2.

clinics increased from 1% in 1990 to 25% in 2001, culminating in an estimated transmission ratio of one in five adults.²³² Grobicki attributed the “sad state” of public healthcare in South Africa largely to HIV noting that HIV-infected people in South Africa are more than any other country – an estimated 5.5 million people.²³³

In support of the above facts, the World Health Organization (WHO) observed that South Africa is responsible for 24 percent of HIV/TB occurrences in the world. Studies indicate that six in every 10 individuals with TB in South Africa are moreover HIV positive.²³⁴ Thembeka Gaushe, a high ranking nurse in Zithulele Hospital’s TB section, revealed overpopulation is a chief agency in the spread of the disease in South Africa’s rural areas.²³⁵ This clearly shows the extent of the gaps that exist in the actualisation of fundamental rights in South Africa and necessitates that regulation of philanthropic CSR activities be utilised to address these gaps.

Another problematic socio-economic rights area is the right to food. The right to food has enjoyed recognition and support both on the international and domestic level. Article 11 of the CESCR prescribes that²³⁶

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

It goes further and stipulates that²³⁷

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.

A holistic view of the above provisions suggests that the state is not usually called upon to deliver food to the people, but merely to guarantee that sufficient food of acceptable quality is obtainable, in a way that average individuals can sensibly acquire it. The explanations of the measures by which the state is obliged to actualise the protected socio-economic rights in the constitution

²³²United Nations Global Compact Network (note 200 above) 2.

²³³ D Taylor ‘Inside South Africa’s Rural Healthcare Crisis, voice of Africa Newscasts’. April 30, 2012.

²³⁴*ibid.* see also *ibid.* see also world Health Organisation HIV/AIDS Fact sheet Updated November 2016.

²³⁵*ibid.*

²³⁶Article 11(1)

²³⁷Article 11(2)

(reasonable legislative and other measures) are the same as the ones mentioned in article 2(1) of the [CESCR (all appropriate means, including particularly the adoption of legislative measures). Section 27(1)(b) of the constitution of the Republic of South Africa states that, “everyone has the right to have access to sufficient food and water.” This obligation is extended in section 27(2), according to which “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” According to the Section 35(2)(e) of the constitution, prisoners and detainee also have a right to sufficient food, and section 28(1)(c) provides that every child has the right to “basic nutrition, shelter, basic health care services and social services.”

Despite the provisions enshrined in both international and national Instruments on the right to food, South Africa is regarded as having one of the highest rates of poverty and inequality in the world with about 11 million people who has no idea where or how they will get their next meal.²³⁸ The world food programme recorded that an estimate of about 12 million people in South Africa are food insecure. This goes to show the extent of gaps in the actualization of rights which arguably informs the need to regulate philanthropic CSR to aid the actualization of the right to food as well as other socio-economic rights

With regard to potable water, it was reported that South Africa is the 30th driest country in the world; it is expected to experience further drying trends, and an increase in extreme weather events, including cycles of extreme drought and sudden excessive rains.²³⁹The South African constitution and National Water Act²⁴⁰ explicitly declare the human right to water. The government has even established a benchmark guaranteeing a minimum allocation of 6000 litres of free, clean water a month for every South African. However, while the constitution and the National Water Act overturned the discriminatory water policies of the Apartheid era, the continuing lack of access to potable water depicts the failure of the government to meet this dire need. Given all the competing priorities seeking the government’s attention and the government having limited financial resource to meet the demand for water, the government has neglected to invest the necessary resources to create, maintain and upgrade its water infrastructure and to adequately promote water conservation in the face of increased demands on the precious resource.

²³⁸South Africa Human Rights Commission Right to ‘Food Fact Sheet’ available at <http://www.ohchr.org/Documents/publications/factsheet34en.pdf> (accessed 18 Feb. 2017).

²³⁹ C Harrington ‘Water Security in South Africa: The need to build social and ecological resilience 2014’ in Climate Change, Competition over Resources, Marginalisation.

²⁴⁰No. 36 of 1998.

In addition, the continued failure of the government to regulate the activities of corporate entities has severely depleted South Africa's water resources. As reported, 48% of South Africa's wetlands are critically endangered. This has led to various violent protests over poor service delivery. Taylor quoting Ncedisa Paul on Voice of Africa (VOA) Newscast stated that several youth in the rural areas die of sicknesses which can be cured with less difficulty in more advanced regions owing to the proximity of health care amenities.²⁴¹ Paul further noted that a lot of babies especially from diarrhoea because people fetch water from the river and drink, without boiling the water. These are social responsibilities that deserve to be taken seriously by every citizen, and promoted by families and institutions.²⁴² In as much as the executive government has made efforts in actualisation of the right to water the law is still lagging behind in this respect. This is in the light of the reluctance of courts to set benchmarks in the form of a core minimum standard of human rights actualisation as evidenced in the *Grootboom* case discussed earlier and that of *Mazibuko and Others v City of Johannesburg and Others*.²⁴³ Owing to the fact that the latter case's relevance to the present discussion has already been captured in the paragraphs above -in relation to the *Grootboom* case on the right to adequate housing- the details of the case will be discussed later in relation to the need to commit to international human rights standards. The researcher will now proceed to discuss the right to social security.

In terms of people's right to social security, article 9 of the CESCR provides that "the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance". In an effort to domesticate the right to social security, the South African government enshrined in its constitution Section 27(2) which enjoins the state to take reasonable legislative and other measures within its available resources to achieve the progressive realization of the right to social security. In this regard, the government promulgated the Social Assistance Act,²⁴⁴ and subsequently further regulations. The aims of the Act are to provide for the administration of social assistance and payment of social grants; make provision for social assistance; determine the qualification requirement thereof and to ensure that minimum norms and standards are prescribed for the delivery of social assistance. In *Ngalo v South African Social Security Agency*

²⁴¹ D Taylor Inside South Africa's Rural Healthcare Crisis available at [http://www.voanews.com/english/news/africa/southern/inside-south-Africa-Rural-Health care-crisis-149690295.html](http://www.voanews.com/english/news/africa/southern/inside-south-Africa-Rural-Health-care-crisis-149690295.html) (accessed Feb 2017).

²⁴² National Planning Commission 'National Development Plan 2030 Our Future-make it work' (note 221 above) 50.

²⁴³ *Mazibuko and Others v City of Johannesburg and Others*.2010 (3) BCLR 239 (CC).

²⁴⁴ No.13 of 2004 .the Act came into operation on 01 April 2006.

(SASSA)²⁴⁵ the applicant seeks to vindicate her constitutional right of access to social security which is guaranteed by section 27(1) (c) of the Constitution. The applicant, Ms Zukiswa Ngalo was the mother of Inathi Duba, a disabled minor child born on 21 July 2002. Ms Ngalo was a semi-illiterate unemployed South African citizen. Inathi is suffering from septic arthritis and hip deformity which resulted in her one leg being shorter than the other. As a result of her deformity, she walked with a noticeable limp although she used crutches and orthopedic shoe. The doctor who examined her on the 27 September 2010 in Nelson Mandela Academic Hospital opined that Inathi “qualified for a care dependency grant because she will have a long term disability”. Section 7 of the Act provides that a person is eligible for a care dependency grant if he or she is a parent, primary care giver or foster parent of a child who requires and receives permanent care or support services due to his or her physical or mental disability. Section 6(1) of the regulations provides that “a parent, primary care giver, or foster parent is eligible for a care dependency grant in respect of a care dependent child if a medical officer certifies the child as a care dependent child as defined in the Act”. A care dependent child is a child who requires and receives care due to his or her severe mental or physical disability. The SASSA (the respondent) was established by the South African Social Security Agency Act 9 of 2004, to ensure the efficient and effective management, administration and payment of social assistance. The Social Assistance Act assigns to the Agency a duty to make available, out of monies appropriated by parliament, a child support grant; a care dependency grant; a foster child grant; a disability grant; an older persons grant; a war veterans grant; and a grant in aid.

On the 27 January 2009, Miss Zukiswa Ngalo applied, on behalf of Inathi, for a care dependency grant to the South African Security Agency. A year lapsed without a response to that application. She again made another application for care dependency grant on 20 January 2011 but still no response came from the SASSA. She then resorted to legal means. Her attorneys wrote a letter to the Regional Executive Manager of SASSA requesting the outcome of the application. There was no response received from SASSA. Finally on 04 November 2011 Miss Ngalo brought an application seeking a mandamus directing the Respondent to consider and decide the application for a care dependency grant and that having so decided, to inform the Applicant’s Attorneys of the outcome thereof within 15 days from the date of the decision but also to furnish reasons for refusing the grant in the event of such a refusal. The application papers were served on the State Attorney in Mthatha on the 7 November 2011 at 08h40.

²⁴⁵ 2013 2 All SA 347 (ECM).

On the 17 November 2011 the Respondent filed a notice to oppose the relief sought by the Applicant. Thereafter the answering affidavit was filed on the 08 December 2011 together with a letter to the Applicant's Attorneys dated 22 November 2011 from "the reconsiderator" of the Respondent. The letter informed the Applicant's Attorneys that Miss Zukiswa Ngalo's "application for a reconsideration of the agent's decision is upheld". As a result of the delay, not minding the outcome of the applicants' application, regulation 12 mandated the Agency to notify the Applicant of the outcome of the application. The full text of the regulation reads as follows:²⁴⁶

The Agency must, on approval of a grant application, inform the applicant in writing in the language of preference of the applicant, of such approval and the date on which such approval was made. (2) The Agency must, upon refusal of a grant, or within a reasonable period thereafter, inform the applicant of such refusal in writing and in the language of preference of the applicant, and give reasons for such refusal.(3) The Agency must, when informing the applicant of refusal of a grant application, also inform the applicant of his or her right to lodge an appeal in terms of section 18 of the Act.(4) Whenever the Agency informs the applicant of an outcome of an application, the Agency must ensure that the applicant fully understands the decision of the Agency, the reasons thereof and the procedures to be followed thereafter

Accordingly Leach J held that the respondent was obliged to notify the Applicant of the outcome of her application for care dependency grant within a reasonable time from the date of its approval. He further stated that the failure to take a decision on a social grant application constitutes an infringement of the applicant's constitutional right to lawful and just administrative action. In the light of the above, it is clear that while there are legislation provisions which aimed at improving the social and economic standing of black South Africans and addressing inequalities brought about by past, some of the provisions are weak and inept to effectively address the realisation of socio-economic right. Hence, legislation such as the Companies Act,²⁴⁷ and Regulations 2011²⁴⁸ suffer normative, institutional and accountability deficiencies.

3.6 Implications of legal framework on obligations to respect, protect, fulfill and promote human rights

²⁴⁶ Government Notice No. 162 dated 22 February 2005 Reg. 12(1).

²⁴⁷ Competition Act 89 of 1998.

²⁴⁸ Companies Regulation 2011 (note 143 above).

The deficiencies in normative and institutional frameworks have implication on both state and corporate institutions in South Africa on their obligations to respect, protect, fulfill and promote human rights.

i Obligation to respect

Under international law, the obligation to respect human rights requires states to abstain from performing, sponsoring or tolerating any practice, policy or legal measure from third parties which might violate the integrity of individuals or infringe upon their freedom to use those material or other resources available to them in ways they find most appropriate to satisfy their economic, social and cultural rights.²⁴⁹Hence the South African government should ensure that every organ of the state and third parties (corporations inclusive) in their respective operations respect human rights. For example, in South Africa, there have been occasions where the police has forcefully dispersed, injured or caused the death of citizens demanding for service delivery. In the year 2009, according to the 2010 Human right report,²⁵⁰South Africa experienced one of its worse protests over poor delivery of basic services which occurred in various locations of the country such as in Gauteng, North West, Western Cape, Mpumalanga, and KwaZulu-Natal provinces.²⁵¹ It was alleged also that residents of Orange Farm protested lack of local service delivery by looting shops, burning tires, and pelting police with rocks.²⁵² Hangberg Township in Hout Bay also protested the decision by the City of Cape Town to dismantle homes illegally built on a firebreak, the aftermath of that clash between the police and dwellers resulted in serious injuries to several dwellers and at least one journalist.²⁵³While a proper annexing of CSR can help with the delivery of such services, it is not yet the case. The alarming rate of chaos and the demand for basic service delivery in South Africa indicates that the existing normative and institutional frameworks are inadequate for the realisation of the obligation to respect rights.

No doubt, in response to the government's failure to respect human rights, South African courts at times intervene to reinforce government's obligation to respect human rights. For example, upon observing that the South African government is not doing enough to address the eviction of its displaced citizens, the South African Constitutional Court had to intervene and reaffirm international standards that states are obliged to respect human rights notwithstanding their

²⁴⁹UN Economic, Social and Cultural Rights Handbook for National Human Rights Institutions(note 99 above).

²⁵⁰Human Rights Report: 'South Africa' available at <http://www.state.gov/j/drl/rls/hrrpt/2010/index.htm> (accessed 7 July 2016).

²⁵¹*ibid*

²⁵²Human Rights Report: South Africa Bureau of Democracy, Human Rights and Labour.2010 Country Reports on Human Rights Practices Report April 8, 2011

²⁵³*ibid*

economic development or scarcity of resources. In the *Grootboom case*,²⁵⁴ as mentioned earlier, the municipal conduct of evicting the indigents from their informal settlements without providing an alternative accommodation/housing indicated disrespect for human dignity and served as an impediment for the actualisation of right to access adequate housing as enshrined in the South African Constitution.

Yacoob J, observed that “unless the plights of communities are alleviated people may be tempted to take law into their own hands in order to escape the conditions”. Chaskalson J further noted in *Soobramoney v Minister of Health, KwaZulu-Natal*²⁵⁵ that

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

The Judge ruled in the *Grootboom case* that the provincial response to the housing crisis in the Western Cape was not reasonable because it failed to cater for 'people in desperate need'. Hence the Government has failed to observe its obligation to respect fundamental rights as enshrined in section 26(2),²⁵⁶ which required the State to take reasonable legislative and other measures to achieve the progressive realisation of socio-economic rights within available resources.²⁵⁷

Despite the Court's decision to reinforce states obligation to respect human right, the case itself is limited to states obligation alone and the judge mentioned in passing that the state should seek aid from other non-state actors so as to actualise the progressive realisation of socio-economic rights. The court gave no clear direction as to how this can be achieved. In summation, both existing legislation and judicial precedents at the moment are insufficient to address CSR challenges.

As previously indicated, corporate institutions also have the responsibility to respect human rights since they are legal entities or organs in the society. CSR international standards require corporations to recognize and respect international and domestic laws. For example, the UNGC principle 2 read in line with the Guiding principle 13 recommends that corporate institutions should

²⁵⁴2000 11 BCLR 1169 (CC); 2001(1) SA 46 (CC) Paras 2, 38, 94 &96.

²⁵⁵1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8.

²⁵⁶Constitution of the Republic of South Africa (note 6 above)

²⁵⁷*Grootboom* (note 251 above) para 38.

respect human rights by not being complicit in human rights abuses. Guiding principle 11, 12 and 13 further prescribes that corporate institutions respect human rights and they should not infringe on the enjoyment of socio-economic rights of their host communities.²⁵⁸ The South African Human Rights Commission (SAHRC) noted of lately that corporate ingenuity in disrespecting human rights is predominant in the mining and agriculture sectors. For example, the 2010 Human Rights Report in South Africa revealed that Glencore Xstrata fired 1 000 workers who participated in a non-protected strike at three chrome mines in Limpopo.²⁵⁹ In addition, Bridgestone South Africa locked out 1 200 members of the National Union of Mineworkers of South Africa for attempting to convince workers to sign an agreement to accept lower wage increases.²⁶⁰ Recent studies revealed that employees' self-dignity and rights to self-determination are now eroded by labour brokers due to the facts that labour brokers negotiate working conditions, wages and benefits that will accrue to the employees. In addition, corporations are refusing to allow staff to become unionised and act against workers who embark on strike action, despite these rights being enshrined in the South African Constitution. Workers also face barriers to collective bargaining.²⁶¹

In addition to the account of corporate incessant disrespect for human rights, it was reported that several extractive companies operating in South Africa were alleged to have a policy that prohibits other stakeholders from accessing on-site medical facilities (including access to HIV/AIDS medications).²⁶² The companies were also alleged to discriminate against women in employment, reportedly failing to hire any women workers. As a result of the exclusion, women resorted to prostitution as a means to earn a living, which in turn increased the HIV/AIDS epidemic in the host communities, impacting on the right to work and to life.²⁶³

Still on corporate continual disrespect for human rights, South Africa's Department of Home Affairs contracted the company Bosasa to run the Lindela Detention/Repatriation Centre. It was reported by the South African Migration Project of Queen's University (RSA) that in 2005, more than 4,500 refugees were processed and repatriated through Lindela and at least seven inmates

²⁵⁸ Guiding principle 14

²⁵⁹ C Benjamin 'SA business slammed for rights abuses' available at <http://mg.co.za/article/2015-04-01-sa-business-slammed-for-rights-abuses> (accessed June 20 2016).

²⁶⁰ *ibid*

²⁶¹ *ibid*

²⁶² UN Promotion and protection of all human rights, civil, political, economic, social and cultural rights including rights to development (note 82 above).

²⁶³ *ibid*

died during the period and several thousand attended nearby clinics due to the harsh and inhumane manner in which the inmates were treated. It was alleged that the Department of Home Affairs through Bosasa gave less than ZAR80 a day per refugee to provide food, medical care, security and sleeping accommodation. In corroboration of the company's alleged disrespect for human rights, the Zimbabwe Exiles Forum also confirmed that the company had ill-treated the detainees in Lindela threatening their right to basic socio-economic right.²⁶⁴

Based on the above allegations against corporate institutions, one may argue that the lapses in the CSR legal frameworks as it relates to corporate governance have hitherto encouraged corporations to undermine access to socio-economic rights.

ii Obligation to protect

As expounded by the Maastricht Guidelines, the obligation to protect the actualisation of socio-economic rights requires states and its agents to prevent the violation or infringement of the enjoyment of such rights. Hence, states should not only be reactive in thwarting violations and/or preventing the abuse of human right or the infringement of enjoyment of socio-economic rights but also should take pro-active measures in curbing human right abuses. States should also guarantee access to legal remedies for any victims of human rights abuses.²⁶⁵

An assessment of states fulfillment of its obligation to prevent private entities from infringing on others' enjoyment of socio-economic rights reveals that the South African government is not doing enough to protect workers and the communities where corporate institutions operate and reactively addresses issues relating to the protection its citizens against corporate abuse. For example, prior the Marikana saga, the South African government through its agents such as the Labour department and South African Police force failed to intervene before the civil unrest at Lonmin knowing that the mine workers complained about the human right abuses, harsh working and living conditions they are subjected to.²⁶⁶ It was also reported that the workers were exploited notwithstanding high profits made by Lonmin when compared with the low wages paid to the workers.²⁶⁷ It was only after the ill-fated event which led to the death of 44 people and injury of at

²⁶⁴Monash University Human Rights Translated (note 81 above) 27.

²⁶⁵ibid

²⁶⁶ Marikana Commission of Inquiry: Report on the matters of public, National and International concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province 2,3&4. See also D Bruce Summary and Analysis of the report of the Marikana Commission of Inquiry 73 &74.; F Haffajee. "Where Does Marikana Report Leave Ramaphosa?" News24, June 26, 2015 see also. C Benjamin SA business slammed for rights abuses (note 237 above

²⁶⁷*Supra* Marikana Commission of enquiry 36

least 78 mineworkers were injured that the president Jacob Zuma in collaboration with Lonmin decided to address the concerns of the mine workers. The state in this instance arguably failed to satisfy the obligation to protect the workers' rights by not intervening to ensure that the said company adheres to the law pertaining to basic conditions of employment.

An assessment of South Africa's compliance with the provisions of the OECD guideline which recommends that states have a National Contact Points (NCPs) to protect human rights reveals that laws made by the government have failed to protect the rights of employees and the community as a whole. For example, the recommended role of the NCPs from the South Africa context is SEC. An assessment of the role of SEC presently reveals an institutional structure whose role and powers are unclear. SEC has hitherto remained a toothless bulldog despite the OECD recommendations that states have a clearer and reinforced procedural guideline to strengthen the role of the NCPs, in this case SEC, to improve their performance and foster functional equivalence. The existing procedural guideline and functions of SEC are unclear and may further encourage Human Rights abuses. For example, from the wordings of Regulation 43(4), the composition of SEC is unclear. If the provision is read as it is, it invariably suggests that SEC should comprise the company's directors and employees. Hence monitoring and reporting of CSR issues is just a fruitless effort. The Guiding principle also recommends that as part of states duty to protect human rights against third parties or its agents, states must take necessary steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their jurisdiction those affected have access to effective remedy²⁶⁸

In the light of the above one may submit that the South African government is not doing enough to domesticate and implement CSR international human right standards in its domestic laws so as to protect communities and individuals from influential and powerful non state actors such as corporations. It may also be argued that corporations also have the responsibility to protect human rights. International and domestic laws equally recommend that corporate institutions protect the life and safety of their workers during the course of performing their duties and their environment. Instances where corporations directly or indirectly fail to protect the life and safety of their employees and/or take preventive measures to act with due diligence in addressing these human right issues, such acts or omissions are tantamount to infringement of the enjoyment of or abuse of human rights. For example, if a corporation fails to take adequate measures to protect mine workers during mining operations by not exposing them to poisonous gases or provide protective

²⁶⁸ Guiding principle 25

wears such as helmets and boots. It is important to note that the right to life has also been interpreted broadly to include the right of access to the basic necessities of life such as food, essential medicines and security of life and property.²⁶⁹ Hence, if corporations adopt inadequate occupational health and safety standards, manufacture products having fatal flaws and /or indiscriminately disperse their waste products in the environment which may lead to the death of living organisms in the environment, then such acts or omission can be regarded as an abuse of the right to protect.

An assessment of corporate responsibility to protect reveals that while there are guidelines and laws such as the Consumer Protection Act,²⁷⁰ the Occupational Health and Safety Act,²⁷¹ Mine Health and Safety Act²⁷² just to mention a few under domestic law which protect socio-economic rights and impose criminal, civil, administrative, or disciplinary sanctions for violations of the enjoyment of such rights, there is still a challenge with regards the access to effective remedies when corporations fail to protect such rights. Hence, one may conclude that existing laws do not capture the essence of CSR and does not specifically regulate philanthropic CSR, let alone enhance the fulfilment of obligation to protect.

iii Obligation to promote

According to Khoza, states obligation to promote means that the states must vigorously aim at intensifying awareness and respect for socio-economic rights through methods such as:²⁷³

educating the public about policies and programmes that will help them have access to socio-economic benefits, using the media to inform people about their rights and where to go to claim them, making sure that the speeches and actions of government ministers support the constitutional commitment to socio-economic rights, encouraging the work of NGOs and community organisations on socio-economic rights.

Hence, it is expected that the governments implement measures and develop appropriate mechanisms to promote voluntary good faith negotiations between employers and employees' organisations, with a view to enabling them to work out collective agreements regarding the regulation of employment.

²⁶⁹ Monash University 'Human Rights Translated A Business Reference Guide' (note 81 above) 9

²⁷⁰ Act 68 of 2008

²⁷¹ Act 85 of 1993

²⁷² Act 29 of 1996

²⁷³ S Khoza Socio-economic rights in South Africa (note 139 above)

The ICESCR provides in article 11 that states parties are obliged to promote adequate standard of living for members of the society. Articles 12, 13 and 14 like-wise mandates states to promote rights to adequate nutrition, housing, safe and potable water, adequate sanitation, medical supplies, healthy working conditions and a healthy environment.

An assessment of these obligations from South Africa's perspective indicates that the government is not doing enough to promote the respect for and actualisation of socio-economic rights probably because the obligation to promote human right has recently been devised.²⁷⁴ Nevertheless the obligation to promote is as firm as other obligations and states are obliged to comply with the ICESCR.

Similarly, a breach of the duty to promote human rights could also be extended to corporate entities. Corporations may also aid and/or impact negatively on the enjoyment of the promotion of socio-economic rights in various ways. Firstly, corporations may promote the right to life through the circulation of educational materials that can aid good lifestyle. For example, the company may publish and/or advertise how the general population can avoid contracting HIV/AIDS or other infectious diseases and the remedy if already infected. Secondly, Companies may also promote enjoyment of the right to education by speaking out in appropriate circumstances, publicly or privately, about laws that curtail the right. For example, it was reported that Shell South Africa (a division of Royal Dutch Shell) assisted a South African NGO in publishing a 171-page handbook, "Ukuphamba Umthethosisekelo Wakho / Creating Your Constitution", in both the English and Zulu languages. Thus it may be said that the company has promoted and facilitated the participation of the rural communities in crafting the new South African constitution.²⁷⁵ However this is not always the case. For instance where a cigarette manufacturer fails to raise awareness by advertising the dangers of smoking tobacco to the general public, such an act will constitute a breach of the obligation to promote right to good health care.

iv Obligation to fulfill

Obligation to fulfill human rights requires states to proactively engage in programmes or initiatives that will "provide" for the availability of and/or to "facilitate" the actualisation of socio-economic

²⁷⁴See the Ogoni Case (note 87 above) 49.

²⁷⁵Monash University 'Human Rights Translated' (note 81 above)75

rights.²⁷⁶ An assessment of states obligation to “provide” for socio-economic needs reveals that the South African government is trying its best to provide basic needs such as housing, health care and electricity, however considering the huge demand for these basic needs and the high rate of civil unrest and demand for service delivery, it is clear enough that the government is not doing enough to provide these basic socio-economic needs. Hence, the Constitutional Court in most cases had to intervene to ensure that states obligation to fulfill human rights is not a fiction but a reality. For example in an effort to ensure that the South African government provide adequate health care, the Treatment Action Campaign (TAC) in the *Minister of Health and Others v Treatment Action Campaign and Others*,²⁷⁷ objected to the inadequate measures established by the government aimed at preventing mother-to-child transmission (MTCT) of HIV on two grounds. Firstly, TAC was displeased with the governments’ irrational limitation of access to antiretroviral drug and nevirapine and the prevention of the administration of such prescriptions at public hospitals and clinics, aside from a limited number of pilot sites. Secondly, that the Government had not initiated and implemented an inclusive national programme aimed at the prevention of MTCT of HIV. Responding to the queries, the High Court and the Constitutional Court applied the test of reasonableness developed in the Grootboom case and held that the Government’s initiative did not comply with the right of access to health care services and did not fulfil their duty to take reasonable measures under section 27(2) of the Constitution to actualise of socio-economic rights. The Constitutional Court recommended that the Government be transparent and allow other stakeholders to participate in the implementation of the programme.

Like-wise in *Khosa and Others v Minister of Social Development and Others*²⁷⁸ and *Mahlaule and Another v Minister of Social Development and Others* ²⁷⁹(Khosa case), the government’s obligation to fulfill the actualisation of socio-economic right was extended to foreigners having a permanent resident status. In the said cases, a group of permanent resident holders challenged the constitutionality of some provisions of the Social Assistance Act²⁸⁰ and the Welfare Laws Amendment Act.²⁸¹ The provisions precluded foreigners that have obtained permanent residents status to access to social assistance from the government. Hence, elderly people and children, who would otherwise have qualified for social grants if there was no requirement of citizenship

²⁷⁶In General Comment No.12 on the right to adequate food and General Comment No.13 on the right to education, the Committee declares that the “obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide”.

²⁷⁷2002 (10) BCLR 1075 (CC)

²⁷⁸2004 (6) BCLR 569 (CC).

²⁷⁹*ibid*

²⁸⁰ Social Assistance Act 59 of 1992.

²⁸¹Welfare Laws Amendment Act 106 of 1997.

will be excluded. In an effort to ensure that the government does not shy away from its obligation to fulfill the enjoyment of socio-economic rights, the Constitutional Court held that Permanent residents are a vulnerable group; hence the laws that exclude them from access to the benefit of social assistance treat them as inferior to citizens. The Constitutional Court also decided that excluding the permanent residents from access to a social security scheme was not consistent with section 27 and 28(1)(c) of the Constitution which respectively seeks to protect and fulfill the actualisation of socio-economic rights.

No doubt, the South African government is not doing enough to facilitate the obligation to fulfill this goal. The guiding principle recommends that under the domestic sphere of operation, governments should embark on positive measures such as undertaking legislative and policy review of all laws, regulations or other directives (corporate policies, regulations and constitution included) having any negative influence on the fulfillment of economic, social and cultural rights. As said earlier in the problem statement of this work, the government has failed to review national legislation that will address CSR and has also failed to address the impact of policies and provisions that are inculcated in the companies constitution/policies that encourage corporate abuse of the fulfillment of the enjoyment of socio-economic rights. For example, the Companies Act and Regulation 2011 respectively are couched in a manner wherein corporations wilfully decide on the nature and extent of their participation in the fulfillment of the actualisation of socio-economic rights. Corporations also determine who may or may not be the beneficiary of such benevolence.

A closer scrutiny of the South African government efforts in facilitating the realization of socio-economic rights seems to be more of the government pleading to the conscience of all stakeholders (corporate institutions included) rather than of law as mandated by the South African Constitution. For example, President Zuma, speaking at the National Farm Workers Summit, stated that "the evictions, human rights abuses, and super exploitation of farm workers and farm dwellers remain a blight on the conscience of our society and a serious obstacle to the creation of a vibrant rural economy". The President further submitted that farm workers still struggle to gain access to education and healthcare, proper housing and access to basic services and amenities.²⁸²

It is worthy to note that in the Grootboom case mentioned earlier, Yacoob J, emphasized that the government should enact laws that will guarantee the actualisation of socio-economic rights and

²⁸²Human Rights Report: South Africa Bureau of Democracy, Human Rights and Labour. (note 249 above)

to seek other measures that will aid the actualisation of the said rights. The researcher is of the opinion that the Yacoob J is reaffirming the submissions of Professor John Ruggie, Kofi Annan and Mary Robinson just to mention a few, that the State should look beyond what it can offer and consider other non-state actors that can aid the progressive realisation of socio economic needs- in this case corporate institutions. In line with the above judgment, it has been argued that corporate institutions are the best placed institutions that can aid the progressive realisation of socio-economic rights considering their influence and impact in the society.²⁸³ Hence, it may be argued that states obligation to fulfil (facilitate) the actualisation of socio-economic rights requires states not just to enact laws, but also take other necessary measures which will facilitate corporate participation in the actualisation of socio-economic rights.

Corporate institutions have also been identified to have similar responsibility to fulfil (provide and facilitate) the realisation of socio-economic rights. It was argued that in the past that corporate sole responsibility was to provide maximum financial return to its shareholders and the state alone should seek ways to fulfill the actualisation of socio-economic rights.²⁸⁴ Lately, corporations have also accepted that they have a role to play in the fulfilment of socio-economic rights; hence, they participate in national and international CSR initiatives in the form of philanthropic gestures knowing that there is a need to give back to the society.²⁸⁵ In an attempt to fulfill the actualisation of socio-economic rights, corporations have hitherto participated and facilitated CSR initiatives such as beauty pageants, sponsorship of sporting codes and programmes such as the lotto jackpot, 'SA got talent', construction of infrastructures such as houses, schools, hospitals etc., scholarships and other forms of benevolence. Nevertheless, the challenge of these forms of CSR

²⁸³ W Visser *The age of responsibility: CSR2.0 and the New DNA of business* (note 13 above) 8. See also O Falck & S Iteblich 'corporate social responsibility: Doing well by doing good' (2007) 50 *Business Horizons* 249, W Visser 'Revisiting Carroll's CSR Pyramid: An African Perspective' (note 13 above) 31; B Nwete 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?' (note 13 above) 328; W Visser 'Corporate Social Responsibility in Developing Countries' (note 47 above) 478 & 484; BU Ihugba 'Compulsory Regulation of CSR: A Case Study of Nigeria' (2012) 5 No. 2, *Canadian Centre of Science and Education* 61; M Flores-Araoz 'Corporate Social Responsibility in South Africa:' (note 13 above)

²⁸⁴ AO Nwafor 'The shifting responsibility of company Directors-How desirable in modern times' (2012) 9 *Macquarie Journal of Business Law* 121. See also E Merrick & Dodd Jr, 'For whom are corporate Managers Trustees' (1932) 45 *Harvard Law Review* 1145, 1146-1147.

²⁸⁵ AJ Hoffman 'Climate Change Strategy: The Business Logic behind Voluntary Greenhouse Gas Reductions' (2005) 47(3) *California Management Review*, 21-46. See also TW Dunfee 'Do Firms with Unique Competencies for Rescuing Victims of Human Catastrophes have Special Obligations? Corporate Responsibility and the Aids Catastrophe in Sub-Saharan Africa' (2006) 16(2): *Business Ethics Quarterly* 185-210; P Newell & JG Fryna 'Beyond CSR? Business, poverty and social justice: an introduction' (2007) 28 NO 4 *Third World Quarterly* 674; Visser 'Corporate Social Responsibility in Developing Countries' (note 8 above) 484. Global Environmental Health in the 21st Century: From Governmental Regulation to Corporate Social Responsibility available at <http://www.nap.edu/catalog/11833.html> accessed 20 July 2014). See also B Nwete 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?' (note 13 above).

initiatives includes amongst others; lack of transparency and accountability and directly or indirectly encourages human right abuses.

Assessing corporate philanthropic responsibility and their role in fulfilling the actualisation of socio-economic rights, one can easily discern that most philanthropic CSR initiatives are established on falsehood based on the facts that such initiative are not monitored, accessed by relevant stakeholders and most times such initiatives are not done considering the communities insatiable needs. For example, philanthropic CSR projects such as beauty pageants, strengthening research capacity, sports just to mention a few, may be a noble project, but they do not surpass basic socio-economic needs such as potable water, health care which determines the communities existence. An evaluation of human needs by Abraham Maslow's hierarchy theory of needs suggest that human needs are insatiable and hieratical in nature. Hence, if corporations intend to fulfill the realization of socio-economic rights, such responsibility should extend beyond philanthropic gestures.²⁸⁶

A particular episode which shows how state and non-state actors can negatively affect the human rights of population is the Marikana saga.

3.7 Philanthropic responsibility; Marikana sagas as a reflection of the failure of the state and corporate obligation.

It may be argued from the literal point of view that philanthropic CSR means corporate acts of charity that is aimed at supporting other stakeholders, nevertheless from a legal perspective, corporate acts or omissions which although is presumed to be a noble act, may as well have an undertone of human right abuses. For example, it is a general norm that philanthropic CSR is viewed from a perspective which makes corporations look like saints or better still an epitome of *ubuntu* while unknowingly to many that corporations benefit more from their acts of benevolence or 'acclaimed benevolence' on papers at the expense of their beneficiaries. Scholars have alleged that most corporations pay lip service to CSR in order to appear good corporate citizens. For example, Sonwabile noted that although South Africa's mining companies, particularly those in the platinum industry, have reportedly demonstrated some commitment towards their CSR obligations, it has not been genuine towards the social well-being of the communities on whose

²⁸⁶Abraham Maslow theory depicts that humans firstly aspire to satisfy the basic needs of life, then moves to another level of needs. The first need that is crucial for existence are biological and physiological needs. These needs are air, food, drink, shelter, warmth, sex, sleep, etc. if the Biological and Physiological needs are met, their needs would move to Safety needs and other needs.

land they operate.²⁸⁷ It was noted also that growing concern was that the platinum mining industry in post-apartheid South Africa is characterised by all forms of human right abuses ranging from low wages, and poor working and living conditions.²⁸⁸

A review of the tragedy that occurred at Marikana revealed corporate abuses of human rights as a result of their philanthropic gestures. The Marikana commission of inquiry in its report revealed that amongst other reasons such as unhealthy working condition and poor wages, the fateful event came to light as a result of Lonmin's failure to abide by the commitment it made to the mine workers (corporate philanthropy) after using the proposed commitment to obtain benefits from the government. As a result of the proposed commitment the government converted Lonmin old order mining rights to new order mining rights. In pursuit for it to facilitate the new mining right, Lonmin made a proposal in its annual Social and Labour Plan (SLP) report to the Department of Mineral Resources (DMR) to convert a total of 114 hostel blocks into 2, 718 family and bachelor accommodation units; and construct 5,500 houses by September 2011.²⁸⁹

The proposal was approved by the Department of Mineral Resources. The housing project by Lonmin as indicated in its SLP report was clear enough to indicate the housing project as an obligation to build houses (philanthropic CSR), as opposed to an obligation to facilitate a series of market driven transactions between employee buyers and private financial institutions and/or developers. Nevertheless, Lonmin withdrew its promise and contracted the housing project to its subsidiary Western Platinum Limited (WLP) and Eastern Platinum Ltd (ELP) as financial institutions which will facilitate the mortgage of the said houses to the mine workers. It was also reported that despite the fact that the said houses will be mortgaged, Lonmin subsidiary (WLP and ELP) by the end of the 2009 financial year had only built three (3) of the 3200 houses which it had undertaken to build in the first three years of the SLP and had 41 hostels behind their target for the conversion of 70 hostels over the first three year period.

Lonmin's incessant abuse of human rights was escalated when in its 2009 SLP report discarded any reference to the figures in its actual SLP decriing that the global economy had a negative

²⁸⁷S Mswana Mining and 'community' struggles on the platinum belt: A case of Sefikile village in the North West Province, South Africa.

²⁸⁸S Mswana. No chief ever bought a piece of land! Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province (2015) Society Work and Development Institute, University of the Witwatersrand South Africa Working Paper: 3. 33

²⁸⁹ C Chinguno 'Marikana and the Post-apartheid Working order'. Society Work and Development Institute University of the Witwatersrand Working Paper (2013)1.

impact on the price of platinum, hence the company had to review its obligation as it relates to its housing and hostel project.²⁹⁰ In accordance with the review, the new target for the 2009 financial year was reduced to the construction of 3 show houses, what had previously been an unconditional obligation to construct 5500 houses over five years with a capital budget of R665 million. Seemingly, Lonmin review of the housing obligation was converted into a voluntary obligation that is aimed to build houses only for workers who could obtain mortgages, and then only when at least 50 applicants with approved home loans approached WPL or EPL with a request to build them each a home. Lonmin's revised obligation was not accepted by the DMR, which noted in its audit and inspection report of 9 September 2009 that Lonmin had indicated to on contract to build houses for its mine workers. As a result of the short fall of houses in the community, it was a common cause that large numbers of its workers had to live in squalid informal settlements surrounding the Lonmin mine shafts because of Lonmin's failure to keep to its commitment to provide decent housing for its employees. It was reported that the Marikana massacre has a link to the inhumane living conditions the mine workers were subjected to.

In response to these allegations at the Marikana commission of enquiry, Lonmin claimed among other reasons which were rejected by the commission that in the wake of the financial crisis it could not afford to construct houses for its employees. However a scrutiny of Lonmin's financial report revealed a mind-blowing revelation of Lonmin's insensitiveness to the plight of the mine workers. It was reported that²⁹¹

over the 2007-2011 period in which Lonmin claims that WPL and EPL could not afford to meet their housing obligations which were budgeted at R665m, the two companies paid dividends of US\$607 million to Lonmin Plc and Incwala Resources (Pty) Ltd, and paid more than R1.3 billion in "marketing commission" payments to Lonmin Plc (in the form of its SA branch company Lonmin Management Services (Pty) Ltd) and/or its Bermudan registered subsidiary, Western Metal Sales Ltd. Over the period 2008-2011 alone, Lonmin Management Services made an aggregate profit of R 643,547,159 on these "marketing commissions" paid by WPL and EPL.

In view of the Marikana tragedy, Mr Chaskalson SC noted that Lonmin has been so neglectful of the housing needs of its workforce in that the 5500 houses in their SLP would have been no more than a drop in the ocean compared to the huge profits made over the years. A summary of the

²⁹⁰Marikana Commission of Inquiry(note 226 above)18 &24

²⁹¹Marikana Commission of enquiry: Report on matters of public National and International concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province. Signed at Pretoria on the 31st of March (2015) 538.

South African government and Lonmin actions and omissions in relation to philanthropic CSR and human rights obligations shows the following shocking discoveries and lessons that could be learnt thereof.²⁹²

Firstly, the South African government failed to intervene during the housing crisis at Lonmin by not seeking measures that will aid the actualisation of socio-economic needs in the area. Secondly, SAPS and DMR and other organs of the government failed to protect the mine workers' rights prior and during the Marikana saga as enshrined in International instruments and in the South African Constitution. For example, DMR would have taken measures that Lonmin fulfil its obligation as indicated in its SLP report. Thirdly, the Department of Mineral Resources approved Lonmin's proposal to convert its old order mining rights to new order mining rights, without a legal framework which will monitor and impute civil or criminal liability for non-compliance within the contract in which Lonmin benefited from.

Moving to Lonmin's responsibility in relation to human rights, one will uncover firstly that Lonmin published false reports of being socially responsible which it benefited from, at the expense of the mine workers. Secondly, due to the philanthropic CSR nature of the housing initiative Lonmin proposed to be embarked upon, Lonmin breached and repudiated its housing obligations infringing access to the mine workers enjoyment of socio-economic rights. This submission was supported by the Marikana Commission. Thirdly, Lonmin's failure to deliver houses to the mine workers according to the Marikana commission was linked to one of the factors that led to the Marikana saga, yet Lonmin failed to protect its workers and provide a safe working environment during the wild strike. Seemingly, it may be said that Lonmin's action and omissions during the strike caused the death of the mine workers depriving them from their right to life.

The above case has shown how the South African government and corporations alike have failed to respect, protect, fulfil and promote socio-economic rights. The absence or gap in the legislative frameworks as it relates to philanthropic CSR encouraged Lonmin to back down from its philanthropic legitimate commitment to provide housing units for the mine workers. In other words Lonmin did not see its commitment regarding provision of houses as compulsory but voluntary. It is argued that this perception of philanthropic CSR as a voluntary exercise is a main challenge of utilising same to achieve the realisation of socio-economic rights in South Africa. It is further argued that, on three grounds such perceptions are misplaced.

²⁹² *ibid*

Firstly, even when corporations perceive philanthropic CSR as voluntary and refuse to carry it out (as did Lonmin), they still reflect the same in their Companies annual reports. The implication of this is that Corporations will enjoy corporate good will without doing what is required of them. Corporate good will is defined as an intangible asset owned by and associated with the operation of the company.²⁹³ The goodwill of a company increases its value, as qualities such as company reputation, brand or trade name recognition, customer list, exclusive supplier list, accreditation, published articles or industry press just to mention a few. According to a 2010 study by KPMG titled, "Intangible Assets and Goodwill," more than 50% of the purchase price of a business is typically attributed to goodwill.²⁹⁴ The amount of goodwill implied in the value of a business could impact the purchase price that a buyer may be willing to pay.²⁹⁵ This connotes that organisations such as Lonmin will continue to enjoy states good will and improved value of their business while failing to perform the expected philanthropic responsibility.

Secondly, without fulfilling their obligations to the public, such corporations continue to enjoy tax allowances, deductions and other fiscal incentives from the state for being socially responsible. A research on corporate philanthropy investigates whether tax laws-specifically, the deduction of philanthropic contributions before after profits is being declared affects Tax payments by firms. Whether it does or not is in dispute.²⁹⁶ For example, in terms of section 56(2) of the Tax Income Act,²⁹⁷ the section prescribes that for individuals, 'donations tax shall not be payable in respect of the sum of the values of all property disposed of under donations (by a donor who is a natural person), where it exceeds R100 000 during any year of assessment'. In other words, the first R100 000 of any good faith donation will be free of donations tax. This connote that a company that has not fulfilled its CSR obligations can benefit from tax reliefs simply by indicating in its report that it has performed its philanthropic obligation.

Lastly, even if corporate institutions such as Lonmin, renege its commitment to housing, they can still sponsor any sporting codes or beauty pageant that are not beneficial or meet the immediate needs of the local community. The argument here is of what benefit is beauty pageant competition in a community that are living in abject poverty or lack essential basic amenities such as potable

²⁹³ How does goodwill increase a company's value? Investopedia available at <http://www.investopedia.com/ask/answers/010815/how-does-goodwill-increase-companys-value.asp#ixzz41H8y5WD6> (accessed Jan 20 2016).

²⁹⁴ <https://www.kpmg.com/PT/pt/IssuesAndInsights/Documents/Intangible-assets-and-goodwill.pdf> 11.

²⁹⁵ <https://www.divestopedia.com/definition/998/goodwill>

²⁹⁶ Nwete 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?' (note 13 above) 331, 332 & 335

²⁹⁷ Income Tax Act, 1962

water, shelter and health care just to mention a few? Abraham Maslow, a renowned scholar in the field of human behaviour through his theory of human needs and behavioural motivation explains why people may engage in protest. He highlighted stages of needs, which predetermine human behaviour. The first and second stages of his theory depict the basis of human needs-biological and physiological needs which inter alia are; air, food, drink, shelter, warmth, sex, sleep, and safety needs which are protection, security, order, law, limits, stability. According to Maslow, people aspire to attain the first stage and once satisfied would increase their utility by adding the second state. It is worthy of note that the attainment of these stages is determined by availability of scarce resources. Absence of these needs or instances where people perceive that such needs are threatened, people tend to revolt. The importance of Abraham Maslow's theory in relation to philanthropic CSR is readily visible in the manner in which people demand for socio-economic needs in South Africa and the resulting chaos that follows after. Allowing companies like Lonmin that cannot meet core socio-economic right such as right to housing to sponsor activities such as beauty pageants is self-conflicting. Furthermore it is not acceptable because the ultimate beneficiary of such gesture may not be local populations in dire need of socio-economic right.

An assessment of laws and practices in South Africa from the standpoint of human rights obligations in reality falls short of the four layers of corporate and the government's obligation to respect, protect, promote and fulfill human rights as discussed in this write-up. The high rate of poverty and unemployment in South Africa has left communities with no other alternative but to embark on protests which in most cases corporations bear the brunt. Hence the urgent call to hold the government and corporations accountable for actualisation of socio-economic right.

3.8 Conclusion

In conclusion it can be said that, within the South African context, the legislative and institutional framework that facilitate CSR are inadequate, although they do contain very unique characteristics, especially when addressing empowerment. There is no specific set of regulations creating a situation where a business can be compelled, through legal means, to have a philanthropic CSR policy or strategy in place or to engage in philanthropic CSR activities in a manner that specifically enhance the realisation of socio-economic rights.

While socio-economic rights are protected and guaranteed by the South African constitution, many South Africans till date lack access to basic socio-economic rights such as potable water and sanitation, health care, education and adequate housing. Although the South African

government is the duty bearer of this right, corporations have come to terms that they have a role to play in the actualisation of socio-economic rights hence they embark on philanthropic CSR. The failure of the South African government to close the normative, institutional and accountability gaps on how philanthropic CSR are done in South Africa has hitherto encouraged transnational corporations to further abuse and/or infringe on the enjoyment of socio-economic rights. As indicated in this chapter, the shortcomings of philanthropic CSR as it relates to human rights and its use to address human right abuses is an anomaly in this Constitutional era. The chapter revealed the implications of normative and institutional lapses for key socio-economic rights and state's human rights obligations. The next chapter is set out to examine how existing normative and institutional frameworks can be developed in an effort to actualise the progressive realisation socio-economic rights.

Chapter 4

Actualising socio-economic rights through regulated philanthropic CSR in South Africa

4.1 Introduction

The preceding chapter dealt with the normative and institutional inadequacies of philanthropic CSR and implications for socio-economic rights and state's obligations.. It was observed that the state regulatory framework for CSR in South Africa lacked a variety of conceptual and practical efficiency ranging from lack of content to the weakness of their enforcement mechanisms. The normative, institutional and accountability deficiencies characteristic in philanthropic CSR in South Africa have not assisted the cause of ensuring appropriate realisation of socio-economic rights.

The analysis in that chapter informed this chapter, which sets out to discuss how a regulated approach to CSR can provide sturdy panacea to the aforementioned problems. Therefore, the chapter looks at how extant substantive legal frameworks and institutional frameworks are to be developed.

4.2 Change in normative framework

In order to achieve the realisation of socio-economic rights, especially in the light of corporate conduct intended as a philanthropic gesture of good will which in most cases are done in bad faith, some form of rules regulating such conduct are inevitable. Proposing such a normative standard, entails that CSR must be based on legal principles that guide any claim (for or against), and accountability. It follows therefore that, by establishing a normative framework demand can be made of businesses to perform philanthropic CSR in a manner that can contribute to the realisation of socio-economic rights. Hence an attempt is made here to provide a comprehensive framework that provides for legal role distribution and accountability measures within the sphere of philanthropic CSR through developing current legal regimes. Additionally, the researcher undertakes to utilise domestic human rights developments to create a human rights-based standard to CSR, with particular reference to; the right to have access to adequate housing²⁹⁸, right to health care, water and social security²⁹⁹, the right to a clean environment³⁰⁰ and right to education.³⁰¹

²⁹⁸Sec 26.

²⁹⁹Act 108 of 1996 Sec 27.

³⁰⁰Sec 24.

³⁰¹Act 108 of 1996 Sec 29.

4.2.1 Reinforcement of international human rights standards

Probably, one of the greatest normative changes that can be made to the South African human rights framework is committing to international standards. Although South Africa has ratified the CESC, ³⁰²the bearing that this can have on the realisation of socio-economic right in particular through the means of CSR it is yet to be tested. Dugard pointed out that failure to ratify the CESC implies that there will be hardly any pressure on South Africa to comply with the jurisprudence of the Covenant resulting in South African law on socio-economic rights taking its own course. ³⁰³ For instance, international human rights frameworks set a minimum core obligation towards realisation of socio-economic rights whereas South African courts have been cautious in making pronouncements to that extent. ³⁰⁴

The most notable instance of such judicial reluctance is the case of *Mazibuko and Others v City of Johannesburg and Others*. ³⁰⁵ In the said case, it is of common cause that in terms of Section 9 of the Water Services Act the Minister may occasionally set “compulsory national standards” relating, *inter alia*, to the provision of water services and the “effective and sustainable use of water resources for water services”. ³⁰⁶ In line with this provision, the Minister issued regulations pertaining to mandatory national standards and mechanisms to safeguard water. In terms of these regulations, the baseline standard for basic water supply services is: (a) the availing of apposite edification regarding healthy water usage; and (b) a baseline volume of drinkable water amounting to 25 litres per person per day or 6 kilolitres per household monthly (at a smallest possible flow rate of at least 10 litres per minute; inside 200 metres radius of a home; and efficient in a manner that no individual household member is deprived of a supply in excess of seven full days per year). ³⁰⁷

The above case raised two main issues, namely: whether the City’s Free Basic Water policy, in terms of which the City resolved to provide 6 kilolitres of free water on a monthly basis to each accountholder in the city, was in violation of section 27 of the Constitution or section 11 of the Water Services Act; and whether the installation of pre-paid water meters by the City of

³⁰²The International Covenant on Economic, Social and Cultural Rights was ratified on January 18 and will enter into force on 12 April 2015.

³⁰³J Dugard *International Law: A South African Perspective*; (2013)

³⁰⁴*Ibid.*

³⁰⁵ 2010 (3) BCLR 239 (CC).

³⁰⁶ *Suprapara* 23.

³⁰⁷ Government Gazette, Gazette No 22355, Notice R509 of 2001 (8 June 2001) published in terms of section 9 of the Water Services Act 108 of 1997. The City should furnish the applicants and all similarly placed residents of Phiri with a free basic water supply of 50 litres per person per day. Para 20.

Johannesburg and Johannesburg Water (Pty) Ltd in Phiri was lawful.³⁰⁸ The applicants *in casu* argued that the City ought to provide the applicants and all equally positioned inhabitants of Phiri with a free basic water supply of 50 litres per individual per day. To this end, the Court was faced with a contention by the applicant that the suggested quantity that is, 50 litres per person per day, is what is essential for dignified human life. The Court in turn pointed out that the argument that it should ascertain an amount of water which would actualise the purport of the section 27(1)(b) right to water is, basically the same as a minimum core contention albeit it is broader since it advances over and above the minimum. It was held that the applicant's argument that the Court should approve a commensurate standard shaping the substance of the right in lieu of simply its minimum content must fail on similar grounds that the minimum core argument failed in Grootboom and Treatment Action Campaign No 2.

In international law, the notion of "minimum core" stems from General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights where the Committee expounded its opinion that a minimum core obligation to guarantee the actualisation of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Accordingly, for instance, a signatory State in which any considerable sum of individuals is denied vital foodstuffs, of critical primary health care, of basic shelter and housing, or of the most basic systems of education is on face value, unable to deliver on its obligations under the Covenant.³⁰⁹ It is therefore expected that by ratifying the above international human rights convention, South Africa will be obliged to comply with at least the minimum standards pertaining to human rights advancements and thus create a strong foundation for a legislative environment necessary for entities, particularly businesses, within the state to apply philanthropic CSR in a manner that contributes to the fulfilment of state obligation.

4.2.2 Restating the role of entities such as corporations in human rights advancements

Although only states are signatories to the CESCRR and are accordingly responsible for compliance with the Covenant, the entire society's membership (health professionals, families, local communities, inter-governmental and non-governmental organizations, civil society organizations, as well as the private business sector) have obligations in relations to the actualisation of the right to health.³¹⁰ Hence, state parties should provide a setting which enables the fulfilment of these duties. A binding obligation on companies to channel their CSR efforts

³⁰⁸At para 6.

³⁰⁹General Comment 3 'United Nations Committee on Economic, Social and Cultural Rights' (1990) para 10.

³¹⁰ A Clapham & MG Rubio 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' (2002) *Health and Human Rights Working Paper Series* No 3;4.

towards socio-economic rights may carry with it a corresponding legitimate expectation on the part of the beneficiaries. This dynamic essentially rests on the existence of a symbiotic relationship between corporate activities and socio-economic developmental objectives. This becomes particularly necessary because philanthropy is goodwill and generally one cannot be under any obligation towards philanthropic undertakings. However, some scholars argue that the strict adherence to a definition that accentuates CSR and its charitable nature is consequently incongruous in the South African setting.³¹¹The reason for this is the historical link between corporate activity and the structural disenfranchisement of the society which makes South Africa's case a more peculiar one.³¹² Therefore, as a precursor to the statutory framework, the researcher will delve into some of the principles that may guide companies in becoming legally bound to any philanthropic CSR acts. These principles are: constitutional imperative, improved functional approach, improve sphere of influence, prior conduct and human rights as an essence of philanthropy.

i. Constitutional imperative

Since one of the main objectives of the study at hand is to utilise CSR to achieve socio-economic ideals enshrined in the constitution, it is prudent to firstly ascertain the underlying human rights obligations that companies have in that respect. The introduction to the South African Constitution contains the imperative to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."³¹³The South African Constitution contains a supremacy clause which provides that the constitution is the supreme law of the land and any law or conduct inconsistent with it is null and void.³¹⁴Section 8(2) of the South African Constitution is also fundamental to the extent that it provides that the Bill binds both natural and juristic persons "if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." The above clauses are the most crucial provisions if any obligation towards philanthropic CSR endeavours can be said to exist and/or be connected to the progressive realisation of the socio-economic rights enshrined in the Constitution. Accordingly, Kirby postulates that juristic persons are bound by the Bill of Rights and

³¹¹ C VALOR 'Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability' (2005)110 *business and Society Review*.

³¹²*ibid*

³¹³R Hamann, T Agbazue, P Kapelus & A Hein 'Universalizing Corporate Social Responsibility? South African Challenges to the International Organization for Standardization's New Social Responsibility Standard Business and Society Review' available at https://www.researchgate.net/publication/228147916_Universalizing_Corporate_Social_Responsibility (accessed 12 Aug. 2016).

³¹⁴Act 108 of 1996 Sec 2.

are legally required to align their conduct with the Bill of Rights in, arguably, the same way that natural persons would have to align their conduct with the Bill of Rights.³¹⁵ Despite these constitutional provisions, there is hardly any clarity, within them, as to whether corporate bodies can be compelled to undertake philanthropic gestures. That the above is possible is evident in the KwaZulu-Natal High Court case of *Standard Bank of South Africa Limited v Dlamini*,³¹⁶ which dealt with an issue arising from a credit agreement between the parties, the Court analysed the relevant law in the form of the National Credit Act³¹⁷ and the Consumer Protection Act³¹⁸ with reference to the rights bestowed on an individual and the corresponding duties. The Court noted in *obiter dictum* that the Bank, like most large corporations that invest in CSR activities, had to be cognisant of the objects of the CPA which were at present accessible to the public. The purposes of the CPA include the promotion and advancement of social and economic welfare of consumers in South Africa through promoting fair business practices. The Act is additionally aimed at protecting consumers from: unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and, deceptive, misleading, unfair or fraudulent conduct; as well as improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour.³¹⁹ The Court pointed out further that, institutions such as the Bank should embrace the structure charted in terms of the National Credit Act (NCA) and the CPA for addressing the socio-economic imbalances substantively and for reforming the credit industry, or if no other basis exists, the reason that that continued inequalities and necessity may result in unrest and social instability which is not compatible with business.

The above case is of great importance pertaining to the study at hand because it provides a good illustration of how South African courts have interpreted legislative developments to effectively link companies CSR activities to the socio-economic or human rights ideals. In other words, the above case illustrates how the fundamental rights enshrined in the Bill of Right have horizontal application, meaning that they bind individuals and corporations, as well as the state. It is the researcher's submission that big companies' emerging role as leaders in society may arguably result in assumed legal responsibility. This basically entails acknowledgement of the fact that the growth of an enterprise is occasioned by greater socio-economic impact. Since the magnitude of

³¹⁵ N Kirby 'What's really right? Corporate Social Responsibility as a legal obligation in South Africa', (2014) *Legal brief WerksmensAttorneys2*.

³¹⁶ 2013 (1) SA 219 (KZD).

³¹⁷ Act 34 of 2005.

³¹⁸ Act 68 of 2008.

³¹⁹ 2013 (1) SA 219 (KZD) at para 77-78.

that impact is likely to be great it is up to the companies to make sure that such impact is a positive one and the law recognises and attaches responsibilities to that extent.

ii Improved functional approach

The above approach is derived from administrative law. Section 1 of the Promotion of Administrative Justice Act covers the decisions made by private individuals and companies when exercising a public power or performing a public function.³²⁰ An example would be when a government department outsources some of its work to a private company i.e. when a municipality contracts with a company to supply water to people's homes. Ordinarily, it is the state that is the primary duty bearer in so far as the rights relating to socio-economic rights are concerned. However, in such cases where the obligation of state is outsource, a company performing such a public function will do so in accordance with the states obligation to ensure the fulfilment of socio economic rights.³²¹ Nevertheless, this approach does not entail that companies displace the state as the primary duty bearers in so far as the obligations to promote and fulfil socio-economic rights are concerned.

iii Improved Sphere of influence

According to OHCHR, sphere of influence can be described as including a company's inside and outside business associations, including its interactions with joint venture partners and government authorities.³²² All companies have a sphere of influence, but spheres of influence naturally depend on a company's size.³²³ As indicated by Bilchitz, the first point of call is to give effect to the definition of corporate 'sphere of influence' from the South African perspective.³²⁴ In relation to corporate sphere of influence, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises in a report submitted that corporate sphere of influence is not about what rights companies must respect but rather the scope of due diligence required to fulfil the responsibility to respect human rights'. The Special Representative further explored the possibility of redefining corporate

³²⁰ Act 3 of 2000.

³²¹ Monash University Human Rights Translated (note 81 above) 27. See for example issues relating to South Africa's Department of Home Affairs contracted the company Bosasa to run the Lindela Detention/Repatriation Centre discussed above

³²² *Supra* 70. See also The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity *OHCHR Briefing Paper*, (2004), 18–19.

³²³ *Ibid.*

³²⁴ D Bilchitz 'Corporate Law and the constitution: Towards Binding Human Rights Responsibility for Corporations' (note 77 above) 125

“influence” in terms of “control” or “causation” but, uncovered that the definition may be too restrictive for companies that seek to not only respect rights but also to voluntarily “support” them,³²⁵ Ruggie in an effort to define the scope of corporate sphere of influence submits that it is not the proximity of corporate action or inaction within a confined area that determine the impact on human rights but rather the company’s web of activities and relationships. The author made submissions that all companies have a sphere of influence; nevertheless, larger companies will naturally have a larger sphere of influence than smaller companies.³²⁶

Lehr and Jenkins argue that ‘sphere of influence’ lumps together ideas of ‘proximity, impact, control, benefit and political influence’.³²⁷ Hence, corporate sphere of influence may be described as areas where the company has a competitive/comparative advantage to respect human rights over other companies. Lehr and Jenkins contend that ‘sphere of influence’ juxtapose ideas of ‘proximity, impact, control, benefit and political influence’.³²⁸ Thus, corporate sphere of influence may be described as areas where the company has a competitive or comparative advantage to respect human rights over other companies. Lehr and Jenkins have observed that most researchers have suggested that it is during this epoch that corporations must take steps to ensure they respect human rights. The reasons are because just to mention a few; the growing awareness of the potential human rights obligations of non-state actors, the increasing recognition of social and economic rights, and the actual or potential harms caused by corporate institutions. Lehr and Jenkins suggests that the idea of influence alone cannot be used to assign human-rights responsibilities to companies unless one makes an irrational deduction that corporate influence is solely responsible for the infringement of the enjoyment of the socio-economic rights or human right abuses. According to the authors such premise lumps together too many dissimilar concerns to be truly useful.³²⁹

The notion of sphere of influence is important in the proposed regulation of philanthropic CSR because it helps ascertain whether a company meets the size threshold, in terms of turnover, workforce size, or the nature and extent of the activities of companies which may be charged with

³²⁵J Ruggie Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to development. Clarifying the Concepts of “Sphere of influence” and “Complicity” Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises A/HRC/8/16 15 May 2008

³²⁶*ibid*

³²⁷ A Lehr & B Jenkins ‘By invitation: Business and human rights—Beyond corporate spheres of influence’, available at <http://www.ethicalcorp.com/content.asp?ContentID=5504> (accessed 24 July 2014).

³²⁸ *ibid*.

³²⁹*ibid*. see also D Bilchitz Corporate Law and the constitution: (note 77 above).

a responsibility to make the proposed contribution to socio-economic right advancement programmes. This is because current corporate practice has seen different associations between companies of varying sizes and scope of activities. Thus, in addition to influencing which companies must contribute, the idea of sphere of influence also informs the area which CSR contributions should be made. For instance, applying the notion of sphere of influence, companies involved in environmental activities, counting their subsidiaries, must contribute towards programmes designed to ensure that members of communities in which their operations are based realise their rights to a clean environment. Hence, instances where corporations can identify their sphere of influence in a community or beyond, such understanding will define their scope of responsibility to aid the actualisation of socio-economic rights and or prevent the human right abuse.

iv Prior conduct

Prior conduct is based on premise that in the past, corporate institutions have one way or the other through their conduct had impacted negatively the enjoyment of socio-economic right. For example conducts such as tax evasion and environmental pollution had prevented states from having enough income to address socio-economic needs. Babarinde points out that since it is widely accepted that corporations supported and also profited from, the apartheid regime, it is a common consideration that corporate institutions would “be expected, or even summoned, to assist in the righting the wrongs of the past”.³³⁰Hamman *et al* posit that although there is much discussion on the degree and mode of this contribution, there is clarity pertaining to the participation by mining companies, for example, in instigating and propagating substantial features of the colonial and ensuing apartheid regime, such as rural land taxes and the migrant labour system. According to the above authors, on-going apprehension on the part played by companies in the course of apartheid regime, in the abuse of workers, human rights violations and environmental harms, is apparent in the wave of recent court cases such as the high-profile case against Cape PLC.³³¹Busacca accordingly concludes that, CSR is an important economic mechanism that companies can utilise to affirm social and moral order not only locally, but internationally as well, especially in a post-apartheid South Africa. ³³²Accordingly, legislative regulation of CSR, philanthropic CSR may be necessary in order to hold companies legally

³³⁰OA Babarinde “Bridging the Economic Divide in the Republic of South Africa.”(2009) *Thunderbird International Business Review*359.

³³¹R Hamann *et al* ‘Universalizing Corporate Social Responsibility? (note 329 above)11.

³³² M Busacca ‘Corporate Social Responsibility in South Africa’s Mining Industry: Redressing the Legacy of Apartheid available at<http://scholarship.claremont.edu> (accessed 10 Aug. 2016)12-13.

accountable for contributing to human rights violations and in the same manner remedy the socio-economic discrepancies that have such historical foundations. In this way, prior conduct will be the basis of companies' obligation to contribute towards socio-economic programmes. Regulation of philanthropic CSR will equally serve as a measure for holding companies accountable for non-compliance. As in the application of the prior conduct principle in the law of delict, where one's prior conduct results in the creation of a dangerous situation that individual may be held liable if they then fail to take steps to mitigate the harm. The existence of a legal duty to act in this case is informed by public interest applied through an objective of good moral test. This principle was upheld in the case of *Minister van Polisie v Ewells*³³³This objective value basis for attaching responsibility to act may be applied to companies whose prior conduct resulted in human rights violations by giving legal recognition to their legal obligation to mitigate human rights harms. Regulation of CSR activities may then be used as pre-emptive action that reinforces these public interest based obligations. It also works as a measure of ensuring that the human rights discrepancies are proactively addressed by making them the focal point of this regulated approach to CSR.

v Human rights as an essence of philanthropy

Relations underlined by acts of goodwill have been characteristic in South African society. Authors of the *King Report on Governance for South Africa* consequently observed that in the African milieu these moral obligations are encapsulated in the *Ubuntu* philosophy which can be articulated through the expression '*uMuntu ngumuntu ngabantu*', which in turn translates to 'I am because you are; you are because we are'. Fundamentally, *Ubuntu* entails humaneness and the idea of *Ubuntu* includes communal support and respect, interdependence, harmony, unified effort and responsibility. In particular, it encompasses a common resolve in all human endeavours and is premised on service to humanity."³³⁴In espousing the qualities of good corporate governance, the Institute of Directors allude to how effective leaders should rise to the challenges of modern governance.³³⁵ They additionally point out that, such leadership is the personification of ethical ideals of responsibility, accountability, fairness and transparency which are grounded on moral responsibilities that are captured under the notion of *Ubuntu*. Accountable leaders take charge of business policies and operations with the aim of accomplishing viable economic, social and environmental performance.³³⁶ The principle of *Ubuntu* may act as a basis for a regulated

³³³1975 (3) SA 590 (A)

³³⁴The King Report on Governance for South Africa (2009) 61.

³³⁵*ibid*

³³⁶*Supra* 9.

philanthropic CSR in that it emphasises the symbiosis of human rights and societal relationships wherein companies are dependent on society for the realisation of their economic or pecuniary objectives and society also depends on companies for the realisation of their socio-economic advancement goals, including the advancement of human rights. Hence, the regulation of philanthropic CSR through the principle of *ubuntu* has the effect of giving legal recognition to: the relationship between companies as entities of society and society and the generally accepted responsibilities of companies towards societal development in an effort to actualise the realisation of socio-economic rights and the advancement of human rights objectives as a whole.

Evidently, the principles discussed above indicate an appreciation of how corporate involvement in socio-economic development through CSR activities can help actualise important socio-economic ideals; and how companies have signalled their commitment to the realisation of these objectives. However, in as much as the above principles highlight the need for companies to embrace CSR, there is no effective compliance mechanism due to the greater emphasis on voluntariness. The researcher therefore submits that development of extant legal regimes relevant to CSR can amalgamate philanthropic CSR with other forms of CSR resulting in robust actualisation of socio-economic rights through concerted efforts. As such the researcher will now focus on the application of the Constitution and other legal mechanisms to propound a substantive framework for CSR. Aside from the foregoing principles, statutory development of substantive CSR content is also required for the realisation of socio economic rights through philanthropic CSR.

4.3 Statutory development of substantive CSR content

i Empowering provision

Kloppers posits that the new Companies Act of 2008 reshaped the context of corporate law by bringing forth new concepts such as business rescue practices, providing companies in financial distress with an alternative to continuing with insolvency procedures, and set new solvency and liquidity requirements.³³⁷ Strikingly, the author points out that even with the comprehensive alterations brought about by the Act no precise reference is made to CSR and submits in the same vein that, provided that no legal requirement is set to incorporate CSR issues into their

³³⁷ Kloppers 'Driving corporate social responsibility (CSR) through the Companies Act: an overview of the role of the social and ethics committee(note 55 above)166

decision-making and governance structures companies will not be legally obliged to act in a socially accountable way.³³⁸

Nonetheless, the Companies Act is the main regulatory authority on CSR. This new piece of legislation empowers the Minister of Trade and Industry, through the use of regulatory mechanisms, to direct companies to create a social and ethics committee or CSR Board committee, charged with monitoring corporate governance and implementation of philanthropic CSR projects.³³⁹ Pursuant to the Companies Act provision, the legislature has enacted Companies Regulations 2011 to supplement the Companies Act. This statute provides more substantive authority on CSR. However, the one aspect that needs to be changed in this context pertains to the scope of authority of the empowering legislation. This means that company legislation has to be clear as to the type of CSR activities regulated by such legislation including philanthropic CSR. This can be done by specifying the human rights programmes that companies must channel their philanthropic CSR programmes towards. In the light of Carroll's CSR model, the resultant effect of the proposed regulatory developments is that philanthropic CSR in South Africa will functionally fall under the banner of legal responsibility, to the extent that it provides for the areas where the contributions should be directed, namely, socio-economic rights advancement programmes. Beyond that, philanthropic contributions made towards other agendas not directly connected to socio-economic rights advancement programmes will become residual CSR.

ii Ensuring a socio-economic right oriented philanthropic CSR

While current regulatory CSR frameworks encourage the practice of philanthropic CSR, a wide gap exists on how to use philanthropic CSR to achieve socio-economic rights. Regulation 2011 presented a new requirement that every state owned company, every listed public company, and any other company that has in any two of the preceding five years, recorded above 500 points in terms of Regulation 26(2) must have a Social and Ethics Committee (SEC). Regulation 2011 brings to light non-binding statutory intervention and functional mechanisms through which philanthropic CSR ought to be dealt with. Furthermore, Regulation (43) (5) (ii) (bb) directs SEC to monitor company input towards community development as well as to take note of all forms of corporate philanthropy such as sponsorship, donations and altruistic giving.

³³⁸ *Ibid*

³³⁹ At section 72

Notwithstanding the above legislative structure and the consequent creation of SEC, the above committee's authority to implement the provisions of the regulations is relatively weak and inadequate to address philanthropic CSR challenges. Arguably, Regulation 26(2) read together with Regulation 43(1) from the South African perspective pins the extent of corporate influence within the confines of the provisions. Similarly espousing this notion of gauging corporate sphere of influence under statutory provisions is the Indian Act which expressly categorised certain companies both in the public and private sector as falling within the same sphere of influence. The Indian Act prescribes that companies whose turnover is greater or equal to R10 billion or its Net worth is greater or equal to INR 5 billion or its Net Profit is greater or equal to R 50 million must engage in CSR. The researcher opines that as in the case with India, the regulation of CSR in South Africa needs to establish criteria for identifying the affected companies and then place definite directives upon companies to contribute to CSR. This will aid the actualisation of socio-economic rights in that companies can gauge what is expected of them and the actualisation of socio-economic rights will occur in accordance with sound projections.

In a similar manner, that the Indian regulation prescribes a mandatory 2% contribution for CSR, the South African normative frameworks may apply such principles in corporate governance. This view is supported by section 39 of the South African Constitution which prescribes that the state may apply foreign law in its domestic law. The concept of CSR in India is regulated by clause 135 of the Companies Act of 2013. The CSR relevant provisions in this statute apply to companies with an annual turnover of 1,000 crore INR and above, or a net worth of at least 500 crore INR, or a net revenue of more than five crore INR.³⁴⁰ This directive towards a mandatory CSR contribution is in contrast to the South African CSR context, and forms part of the normative developments being proposed by the researcher in the present study.

Clause 135 of the Act outlines the applicable procedures in nexus with companies' development of their CSR agenda. Part of the guidelines provide that the CSR committee will be in charge of formulating a comprehensive course of action with regards to CSR undertakings, together with the spending, the category of actions, roles and duties of different stakeholders plus a monitoring system for such undertakings. Additionally, CSR committee can make sure that all types of income amassed by the company through CSR activities have to be paid back to the community

³⁴⁰Confederation of Indians *Handbook on Corporate Social Responsibility in India* (2013) 12.

or CSR corpus. Such a defined role in contribution by companies is typically what is lacking in the South African setting and is in line with the researcher's proposed developments.

The Companies Act, 2013 has centrally advanced the concept of CSR and relying on its disclose-or-explain directive, is upholding heightened transparency and disclosure. Schedule VII of the Act outlines the CSR activities and recommends that communities be at the core. Then again, by deliberating on a company's association with its stakeholders and incorporating CSR into its principal operations are useful precedents that may be inculcated into regulation 2011.³⁴¹ Arguably the idea of basing the core aspects of CSR such as philanthropy, on a legal duty serves greater utility in achieving socio-economic objectives as one can actually identify and measure the extent of companies' involvement in these regards. Hence, in line with the above observation, the researcher submits that the South African normative frameworks need to stipulate an amount that constitutes a minimum mandatory contribution amount added to a directive that goes beyond the mere establishment of SEC. This means that the performance of companies through their SEC can be measured in terms of how they satisfy the actualisation of socio-economic rights,

iii Improved formulation of Guidelines on standard CSR practice

Regulation 43 (5) somewhat provides guidelines on what constitutes standard CSR practices. It does so by empowering the SEC to monitor the corporation's undertakings, in view of any applicable statute, other legal requisites or predominant rules of best practice, with reference to issues *inter alia* connecting to social and economic growth, including the company's positioning in terms of the goals and purposes of the 10 principles set out in the United Nations Global Compact Principles and the Broad-Based Black Economic Empowerment Act. In similar fashion, the above Regulation also empowers SEC to monitor good corporate citizenship, including: the company's input to the progress of the societies where its operations are primarily based or societies wherein its products and services are mostly marketed; and the company's achievement of sponsorship, donations and charitable giving. Additionally, Regulation 43 (5) empowers SEC to monitor the company's performance pertaining to the environment, health and public safety, together with the effect of the company's operations and of its goods or amenities. At least the provision outlines areas of focus.

However the researcher submits that Regulation 2011 should go beyond the existing guidelines by prescribing the minimum amount of contribution that will establish an ascertainable CSR

³⁴¹*supra* 7

benchmark, for instance contribution of no less than one percent of the company's after tax profit to be spent on social-economic projects. Additionally, so as to hasten investment in socio-economic growth, the regulation can allot a higher score that reflects socio-economic projects as high priority areas.

iv Improved sanction for non-compliance

Under the current framework, if companies do not engage in CSR activities they have to explain their failure to do so. This is arguably neither a sound sanction nor a proportionate consequence for non-compliance. The King code of governance for South Africa, King IV code, as with King I and II and III is similarly founded on the 'apply' or 'explain' principle. King points out that in the Netherlands, it is a requirement that directors 'apply' their code or 'explain' their rationale for non-compliance. The 'comply or explain' approach could mean a tedious reaction to the King code's principles and its recommendations whilst the 'apply or explain' system indicates an understanding of the point that it is usually not a matter of compliance or non-compliance, but somewhat the consideration of the functionality of these values and recommendations³⁴²

In other words, under the 'disclose or explain' provision companies have hardly anything to lose if they fail to engage in CSR programmes aimed at the actualisation of rights. As such the researcher submits that the standards of conduct set for members of the SEC should be covered in section 76 of the Companies Act, while section 77 should deal with the liability of the members of the committee for non-compliance with the set standard. Despite the fact that the heading of section 76 is "Standards of directors' conduct", the section is in the same way relevant to prescribed officers or members of board committees for instance the SEC or the audit committee. In terms of section 76(3) a member of the SEC is mandated to exercise the power and perform the roles of a member of the committee in good faith and for an appropriate resolve, in the best interest of the company, and with the degree of care, skill and diligence that may be reasonably expected of a person carrying out the same functions in relation to the company as those carried out by the member of the committee. As it relates to the duty to act in the company's best interest and to act with the necessary degree of care, skill and diligence, a committee member will not be liable if it can be established that plausibly diligent steps were taken to acquire knowledge on the

³⁴²King IV Report on Corporate Governance (note 136 above).

issue or had sound reasons for making such decisions based on the premise that such decision was made in the best interest of the company..

For the purposes of this study, no distinction is drawn between the liability of a director and the liability of a member of a board committee or SEC. In terms of section 77(2) of the Companies Act, a member will be held liable when such a director breaches the ideals that sum up to be in the best interests of the company. Hence in the light of the above, If a member of the SEC neglects to act *bona fide* or in the best interest of the company (recognising philanthropic CSR a legal duty), that individual official will be considered to have violated the fiduciary duties and will be held legally responsible for any loss, damages or expenses encountered by the company emanating from the violation. In a very similar manner, a member of the Social and Ethics Committee will be held susceptible to delictual claims if the member neglects to act with the amount of care, skill and diligence necessary.

In addition to positive punishment, the researcher advocates also for economic incentives as a measure of reinforcing compliance. Therefore, the use of an incentive such as a socio-economic performance based tax breaks may encourage the progressive realisation of socio-economic rights. Aside from the foregoing statutory development of substantive CSR content for the realisation of socio economic rights through philanthropic CSR, there is a need for a development of the Institutional frameworks.

4.4 Institutional framework- Proposed development of current institutional frameworks

The institutional frameworks that need to be developed to aid the actualisation of socio economic rights are as follows; legal authority, structural composition, structural accountability measures/enforcement mechanisms and Institutional mandate.

i. Legal authority

The existing legal authority that appears to have impacted on how institutions should reflect philanthropic CSR is the new Companies Act and Regulation 2011. Currently, Section 72 of the new Companies Act authorises the Minister of Trade and Industry through the use of regulatory mechanisms to mandate companies to create a SEC or CSR Board committee, charged with monitoring corporate governance and implementation of philanthropic CSR projects. Section 72(4) of the Companies Act provides expressly that: "The Minister, by regulation, may prescribe

–(a) a category of companies that must each have a social and ethics committee, if it is desired in the public interest, having regard to: “annual turnover; workforce size; or the nature and extent of the activities of such companies”. In this regard, the researcher proposes in line with the Minister’s mandate to enact regulatory frameworks that would specifically regulate philanthropic CSR. The law will empower SEC and other institutions identified in this research to bridge the gap that existed in Regulation 43(5) which provides that SEC records corporate sponsorship, donations and charitable giving. In addition, the proposed law should not only be to record philanthropic CSR but also create a platform wherein philanthropic CSR will be evenly distributed to those that are in dire need of support.

ii. Structural composition

In terms of Regulation 43(4), the structural composition of a company's SEC comprises not less than three directors or recommended officers of the company, at least one of whom must be a director who is not involved in the daily administration of the company's operations, and must not have been involved as such within the preceding three fiscal years. Although the provision attempts to accommodate the independent functioning of SEC, the body arguably remains attached to the company by virtue of the fact that the body is appointed by the board of directors and reports directly to the board of directors and the company’s shareholders. Hence, the researcher advocates for the employment of external structures to reinforce reporting and accountability measures. Hence, the researcher proposes a structural composition of SEC that will encourage public participation. In addition, the local community through enabling law should be empowered to democratically elect members of the community who will participate in decision makings related to CSR issues.

iii. Structural Accountability measures/enforcement mechanisms.

The need to empower existing CSR structures such as SEC and ensure that they are accountable for their operations cannot be overemphasised. For example the inefficiency of SEC as a monitoring mechanism arguably emanates from the lack of independence and limited scope of powers of such bodies. A cursory reading of Regulation 2011 actually points towards the fact that SEC members are appointed by the board of directors.³⁴³ Surprisingly the very same SEC directly reports to or accounts to the company’s board of directors and the company’s shareholders.³⁴⁴ This raises the question as to the extent of objectivity of SEC in discharging their

³⁴³Regulation 43 (3).

³⁴⁴Regulation 43 (5) (a) & (b).

monitoring function, owing to an evident lack of independence between SEC and the company on whose behalf they carry out CSR activities. Under such a framework, whether companies comply with their CSR mandates or not is largely dependent on the benevolence or malevolence of the same companies. Yet, without external checks and balances the entire system could potentially be chaotic.

Against this backdrop, the researcher proposes that rather than just reporting to the board of directors and shareholders, SEC's scope of responsibility should be extended to other monitoring structures. Accordingly, to enhance accountability SEC should also report those activities to the Financial Reporting Standards Council using the format generally prescribed for such financial reporting. The benefits of using such a body stem from the fact that the Council is constituted by persons who have competencies in relation to financial reporting and accounting.³⁴⁵ The Companies and Intellectual Property Commission established in terms of section 185 of the Companies Act can also be employed as an added structural accountability measure. The Commission may serve the purpose of reviewing the financial reports and handling incidental complaints pertaining to companies' CSR activities in the same manner it performs similar functions provided for at section 187 of the Companies Act. This is arguably an effective and objective accountability measure because of the independence of the commission which detaches it from rigid pursuit of company proprietary interests.³⁴⁶

The Competition Tribunal is also there to reinforce institutional objectivity. This is because it has the power to adjudicate any dispute incidental to the compliance with the provisions of company legislation including the power to grant appropriate relief in such matters.³⁴⁷ Extra bodies that can also be utilised include the Human Rights Council and non-governmental organisations which actually specialised in human rights developments. With the aid of these external structures, through monitoring, transparency and accountability of CSR projects, philanthropic CSR will gainfully be managed, accounted for and distributed in a manner which will facilitate the actualisation of socio-economic rights.

³⁴⁵Companies Act (note 62 above) Sec 203. It describes the requisite qualifications for becoming a member of the Financial Reporting Standards Council.

³⁴⁶Supra Sec 185. It provides that the Commission is an independent body, unlike ordinary public service bodies and is subject to the constitution.

³⁴⁷SupraSec 195.

iv. Institutional mandate.

In order to achieve the pertinent socio-economic objectives, SEC as an institution should be mandated to unequivocally establish high priority areas for CSR investments. Specifically, corporate institutions should be given mandates to channel philanthropic responsibility towards actualising basic socio-economic needs that are crucial for human existence rather than embark on projects such as beauty pageants and the likes. Instances where there are conflicts of rights, for example right to cultural development (sponsoring beauty pageant or cultural events) and right to health care, water and social security. It is paramount that the latter right on a scale of preference is more essential than the former. A report titled *'The Good Corporate Citizen'* by Triologue in 2005, documented thirteen areas that CSR impacts on in South Africa, namely: black ownership and control, corporate governance and ethics, employee equity, employee relations and support, employee skills development, health and safety, HIV and AIDS, preferential procurement and enterprise support, supply chain compliance, product development, marketplace stewardship, corporate social investment, environmental impact of operations.³⁴⁸ Their practices of CSR put most (or all) emphasis on social investments. Cited examples of CSI are HIV/AIDS-schemes, construction of shelter and schools as well as projects targeted at improving living conditions in the companies' nearby societies.

Similarly, Philanthropic CSR investments should be channelled largely in underdeveloped regions. For example, if MTN may discretionally decide to channel its philanthropic CSR investments in modern schools in Cape Town having sophisticated libraries and laboratories while somewhere in the deep rural areas students do not for instance have access to class rooms and desks. To further reinforce the efficacy of the desired proposal for the actualisation of socio-economic rights through philanthropic CSR, The researcher presents a structural framework for CSR Regulation.

4.5 Summary of the functioning of the proposed philanthropic CSR Framework

The following represents the proposed institutions and their functions in actualising a regulated philanthropic CSR. The role and functions of the various structures which will facilitate the actualisation of socio-economic rights are highlighted below.

³⁴⁸ Busacca 'Corporate Social Responsibility in South Africa's Mining Industry: Redressing the Legacy of Apartheid,(note 305 above)13-14.

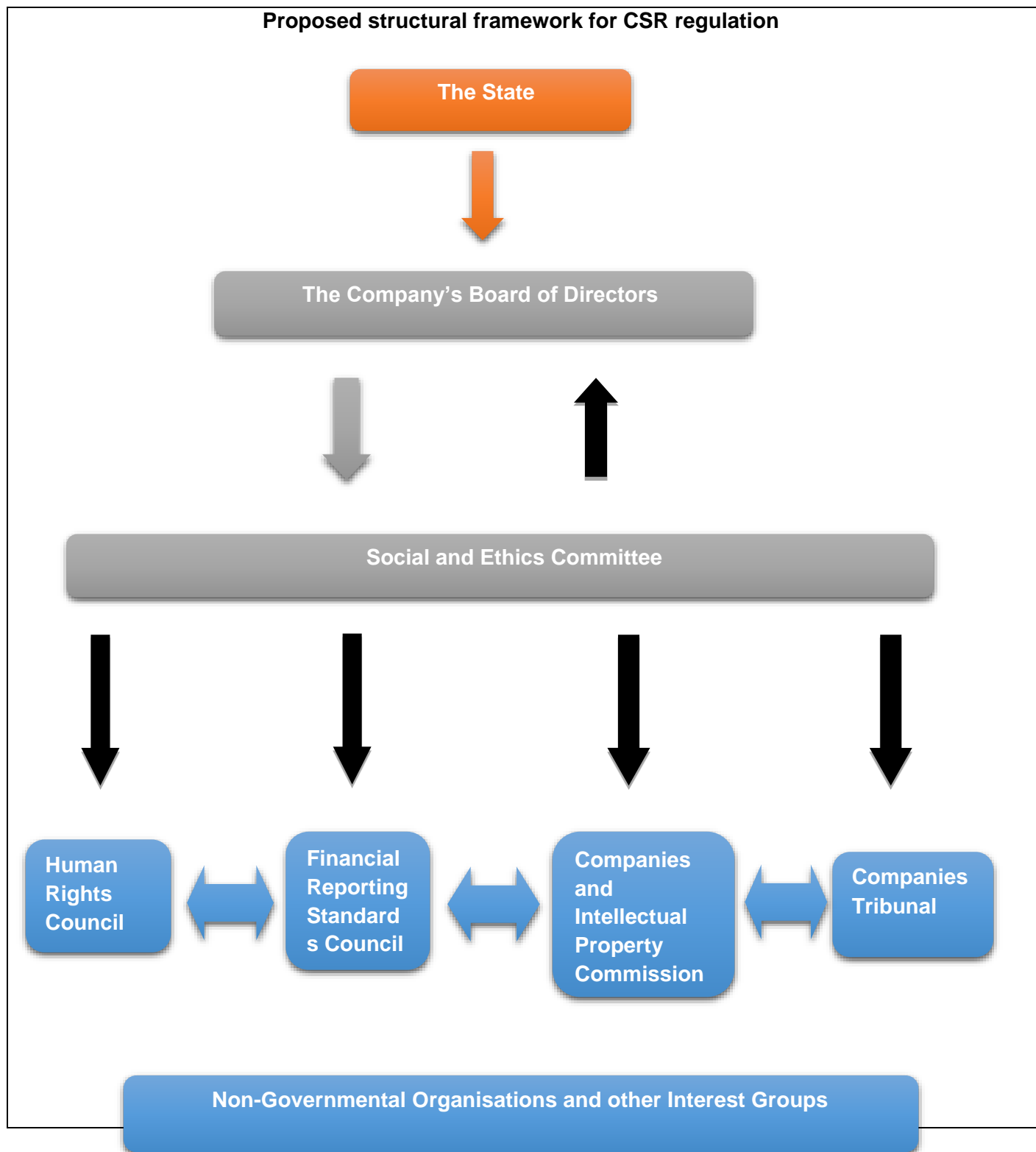


Fig 1. Structure of proposed regulatory CSR philanthropic framework and institutions

- a. The State, through the legislature, enacts statutes that regulate all CSR activities, counting philanthropic CSR undertakings. Through such legislation, companies are directed to create Social and Ethics Committees that are partake in CSR activities.
- b. The Company, through its Board of Directors establish a Social and Ethics Committee to undertake CSR activities on behalf of the company.
- c. The Social and Ethics Committee performs the CSR responsibilities of the company. The SEC reports back on its CSR activities to the company's Board of Directors. The SEC renders a financial report on its CSR activities to the Financial Reporting Standards Council in terms of financial reporting standards. SEC also reports to the Human Rights Council pertaining to its financial contribution to the set socio-economic rights development objectives.
- d. The FRSC and the HRC have the power to investigate or evaluate the compliance level of SEC to its CSR obligations and the related report-back duties.
- e. The Companies and Intellectual Property Commission will have power to review any reports furnished to FRSC and HRC by SEC, and make appropriate order in case of any irregularities in SEC's financial reporting to the respective bodies.
- f. Where any incidental dispute that arises in connection with the CICPs exercise of its powers of review will be adjudicated over by the Companies' Tribunal. So as to ensure concentrated legal application of legal regulation to company activities an appeal court may be created for purposes of appealing against the decisions of the Companies Tribunal.
- g. NGO's and other interest groups serve as extra external measures of reinforcing compliance and accountability by the above bodies.

4.6 Conclusion

In conclusion, chapter four hinged on the researcher's proposed normative and institutional frameworks for the regulation of philanthropic CSR. The proposed developments were made on the back of extant socio-economic discrepancies and the inadequacies of CSR regulations in realising socio-economic objectives, especially when it comes to philanthropic CSR endeavours. The researcher had identified normative and institutional inadequacy within the sphere of CSR. Normative inadequacies included lack of actual statutory directives upon companies to contribute to CSR, the extent of, or minimum standard of contribution, the nature of activities or programmes

towards which CSR contributions are to be made as well as the remedy in cases of non-compliance.

In the same vein, the researcher identified institutional deficiencies in terms of institutional accountability measures with regard to the functioning of the SEC. As the principal structure charged with the task of engaging in CSR activities on behalf of companies, the SEC is not entirely independent from the company based on it being appointed by, and reporting mainly to, the company's board of directors, despite the Companies Act stipulating that it must be independent. Also the relevant statutes do not expressly provide for external accountability measures in relation to CSR activities. As such, the researcher's proposed normative developments include ratification of relevant international human rights conventions such as the CDESCR and statutory frameworks providing for comprehensive substantive content on the minimum standard of contribution, guidelines on the distribution of such contribution and the roles of different institutions involved in CSR activities.

The researcher proposed institutional developments which would expressly define the composition of SEC to include members of the local community. This will encourage public participation in deciding philanthropic CSR investments. The utilisation of already existing bodies such as the Human Rights Council, the Financial Reporting Standards Council, the Companies and Intellectual Property Commission, the Companies Tribunal as well as Non-Governmental Organisations will facilitate monitoring and reporting of philanthropic CSR. These institutions are designed to act as external accountability structures, with the purpose of reinforcing transparency and accountability apropos the undertaking of and reporting on CSR activities by companies, through their SECs.

Chapter 5

Conclusion and recommendations

5.1 Conclusion

In the preceding chapters, the researcher dealt with the analyses of current normative and institutional frameworks on CSR in South Africa, with particular reference to philanthropic CSR. The above analyses were done with a view to propose improvements on the current CSR frameworks. This incidentally formed the basis of chapter 4. The structure and orientation of research in the previous chapters was informed by the research aim and objectives. To this end, the research aim was to examine how the notion of CSR in the form of philanthropic responsibility can be developed as a tool for the realisation of Socio-Economic Rights in South Africa. The objectives of this dissertation were: to evaluate the general notion of CSR and its limitation; to describe relevant international human rights obligations relevant to CSR; and, to assess the adequacy or otherwise of relevant domestic instruments on CSR in the light of international human rights obligations and prescribe the way forward.

In the present chapter the researcher takes the reader through the conduct of the previous chapters by providing conclusions to the research questions and recommendations on further researches. The research questions were:

What are the emerging standards in international human rights law in relation to human rights obligations on CSR?; What are the present corporate laws and practices on CSR in South Africa and their implications in terms of states human rights obligations and realization of socio-economic rights?; What normative and institutional framework developments are necessary to advance corporate philanthropic gestures as a tool of realising socio-economic rights in South Africa?; How can the normative and institutional frameworks be used to enhance the realisation of socio-economic rights?. In answering the above research questions, the researcher analysed a lot of material such as, international human rights instruments in the form of hard and soft laws, foreign as well as South African national legislation, cases and articles and other text on CSR. In line with the above, the researcher will at this juncture summarise the outcome of the finding as regards to:

- a. **The emerging standards in international human rights law in relation to human rights obligations on CSR**

In dealing with the above query, this research answered the question -What are the emerging standards in international human rights law in relation to human rights obligations on CSR? In addressing the question, the researcher analysed international and regional human rights instruments. The analyses were dissected in accordance with jurisdiction as well as in line with the application of the relevant instruments as hard and soft laws. Accordingly, the researcher evaluated states' obligation to respect, protect, fulfill and promote socio-economic rights and the prevailing CSR international standards expected from corporate Institutions to actualise socio-economic rights. In this vein, the researcher made the following findings on the above research questions

On the first research question, the researcher found that international law occupies an important position in South Africa. South Africa has made significant steps to align itself with international human rights standards in relation to the regulation of corporate activities and CSR. At African Regional level, the South Africa is signatory to the OECD and has adopted the OECD principles and its CSR standards through Regulation 2011. At sub-regional level, South Africa as a member of Southern African Development Community (SADC) is bound by the Framework for the Harmonization of Mining Policies Standards and Regulatory Frameworks regulates *inter alia* corporate governance, ecological management in addition to socio-economic issues in the mining sector.

In the light of the above, the question regarding the identification of international law is of significance in as much as it deals with the application of international law in South Africa.

Although the South African government has adopted at the UN level instruments documents such as the United Nations Global Compact (UNGC) in the Companies Regulation 2011 and the Guiding Principle on Business and Human Right which came into force after the enactment of Regulation 2011, there is still a need for commitment towards international socio-economic standards through ratification of instruments such as the CESC. This is because full commitment ensures that South Africa adheres to a set minimum standard of compliance in terms of the obligations to respect, protect, promote and fulfil socio-economic rights. In this way the regulation of philanthropic CSR will be informed by definite socio-economic objectives and CSR regulation will most likely be well-adjusted to meet these ends. This makes it easier for companies to identify and respect new or evolving ethical moral norms adopted by society and to do what is expected morally or ethically.

The application of International law in South Africa's legal system is reinforced by Section 39 1(b) of the Constitution which stipulates that "when interpreting the Bill of Rights, a court, tribunal or forum – must consider international law". The said section contains peremptory provisions which denote that when interpreting the Bill of Rights, a court, tribunal or forum must make value judgments that are aimed at promoting the values which underlie an open and democratic society based on human dignity, equality and freedom), and must have regard to international law. Section 233 of the Constitution also prescribes that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

b. Corporate laws and practices on CSR in South Africa and their implications in terms of human rights obligations and realization of socio-economic rights

The researcher answered the question - what are the present corporate laws and practices on CSR in South Africa and their implications in terms of states human rights obligations and realization of socio-economic rights? In the light of the above, the researcher analysed the current CSR relevant law in the form of the Companies Act, Regulation 2011, the South African Constitution and court cases in an attempt to decipher the existing gaps in current legal frameworks on philanthropic CSR and the implications of these laws on the obligation to respect, protect, promote and fulfil socio-economic rights particularly through a regulated philanthropic CSR.

Amongst the findings were normative lapses in philanthropic CSR in that both the Companies Act and Regulation 2011 did not sufficiently deal with matters pertaining to philanthropic CSR. Through Regulation 2011 SEC intended to monitor philanthropic CSR; however its powers are weak to address CSR challenges.

Furthermore, structural deficiencies were also found to exist within the current CSR regulations particularly when it comes to philanthropic CSR. The first problem is that SEC as an institution charged with implementing CSR programmes on behalf of companies is not constituted in such a manner that encourages its directors to be committed to philanthropy CSR. In terms of Regulation 26 (4), the SEC must be constituted by not less than three directors or recommended officers of the company, at least one of whom must be a director who is not involved in the daily administration of the company's operations, and must not have been involved as such within the preceding three financial years. Although the provision is designed to ensure transparency and accountability through the independent functioning of SEC, the body arguably remains attached

to the company by virtue of the fact that the body is appointed by the board of directors and reports directly to the board of directors and the company's shareholders. As a remedy, researcher suggests the employment of external structures to reinforce reporting and accountability measures. The proposed developments are in relation to external monitoring and reporting mechanisms relying on structures such as the Financial Reporting Standards Council, the Companies and Intellectual Property Commission and the Companies Tribunal whereby the current scope of work of the above bodies should be extended to issues pertaining to the implementation of a regulated philanthropic CSR. Accordingly, SEC's scope of authority could be extended to the implementation and management of the company's CSR activities subject to external reporting to the above external bodies, in lieu of to only reporting to the board of directors and shareholders.

It is characteristic that South Africa's failure to bridge the normative, institutional and accountability gaps in the conduct of philanthropic CSR in South Africa has previously encouraged transnational corporations to further abuse and/or infringe on the enjoyment of socio-economic rights.

An assessment of corporate responsibility to protect reveals that while there are guidelines and laws such as the consumer protection Act, the Occupational Health and Safety Act, Mine Health and Safety Act just to mention a few under domestic law which protect socio-economic rights and impute criminal, civil, administrative, or disciplinary sanctions for violations of the enjoyment of such rights, there is still a challenge with regards the access to effective remedies when corporations fail to protect such rights.

In addition to the account of corporate incessant disrespect for human rights, it was reported that several extractive companies operating in South Africa were alleged to have a policy that prohibits other stakeholders from accessing on-site medical facilities (including access to HIV/AIDS medications). The companies were also alleged to discriminate against women in employment, reportedly failing to hire any women workers. As a result of the exclusion, women resorted to prostitution as a means to earn a living, which in turn increased the HIV/AIDS epidemic in the host communities, impacting on the right to work and to life.

Finally, corporations may hinder the promotion of the enjoyment of right of self-determination if it hinders employees to form trade unions and join the trade union, and infringe their right to strike for decent wages. For example the 2015 SAHRC reports that Businesses are refusing to allow

staff to become unionised and dismiss employees who embark on strike action to demand reasonable remunerations, despite these rights being enshrined in the Constitution.

Assessing corporate philanthropic responsibility and their role in fulfilling the actualisation of socio-economic rights, one can easily discern that most philanthropic CSR initiatives are established on falsehood based on the facts that such initiative are not recorded, monitored, accessed by relevant stakeholders and most times such initiatives are not done considering the communities insatiable needs. For example, philanthropic CSR projects such as beauty pageants, strengthening research capacity, sports just to mention a few, may be a noble project, but do they surpass basic socio-economic needs such as portable water, health care which determines the communities existence. An evaluation of human needs by Abraham Maslow's hierarchy theory of needs suggest that human needs are insatiable and hieratical in nature. Hence, if corporations intend to fulfill the realization of socio-economic rights, such responsibility should extend beyond philanthropic gestures.

In conclusion it can be said that, within the South African context, the legislative and institutional framework that facilitate CSR are inadequate, although they do contain very unique characteristics, especially when addressing empowerment. There is no specific set of regulations creating a situation where a business can be compelled, through legal means, to have a philanthropic CSR policy or strategy in place or to engage in philanthropic CSR activities in a manner that enhances the realisation of socio-economic rights.

c. The required normative and institutional framework for advancing philanthropic CSR as a tool of realising socio-economic rights in South Africa

In answering the question what normative and institutional framework developments are necessary to advance corporate philanthropic gestures as a tool of realising socio-economic rights in South Africa? Having identified the weaknesses in the current normative frameworks, the researcher concludes that the following developments are necessary if CSR regulation is to be utilised as a tool to achieve the actualisation of socio-economic rights: reinforcement of international human rights standards through ratification of international Conventions; restating the role of entities such as corporations in human rights advancements and statutory development of substantive CSR content. Under the institutional framework, it is essential that institutions like SEC be developed and empowered statutorily.

As for the development of philanthropic CSR as a means to achieve socio-economic advancement, the researcher found that it is essential to harmonise or rather integrate the loose-

ended philanthropic CSR with the regulated legal CSR. This is because on one hand philanthropic CSR affords a lot of discretion to companies and with that comes plenty of room for manipulation while on the other hand, there exist really pressing socio-economic advancement needs to which such financial contribution can be challenged.

5.2 Recommendations for future research on regulated philanthropic CSR

Despite the fact that South Africa has made significant advancements in the development of socio-economic rights, ratification of major human rights instruments such as the CESC is still necessary as it perpetually aligns the State's human rights development with the dominant international standards and makes compliance with a minimum standard imperative.

The researcher further recommends that in addition to the proposed normative and institutional framework, any future development of statutory CSR frameworks must provide for thorough substantive content on the minimum standard of contribution, guidelines on the distribution of such contribution and the roles of different institutions involved in CSR activities.

In the same vein, the researcher suggests the proposed institutional developments which encompass the express definition the functions of SECs and the utilisation of already existing bodies such as the Human Rights Council, the Financial Reporting Standards Council, the Companies and Intellectual Property Commission, the Companies Tribunal as well as Non-Governmental Organisations so as to provide external accountability measures, which underline transparency and accountability regarding the conduct of CSR related activities and the reporting thereof, by the relevant institutions.

It is the researcher's findings that the necessary developments, as proposed in chapter 4, are essential to the following aspects of CSR and human rights development. These are: reinforcement of international human rights standards through ratification of international Conventions; and restatement of the role of entities such as corporations in human rights advancements. Additionally the researcher submits that statutory development of substantive CSR content must include: an empowering provision; categories of affected companies; the directive upon companies to undertake CSR activities; guidelines on standard CSR practice; human rights focus on companies' duties, manner and extent of contribution towards CSR endeavours; and, sanction or remedies in case of non-compliance;

In the same manner, institutional framework development content must accommodate for: legal authority; structural composition that ensures independence, partiality and accountability;

structural accountability measures/enforcement mechanisms that provide checks and balances within the whole system; and, comprehensive definition of each body's institutional mandate.

Finally, the researcher submits that the lingering use of philanthropy CSR has a voluntary initiative is long overdue, hence scholars should conduct further study on philanthropic CSR and present mechanisms wherein philanthropic CSR may be developed to accommodate human rights obligation.

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