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Philip C. Aka

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Corporate Governance in South Africa: Analyzing the Dynamics of Corporate Governance Reforms in the “Rainbow Nation”

Philip C. Aka†

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I. Introduction and Argument

Recently in South Africa¹ there have been animated discussions about the need to “reform” corporate governance law² in the country to bring it up to “the 21st century.”³ The discourse on reforms is embodied in the 1973 decision of the Department of Trade and Industry (DTI)⁴ to overhaul corporate governance in the

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¹ See infra Part II (presenting a refresher on this country, memorably dubbed the 'rainbow nation,' in cognizance of an immense diversity so rich that it is metaphorically equated to the colors of the rainbow).

² Company law is the term South Africans, like the British from whom they borrowed some of their legal ideas, use for “corporate law.” Tshepo Mongalo, South Africanizing Company Law for a Modern Global Economy, 121 S. Afr. L. J. 93, 93 (2004). The two terms are used interchangeably in this paper, although, instinctively, I use “corporate law” more. Definitions of this and other terms of the study like corporate governance (never “company governance”) are provided in infra Part III.A


⁴ The Department of Trade and Industry (DTI) is one of 37 ministries or national departments of the South African government. See http://www.info.gov.za/aboutgovt/dept.htm (last visited March 23, 2007). The purposes of the department include to “[p]rovide leadership to the South African economy,” “[a]ct as a catalyst for the transformation and development of the economy and respond to the challenges and opportunities of the economic citizens, in order to support the government’s economic goals of growth, employment and equality,” “[r]espond to the
country to bring it into conformity with global trends, taking into account the local context and peculiarities of South Africa.\(^5\) The last such review took place over thirty years ago. The proposal for this overhaul is embedded in a fifty-page policy paper released in May 2004 and sets forth “the framework and guidelines for more detailed technical consultation, which will provide the foundation for the drafting of a new Companies Act,” drawing on the body of jurisprudence on this topic going back more than a century.\(^6\)

The policy document promised “an overall review of company law,”\(^7\) and the development of a “clear, facilitating, predictable and consistently enforced law” that would provide “a protective and fertile environment for economic activity.”\(^8\) It proposed that “company law should promote the competitiveness and development of the South African economy” through various means that include: (1) promoting the growth of enterprise and entrepreneurship, thereby creating jobs, simplifying the procedures for forming companies, and reducing the costs associated with the formalities of forming a company and maintaining its existence; (2) promoting innovation and investment in South African companies and markets by providing flexibility in the design and organization of companies, and a predictable and effective regulatory environment; (3) promoting the efficiency of companies and their management by, among other things, shifting company law from a capital maintenance regime based on par value to one based on solvency and liquidity; (4) encouraging challenges and opportunities in the economy and society,” and “[p]rovide a predictable, competitive, equitable and socially responsible environment for investment enterprise and trade.” The Department of Trade and Industry, Overview of the DTI, http://www.dti.gov.za/thedti/overview.htm (last visited March 7, 2007). For more on this key department, see infra note 87 and accompanying text. The DTI’s influence in South Africa’s economy is arguably likeable to the role of the Ministry of International Trade and Industry as “economic general staff” in Japan’s state-assisted capitalist structure. See generally CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 (Stanford Univ. Press, 1982).

\(^5\) GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 7; see also Mongalo, supra note 2, at 121 passim.

\(^6\) GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 7. The guidelines are analyzed at greater length in infra Part IV (articulating the factors that lend impetus to the impending reforms of South African corporate governance law).

\(^7\) Id. at 9.

\(^8\) Id. at 11.
transparency and high standards of corporate governance; and (5) harmonizing company law in South Africa with best practice jurisdictions internationally by, among other things, ensuring that company law sanctions should be de-criminalized where possible, and avoiding over-regulation.9 The changes can be summarized by the acronym SFCTP: “S” denoting simplification, “F” flexibility, “C” corporate efficiency, “T” transparency, and “P” predictable regulation.10 The policy paper addressed a number of specific issues of corporate governance, including the laws relating to company formation, corporate finance, shares and share issuance, capital maintenance, corporate governance, mergers and takeovers, insolvency and corporate rescue or winding up a business, and the administration and enforcement of the law.11

The policy paper formulated a new approach to the law of corporate governance that packages and presents a replacement of the old model that focused on shareholders.12 This approach balances “the interests of shareholders...with those of other stakeholders when...appropriate and/or required by the Constitution and related legislation.”13 Under this approach, a company conducts its “business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies[;]”14 and considers “stakeholders, such as the community in which the company operates, its customers, its employees, its suppliers and the environment” when making corporate decisions or developing strategy.15 The document

10 COMPANIES BILL, supra note 9, at 3-5.
11 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 30-48.
12 The traditional approach focuses “on the role of directors, auditors and shareholders in managing and overseeing [a] company’s business primarily for the benefit of the shareholders,” said to own the company, and “[m]ost of the checks and balances on the powers of the controllers of the company were aimed at... primarily” this one group. Id. at 24. Under this traditional approach, “the interests of the shareholders are paramount and interests of other stakeholders“ where factored in at all, are considered only if advancing those interests will lead to maximization of profit for shareholders. Id.
13 Id. at 25.
14 Id.
15 Mongalo, supra note 2, at 114.
embraced the King Committee's notion of a shift away from a single bottom line that focused on profit for shareholders, to a triple bottom line, encompassing the economic, environmental, and social aspects of a company's activities. Various rationalizations provided in support of this new approach include that the new guidelines "reflect the recognition that the company is a social as well as an economic institution, and accordingly that the company's pursuit of economic objectives should be constrained by social and environmental imperatives, some of which are provided for in legislative enactments;" that "advancing the interests of other stakeholders is not invariably a subordinate consideration to the primary goal of directors to act in the best interest of the shareholders as a body;" and that "company law must acknowledge that companies as economic agents have an impact on society and therefore on a broader range of stakeholders" other than shareholders.

The process of drafting and consultation associated with the new reforms was expected to be completed by December of 2005 and a bill embodying the changes submitted to the South African legislature (Parliament) by January of 2006. However, the process became delayed and the bill did not make its way to Parliament until one year later in the spring of 2007. The bill is open for public comment until March 19, after which it goes to Parliament in June 2007. If passed into law, the new Companies Bill of 2007, like the policy paper, prepared and published by the

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16 See GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 39 (indicating that disclosures by companies "should extend not only to financial information, but should also include statements on compliance with public interest legislation, including the Black Economic Empowerment [BEE] Act, environmental regulation[,] and labor regulation."). For more on the concept of "triple bottom line," see infra nn. 185-86 and accompanying texts (discussing the King Reports and Code). For more on the BEE Act and related affirmative action plans for blacks, see infra nn. 73-82.

17 GUIDELINES FOR CORPORATE LAW REFORM, supra, note 3 at 25.

18 Id. at 26 (emphasis added).

19 Id.

20 See id. at 49-50, 50 tbl. Three sub-issues covered under corporate governance are (1) shareholders and investor protection, (2) directors and the structure of the Board, and (3) disclosure and reporting. See id. at 35-39.

21 Id.

Department of Trade and Industry,\textsuperscript{23} will repeal and replace the Companies Act No. 61 of 1973 as well as “provide for the possible future repeal of the Close Corporations Act No. 69 of 1984.”\textsuperscript{24} The proposed legislation is also designed “[t]o provide for the incorporation, registration, capitalization, organization and management” of companies “to define the relationships between companies and their respective shareholders or members and directors [and] to provide for equitable and efficient mergers, amalgamations and takeovers of companies, and for efficient rescue of failing companies, [and] to provide appropriate legal redress for investors and third parties with respect to companies.”\textsuperscript{25} The bill also established three institutions charged with administrations of various aspects of the new law. These institutions are (1) a Commission and a Takeover Regulation Panel, which will administer the requirements of the Act with respect to companies; (2) a Companies Ombud, which will facilitate alternative dispute resolution and review decisions of the Commission and the Takeover Regulation Panel; and (3) a Financial Reporting Standards Council, which will advise on requirements for financial record keeping and reporting by companies.\textsuperscript{26}

The movement for an overhaul of the law of corporate governance now taking place in South Africa both tracks and expands upon a general process of reassessment of corporate governance in sub-Saharan Africa since the beginning of the new century. In 2000, at a “consultative meeting” held in Kenya, in which fourteen African countries were represented, an agreement

\textsuperscript{23} An interesting development integral to the impending reforms in the law of corporate governance in South Africa but also testimony to the influence of the DTI as an impetus to change is that the black scholar and commentator on corporate reforms in South Africa, Tshepo Mongalo, left his position in academia to become project manager of corporate law reform with the DTI. See Zobuzwe Ngobes, Companies Act Needs Much Work, Academic Says, July 28, 2003, available at http://www.busrep.co.za/index.php?fsetId=561&ArticleId=196690. Mongalo, the author of CORPORATE LAW AND CORPORATE GOVERNANCE: A GLOBAL PICTURE OF BUSINESS UNDERTAKINGS IN SOUTH AFRICA was, at the time this paper was written, a Senior Lecturer in Business Law at the University of KwaZulu-Natal, in South Africa. Id.

\textsuperscript{24} COMPANIES BILL 2007, supra note 9, at 2.

\textsuperscript{25} Id.

\textsuperscript{26} Id.
was reached that there should be a “harmonized development of corporate governance standards and practices in the continent that takes into consideration the needs of the continent.”

The conferees assessed that “[t]he adoption of corporate governance principles by African countries will be a giant step toward creating safeguards against corruption and mismanagement, promoting transparency in economic life and attracting more local and foreign investment.”

One year later, a conference and workshop on corporate governance, instructively themed “Corporate Governance for Sustainable Growth,” took place in Accra, Ghana; participants from a variety of countries, including Kenya, South Africa, and the United States attended. Background discussion from the conference proceedings indicated that “[t]he timing of the conference coincided with the increased corporate governance debate and awareness in Africa as in other emerging economies[,]” importantly and revealingly adding: “[i]ncreasingly, Africa is being called upon to take stock of its corporate governance capacity.” Consistent with the King Report(s) on Corporate Governance in South Africa, to which they referred explicitly by name, the conferees took a broad view of corporate governance that encompassed “stakeholders.” The conferees drew an instructive connection between governance generally and in the corporate context. “Corporate governance brings the values of democracy to the corporate level, and ensures that effective rules of the game allow equal access and protection for all participating in economic life.”

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27 CTR. FOR INT’L PRIVATE ENTER. & INST. FOR ECONOMIC AFFAIRS, WEST AFRICA CONFERENCE ON CORPORATE GOVERNANCE: CORPORATE GOVERNANCE FOR SUSTAINABLE GROWTH 3 (2001) [hereinafter CORPORATE GOVERNANCE FOR SUSTAINABLE GROWTH], available at http://www/cipe.org/about/news/conferences/africa/ghana/pdf/ghana.pdf. The Center for International Private Enterprise, based in the U.S., was one of three organizations that sponsored the meeting. The Institute of Economic Affairs in Ghana was another of the three sponsors. The name of the third organization, the Development Policy Center (DPC), based in Nigeria, did not appear in the source title.

28 See id.

29 See id. at 3.

30 Id.

31 Id. at 6. For more on the King Reports and Code see infra nn. 185-193 and accompanying texts.

32 CORPORATE CONFERENCE FOR SUSTAINABLE GROWTH, supra note 27, at 3.
governance, whether corporate or non-corporate, hinges on" certain common denominator principles, including: accountability, transparency, equity, open communication, participatory decision-making and management, shared responsibility, and submission to the rule of law.33 The conferees identified some of the key factors distinguishing corporate governance in advanced economies from governance in poorer economies of the kind found in "Black Africa."34 They also instructively dwelt on the possible influence of privatization and corporate governance in Africa.35 In short, the conferees appear to indicate that "[g]ood corporate governance" cannot occur without "a good corporate culture."36

33 Id.

34 See id. at 8 (analyzing the role of financial markets). The basic argument is that "[a] well-developed capital market promotes effective corporate governance." Id. Under such a system, there is "a set of laws establishing voting and control rights for shareholders, rules imposing on directors and officers certain fiduciary duties, among others." Id. In these markets characterized by efficiency, transparency, and liquid capital, "companies that are perceived to have poor corporate governance are punished in the market place with low share prices." Id. In these systems where "widely-held public companies represent a significant part of the corporate sector, the reality of proxy contexts, hostile takeovers and leveraged buy-outs also exerts some discipline over management." Id. These factors are non-existent in African countries where instead, "there is a dominance of state enterprises or closely-held family-owned and managed businesses." Id. To be sure, there are cases where shares are publicly held. However, in these rare cases, represented by the likes of Ghana, a majority of the shares are held by foreign parent companies. Id. The report pointed out that 12 of the 22 companies listed on the Ghana Stock Exchange are foreign-controlled with control blocks as high as 72 percent. Id.

35 See id. at 14 ("[p]rivatization of government ownership in enterprises is germane to good corporate governance. Most state-owned enterprises . . . do not abide by corporate governance rules and this ultimately affects the enterprise's performance and therefore affects the taxpayer.").

36 See id at 4. The report does not seem to point to one silver bullet or overarching strategy that leads to a desirable corporate culture in Africa. Rather, there is indication that such a culture is the synergistic result of a series of small melding and welding steps that include good governance in the larger society, a "good reputation industry," and transparency. Id. Regarding the last, the report stated the hard-to-contest position that "[p]eople are willing to invest time, money, sweat and tears in their own ventures only if they believe that the market is transparent, and not rigged against them." Id.; accord, MELVIN D. AYOGU, CORPORATE GOVERNANCE IN AFRICA: THE RECORD AND POLICIES FOR GOOD GOVERNANCE (African Dev. Bank Econ. Research Paper No. 66 at 19) (2001) (commenting regarding the nature of the "close" linkage of corruption to corporate governance, that "[a] corrupt system influences corporate governance through its impact on the calculus of crime and punishment, as well as on the credibility of the apparatus for enforcing corporate rules, procedures and regulations.").
This Article analyzes South Africa’s corporate governance reform discourse and its evolving corporate culture. These initiatives in South Africa reflect critical issues and concepts in comparative corporate law. While South Africa is *sui generis*, or unique, the country demonstrates important lessons in governance reform and contributes to scholarship of the same. The Article is divided into five parts. Part II presents a brief overview of South Africa designed to familiarize the reader with the “rainbow nation.” Part III is a background account of the nature and character of the law of corporate governance in South Africa that, besides definitions of the basic terms of the study, presents the legal framework and characteristics of the law of corporate governance in the country. Part IV analyzes the interactions of domestic and external factors that are lending impetus to the impending changes in the law of corporate governance in South Africa. Part V develops an exhaustive survey of the literature on the law of comparative corporate governance that integrates discussion of the changing attention to Black Africa in the scholarship. Part VI applies that scholarship to South Africa.

II. Refresher on the “Rainbow Nation”

South Africa is a large country, about twice the size of Texas, located at the foot of Africa. With a population estimated at about forty-three million people, South Africa ranks among the most populous countries in Sub-Saharan Africa, fourth after Nigeria, Ethiopia, and the Democratic Republic of the Congo, formerly Zaire, in that order. The population comprises numerous racial and ethnic groups, evident in the twenty-two

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37 The dictionary defines *sui generis* as “[b]eing the only example of its kind; unique.” *The American Heritage College Dictionary* 1358 (Houghton Mifflin Co., 3d ed. 1993).


40 See Ramsay, *supra* note 38, at 158, 52, 107, 81 (including general information on these states, including population, with South Africa at 158, Nigeria at 52, Ethiopia at 107, and the Democratic Republic of the Congo at 81).
official languages recognized in the country, and justifying the appellation "the rainbow nation" applied to it. Although the country's constitution provides for a unitary system of government, the complexity of the country's rich diversity creates a political framework that is "a hybrid governance structure with strong powers vested in the central government and some federal characteristics, with provinces having limited legislation-making functions." Since the country's independence from Britain in 1910, a white minority held control of the reins of government and denied blacks, who form the majority of the population, a voice and opportunity for participation in the affairs of their own country. The exclusion reached new heights in 1948 with the


42 The term was coined by the cleric Bishop Desmund Tutu, reputed for his chairmanship of the Truth and Reconciliation Commission (TRC), among other initiatives in the struggle for black inclusiveness in the South African political system. See Paul-Henri Bischoff & Roger Southall, The Early Foreign Policy of the Democratic South Africa, in AFRICAN FOREIGN POLICIES 154, 159 (Stephen Wright, ed.) (1999); NAOMI CHAZAN, ET AL., POLITICS AND SOCIETY IN CONTEMPORARY AFRICA 487 (Lynne Rienner, 3rd ed., 1999) (regarding the TRC).

43 Seafield, supra note 41, at 295.

44 The black experience in South Africa invites comparison with that of blacks in the United States over a century before. A key distinction is that in the United States in 1790 blacks formed the minority population, comprising only an estimated 18 percent of the country, KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA 75 (9th ed. 2008), whereas in South Africa, they were and have always been the majority. Another point of distinction is that in the United States denial of national citizenship to blacks was justified on the ground that they were brought involuntarily into the country as slaves, whereas in South Africa, blacks were subjected to and endured exclusion and segregation in their own homeland. There is an ingrained academic tradition in the United States, embodied in the works of Professor Fredrickson and former Judge Higginbotham and others, comparing the United States and South Africa. See, e.g., GEORGE M. FREDERICKSON, BLACK LIBERATION: A COMPARATIVE HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA (1995); GEORGE M. FREDERICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981); A. Leon Higginbotham, Jr. et al., De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice, 1990 U. I.L. L. REV. 763 (1990); A. Leon Higginbotham, Jr., Racism in American and South African Courts: Similarities and Differences, 65 N.Y.U. L. REV. 491 (1990). See also ANTHONY W. MARK, MAKING RACE AND NATION: A COMPARISON OF THE UNITED STATES, SOUTH AFRICA, AND BRAZIL (1998) (going beyond the traditional two
introduction of the policy and practice of apartheid (or apartness in Afrikaans).  

Led by the African National Congress (ANC), blacks resisted their exclusion, first non-violently and when that failed, beginning in 1961 and continuing through armed struggle until 1994 when the policy of apartness ended with the inauguration and evolution of majority rule in the country. Important highlights of this resistance include the adoption by the ANC and other opponents of apartheid, of the Freedom Charter in 1955, which spelled out a vision of a nonracial, democratic state for South Africa and the incarceration of Nelson Mandela, a known arrowhead and icon of black resistance, by the white minority government for almost three decades until his release in 1990. Following Mandela’s release from prison and the lifting of the ban the white minority regime slapped upon the ANC and other parties who opposed apartheid, South Africa, in 1993, adopted a “transitional” constitution (to replace the apartheid era one of 1983), which was superseded by the country’s present constitution in 1996.
South Africa boasts one of the largest and most broad-based economies in Africa.\textsuperscript{49} Once heavily dependent on the mining of gold, diamonds, and other mineral resources, today, the South African economy is more diversified with formal sectors based not only on mining and agriculture, but also on manufacturing and services.\textsuperscript{50} With an annual gross domestic product (GDP) of over $130 billion, nearly 30 percent of Africa’s economic output,\textsuperscript{51} South Africa is the only country in Sub-Saharan Africa with the material potential to join the ranks of newly industrialized countries now dominated by Asian countries like Hong Kong, Malaysia, Singapore, and South Korea.\textsuperscript{52} For example, seven of the eight African companies listed on the New York Stock Exchange (NYSE) are South African companies, four of which deal with the mining industry,\textsuperscript{53} an occurrence reflecting the continued influence of mining as a mainstay of the South African economy even with diversification.

Yet in absolute terms, South Africa is not a rich country. With a population approximately twice the size of Texas, South Africa’s economy is only half as large.\textsuperscript{54} Also, for the 25.6 million people that make up its adult population, “the South African economy only provides employment opportunities for 9.6 million people[,]”

\textsuperscript{49} Seafield, supra note 41, at 295.
\textsuperscript{51} Schraeder, supra note 39, at 246.
\textsuperscript{52} Bischoff & Southall, supra note 42, at 155.
leaving the rest, most of them blacks, structurally unemployed.\textsuperscript{55} Even more critical, the country's apparent economic prosperity conceals the fact that, as one analyst aptly phrased it, "South Africa is a country of vast extremes."\textsuperscript{56} Vast disparities exist between blacks and whites on every conceivable indicator, including wealth, income, health, education, housing and land.\textsuperscript{57} One report of the United Nations Development Program ranked South Africa as the third most unequal country in the world, surpassed only by Brazil and Guatemala.\textsuperscript{58} At 0.62, South Africa's Gini coefficient, a measure of income inequality, is also among the highest in the world.\textsuperscript{59} In 1989, the estimated annual per capital income of whites in the country was $4,775, compared to only $417 for blacks.\textsuperscript{60} The distribution of infrastructure in the country follows a similar pattern, with white South Africans enjoying a standard of living similar or equivalent to what one will find among the most developed countries of the world, while blacks are relegated to standards redolent of the least developed countries.\textsuperscript{61}

In short, South Africa "has a two-tiered economy; one rivaling other developed countries and the other with only the most basic infrastructure" of the kind associated with least developed societies, making the country "a productive and industrialized economy that exhibits many characteristics associated with

\textsuperscript{55} Seafield, \textit{supra} note 41, at 295. For more on this challenge, see \textit{infra} nn. 64-68, and accompanying text.

\textsuperscript{56} Seafield, \textit{supra} note 41, at 295. An example is the health care industry: "[i]n 1992, infant mortality for [black South] Africans was eight to ten times higher than that for whites and was significantly higher than rates in Zimbabwe, Zambia, and Botswana." Tuberculosis, a disease that generally tracks poverty, "struck 780 of 10,000 black [South] Africans, compared with only 13.5 of 10,000 white[] [South Africans]." \textit{See} CHAZAN ET AL., \textit{supra} note 42, at 486.

\textsuperscript{57} True to its notoriety as a land "of vast extremes," South Africa combines, as a U.S. analyst points out, "sophisticated publicly listed companies," some of which trade their stocks in the New York Stock Exchange, with "an extremely high AIDS prevalence rate among [its] general population[.]" Salomon, \textit{supra} note 53, at 1504. For more on HIV/AIDS in the country, see \textit{infra} note 69 and accompanying text.

\textsuperscript{58} Seafield, \textit{supra} note 41, at 295.


\textsuperscript{60} \textit{See} CHAZAN ET AL., \textit{supra} note 42, at 485.

\textsuperscript{61} \textit{See} Seafield, \textit{supra} note 41, at 295.
developing countries....”

This contrast between First and Third Worlds, a legacy of apartheid, “is one of South Africa’s most striking features.”

While remarkable progress hard to minimize has been made since the onset of majority rule in 1994, much still remains to be done to bridge the gulf of disparity between white and black South Africans. Unemployment of a size that dwarfs the Great Depression still afflicts blacks. More than whites, blacks are also unlikely to possess the education and skills that lead to steady or fulfilling employment. Of the more than three million South Africans with no formal education at all, 90 percent are black. The result of this unequal access to education for blacks is a skills shortage so acute that some corporations, such as the liquid fuel company Sasol, had to import pipe-welders from Thailand. Everywhere in the country, “[t]he great constraint holding back development... is the lack of skilled workforce.”

Tracking and compounding these problems are recent challenges, including HIV/AIDS, an “epidemic of shattering

62 Economy of South Africa, supra note 50.

63 Seafield, supra note 41, at 295.

64 See Chazan et al., supra note 42, at 487 (noting that in 1996 “as many as 55 percent of young black males were unemployed”); Schraeder, supra note 39, at 264, 265 (quoting the variant figures of 45 percent and 35 percent). The rate of unemployment in the U.S. during the Great Depression, beginning in 1932, was about 25 percent, excluding millions of underemployed people. Janda et al., supra note 44, at 590. Added to this and complicating matters is the impoverished condition of the historically neglected black townships. About eight million South Africans, especially people living in the black townships, still lack access to running water and three million citizens lack adequate housing. See Schraeder, supra note 39, at 265; Alec Russell, Mbeki Vows to Increase Police Force in Focus on Crime, Fin. Times (London), Feb. 10, 2007, at 2. Sixty-eight percent of South Africa’s rural population, most of which is black, lives in abject poverty. Seafield, supra note 41, at 296.

65 Seafield, supra note 41, at 295-296.

66 Id. at 296.


68 Id.; See also Alec Russell, Interview with Fin. Minister Trevor Manuel: Caution in a Commodity Boom Climate, Fin. Times (London), June 5, 2007, (Fin. Times Special Rep. on S. Afr.) at 4 (“If you say we don’t produce sufficient rocket scientists we don’t need to spend too much time talking about that. But the country also has huge deficits in artisanal skills . . . . If you are building refineries you can’t just take people off the streets, give them a welding machine or an oxyacetylene torch and say ‘weld the pipes.’”).
dimensions” which affects every facet of life, including business, and an exceptionally high crime rate. A ten-year review in 2004 of the post-apartheid period found the persistence of “two economies” in the country. One of the tools the South African government has used to correct the disparity resulting from its apartheid past and promote inclusiveness is the Black Economic Empowerment initiative. Known as the BEE Act, the law

69 See Salomon, supra note 53, at 1477. See also Catholic Relief Services (CRS), South Africa, http://www.crs.org/our_work/where_we_work/overseas/Africa/south_africa/index.cfm (last visited March 20, 2006) (“South Africa has an estimated five million people living with HIV/AIDS. There are more people infected with HIV/AIDS in South Africa than in any other country in the world.”). According to CRS, South Africa is home to an estimated 660,000 children under 15 who have been orphaned because of AIDS. Id. In the mining, metals processing, and agribusiness industries, where more than 23 percent of workers suffer from AIDS, the cost of labor has risen dramatically because of an increase in absenteeism and employee turnover as a result of the epidemic. See Salomon, supra note 53, at 1503. As one U.S. analyst pointed out, given that the mines depend primarily on a workforce derived from a particularly high-risk segment of the population, AIDS is particularly relevant for U.S. investors in these companies whose stocks are listed in the New York Stock Exchange. Id.

70 With about 18,000 murders a year or nearly more than ten times the number in the United States, South Africa dubiously boasts one of the highest violent crime rates in the world. See, e.g., Schrader, supra note 39, at 265; Russell, supra note 64. Thoughtful commentators have warned that violent crimes could, if not curbed, pose a threat to post-apartheid South Africa, and overshadow the economic accomplishments of the ANC government. One analyst wrote, “As South Africans know all too well from the apartheid era, international perceptions are crucial to their hopes of success. The outriders of the big private equity groups eyeing potential investments may not in these ‘good times’ be put off by the murder rate. But the drip-drip of bad news will, in the long run, take its toll.” Alec Russell, Pretoria Must Take the Crime Crisis Seriously, FIN. TIMES (London), Feb. 6, 2007, at 13. Pointing to the relationship between economic development and human rights, one South African human rights practitioner correctly noted that “[t]he improvement of the economy is a sine qua non for the effective exercise and promotion of human rights.” Seafield, supra note 41, at 336. The same writer observed that “[t]he increase in crime has resulted in a backlash against the constitution; people are now blaming the ills of society on the bill of rights and are calling for the reinstatement of capital punishment[.]” and advised: “[a] balancing act between the dictates of the constitution and being tough on crime is required.” Id. In response to this problem, the Mbeki government intends to increase the police force in South Africa from 152,000 to 180,000 troops. Russell, supra note 64. The government has also “called for more community policing and better regulation of the private security industry.” Id.

71 Infra note 182 and accompanying text; supra note 62 and accompanying text.

72 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 14 & 51 n.11.

73 Id. Some of the assumptions underlying adoption of the BEE Act are that
culminated the promise of the ANC government upon taking office in 1994 to eradicate all forms of discrimination, wherever it existed, and the publication of the Reconstruction and Development Program (RDP), a broad-based measure designed to correct the exclusion of blacks and bring them into the economic mainstream. A variety of other legislative measures have since been enacted to complement the BEE Act. Both the private sector in South Africa and the South African Constitution approve preferential measures for blacks, and South African legal

“economic unity” in South Africa requires the inclusion of blacks, long excluded as a group for no reason other than their race or color, be integrated into the economic mainstream; that race/color is a legitimate tool for achieving that integration; that South Africa performs below its potential because of the low level of income earned and generated by the majority of its people; and that unless steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race. Id.

Mongalo, supra note 2, at 112.

Some of the objectives of the RDP are “to de-racialize” business ownership and control in South Africa through “focused policies” of assistance to blacks designed “to make it easier for [them] to gain access to capital for business development,” and “ensur[ing] that no discrimination occurs in financial institutions.” Id. (quoting RECONSTRUCTION AND DEVELOPMENT PROGRAMME DOCUMENT para. 4.4.6.3).

See id. at 112-113. These initiatives include the Employment Equity Act 55 of 1998, which required companies to develop an employment equity plan and to report on progress in achieving the objectives set out in their plans, as well as the Skills Development Act 97 of 1998, and the Skills Development Levies Act 9 of 1999, both of which govern the provision of resources for skills development and training by companies. Id. at 113, nn. 125-26.

With respect to the private sector, the King Report of 1994 assessed adoption of affirmative action measures by companies to be good corporate-governance practice and dedicated a whole chapter, Chapter 8, to affirmative action. Id. at 113, 113 n. 120. King II (2002) did the same thing, expressing in its final report the view that taking into account the “social imbalances” that have existed in South Africa for many decades and the need for reform, among other factors, companies need “a greater social and ethical conscience” in the interest of their long-term survival as well as “the greater well-being of society generally.” Id. at 113 (citing KING COMM., KING REPORT ON CORPORATE GOVERNANCE IN SOUTH AFRICA § 4, ch. 5, para. 1). The report also admonished South African companies to make themselves “seen as agents of change not only for their own benefit but also for the benefit of their stakeholders.” Id. Regarding constitutional protection, the interim Constitution provided for affirmative action as an integral part of the right to equality. The document forbids any person from being “unfairly discriminated against” on grounds that include race, gender, sex, and language, but also stipulated that the provision should “not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons
scholars, such as Mongalo, contend that such measures are good corporate-governance practices that should form a necessary and integral part of a reformed law of corporate governance in South Africa. However, like in the United States, these affirmative action measures remain controversial. Critics complain that the policy and its accompanying programs are a tool ANC politicians use to provide "jobs for the boys," and the government, responding to these complaints, has moved to streamline or reshape the measures which it recently renamed "broad-based black economic empowerment." Reinforcing its controversial nature, the BEE Act also recently became the subject of international litigation. One thoughtful South African

disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms." See id. at 113 (INTERIM CONST. OF S. AFR. §§8(2) and (3)). The language of the document suggests preferential measures also apply to white women. The final Constitution, Act 108 of 1996, echoed the provisions of the interim Constitution on this very subject matter. Id. at 113.

78 Id. at 112. Besides recognizing South Africa's peculiar circumstances, affirmative action measures, such as the BEE Act, speak to the inadequacy of a focus on conventional corporate law principles in the South African setting. Id. at 114-115. Mongalo argued that the conventional rules, coupled with apartheid laws, enabled South African companies to embark on an exclusive corporate approach focused on shareholders that now needs to change. Id. at 114. He said the dismantling of apartheid has served to reveal the shibboleths of the exclusive shareholder supremacy at all costs approach and brought with it the realization that companies do not operate in a vacuum. Id. Mongalo welcomes the innovation represented by the King Reports, see infra nn. 185-193 and accompanying texts, with their notion of a "triple-bottom-line" approach to corporate governance that goes beyond the single bottom-line of profit for shareholders, but indicated they did not go far enough, given that these reports "ignor[ed] calls for a more explicit recognition of the role of stakeholders within corporate law." Id. at 115.


81 See Russell & Barber, supra note 80.

82 In a case that signifies the growing power of international law in governing trade and investment, three Italian mining companies, Marlin Holdings, Marlin Corp., and RED Graniti SA, have filed an arbitration suit with the International Center for Settlement of Investment Disputes (ICSID) in Washington D.C. (housed with the World
commenting in 1993 on the folly of expectation of a quick move toward liberal democracy in South Africa, stated, "[a]nyone who thought we would be able to change [three hundred] years of white domination and [forty-five] years of apartheid into a liberal democracy in a flash and without releasing considerable energy was naive." Like with the dismantle of apartheid, the disparities of the apartheid era will take some time, quite a lot of hard work and some luck to fix.

Economic factors play a major role in the shaping of the foreign relations of post-apartheid South Africa. In an attempt to overcome the extraordinary challenges they confront, South Africa governments, especially the market-friendly administration of Thabo Mbeki, "ha[ve] aggressively sought foreign aid, trade, and investment." The economic orientation of South African post-apartheid foreign policy is indicated by the prominent role the Department of Trade and Industry has played in the foreign affairs of the country, a role that has loomed so large that a suggestion has been made for the merger of the department with the Department of Foreign Affairs "to avoid unnecessary bureaucratic competition and to ensure a more integrated foreign-policy

Bank) against the South African government, alleging that South Africa's new minerals law, enacted pursuant to the BEE Act, violated investment protection treaties the South African government signed with Italy and other foreign governments. The companies seek compensation in the amount of $350 million for what they allege as the expropriation of their granite mining operations. See Luke Peterson & Alan Beattie, Mining Trio Mount Court Challenge to South Africa, FIN. TIMES (London), Mar. 9, 2007, at 8. An occurrence that complicates matters for the black-led government in South Africa is that, during the 1990s, "in an attempt to placate nervous foreign investors," it signed "a series of bilateral treaties" with a diversity of foreign governments that include Italy, the country of incorporation of the companies bringing this claim, making guarantees in return for investments that it must still keep without violating its own laws, here symbolized by the BEE Act. Id.

See Chanzan et al., supra note 42, at 477.

Id.

See Schraeder, supra note 39, at 245 passim.

Id. at 264. Recognition among the leadership in South Africa "that foreign capital is crucial to internal reconstruction and development has made South Africa a firm proponent of the neoliberal model of development," a world view "which rejects the once-heralded models of import substitution, trade protectionism, and government control of key industries." Id. at 265. Professor Schraeder views this occurrence as a "surprising development[] in South African foreign policy since the apartheid era." Id.
approach."

III. Nature and Character of the Law of Corporate Governance in South Africa

A. Defining Corporate Governance

The key to a proper understanding of the concept of corporate governance is to understand two terms: corporate law and corporate finance. Corporate law "recognizes, as a formal matter, three different groups: shareholders, directors, and officers. Corporate law gives each of these groups certain rights and imposes certain obligations with respect to the operation of the enterprise. It also regulates the distribution of rights and duties between the three groups." More to the point for our purpose here, corporate law is essentially concerned with creation and or availability of the corporate form for two primary purposes, namely: (1) to facilitate and regulate the process of raising capital for the business operations of a company (corporate finance), and (2) to impose controls on persons whose power is derived from the finance that the use of the corporate form has put at their disposal or regulating organs concerned with the governance of a company.

87 Schraeder, supra note 39, at 261; Bischoff & Southall, supra note 42, at 159.

88 We could even back off one step by beginning our definitional journey with corporation. Corporations are "an ancient device of intangible organization" that, since the 19th century, have provided a "convenient foundation" and "an efficient means" for aggregating resources and a "large-scale organ [] for" producing wealth. LARRY CATÁ BACKER, COMPARATIVE CORPORATE LAW: UNITED STATES, EUROPEAN UNION, CHINA AND JAPAN: CASES AND MATERIALS 3 (2002). See also Charles R. P. Pouncy, Stock Markets in Sub-Saharan Africa: Western Legal Institutions as a Component of the Neo-Colonial Project, 23 U. PA. J. INT’L L. 85, 90 n.17 (Spring 2002) ("Innovations in the structure of business organizations were important if large-scale risk-taking ventures were to become practical. The consequences of being a co-owner of a failed partnership, which could include being imprisoned or sold into slavery to satisfy one’s debts, provided a strong incentive for the creation of alternative organizations in which personal liability could be limited."). Five attributes of a corporation recognized by the law of corporation are (1) limited liability, the quality most commonly associated with the corporate form, (2) free transferability of ownership interests, (3) continuity of existence or "perpetual life," (4) centralized management, and (5) entity status. MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 100 (8th ed. 2000).

89 BACKER, supra note 88, at 176.
Stated differently, the nature of the inter-relationship among shareholders, directors, and officers is that issues of corporate law could be categorized into two areas: corporate finance law, and corporate governance.

Corporate finance law deals with the way in which a company raises money for its business operations and how the company deals with its finances generally. Issues involved in the law of corporate finance include incorporating and commencing a business, corporate personality and its significance in corporate finance, pre-incorporation contracts and their significance in financing business activities, shares and share capital, rights attaching to shares, distributions to shareholders, share buy-backs and redeemable shares. By comparison, corporate governance focuses mainly on the systems by which companies are directed and controlled. It is "the collection of law and practice[s]," "grounded in fiduciary duties and their application[,]" "that regulates the conduct of those in control" of a corporation, and the means through which a variety of countries provide a legal basis for corporations "while preserving, to some extent, authority to control abuses of" these business organizations. Issues involved in the law and study of corporate governance include formation and dissolution of companies, financing, structures such as board of directors and shareholders, the importance of the corporate constitution, duties and responsibilities of those controlling companies, the importance of company meetings, formation and dissolution of companies, financing, structures such as board of directors and shareholders, the importance of the corporate constitution, duties and responsibilities of those controlling companies, the importance of company meetings,

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90 Mongalo, supra note 2, at 100 (citing EILIS FERRAN, COMPANY LAW AND CORPORATE FINANCE 3 (Oxford Univ. Press 1999)).

91 Id.

92 Id.

93 Id.

94 Id. The link between the two terms, as the South African legal scholar, Mongalo, said, can be explained by posing the question: "Given that a company has been enabled by company law rules relating to corporate finance to raise capital, are the controllers of the company (directors, shareholders and other stakeholders) subject to effective regulation . . . to ensure that they act as stewards of the company's assets? If there are such rules . . . [w]hat are these rules? Are they effective or do they need to be bolstered? This is the core of corporate governance." Id.

95 BACKER, supra note 88, at 3. Features of a corporation also include provisions commonly contained in charters and similar documents or custom, such as the manner of calling and holding meetings, qualifications for office, and so forth. Id.

96 BACKER, supra note 88, at 3.
protection of minorities within companies, and insider trading and its importance in corporate governance. Sources of corporate governance law include statutes, cases, and government or stock rules. These sources could also encompass securities law (focusing on both the selling of and the market for securities). Other factors beyond corporate law which can influence corporate governance include banking, tax, labor, and bankruptcy laws. Given the critical nature of law enforcement in this, as in other areas, issues of criminal and civil litigation also arise in the corporate setting. Finally, as South Africa exemplifies, the law of corporate governance can go beyond conventional instruments to include codes that complement or serve as substitutes for the legal protection afforded by conventional techniques.

A cautionary note that goes both to the conceptual limitation of corporate governance and to its connection with broader forces of governance in a society beyond the corporate arena is that "corporate governance is one piece of the complex puzzle of what makes" both the economy and political system of a country work.

B. Legal Framework Relating to the Law of Corporate Governance in South Africa

Much of the regime of South African corporate law originated in the United Kingdom; although certain aspects of the African country's corporate law are either home-grown or inherited from the Roman-Dutch tradition, much of that law has its origins in the United Kingdom, especially the Joint Stock Act of 1856 and related legislation. Company law in South Africa may be conveniently divided into two eras or periods, namely, (1) the

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97 Mongalo, supra note 2, at 100; Arthur R. Pinto, Globalization and the Study of Comparative Corporate Governance, 23 W. Int'l. L.J. 477, 484 n. 23 (2005).
98 Pinto, supra note 97, at 484 n.23
99 Id.
100 Id.
101 Pinto, supra note 97, at 484, n.23; see also infra nn. 185-193 and accompanying texts (discussing the King Reports and the Code accompanying the second King Report).
102 See Pinto, supra note 97, at 503.
103 See Mongalo, supra note 2, at 93-94, 99.
period before 1910, and (2) the period since 1910. Before 1910, a notable applicable law is the Joint Stock Companies Limited Liabilities Act No. 23 of 1861 of the Cape Colony. As its name implicates, the provincial legislation did not embrace a unified South Africa. Along with other provincial company legislation of the period, the law was patterned on English law. In fact, as the South African commentator and practitioner on corporate reforms Mongalo pointed out, until the enactment of the 1973 law, the general legislative policy in South Africa was “to follow the example set in England.”

Post-1910, the relevant or applicable laws are (1) the Union Companies Act No. 46 of 1926, and (2) the Companies Act No. 61 of 1973, which together constitute the main sources of law on companies in South Africa. As its name implies, the 1926 law was South Africa’s first national company law. It was patterned on the English Companies (Consolidation) Act of 1908 which, in turn, was based on the Joint Stock Acts of 1844 and 1956. The

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104 Recall that 1910 is the year South Africa secured its freedom from Britain, a “national” independence limited only to whites. See supra note 44 and accompanying text.

105 See GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 12.

106 Id. at 12 (describing the law as “a carbon copy of equivalent English legislation”).

107 See Mongalo, supra note 2, at 94. Even the Companies Act of 1973, infra nn. 110-14, retained influence of English law. Id. Although an extensive reform that is said to “effectively cut the umbilical cord between English and South African company law,” the law still embodied provisions borrowed from English law. Id. at 94, 94, n.11. Moreover, “decisions of the higher English courts on similar English Companies Acts” were still accorded “persuasive authority of great weight” by South African courts, even though those decisions had no binding effect. Id. at 94. This is equally so with respect to English common-law doctrines which remained relevant and continued to be applied in South African courts. Id. Examples here are common-law corporate governance principles, such as those relating to the duties of directors, that are still un-codified. Id.

108 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 12. A law that, although not strictly part of the regime of South African company law, deserves some quick mention is the Close Corporations Act No. 69 of 1984. Id. The law regulates close corporations, introduced in South Africa in 1985. Id. See also Mongalo, supra note 2, at 98. Its “purpose was to provide a simple, inexpensive business entity offering limited liability for a single person enterprise or one involving a small number of persons.” Id. The legislation was “inspired by an English policy document recommending the introduction of a new form of incorporation for small companies which, ironically, was never implemented in the United Kingdom.” Id.

109 Mongalo, supra note 2, at 94.
Companies Act of 1973 replaced the 1926 Act. One of the most important provisions of the 1973 law is Section 18 mandating the establishment of a Standing Advisory Committee on Company Law charged with the task of making recommendations from time to time regarding the amendment of the Act.\footnote{See id. at 98 & 98 n. 38.} The Committee’s establishment was the result of the recommendation of the Van Wyk de Vries Commission,\footnote{Id. at 98 n.38. The commission is named for chairman Justice Van Wyk de Vries. Id. at 96 n.33. For the charge or terms of reference of the Commission, see id.} which reviewed the 1926 law.\footnote{Id. at 96-97.} The Commission began its work in 1963 and published its main report in 1970 and a supplementary report, accompanied with a draft bill, in 1972.\footnote{See id. at 96-97 & 96 n.33.} The companies law of 1973 became the monument of that review.\footnote{Id. at 96.} Although short of an actual overhaul, the work of the Van Wyk de Vries Commission represented a major review of South African corporate governance law leading to 1973.\footnote{Id.} Another incomprehensive change short of an actual overhaul in the post-1973 period is the Securities Regulation Panel of 1989 designed to regulate takeovers and changes of control in a company.\footnote{See GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 12.}

Two other necessary elements complete the legal framework of South African law before 2007. The first consists of the common law relating to the formation, maintenance, and death of corporate entities.\footnote{Id. at 9-10.} The second consists of the organizations responsible for enforcement of corporate law in South Africa.\footnote{See id. at 10.} Besides, not surprisingly, the Department of Trade and Industry, these organizations include the Johannesburg Securities Exchange (JSE), the Financial Services Board, and the Director of Public Prosecutions.\footnote{Id. at 10. Established in 1887 before South Africa became a nation, the JSE, known in full as JSE Securities Exchange South Africa, used to be called the Johannesburg Stock Exchange (JSE). JSE Corporate Identity, http://www.jse.co.za/history_corporate_id.jsp (last visited Oct. 8, 2007). The}
institutional requirements to ensure simplicity and effective and consistent enforcement” relating to corporate offenses, and to clarify the roles and responsibilities of these enforcing bodies.120

C. Features of the Law of Corporate Governance in South Africa

Publicly-held corporations are one of several business associations in South Africa. The others are partnerships, business trusts, and close corporations. Companies, especially those with a share capital, form the business entity that dominates economic life in South Africa. Also, corporations generate enormous revenues that contribute substantially to the country’s gross domestic product (GDP).121 “By size of operations, market capitalization and number of employees,” publicly-held or listed companies, are massive organizations with resources that begin sometimes to match those of a country.122 These are among the factors that make corporate law central to the economy of South Africa and its prosperity and fundamental to its commercial competitiveness. The same factors also necessitate urgent reform of the country’s corporate governance by the Department of Trade and Industry.123 As Mongalo said, South Africa needs a new company law “which is up-to-date, competitive and designed to cater to the modern corporation which is not only a domestic force, but also an international competitor.”124

As a result of international sanctions imposed upon South Africa during the apartheid era, the corporate ownership model that prevailed in the country appeared to be one involving a concentration of power within the hands of only a few individuals and companies.125 With foreign investment into the country down to only a trickle, “the biggest South African businesses became

organization adopted its new name effective from Nov. 8, 2000, but retained its old acronym to minimize confusion. Id.

120 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 10.
121 Mongalo, supra note 2, at 95.
122 Id.
123 See id.
124 Id. at 97.
125 See id.
As a result, by the end of 2000, South Africa had 608 companies listed on the main board of the Johannesburg Stock Exchange. Of that number, 390, comprising nearly two-thirds of all listed companies, had a shareholder holding more than 30 percent, meaning that there was still a considerable number of companies with a substantial shareholding concentrated in single investors or only a few. However, the majority of listed companies did not have a shareholder who clearly wielded legal control. Instead, companies with a shareholder(s) controlling 50 percent or more of the shares amounted to a mere 190, or a fewer than a third of all listed companies. Moreover, most of the shareholders with more than 50 percent shareholding in listed companies within the same period were institutional, not individual or family, shareholders. What can one make of these corporate ownership statistics? Mongalo’s take is that the dispersed and concentrated ownership models “operat[e] side by side” in South Africa. The consequence of reform of corporate governance in the country, he said, is that both problems, namely, strengthening managerial accountability standard with respect to the dispersed model and protecting the interests of minority shareholders with respect to the concentrated model, require urgent attention.

There are two regimes relating to the law of corporate governance in South Africa. The first consists of conventional corporate governance principles made up of (a) company legislation, such as the Companies Acts of 1926 and 1973, (b)

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126 Id. at 111.
127 Mongalo, supra note 2, at 111.
128 See id.
129 Legal control is defined here as having more than 50 percent of the shareholdings. Id. at 110.
130 See id.
131 See id.
132 See id. at 110-11.
133 Mongalo, supra note 2, at 111.
134 See id. Mongalo said the King Committee missed this assessment because it presumed that dispersed ownership was the model in South Africa leading it to see improvement of managerial accountability as the problem needing solution. See infra notes 185-193 and accompanying texts.
135 See Mongalo, supra note 2, at 101.
articles of associations of companies, and (c) the common law. The principles of corporate governance under this regime are enforceable either by terms of the common law or pursuant to statutory provisions. To use action for a breach of fiduciary duties as example, shareholders or the company could sue the wrongdoer(s) under a common law derivative action or under the derivative action rule provided by section 266 of the Companies Act of 1973. The second regime is a new system embodied in codes of good practice. Known also as the "code" or self-regulatory system of corporate governance, this regime is designed to enhance and modernize the rules and principles of conventional corporate governance to reflect the context of the modern environment within which companies operate. The reason this regime is denominated "code" or self-regulatory is that it lacks a legal basis for enforcement. "Its purpose is to impose stricter checks and balances to curb malpractice or wrongdoing by those engaged in corporate decision making." This new regime "merely restates... in an enhanced manner, principles found in traditional [South African] corporate governance." It is a regime borne out of reviews undertaken by panels established by the private sector as was the case in the United Kingdom. In South Africa, these reviews took the form of the King Reports, with an accompanying Code of Corporate Practices and Conduct, each of which incorporated new standards on corporate governance. With this new regime, South Africa now has "many corporate governance principles," old and new, "which may be legally enforced in [its] courts of law."

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136 See id.
137 See id.
138 See id. at 101.
139 See id.
140 Mongalo, supra note 2, at 101.
141 Id.
142 Id.
143 Id. at 102.
144 Id.
145 See infra notes 185-193 and accompanying texts.
146 See Mongalo, supra note 2, at 102.
147 Id.
South Africa has witnessed a steady growth in corporate development since the onset of majority government in the country in 1994.\textsuperscript{148} For the ten-year period between March of 1996 and March of 2006, corporate registrations in the country grew phenomenally, from 518,000 to 1.8 million registrations.\textsuperscript{149} This growth occurred because corporations that strove to survive in the era of sanctions against apartheid, have developed a different mindset—\textsuperscript{5}in favor of paying.\textsuperscript{150} The Revenue Service Department’s policy of “pay now and argue later” was approved by the Constitutional Court, sending the message, which corporations understood, that the administration must be taken seriously.\textsuperscript{151}

IV. Impetus for Reform of Corporate Governance Law in South Africa

This section continues and builds on the discussion in the introduction of the Article\textsuperscript{152} but focuses on the impetuses for reform of South Africa’s corporate governance law. The \textit{Guidelines on Corporate Law Reform} released by the Department of Trade and Industry articulated three interrelated impetuses that collectively form the need for the overhaul of the law of corporate governance in South Africa.\textsuperscript{153} The DTI seeks to accomplish: (1) a changing environment, (2) a new constitutional dispensation, and (3) the imperativeness of modernization.\textsuperscript{154} Regarding the first,

\begin{itemize}
  \item \textsuperscript{149} See \textit{id.}
  \item \textsuperscript{150} See \textit{id.} at 3.
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} See supra nn. 3-26 and accompanying texts.
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} See generally \textit{GUIDELINES FOR CORPORATE LAW REFORM}, supra note 3, at 13-17. A fourth impetus in the policy document not given attention here is the treatment of non-profit organizations and cooperatives, which, in my assessment, is integral to impetus number three, relating to the necessity for modernization. These businesses, estimated to number about 11,000, are called section 21 companies, after the section of the 1973 Act that provides for them. The report suggests that “specific provisions” be made for these business entities “when reforming the Companies Act to ensure that these types of companies are not faced with the same requirements regarding share capital, but still comply with principles of sound governance, accountability[,] and the protection of creditors.” \textit{Id.} at 18.
\end{itemize}
the policy paper enumerated factors within and outside South Africa that "have contributed to fundamental changes in the environment in which business operates,"\textsuperscript{155} and "highlighted the need for domestic laws to be investor friendly and competitive with international trends."\textsuperscript{156} These factors include "greater globalization, increased electronic communication, greater sensitivity to social and ethical concerns, fast changing markets, greater competition for capital, goods and services," and "mobility of international capital."\textsuperscript{157} South Africa simply cannot afford to stand immobile while the world around it, domestically as well as internationally, is moving.\textsuperscript{158}

The second impetus revolved around "fundamental legal developments" in South Africa since the Companies Act of 1973, the most important of which was the adoption of the post-apartheid Constitution of 1996.\textsuperscript{159} Given the status accorded the Constitution as "the supreme law of the country," "[n]o area of South African law can be analyzed or evaluated without recourse to the" document.\textsuperscript{160} Embedded in this same document, under its Chapter 2, is a Bill of Rights that, because it "enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom," forms "a cornerstone of democracy in South Africa."\textsuperscript{161} The Constitution and the principles it espouses are then reflected in the policies and legislative programs that have taken place since 1994, such as environmental regulation and affirmative action laws, like the BEE Act, designed to promote inclusion for blacks.\textsuperscript{162} Briefly, the company law the policy paper formulates and proposes will be "consistent not only with the Constitution of South Africa and the principles of equality and fairness that it enshrines, but also with other laws" that go beyond the economic concerns of shareholders

\begin{itemize}
\item\textsuperscript{155} \textit{Id.} at 14.
\item\textsuperscript{156} \textit{Id.}
\item\textsuperscript{157} \textit{Id.} at 13.
\item\textsuperscript{158} \textit{See id.}
\item\textsuperscript{159} \textit{Id.} at 14.
\item\textsuperscript{160} \textit{GUIDELINES FOR CORPORATE LAW REFORM, supra} note 3, at 14.
\item\textsuperscript{161} \textit{Id.}
\item\textsuperscript{162} \textit{See id.}
\end{itemize}
to promote the broader interests of society.\textsuperscript{163}

The third and final impetus articulated in the DTI policy paper is the necessity for modernization of the current corporate law regime that includes corporations.\textsuperscript{164} The goal is a "company law, which is up-to-date, competitive and designed for a modern corporation that is not only a domestic institution operating in a new environment but also an international competitor[,]"\textsuperscript{165} with "[c]areful consideration" paid to "developments and best practices internationally," while keeping also in mind the local context and peculiarities of South Africa.\textsuperscript{166} This last impetus is tied to or directed at two main problems. The first is that the existing regime is full of "highly formalistic," and "economically unrealistic" rules, that "mak[e] it burdensome and costly to form and manage an enterprise."\textsuperscript{167} These rules may also, "encourage sham compliance with provisions."\textsuperscript{168} This must be changed to afford South African businesses the flexibility they need "to raise capital in a global environment that requires responsiveness and innovation."\textsuperscript{169} Some of the important areas of attention include the rules governing the duties and liabilities of directors now "largely left to common law and Codes of Corporate Practice[,]"\textsuperscript{170} and the administration of corporate governance rules, under the current law marked by a "lack of enforcement and recourse."\textsuperscript{171}

\textsuperscript{163} See id.
\textsuperscript{164} See id. at 15.
\textsuperscript{165} Id. at 6. The policy paper reminds the reader "to take into account that these days many companies are global and operate in many economies and jurisdictions, not only that of South Africa." Id.
\textsuperscript{166} GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 11; see also id. at 5 (disclosing that the decision of the South African government "to review and modernize company law in [the] country was based on the need to bring our law in line with international trends and to reflect and accommodate the changing environment for business, both in South Africa and globally.").
\textsuperscript{167} See id. at 15, 16.
\textsuperscript{168} Id. at 15.
\textsuperscript{169} Id. at 16-17.
\textsuperscript{170} Id. at 16.
\textsuperscript{171} Id. at 17. The DTI policy paper does not put all the blame for lack of enforcement on corporate law. Instead, it says, the problem is partially "attributable to the disincentives to litigation created by the court system, such as the under-developed nature of class actions and contingency fees and the costs of protracted litigation ..." Id.
The second main problem is that, except for the mini-review represented by the Van Wyk De Vries Commission, no comprehensive reform of the outdated and outmoded legal framework “built on foundations, which were put in place in Victorian England in the middle of the nineteenth century[,]” has taken place, when a broad range of countries or jurisdictions within and beyond Africa, including Australia, Botswana, Canada, Hong Kong, and the United Kingdom, “have undertaken extensive reviews of their domestic company law.” Indeed, “[d]uring the same period, a series of spectacular corporate failures have focused attention upon the need for improved corporate governance in many countries, not the least being the USA, which has recently passed the Sarbanes-Oxley Act.” South Africa has also had its own share of failures represented by the collapse of companies like Leisurenet and Regal Bank. The net effect of such occurrences has been that “investor confidence around the world, and particularly in the U.S., has been badly shaken by events at Enron, WorldCom, Tyco, Adelphia, Vivendi[,] and Parmalat, to name but a few.... [T]he actions of a small number of people have had immense repercussions on the whole business community.”

An overarching factor around which, for the DTI, these various factors coalesce is the importance of good corporate governance for the South African economy. “Corporations, in various forms, are central to [the] country’s economy and its prosperity,” in that they are tools “for wealth creation and social renewal.” A company law regime that is “clear, facilitating, predictable and consistently enforced” can “create a protective and

172 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 7.

173 Id. at 5.

174 Id. at 7, n.2. There can be no good reason for South Africa to resist change, the DTI counseled, at a time when “the framework upon which our company legislation is based has been questioned in the land of its origin,” pointing out that the review of core company law in Britain resulted in the publication of a report in July 2002. Id. at 5.

175 Id. at 7.

176 Salomon, supra note 53, at 1486.

177 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 10-11.

178 See id. at 8.

179 Id. at 5.
fertile environment for economic activity...Accordingly, the DTI prescribes the five steps, summarized in the policy paper, that it designed to promote the competitiveness and development of the South African economy using company law. The contribution of corporate governance to economic development becomes particularly urgent considering the fact that despite the vision of the government and the magnificent strides achieved in the post-apartheid period, one review on the first ten years of majority rule found that the country continues to be saddled by "two economies." This review elaborated as follows:

The first is an advanced, sophisticated economy based on skilled labor, which is becoming more globally competitive. The second is a mainly informal, marginalized, unskilled economy, populated by the unemployed and those unemployable in the formal sector. Despite the impressive gains made in the first economy, the benefits of growth have yet to reach the second economy, and with the enormity of the challenges arising from the social transition, the second economy risks falling further behind if there is no decisive government intervention.

One of several corporate governance events in South Africa that the policy paper indicated preceded and culminated the review it proposed was the publication of the second King Report on Corporate Governance in South Africa. The King Report on Corporate Governance (King I), released in 1994, broke new ground in corporate governance at the time it was published: it formalized the need for companies to recognize they no longer operated independently from the societies in which they operate by advocating an integrated approach to good governance that

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180 Id. at 5, 11.
181 See supra note 9 and accompanying text.
182 GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 9.
183 Other important corporate governance occurrences include the issuance in November 1997 of a policy paper by the DTI titled "Proposed Guidelines for Competition Policy," which outlined a broad legislative reform program that included, among other issues, a review of existing securities regulations, and current practices and regulations relating to corporate governance; and the release of another DTI document, "Integrated Manufacturing Strategy" (IMS), which embodied the government's vision of the kind of economy appropriate for South Africa. The IMS advised that "[e]nterprises of all types and sizes will have to become adaptive, innovative[,] and internationally competitive." GUIDELINES FOR CORPORATE LAW REFORM, supra note 3, at 7-8.
184 The Report is named after former High Court judge Mervyn King.
includes principles of good social, ethical, and environmental practice.\textsuperscript{185} The second King Report of 2002/3 and the Code of Corporate Practices and Conduct that complemented it (the report simply elaborated or amplified the provisions embodied in the code) built on the changes in corporate governance that the 1994 report introduced by acknowledging a shift away from the single bottom line (or profit for shareholders) to a triple bottom line; this means that companies should consider economic interests along with social and environmental factors in their corporate decision making, all the while keeping in mind that they are ultimately accountable to the company or body of shareholders.\textsuperscript{186} King II tracked the findings of an important study conducted in South Africa from 2001-2002 that demonstrated that shareholders and other investors attach importance to corporate governance and are willing to pay a premium for the shares of a well-governed company over a poorly managed company with a comparable financial record.\textsuperscript{187}

The Code of Corporate Practices and Conduct, which accompanied the second King Report,\textsuperscript{188} imposed a “requirement” on companies to “comply or explain.”\textsuperscript{189} Under this “code” regime, affected corporations, such as listed companies, banks, financial and insurance institutions, and certain categories of public sector enterprises, must comply with provisions in the Code of Corporate Practices and Conduct. If they fail to comply, they must justify their non-compliance in their annual reports\textsuperscript{190} Stated differently, the King Code requires a company to report at least once a year on its policies on social, ethical, safety, health, environmental and related matters, but leaves it to the board of each company to decide what it deems relevant for disclosure in “regard to the company’s particular circumstances.”\textsuperscript{191} The issue

\begin{footnotes}
\item[185] See Mongalo, \textit{supra} note 2, at 114.
\item[186] See \textit{id.} at 114.
\item[187] See \textit{id.} at 102. \textit{See also id.} at 102 n.54. Mongalo interprets this finding to mean that “by simply developing good governance practices, directors are potentially able to attract a greater number of long-term investors.” \textit{Id.} at 102.
\item[188] See \textit{id.}.
\item[189] \textit{Id.} at 102.
\item[190] \textit{Id.}
\item[191] Mongalo, \textit{supra} note 2, at 102.
\end{footnotes}
of AIDS, on which Salomon did her study, is one example. "[L]isted companies do not have to take any prescribed action; rather, [they] are only required to document to what extent they are responding to the AIDS epidemic in their workplace."\textsuperscript{192}

Although unveiled in the wake of corporate failures in both South Africa and abroad, it is interesting that the United States and South Africa took different approaches to dealing with the problem: the United States achieved compliance through the threat of legal sanctions represented in the Sarbanes-Oxley Act of 2002, while South Africa applied a self-censoring technique.\textsuperscript{193}

Mongalo's piece, published the same year as the guidelines, tracks the document verbatim in more than a few places. Therefore, it is reasonable to speculate that this black South African, who later left his job in academia to join the DTI as project manager of corporate law reforms, helped author the document. We will take the impetuses one by one. Mongalo appears to share the view of the DTI that the occurrence of fundamental changes in the business environment in which businesses operate is necessary in reforming corporate governance principles. He commented that because "[w]e live in an era where investment can be moved from one part of the world to another with the click of a mouse," "the main objective" of a reformed company law "should be the encouragement of foreign direct investment."\textsuperscript{194} Mongalo also wants "serious note" to be "taken of the fact that corporate law is becoming increasingly globalized, where all countries are fighting for investor capital."\textsuperscript{195}

Along with the DTI, Mongalo embraces the impetus relating to a new constitutional dispensation dictating a move away from conventional corporate governance principles. Not only does he defend the BEE Act and related affirmative action measures as good corporate-governance practices that should form a central

\begin{itemize}
\item \textsuperscript{192} Salomon, \textit{supra} note 53, at 1486.
\item \textsuperscript{193} \textit{Id.} One South African put the matter memorably when he stated, "while one system promotes the employment of an army of lawyers to find the best possible ways around a plethora of laws, the other involves employing an army of consultants to address how the principles will be best applied to an organization." \textit{Id.} See also Pinto, \textit{supra} note 97, at 501, n.77 (indicating that the U.S. approach "may be related to the need for greater protections in a market based system.").
\item \textsuperscript{194} Mongalo, \textit{supra} note 2, at 116.
\item \textsuperscript{195} \textit{Id.}
\end{itemize}
part of a reformed law of corporate governance in South Africa, he also supports “a more explicit recognition of the role of stakeholders within corporate law” beyond the “triple-bottom-line” philosophy of the King Committee. In justifying this wholly integrated approach to corporate governance, Mongalo, like the DTI, pointed to South Africa’s post-apartheid constitution whose provisions, including its supremacy clause, he said mandated a more harmonious “balanc[ing]” of shareholder-investor interests and those of the public or other stakeholders, and counseled dispensation with the most exclusive principles of conventional governance law.

With respect to the third and last impetus, Mongalo, like the DTI, believes South African corporate governance law to be sorely outdated and in dire need of modernization. As a result of the increased globalization of the South African economy in a number of areas, the current framework of corporate governance in the country is “holding back, rather than facilitating competitiveness, growth and investment.” The embedment of South Africa’s law of corporate governance in English law and the law’s lag in modernization have “led to unfortunate consequences, at a substantial cost to businesses and the economy.” Also, like the DTI, Mongalo advocates the imperativeness of good corporate governance for the South African economy. Foreign direct investment “from all quarters of the globe” is crucial to South

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196 See id. at 112-15.

197 Id. at 115. For all the major advance it represents in the direction of an integrated or all-inclusive approach to corporate governance, Mongalo did not think the second King Report went far enough. He complained, “in view of the country’s past, King II should have recommended changes to the core of directors’ duties to accommodate the interests of other stakeholders,” rather than “ignore[e] calls for a more explicit recognition of the role of stakeholders within corporate law. Merely communicating relevant issues to stakeholders without involving them in corporate decision-making runs contrary to the very same triple-bottom-line advocated by King II.” Id. King II discussed stakeholder communication matters under § 4 of the Report entitled “Integrated Sustainability Reporting.” Stakeholder communications matters are also set forth in § 5 of the Code.

198 See id. at 97. See also id. at 114, n.131.

199 See id. at 115.

200 Mongalo, supra note 2, at 115.

201 Id. at 97.

202 See id. at 109.
Africa's economic growth. Given this occurrence, "a good system of corporate governance must be in place." He approvingly cites Arthur Levitt, former Chairman of the U.S. Securities and Exchange Commission, who stated that "no market has a divine right to investors' capital," but rather "[m]arkets exist by the grace of investors." He claims that directors who adopt good governance practices can potentially increase the number of long-term investors they attract, and comments on the profundity of the "implications of good corporate governance for companies," citing the statement of James Wolfensohn, former President of the World Bank, to the effect that "[t]he proper governance of companies will become as crucial to the world economy as the proper governing of countries." Mongalo agrees that there are many reasons why businesses fail that have little or nothing to do with how they are managed, but insisted that most of the "classic collapses" during the past decades can be attributed to the failure of conventional corporate governance principles.

Finally, in some respects, Mongalo's recommendations for change parallel that of the proposals DTI made for promoting the competitiveness and development of South Africa's economy through company law, but in other respects, his recommendations exceed those of DTI. For example, Mongalo advised that "a balance be struck between self-regulation and state intervention." "A framework of company law" that is "too interventionist," he said, "may have the opposite effect of chasing away the investment necessary for economic development." Mongalo recommended the codification or regulation by legislation of directors' duties to correct the present situation characterized by "so many sources of duties of directors, namely, the common law, statute, and codes of good practice, which all

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203 See id.
204 Id. at 109.
205 See id. at 97.
206 Mongalo, supra note 2, at 102.
207 Id. at 102, n.53.
208 Id. at 97.
209 Id.
210 Id. at 116.
operate in tandem." The case for codification is supported by the fact that "the exact details of the core duties of directors at common law can be determined only through a process of reconciling a number of conflicting cases, some of which date back to the early [nineteenth] century." However, principles only suitable for certain businesses, like listed companies, should be left as codes of good practice, given that these codes have the advantage of flexibility in the sense that individual companies can apply them in a way that best fits their own circumstances and, compared to statutes, the codes are easier to update.

V. South Africa and the Scholarship on the Law of Comparative Corporate Governance

A. Overview of the Scholarship on the Law of Comparative Corporate Governance

Generally speaking, a comparative study involves a systematic examination of similarities and differences between or among nations or regions designed to explain those similarities and differences. As Professor Brown stated, "[t]he comparative method compels us to identify similarities and differences, and then to account for them. We are led away from description, and toward explanation. We see every aspect of our subject in a new light." In comparative law, "[a] deep understanding of" different legal systems "could lead to lessons to be learned from each system that could influence the development of law" and possibly "lead to emulation and practical attempts to unify or harmonize law." Finally, comparative corporate governance

211 Id. at 109.
212 Mongalo, supra note 2, at 109.
213 Id. at 115-16.
215 Id.
216 Id.
217 Id. See also THEEN & WILSON, supra note 48, at 3 (stating, "[a] broad, worldwide examination of political experience permits generalizations and the identification of tendencies and perhaps even continuities.").
218 Pinto, supra note 97, at 484. See also BACKER, supra note 88, at xxxviii (stating that comparative corporate governance is concerned with "[t]he power of harmonization,
scholarship seeks to understand and illuminate approaches governments in various regions of the world take relating "to the regulation of the corporation,"219 with specific "attention to the origins and durability of the differences between countries or regions."220 The business organization the field centers its primary focus on is the publicly held corporation.221

1. Sources of Contribution to the Scholarship on the Law of Comparative Corporate Governance

Early scholarship relating to the law of comparative corporate governance was instead of being designed to achieve explanatory ends, descriptive and formalistic.222 These early studies also followed a micro approach with focus on particular countries and differences in corporate law systems.223 They were also teleological in the sense that they were scholarship designed to shape or influence the development of corporate rules in other countries.224 Beginning from the early 1990s, a shift to a macro approach beyond individual countries took place in comparative corporate governance.225 This shift in focus was influenced by economic and corporate events within the United States, including the recession and poor corporate performance of some U.S. companies, which compelled commentators to look at the more successful economies of Germany and Japan in an attempt to determine whether these countries’ corporate governance systems contributed to their economic successes.226 The shift in focus to a

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219 BACKER, supra note 88, at xxxviii.
220 Id. at 3.
221 Pinto, supra note 97, at 478. As Professor Pinto points out, although the situation appears to be changing for good, comparative corporate governance neglects the closely held corporation. Id. at 478, n.5.
222 See id. at 482.
223 See id.
224 See id. One of these early country-specific studies that Professor Pinto cited is ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 75-95 (Foundation Press, 1976).
225 Id.
226 See Pinto, supra note 97, at 482. One of these corporate occurrences was the hostile takeover era in the 1980s, a period during which some attention was devoted to
macro scholarship led not only to studies on different ownership models (discussed below) but also to inquiries as to whether corporate governance was a factor in economic competitiveness.227 If it was, then "the study of comparative corporate governance mattered from a policy point of view."228 One work which exemplified this period was Strong Managers, Weak Owners, written by Mark Roe and published in 1994.229

One group that has made important contributions to the development of comparative corporate governance scholarship is traditional comparative law scholars.230 These scholars specialize on the issue of legal transplants, or specifically on how and if law can be exported.231 What lends importance to this line of inquiry is that it raised the issues of corporate governance in the context of developing non-Western countries. The scholarship also sired studies by Professor Paredes and others who, for example, in writing about "why importing U.S. corporate law isn't the answer," furthered the debate on the transplant issue.232 A second

the ownership of foreign corporations because concentrated ownership, explained below, meant that a hostile takeover was virtually impossible. The failure of the corporate raider, T. Boone Pickens, in an attempted takeover of a Japanese company raised the issue of open markets and corporate governance. See id. at 483, n.19.

227 See Pinto, supra note 97, at 482-83.

228 Id. at 483.

229 See Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance (Princeton Univ. Press, 1994). The study challenged the traditional assumption that the emergence of America's widely or publicly held corporations was an occurrence dictated entirely by economics. Roe found that, unlike American corporations, where shareholders are scattered and rarely play a prominent role, German and Japanese firms are often monitored by large shareholders, such as banks and insurance companies. He said that political factors more than economics, especially traditional American hostility to concentrated financial power, account for the difference between the United States and these systems. See also Mark J. Roe, Political Determinants of Corporate Governance: Political Context, Corporate Impact (Oxford Univ. Press, 2003); See also Mark J. Roe, Political Preconditions to Separating Ownership from Corporate Control, 53 Stan. L. Rev. 539 passim (2000).

230 See Pinto, supra note 97, at 484. Pinto states that "an understanding of other disciplines will help explain similarities and differences in systems." Id.


232 See Pinto, supra note 97, at 484, n.26. Paredes, supra note 231.
group of contributors to the scholarship on comparative corporate governance are financial economists who, through empirical research, have helped remove the study of comparative corporate governance from the formalism and non-empirical methodology of traditional comparative law. "Unlike traditional comparative law, financial economists have looked to see if a particular model is better or optimal." Their influence "has broadened the study by showing corporate governance in the larger context of financing business and economic performance." However, in another sense, their contribution also narrowed the field by excluding "non-finance issues, such as the role of the corporation in society and other non-financial stakeholders." Additionally, empirical research tells less than a complete story of the complex issues involved in corporate governance since it tends to exclude non-economic factors, such as cultural values, that in some societies may impinge ineluctably on corporate governance. Professor Licht has called attention to such omissions in an important work that he instructively titled "The Mother of all Path Dependencies."  

As is apparent from the foregoing discussion, one source, no less important than the two groups above, that has exerted enormous influence on comparative corporate governance scholarship is the United States. Professor Pinto detailed several U.S. studies and schools of thoughts that "became integral parts of the scholarship on comparative governance from both a theoretical and empirical perspective." Going from past to present, these

233 See Pinto, supra note 97, at 484-85.
234 Id. at 485.
235 Id.
236 Id.
237 See id.
239 Pinto, supra note 97, at 482. This is a better view of things than the view espoused by Professor Skeel who, in writing about "the comparative turn in corporate governance scholarship," implied comparative governance scholarship to be a mere extension of, or appendage to, U.S. corporate governance law. David A. Skeel Jr., Corporate Anatomy Lessons, 113 YALE L.J. 1519, 1549 (May 2004) (reviewing REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Oxford Univ. Press, 2004)). Skeel's point was that "if we had
bodies of scholarship include Professors Berle and Means's seminal study of publicly-traded corporations with the notion of separation of ownership from control that the study contributed as its central insight; the work on agency costs by Professors Jensen and Meckling; the scholarship on "monitoring board" by Professor Eisenberg; the law and economics movement with their emphasis on market solutions over regulatory approaches as a means to lower agency costs; and the work of Kraakman and others presenting an analytic framework designed to facilitate an understanding of comparative corporate governance.

2. Issues and Concepts in the Scholarship on the Law of Comparative Corporate Governance

Two important issues that have formed the object of attention in the literature on the law of comparative corporate governance possessed the analytic framework developed and applied in this book that he reviewed, "at the outset of the comparative turn in corporate governance scholarship," recent debates about the similarities and divergences of different governance regimes "might have had a much less helter-skelter quality." Id. at 1550.


243 See, e.g., FRANK H. EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harv. Univ. Press, 1991) (contending that the principal task of corporate law is to limit the conflict of interest or "agency costs" between managers and shareholders, and that American corporate law facilitates this goal by providing a menu of default rules the parties can alter by contract if they so choose).

244 See KRAAKMAN ET AL., supra note 239, at 1 (attempting to identify the underlying structure of corporate law and to provide a framework for understanding "the common structure of the law of business corporations . . . across different national jurisdictions."). As Professor Skeel, who reviewed this book, stated, its authors emphasized "the function, rather than the form, of the corporate governance approaches used in different jurisdictions." Skeel, supra note 239, at 1539. He assessed that the book "does not extend or refine the current literature so much as it provides a framework for understanding it." Id. at 1549.
are (1) the shareholder-stakeholder debate, and (2) the dispersed and concentrated ownership debate.245 The first issue concerns whether decision-making in corporations should focus exclusively on shareholders or include entities other than shareholders that are known as stakeholders (the shareholder-stakeholder debate).246 Commentators who argue that shareholders’ interest should form the focus in corporate decision-making view the publicly held corporation “in purely economic terms as a means by which capital is raised from a large number of public savers and used by businesses.”247 To these commentators, since shareholders and creditors are the owners of equity or suppliers of capital, corporate governance should give primacy to these equity owners and the directors who manage the business of the company for their benefit.248 Commentators who advocate a more inclusive approach in corporate decision-making that integrates stakeholders respond that large companies or corporations in society impact interests other than shareholders where their businesses operate; therefore, they should at least be accountable to society for the implications of corporate actions.249 Stated differently, these non-shareholder interests, along with those of shareholders who supply capital, ought to have a role in corporate governance.250 These commentators usually point to labor, which invests human capital

245 Two observations or comments are in order here. The first is the interconnection of these two critical issues embodied in the shareholder-stakeholder debate, and the debate/position relating to ownership models. Concentrated ownership structures appear to be connected with the stakeholder model. As Professor Pinto states, “[a]rguments for a stakeholder model of corporate governance seem more prevalent in countries where there is concentrated ownership.” Pinto, supra note 97, at 478. A second observation is that the ownership model issue tracks many issues, among them the question of conflicts of interest or “agency costs” that result whenever one party acts on behalf of another, an occurrence which presents the risk that the party will pursue his own interests rather than those of the other party. These “conflicts” or “costs” fall into three general categories: conflicts between the corporation’s shareholders and its managers; between controlling shareholders and minority shareholders; and conflicts between the corporation and contracting parties, such as creditors, employees, and customers. See Skeel, supra note 239, at 1528-29.

246 Id.
247 Pinto, supra note 97, at 479.
248 Id.
249 See id. See also id. at 479, n.6.
250 Id. at 479.
into a business, as an example of a stakeholder interest that deserves representation in corporate decision-making.\(^{251}\) Writing about South Africa, Mongalo stated that the stakeholder approach was necessary to “take account not only of the shareholders, but also of the imbalances of the past” created by the segregation laws of the apartheid era.\(^{252}\) He stated that the dismantling of apartheid in the country revealed “[t]he shibboleths of the” shareholder approach and led to “the realization that companies were not operating in a vacuum.”\(^{253}\)

As Professor Pinto cautions, these two positions are not cast stagnantly in stone as they often appear.\(^{254}\) Instead, they are dynamic.\(^{255}\) He observed that the role of stakeholders can be viewed from two possible perspectives: external or internal.\(^{256}\) An external perspective sees stakeholders as outside the internal corporate governance and may suggest that their interests be protected under the concept of corporate social responsibility.\(^{257}\) An internal perspective will attempt to include stakeholders more directly in corporate governance.\(^{258}\) Since a broad definition of stakeholders can create difficulty in ensuring that the corporation is meeting its obligation to all related interests, some commentators who advocate a stakeholder approach to corporate governance “view stakeholders more narrowly to only those who contribute firm-specific assets,” such as suppliers, customers, and labor, a notion “which fits better into a contractual theory of the firm.”\(^{259}\) Also, “a shareholder model does not necessarily suggest stakeholders are irrelevant,” but rather only that they are “not part of the internal corporate governance.”\(^{260}\) What is more, “[e]ven where shareholder protection is the focus of the agenda in some

\(^{251}\) See id.

\(^{252}\) Mongalo, supra note 2, at 114.

\(^{253}\) Id.

\(^{254}\) Id.

\(^{255}\) Pinto, supra note 97, at 478.

\(^{256}\) Id. at 482.

\(^{257}\) Id. at 479, n.6.

\(^{258}\) Id.

\(^{259}\) Id. at 481, n.12.

\(^{260}\) Id. at 477, n.1.
countries the role of stakeholders is part of the focus. 261

A second important issue of immense attention in the scholarship on the law of comparative corporate governance revolves around how and why two particular ownership regimes for publicly listed corporations developed in certain countries or regions of the world and whether any of these ownership models or regimes is "particularly beneficial for corporate governance because it provides a competitive edge to corporations organized pursuant" to that model or regime. 262 The two ownership structures or models in question are (1) widely dispersed ownership where no shareholder or group of shareholders owns a significant percentage of shares; and (2) concentrated ownership where there are groups of shareholders, such as family, corporate groups, or financial institutions that own significant percentages of shares. 263 The first structure or model is exemplified by countries like the United States and the United Kingdom. 264 This model "relies more on market [financing] and the importance of liquidity." 265 It is worth noting, however, that over time "institutional shareholders[,] such as mutual and pension funds[,] have become major stockholders" in large corporations in these two countries, even more so perhaps in the United Kingdom. 266 The second regime or model is exemplified by much of the non-Anglo-American world, including continental Europe and Japan. 267 Unlike the dispersed pattern, which relies more on market financing and liquidity, the concentrated model relies more on private institutions for both financing and monitoring. 268

261 Pinto, supra note 97, at 502, n.80.

262 Naomi Cahn, Corporate Governance Divergence and Sub-Saharan Africa: Lessons from Out Here in the Fields, 33 STETSON L. REV. 893, 898 (Spring 2004). See also William W. Bratton & Joseph A. McCahery, Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference, 38 COLUM. J. TRANSN’L L. 213, 216 (1999-2000) ("Corporate law’s leading question is whether there is a national corporate governance system (or component thereof) that possesses relative competitive advantage.").

263 Pinto, supra note 97, at 480.

264 Id.

265 Id.

266 See id. at 480 n.9; Skeel, supra note 239, at 1529 n.25.

267 Cahn, supra note 262, at 898.

268 Pinto, supra note 97, at 480.
Within comparative corporate governance scholarship, enormous theoretical and empirical footwork has been invested and “designed to explain the outcome of the dispersed and concentrated ownership” models.269 These explanations or “stories,” as Professor Pinto denominated them, are (1) law matters, (2) history and politics matters, (3) interest groups, and (4) deep causation.270 The three latter explanations are responses to law matters.271 All three recognize a role for law but see other explanations for why dispersed ownership emerges or fails to emerge in a specific country or region.272 Note that each of the four explanations has its weakness(es).273 The basic thesis of the “law matters” school, typified by the empirical-oriented scholarship of financial economists like Professor La Porta and others, is that the law determines ownership structure and systems of corporate finance and governance.274 According to this school, the more protective the law is in a country, the more likely it is that a dispersed ownership and economic development will occur within that country.275 Stated differently, “ownership will remain concentrated” in a country unless the affected country “provides legal protections for minority shareholders, such as a fiduciary duty requirement or voting rules that magnify the voice of small shareholders.”276 For this school, the existence of these

269 Id. at 491.
270 Id. at 492.
271 Id. at 494.
272 See id. at 494.
273 See Skeel, supra note 239, at 1545-48. However, Professor Skeel’s analysis covered only the first three explanations and did not include deep causation. Skeel points out that these explanations, with the variety of new theses they embed, have had a positive effect on comparative corporate governance: they have enabled scholars to “take a closer look [at] the governance patterns of countries throughout the world. More than ever before, the new corporate governance literature has brought economists, historians, political scientists, and law professors into a single, very important conversation.” Id. at 1548-49. The assessment is debatable given that, as I point out in V.B. below, the “countries throughout the world” Skeel commented on do not include Africa.

274 See, e.g., Rafael La Porta et al., Corporate Ownership Around the World, 54 J. Fin. 471 passim (1999); Rafael La Porta et al., Law and Finance, 106 J. Pol. Econ. 1113 passim (1998); Rafael La Porta et al., Legal Determinants of External Finance, 52 J. Fin. 1131 passim (1997).
275 Pinto, supra note 97, at 492.
276 Skeel, supra note 239, at 1544.
protections in the United States and the United Kingdom, vis-à-vis the absence of these protections elsewhere, explains why shareholdings are dispersed in these two countries but concentrated elsewhere.\textsuperscript{277} "Law matters" proponents see concentrated ownership as a poor substitute for markets and hold up legal protection as a solution for both developed and developing economies.\textsuperscript{278} An ancillary point to the basic thesis espoused by this school is that a common law system with the case-by-case development it affords is "ideally suited to keeping pace with changes in commercial life," given that "judges have the flexibility to adapt existing precedent to new developments."\textsuperscript{279} By contrast, these proponents argue, civil law systems are rigid in that they rely on strict rules with little judicial discretion.\textsuperscript{280} "On this view, the emergence of dispersed ownership and market-based governance in the United States and the United Kingdom may reflect the superior adaptability of these nations' judicial systems."\textsuperscript{281} Despite its limitations, this school through its scholarship "has transformed corporate law and corporate finance scholarship," and is, as Professor Skeel assesses, "the acknowledged inspiration for the rapidly expanding recent literature on the determinants of different corporate governance regimes."\textsuperscript{282}

The position of the "history and politics" explanation, exemplified by Professor Roe and others, is that it is history and politics, not law, that determines which ownership structure, either dispersed or concentrated, prevails in a country.\textsuperscript{283} For Professor Roe, who has studied both the United States and social democracies in Europe, political factors are key as to why different ownership models emerged in different nations.\textsuperscript{284} Roe wrote that "corporate governance is strongly 'path dependent,'" meaning that "certain political forces push a country down a

\textsuperscript{277} Id.; see also Pinto, supra note 97, at 492-93.
\textsuperscript{278} See Pinto, supra note 97, at 494. See also Skeel, supra note 239, at 1544.
\textsuperscript{279} Skeel, supra note 239, at 1545.
\textsuperscript{280} Id.
\textsuperscript{281} Id. at 1546.
\textsuperscript{282} Id. at 1546.
\textsuperscript{283} See Roe, supra note 229.
\textsuperscript{284} Pinto, supra note 97, at 494.
particular path." Once on a path, a country will experience difficulty pulling itself out of the path, because "local interests and institutions develop connections to and affinities for the path." 285

The "interest groups" explanation, exemplified by the financial economists Zingales and Rajan, argue that it is the interaction between interest groups and external shocks that determines the liquidity or illiquidity of a nation’s equity markets. 286 Zingales and Rajan question the results of Roe’s scholarship based on the United States and social democratic countries in Europe: "if politics and history matter, why is there not a consistent vision in a particular country?" 287 Without discounting the relevance of political factors, this school argues, at least with respect to Europe, that "it is not social democracy but rather the protectionism of local interests that keeps markets closed from competition." 288 For them, "the key to dispersed ownership, raising capital, and improved corporate governance, is a market-based system and open competitive trade." 289 Although, like all the other explanations it also has its problems, Professor Skeel praises this school as "in many respects the most versatile of the recent explanations[]." 290

The "deep causation" explanation, exemplified by the work of Professor Licht and others, stresses the role of "deep" factors, such as culture, in the determination of which ownership model emerges or prevails within a country. Professor Licht’s approach is to identify cultural types and other "deep" factors and to determine the correlations between these factors. 291 Although Licht’s research is empirical, this school also uses theoretical or

285 See id. at 494. See also id. at 494 n.60.


287 Pinto, supra note 97, at 495.

288 Id.

289 See id.

290 Skeel, supra note 239, at 1548.

291 See Licht, supra note 238, at 147 passim.
non-empirical research in analyzing deep factors.  

A matter paralleling the discussion relating to ownership models is “the role of the State in corporate governance, either as a direct investor or through its indirect influence on corporate decisions.” Concerning this topic, Professor Pinto explains that “[w]hile privatizations have lessened the ownership role of the State in many developed countries,” that is not the case in developing countries where there is no sign that the role of the State is declining or will decline. He points out that “[e]ven where there is no ownership, the State can try to influence corporate decisions through regulation or influence.”

A concept of comparative corporate scholarship interrelated to the two ownership models discussed above is convergence. The discourse on convergence arises in the context of which of the two ownership models is “optimal” or “most efficient for the development of corporate law,” and, for example, which structure is the model to which other countries are assimilating themselves. But convergence is elastic in terms of endless possibilities and a concept different writers define differently. It could mean movement toward one rule or system or creation of a hybrid model. It could be formal in the sense that legal rules are converging or a harmonization limited only to corporate governance functions. There are other possibilities as well: goals can converge without legal or functional convergence emerging. Similarities among systems may be limited or minimal even with formal convergence. Harmonization “may also be limited to large multinational corporations in developed

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292 See Pinto, supra note 97, at 496. See also id. at 496, n.66.
293 Id. at 477 n. 2.
294 Id. See also id. at 502, n.82.
295 Id. at 477 n.2.
296 Id. at 499.
297 Id. at 477-78. See also Cahn, supra note 262, at 895, 898.
298 Pinto, supra note 97, at 499 n.72.
299 Id. at 500.
300 Id.
301 Id. at 499, n.72.
302 Id.
economies and... inapplicable to developing economies."

"Harmonization" could also involve issues outside corporate governance like unionization (which different developed countries approach differently). A "harmonization" could also result because multinationals do business under both systems and "must conform to the strictures of each." Also, "some deliberate cross-over [could occur] as governments and corporations discover the benefits of the differing systems." Or could it be something that occurs when developing economies "catch up" with the developed economies? Or perhaps it is a movement of global economies toward market-based systems. In some countries, wholesale adoption of rules may be a reaction to crisis created by scandals, an occurrence that may turn out to be unproductive, especially if they were adopted without regard to local conditions. Also "the adoption of particular rules may suggest that these changes are aspirational or cosmetic," or "a recognition of the evolution toward a particular ownership model such as dispersed ownership." Furthermore, "changes in rules with increased shareholder protection may not mean a change in ownership structure." Also, "optimal corporate governance mechanisms may be more contextual and vary by industries and activities." The sources of the phenomenon could also vary: convergence could be the product of harmonization resulting from growing interdependence and interconnection spelled by globalization, or it could be the result of political process with compromises designed to reach a particular result, as is exemplified by occurrences within

303 _Id._
304 Pinto, supra note 97, at 503, n.83.
305 Cahn, supra note 262, at 898.
306 See _id._
307 See Pouncy, supra note 88, at 102.
308 See _id._ at 95 (stating "developing economies, by focusing on rapid technological development, would, in time, converge with developed economies, providing comparable levels of output per capita, income, and growth, thereby increasing general societal welfare"). This statement, meant to support catchment, could also plausibly be read to mean adoption of a market-based orientation by developing economies.
309 Pinto, supra note 97, at 502, n.78.
310 _Id._
311 _Id._ at 502, n.81.
312 _Id._ at 502, n.79.
the European Community.313 Harmonization could also go two ways rather than just one.314

Given the possibilities outlined above, disagreement among scholars on the term and the effects supposed to flow from convergence are issues regarding which scholars disagree.315 Whereas some scholars identify a consensus around convergence, others disagree, believing that "neither shareholder primacy nor dispersed ownership has or will easily converge."316 For these critics, path dependence (meaning history and political forces in a country) has set up structures that are not easily changed, and, within a country, there may be forces with powerful interests in preserving the existing system.317 In addition, as a result of a particular path, "complementary institutions may make it more difficult to foster change."318 Consequently, "keeping [the] existing system(s) may, in fact, be an efficient result."319 Such "lack of convergence allows for diversity and suggests that globalization will not easily change these models."320 In summary, the law of comparative corporate governance regarding convergence is characterized by such "persistence of diversity" that "it is unclear what type of convergence may result," and even "whether convergence is desirable or inevitable."321

A second concept is globalization.322 Globalization has had an

313 Id. at 499, n.72.
314 The example Professor Pinto gave was the shareholder primacy model often described as an Anglo-American model. There could also, he said, be convergence away from that model, particularly in the United Kingdom. Id. at 500, n. 73.
315 Pinto, supra note 97, at 500-02.
316 Id. at 501.
317 Id. at 499, n.60.
318 Id. at 501.
319 Id.
320 Id.
321 See Pinto, supra note 97, at 500-503, 504; 503, n.83; 503, n.84; 504, n.86. Professor Pinto stated that identifying what constitutes good corporate governance is a complex endeavor that must be based on analysis of the strengths and weaknesses of a system as well as underlying local conditions. Corporate governance is one piece of the complex puzzle of what makes economies work. And given the complexity of law, society, and related issues, it is hard to say whether a particular model of ownership or focus of corporate governance is necessary, adaptable, optimal—much less superior. Id. at 503-504. See also id. at 504, n.86.
322 Id. at 499.
enormous influence on comparative corporate governance scholarship.\textsuperscript{323} Professor Pinto's work emphasized the interconnection between globalization and comparative corporate governance.\textsuperscript{324} An important purpose of the Pinto piece was to show the numerous ways, both economic and non-economic, in which globalization has influenced and fostered both the development of comparative corporate governance and its scholarship.\textsuperscript{325} The economic dimensions of globalization, or economic globalization, are decipherable through the impacts of globalization on trade, capital markets, and multinational corporations.\textsuperscript{326} Globalization, defined as interconnectedness resulting from growing "extensity, intensity and velocity" of global interactions that go beyond economics, has also influenced and fostered the study and development of comparative corporate governance.\textsuperscript{327} Pinto breaks down these broader non-economic influences into categories, based on their sources of origination, including: (1) globalization of people, (2) globalization of information, (3) globalization of culture, and (4) globalization of politics.\textsuperscript{328} A side issue of comparative corporate governance flowing from globalization is the impact of globalization on the option for an ownership system or the relationship between globalization and adoption of an ownership system.\textsuperscript{329} In Professor Pinto's language summarizing the nature of this relationship, "if globalization moves toward any particular model, then convergence studies are also part of the globalization debate."\textsuperscript{330}

\textsuperscript{323} Id.

\textsuperscript{324} Id. at 496-97 ("If globalization is about interconnectedness, then comparisons and influences are bound to result. If globalization is also about competition, then not only firms and people compete; related systems and ideas do as well."). Pinto stated that the study of comparative corporative governance explains why models developed, and suggests a more optimal system in a globalized world, as well as a move toward some kind of convergence. Id.

\textsuperscript{325} Pinto, supra note 97, at 496.

\textsuperscript{326} See id. at 486-87.

\textsuperscript{327} Id. at 487.

\textsuperscript{328} See id. at 487-91.

\textsuperscript{329} Id. at 500.

\textsuperscript{330} Id.
B. Changing Attention to Sub-Saharan Africa in the Scholarship on the Law of Comparative Corporate Governance

Scholarship in corporate governance assigns trifling attention to Africa. Three recent episodes illustrate this popular omission. The first is the “comparative” study by Professor Kraakman of Harvard Law School and six other world-renowned corporate law scholars. The work developed an analytic framework that, although explicitly focused only on five developed countries, claimed to “transcend...particular jurisdictions,” thus maintaining universal application. However the supposedly comparative scholarship which also aimed to formulate an analytic framework that could be applied to all countries, developed and developing, did not cover corporate governance in developing countries.

Notified of this omission by Professor Skeel in a version of his review of the book before the published review, the authors included a chapter 9 in the book titled “Beyond the Anatomy” designed to correct the omission. The epilogue suggested eleven “avenues” for further research, one of which is “to examine to what extent and with which amendments our analytic framework can be used to deal with emerging jurisdictions issues.” Thus the book by Kraakman and his colleagues did not include developing countries, such as those in Africa, even though it is supposed to be comparative and even though it formulated an analytic framework for all countries, both developed and developing. The correction, to the extent that it happened, was due to Skeel’s urging. The second episode is reflected in the

331 Cahn, supra note 262, at 895.
332 See KRAAKMAN ET AL., supra note 239.
333 The five developed countries and economies are France, Germany, Japan, the United Kingdom and the United States. Id. at v.
334 Id.
335 Id.
336 Id. at 215.
337 Id. at 226. See Skeel, supra note 239, at 1538-39 n.54 (disclosing “[t]his eleventh avenue of further research was added in response to an earlier version of this Review.”).
338 Skeel, supra note 239, at 1538.
339 Id. at 1539, n.54.
action of Professor Skeel himself: Skeel stated repeatedly in his review of the Kraakman work that the book and the analytic framework that it contains do not consider the distinctive challenges of corporate governance in developing countries.\textsuperscript{340} Unfortunately, he fell into the same mistake of exclusion that he sought to correct. Skeel, in his review of the book, presented three adjustments that are necessary in a future edition to make the work complete.\textsuperscript{341} Two of these, each of which Skeel would assign a full chapter in a new edition of the book, are bankruptcy and corporate groups and corporate boundaries.\textsuperscript{342} In contrast, corporate governance in developing and transition countries would receive only "an expanded epilogue."\textsuperscript{343} What is the justification—and where is the equal treatment?—in assigning a whole chapter each to the topics of bankruptcy and corporate groups while relegating the whole universe of developing and transition economies to an "expanded" epilogue? As if this was not enough, Skeel's analysis on "developing and transition countries" ended up being a discussion limited only to former socialist countries with no treatment of developing, non-transiting countries, such as those in Africa.\textsuperscript{344} Skeel correctly observed, "[i]n terms of practical importance, there is no greater corporate governance issue in the world today than the question of how to improve the effectiveness

\textsuperscript{340} See id. at 1570 (stating that it is not "safe to assume that the typology will help us to understand how corporate law functions in every country, everywhere in the world.
 . . . If we have learned anything from the corporate governance reform projects of recent years, it is that the strategies that are used in developed countries cannot simply be transplanted into a developing country with the expectation that they will function in a comparable way."); id. at 1573 ("By itself, [the new book] would be a most misleading guidebook for understanding corporate governance in a developing or transition country. Because the authors' typology is based largely on the law on the books, it is not designed to make sense of the vicissitudes of corporate law in many countries . . . ."). See also id. at 1523 ("[i]n the developing and transition nations whose corporate law has been a particular concern in recent years... it is important to move beyond the typology in order to account for problems such as limited judicial enforcement.").

\textsuperscript{341} Id. at 1523, 1550.

\textsuperscript{342} See Skeel, supra note 239, at 1550-1562 (bankruptcy); id. at 1562-1569 (corporate groups and corporate boundaries).

\textsuperscript{343} Id. at 1569.

\textsuperscript{344} The countries Skeel treated include Russia, Hungary, India, the Czech Republic, Slovakia, Lithuania, and Romania. The only developing, non-transition country covered is India. See id. at 1571-76. There were no African countries on the list, even though Africa should be part of the developing world.
of corporate governance in developing countries." But to him, developing countries mean only transition economies and certainly exclude nations in Africa. The third and final episode pointing to inattention in the literature against Africa is signified by Professor Backer's casebook on comparative corporate law. The only mention of Africa in the textbook was in a footnote in the preface where the author indicated that "[o]ther systems of corporate governance are also worthy of study. The governance systems of Latin America, the Indian subcontinent and Africa merit discussion in their own right."

The limited attention to Africa means that the field and law of comparative corporate governance fail to "adequately capture the dilemma of developing countries," particularly those in sub-Saharan Africa. It also signifies that the scholarship overlooks the corporate governance problems in these developing economies. However, as Professor Cahn reminded us, issues of corporate social responsibility, including corruption, "are particularly important in developing countries that typically lack the same labor, environmental, and other legal constraints" that we take for granted in developed countries, one reason corporate social responsibility should form a critical component in the laws and operations of companies in developing countries like those found in Black Africa. She advised there was no way we can

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345 Id. at 1570.
346 See Skeel, supra note 239, at 1571-1576.
347 Backer, supra note 88.
348 See Backer, supra note 88, at xxxviii, n.2.
349 Cahn, supra note 262, at 895.
350 Id. at 899.
351 Id. at 896. Professor Cahn does not define "corporate social responsibility." A good definition of the term in the context of mineral-producing countries in Africa is by Ian Gary of the Catholic Relief Service (CRS), the official international humanitarian agency of the U.S. Catholic Community. In a piece in which he advised that U.S. trade with Africa should stress the values of human rights, Gary opined that U.S. oil companies have a responsibility to help ensure that aggressive oil and other mineral exploitation in mineral-rich African countries does not come at the expense of human rights, the environment, and the human dignity of the poor. See Ian Gary, Oil for U.S., Hope for Them: U.S. Trade with Africa Should Stress Value of Human Rights, available at http://www.crs.org/get_involved/advocacy/policy_and_strategic_issues/philly.cfm (last visited March 7, 2007). The piece appeared originally as an op-ed in the Philadelphia Inquirer on July 9, 2001.
appreciate the particular problems countries that lack appropriate governmental and corporate structures face and must overcome unless we include those countries in the comparative corporate governance literature.\(^{352}\)

There are some signs of growing attention to Africa in the scholarship on the law of comparative corporate governance.\(^ {353}\) Professor Cahn's work itself ranks among the indicators of that change.\(^ {354}\) So also are the contributions of Professors Cohn and Pouncy which, with Cahn's, form the basis for the survey in this portion of the paper.\(^ {355}\) This paper on South Africa is also arguably another reflection of the changing attention. Similar is the scholarship from Africa cited in the introduction of this paper.\(^ {356}\) Focusing on the Congo, formerly Zaire, and a privately-financed initiative in Chad and Cameroon the World Bank is associated with, Professor Cahn's work draws attention to the dilemmas of corruption and ineffective government bureaucracies corporations face in countries without the same standards of governance and norms that are presumed as basic conditions for meaningful business climate in developed economies.\(^ {357}\) To various extents, each of the works surveyed is a contribution to the scholarship on the law of comparative corporate governance. Professor Cohn's narration of his teaching experience based on Uganda belongs in the micro approach in comparative governance approach discussed above.\(^ {358}\) In contrast, the separate works by Professors Cahn and Pouncy are more comparative.\(^ {359}\) All three studies are non-empirical.\(^ {360}\)

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\(^{352}\) See Cahn, supra note 262, at 896.

\(^{353}\) See, e.g., Cahn, supra note 262; see also Pouncy, supra note 88; see also Stuart R. Cohn, Teaching in a Developing Country: Mistakes Made and Lessons Learned in Uganda, 48 J. LEGAL EDUC. 101 (Mar. 1998).

\(^{354}\) Cahn, supra note 262.

\(^{355}\) Cohn, supra note 353, at 101 passim; Pouncy, supra note 88, at 85 passim.

\(^{356}\) See supra nn. 27-36.

\(^{357}\) See Cahn, supra note 262, at 893 passim.

\(^{358}\) See Cohn, supra note 353.

\(^{359}\) See Cahn, supra note 262. See also Pouncy, supra note 88.

\(^{360}\) See Pinto, supra note 97, at 485. Non-empirical research can provide an important perspective which is lacking in empirical research. Professor Pinto notes that "empirical research does not tell a complete story of a complex issue because it is difficult to consider non-economic factors, such as culture or societal norms, that may be
Invited in July 1997 to Kampala, Uganda, to teach a course in securities regulations sponsored by the World Bank, Cohn said that his “initial reaction was disbelief. What I knew about Uganda was primarily the havoc wrought by years of ruthless dictators and, more recently, rampant disease. A stock exchange developing amidst such conditions seemed a far-fetched dream.” Yet to Cohn’s puzzlement, “a stock exchange indeed was being formed and a viable economy seemed to be in the making.”

Uganda, once the “Pearl of Africa,” having passed through the destructive leadership of Idi Amin and Milton Obote, has now come under the comparably more able new management of Yoweri Museveni, beloved by western donors for his fight against AIDS within his own country and for his amenableness to market friendly policies. Yet Cohn beheld a corporate culture or arena that was anything but developed:

Nothing existed except the laws, a Capital Markets Authority that had no capital markets to regulate, and a stock exchange devoid of stock. Broker-dealers existed in name only, with nothing to trade and no experience in creating public issues. There were no private companies that had engaged in a public offering, and privatization offerings to the public were still in the planning stages. There were few, if any, trained and knowledgeable lawyers and accountants prepared for the demands of a securities market. Indeed, few lawyers had seen the Capital Markets Statute... or any of the Capital Markets Authority’s regulations.

Based on assumptions drawn from his experience in the United States, “where securities laws came well after the development of primary and secondary securities markets,” Cohn contemplated that “the statutes, regulations, and organizational structure” in significant for certain governance issues.”

Cohn taught “Development and Regulation of Capital Markets” to a group of government officials, private-sector attorneys, bankers, and broker representatives. Cohn and a co-teacher, Promodh Malhotra, appointed by the International Law Institute, taught the course five hours a day, five days a week for three weeks for a total of 75 hours. Cohn, supra note 353, at 101, 104.

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361 Id. Cohn taught “Development and Regulation of Capital Markets” to a group of government officials, private-sector attorneys, bankers, and broker representatives. Cohn and a co-teacher, Promodh Malhotra, appointed by the International Law Institute, taught the course five hours a day, five days a week for three weeks for a total of 75 hours. Cohn, supra note 353, at 101, 104.

362 Id. at 101.

363 Id.

364 Id. at 102.

365 Id. at 104.
Uganda would "reflect[] market realities and development." These assumptions turned out to be "self-delusion extraordinaire"; rather, in the country, "sophisticated rules and institutions" had been "promulgated in an experiential vacuum."

In the process of teaching the course, Cohn said he:

[S]oon learned that, despite the participants' senior public and private positions, most of them had little knowledge of financial and capital market subjects.... Rudimentary questions persisted throughout the entire course... Only one person in the group had ever owned an equity interest in a business. The rest had never seen a stock certificate, had never made a securities investment, and had never dealt with a broker-dealer.

Various lessons Professor Cohn learned from his experience in Uganda that he shared in this article boiled down to the fact that local context matters: (1) thoroughly study the country and culture, (2) get early classroom feedback on local concerns and conditions, (3) use local materials as much as possible, (4) avoid the temptation to preach U.S. laws and policies, (5) make use of local events and issues, and (6) don't assume knowledge of local laws (including access to those laws). In summation, "[t]he starting point for any course or seminar should be the local conditions, regulations, and goals. They preexist our courses and remain after we have gone."

To implement their program of "structural adjustment" on clients' economies in return for "developmental" lending, multilateral financial institutions like the World Bank and the International Monetary Fund (IMF) have introduced a number of policies and regulations as part of their "structural adjustment" programs. These programs have often been criticized for their negative impact on local economies and their failure to address the specific needs and challenges of developing countries.

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366 Id.
367 Cohn, supra note 353, at 104.
368 Id.
369 Id. at 105.
370 See id. at 107-8.
371 Id. at 108-9. Cohn says that the "use of United States law as models to emulate in both developed and less developed countries" is an occurrence that is matched only by the "growing use of English as the lingua franca." Id. at 101. Because lawmakers in many countries in the world and on many subject areas see U.S. laws and policies as models, imparting "knowledge of U.S. laws" can be "a valuable asset," but it can be an asset that "is misused if not tailored to local conditions." Id. at 108.
372 The term "structural adjustment" should properly be adjudged a bureaucratic newspeak in the sense that something, such as here treatment of a supposedly sick
of "legal interventions" into the economies of those client countries. One of these interventions in sub-Saharan Africa that Professor Pouncy focused upon is stock markets, similar to the kind Professor Cohn "experienced" in Uganda. Pouncy criticized these markets as "a continuation of the neo-colonial project, [and] the replication of Western institutions in the neo-colony for the benefit of the Western economic hegemony, at the expense of domestic interests." With all the other mechanisms of structural adjustment, including privatization, these markets "create[] an institutional structure in [sub-Saharan Africa] that facilitates the neo-colonial recapture" of African resources and re-channel of those resources from "general domestic to specialized foreign uses." He stated that for economic development to occur in any system, particularly economies built on export of primary products, "there must be coordination between trade, finance, and production, the three primary circuits of capital that exist in market economies." However, in Africa, "[t]he focus of the legal interventions promoted by structural adjustment, such as stock markets, is on the financial and trade circuits of capital," and the ability of these interventions to impact the production circuit "is limited by the focus of [sub-Saharan African] stock markets on privatizations, rather than on the provision of capital for the development of new firms or the expansion of existing ones."

Whereas "[t]he creation of stock exchanges in the West and in Asia were closely related to the real economic functions of stock markets[,]" in sub-Saharan Africa this legal intervention and supporting institutions are used as tools by Western multinational companies and African elites to "establish (or in some instances economy, cannot be structural and at the same time merely an adjustment. Because the term does not reflect the reality of severe pain that it imposes on an economy under "adjustment," including currency devaluation and cutbacks in education, health, and other social programs, the word is also properly a misnomer.

373 See, e.g., Karen Pfeifer, How Tunisia, Morocco, Jordan and even Egypt Became IMF "Success Stories" in the 1990s, 210 MIDDLE EAST REP. 23, 23 (Spring 1999).
374 Pouncy, supra note 88 at 86. See also Cohn, supra note 353, at 108.
375 Pouncy, supra note 88 at 86.
376 Id.
377 Id. at 106.
378 Id.
379 Id. at 107.
re-establish) claims to [sub-Saharan] resources, without serious regard to their role as investment modalities.\textsuperscript{380} In other words, for "Black Africa," "liberalized trade and investment regimes, which are created using Western legal institutions, result in the bleeding off of local capital that is used to acquire imported goods or its investment through the auspices of the newly created stock markets in the securities of foreign firms."\textsuperscript{381} The World Bank, IMF and donor countries promoted Western-style capital markets in sub-Saharan Africa because they think these legal interventions could help contain the corruption that permeates their economies and "eliminate some of the opportunities for crony capitalism and [help generate] broad distribution of corporate equities among investors."\textsuperscript{382} However, unfortunately, this expectation has not materialized; instead, with few exceptions, stock markets in Black Africa "have largely been used to float issues of privatized firms."\textsuperscript{383} Rather than serve any economic good, he said, these stock markets will serve only to promote "uncertainty\textsuperscript{384} and much worse.\textsuperscript{385}

Pouncy discussed two concepts of comparative corporate governance law, globalization and convergence, both of which portend negative effects or connotations for Africa.\textsuperscript{386} Professor

\textsuperscript{380} Id. at 106.

\textsuperscript{381} Pouncy, supra note 88 at 107.

\textsuperscript{382} Id. at 103.

\textsuperscript{383} Id. at 104. Pouncy intriguingly draws attention to the ideological roots of some of these ostensibly neutral market devises. For example, privatization, a central element in these market mechanisms, was part of the arsenal of contrivances Western capitalist countries used to accomplish their "goal of confronting and isolating non-market-based economic policies as part of its Cold War efforts." Id. at 103. Not only that, but in a country like Britain, as former Prime Minister Margaret Thatcher, acknowledged in her memoir since leaving office, "the economic rationales for privatization were secondary to her ideologically based desire to injure British trade unionism." See id. 103, n. 78 (citing MARGARET THATCHER, THE DOWNING STREET YEARS 668-69 (1993)).

\textsuperscript{384} Id. at 115.

\textsuperscript{385} Id. ("[t]he only saving grace of economic under-development, the insulation of [Sub-Saharan African] markets from off-border economic shocks, will be eroded as investment in [the region's] assets become part of multinational holdings and subject to investment decisions made without regard to their social impact, and regional and international investment harmonization inserts [the region's] markets in a global financial domino set, subject to financial contagions from which they may lack the ability to recover.")

\textsuperscript{386} Pouncy has alternative names for each of these terms. "Economic convergence"
Pouncy stated that globalization uses economic coercion "to establish an economic hegemony capable of expropriating the wealth of developing economies to the coffers of multinational corporations without regard for human conditions, the environment or the future." What is more, "[u]nlike the developing economies with strong manufacturing and industrial sectors that are able to provide some competition to Western based multinationals," globalization limits Black African economies to the two primary roles of suppliers of raw materials and commodities to international markets, and consumers of "technologies and services produced by more developed economies." This assessment tracks and exceeds the "prophetic" statement of Professor Pinto about criticisms of the "evils" of globalization. Pouncy's notion of convergence is that, staying on a capitalist path and "replicat[ing] the financial, commercial, and legal institutions of the West," African economies will eventually catch up with the developed economies. However, the "promise" of economic convergence "is illusory at best," possibly even "fraudulent," because stock exchanges, privatization, and related legal interventions flowing from structural adjustment measures, tailored as they are primarily to "the reallocation of domestic resources from local to international interests," are simply incapable of bringing about such results. Pouncy further argued that the implementation of structural adjustment programs in Sub-Saharan Africa did not result in significant economic growth; assuming that economic growth could be maintained in the region, which is not now the case, "it would require between 89 and 264 years" for these economies to approach the per capita incomes of developed countries.

for convergence, and multinational diversification" for globalization. See id. at 102, 108.

387 Id. at 109.
388 Pouncy, supra note 88 at 109
389 See Pinto, supra note 97, at 477, 497.
390 Pouncy, supra note 88, at 93.
391 Id. at 86, 101-02.
392 Id. at 101-02.
VI. Application of the Scholarship on the Law of Comparative Corporate Governance to South Africa

Applying the scholarship on the law of comparative corporate governance to South Africa illustrates three findings that form the arguments of this Article: (1) the South African discourse on corporate governance reform reflects broad issues encountered globally; (2) at the same time South Africa presents a unique circumstance which (3) raises the logical and legitimate question whether, given its exceptionality, South Africa makes any notable contribution to the scholarship on the law of comparative corporate governance. Each is analyzed in turn.

A. Resonation of the Law of Comparative Corporate Governance in the South African Discourse on the Reform of Corporate Governance Law

Five key interconnected issues and concepts in the law of comparative corporate governance referenced in the review of the literature are (1) the shareholder-stakeholder corporate decision making debate, Supra nn. 245-61 and accompanying texts. (2) the debate centered on ownership models, Supra nn. 262-92. (3) the role of the State in corporate governance in dispersed and concentrated systems alike, that the two debates mirror, Supra nn. 293-95 and accompanying texts. (4) the meaning, likelihood and or imperativeness of convergence, Supra note 296-321 and accompanying texts. and (5) the influence of globalization on corporate governance. Supra note 322-30 and accompanying texts. These issues and concepts find resonation in the South African discourse on the reform of corporate governance law in that country.

Based on government materials and the writings of scholars such as Mongalo, there is a wellspring of consensus in favor of the stakeholder approach. Supra, note 3 of GUIDELINES FOR CORPORATE LAW REFORM, supra note 3 at 13-18; Mongalo, supra note 2, at 115. This is an
agreement reflected in the King Committee’s notion of a shift from a “single bottom line” of economic concerns centered around shareholders to a “triple bottom line” that, in addition to economic matters, also integrates social and environmental considerations in corporate decision making.\footnote{Id. at 25.} However, judging from Mongalo’s criticism that the King Committee “ignor[ed] calls for a more explicit recognition of the role of stakeholders within corporate law,”\footnote{Mongalo, supra note 2, at 115.} there is no agreement on the mechanics of the “stakeholder” approach, despite its widespread consensus.\footnote{See supra note 197 and accompanying text.} In working out those mechanics, South Africa must keep in mind the thoughtful counsel of Professor Pinto regarding the possible counter-productivity that can follow defining relevant stakeholders too broadly.\footnote{See Pinto, supra note 97, at 481, n.12 (“A broad definition of stakeholder creates difficulty in ensuring that the corporation is meeting its obligation to all related interests.”).} Upon further consideration, this was probably the reason why the King Committee embraced a stakeholder perspective to corporate governance but indicated that directors are ultimately responsible to the corporation.\footnote{See supra note 186 and accompanying text.}

South Africa’s option for the stakeholder perspective would also suggest the concentrated regime as the prevailing ownership model.\footnote{As Pinto argues, these two notions often operate together. See Pinto, supra note 97, at 478 (“Arguments for a stakeholder model of corporate governance seem more prevalent in countries where there is concentrated ownership.”).} However, it is not exactly clear that the ownership regime in South Africa is the concentrated system, as The King Committee assessed the dispersed model to be the prevailing model and tailored its “agency costs” remedies around the model.\footnote{See Mongalo, supra note 2, at 111 (discussing the recommendations of the King Report and Code).} Mongalo speculates that what South Africa has is a mixed system of both dispersed and concentrated ownerships.\footnote{See id. (“Clearly, there are two systems operating side by side.”).} The role of the State is saved for the next section on the sui generis-ness of South Africa.\footnote{Infra Part VI. Section B.} The rest of the commentary here
will focus on globalization and the related concept of convergence.\textsuperscript{409}

Globalization is one of three impetuses the DTI policy paper cited in reforming corporate governance in South Africa.\textsuperscript{410} Although the paper simply denominated this impetus "a changing environment,"\textsuperscript{411} the characteristics it describes: "greater globalization, increased electronic communication, greater sensitivity to social and ethical concerns, fast changing markets, greater competition for capital, goods and services... [and] mobility of international capital,"\textsuperscript{412} unquestionably suggest globalization. The same could be said about Mongalo's observation that "the economy has become more globalized [and] the pace at which information technology is bringing change within our corporate environment..."\textsuperscript{413} Each of these expressions, as we see, went as far as deploying the magic word "globalization."\textsuperscript{414} Also present were some other operative globalization features that Professor Pinto classified under "globalization of information."\textsuperscript{415} Both the DTI policy paper and the Companies Bill of 2007 were published—and are accessible—online.\textsuperscript{416} Critics perceive globalization as a negative force in developing societies.\textsuperscript{417} For South Africans, the main concern is that "South Africa cannot afford to be left behind" while globalization marches forward.\textsuperscript{418} In other words, the South

\textsuperscript{409} See \textit{supra} note 330 and accompanying text for explanation of the nature of that relationship.

\textsuperscript{410} The other two are a local context, signified by the adoption of a new Constitution whose provisions dictate more harmonious balancing of the interests of investors and other stakeholders and dispensation with exclusive rules of conventional corporate governance law and the imperative need for modernization. These various forces are analyzed in \textit{supra} Part IV; see also \textit{GUIDELINES FOR CORPORATE LAW REFORM}, \textit{supra} note 3 at 13-18.

\textsuperscript{411} \textit{Id.} at 13.

\textsuperscript{412} \textit{Id.} (emphasis added)

\textsuperscript{413} Mongalo, \textit{supra} note 2, at 115 (emphasis added).

\textsuperscript{414} See nn. 412-13 and accompanying texts.

\textsuperscript{415} See Pinto, \textit{supra} note 97, at 489.

\textsuperscript{416} For the internet addresses to these two sources, see \textit{supra} nn. 3, 9.

\textsuperscript{417} See JOSEPH E. STIGLITZ, \textsc{GLOBALIZATION AND ITS DISCONTENTS} XIV (W.W. NORTON & CO., 2003); see also Pouincy, \textit{supra} note 88, at 109.

\textsuperscript{418} See \textit{GUIDELINES FOR CORPORATE LAW REFORM}, \textit{supra} note 3, at 13
Africans view globalization as a matter of modernization without which they stand the risk of being "left behind" as opposed to a negative force. The key to understanding their attitude toward globalization is "the need for modernization," which along with globalization and "a new constitutional dispensation," formed the impetuses for reform the DTI identified in its policy document.

If, as it seems, South Africa is not ill at ease with globalization, there are good reasons for this occurrence. First, globalization is not something new for South Africa. "International perceptions are crucial to [South Africans'] hopes of success." Like many countries in the world, the government in Pretoria borrows the ideas for its political and economic system, including its corporate development, from Western countries, particularly Britain. Now in the post-apartheid era, and as a new century unfolds, South Africa has increased its search for new role models and is drawing from a wider range of countries beyond Britain, including the United States and others. This multinational borrowing accords with the South African government's preference for multiple centers of power in the international system, including Asian countries like China, in place of either the bipolar structure that characterized the Cold War or the current "unipolar moment" in the post-Cold War era built around the "sole" superpower of the United States.

Second, in contrast to many other developing societies, South Africa has shock absorbers able to withstand the ravaging effects of globalization. Pouncy, in reference to the establishment of

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419 See id.
420 Id. at 13-18.
422 Id.
423 See GUIDELINES FOR CORPORATE LAW REFORM, supra note 3 at 12 ("The current framework in company law in South Africa is therefore essentially built on foundations . . . put in place by the British in the middle of the 19th century.")
424 See id. at 12-13.
426 See Michael Nowak, The First Ten Years After Apartheid: An Overview of the South African Economy, in POST-APARTHEID SOUTH AFRICA 1, 4 (Michael Nowak &
stock markets instigated by World Bank and IMF structural adjustment measures, complained that

[T]he only saving grace of economic under-development, the insulation of [Sub-Saharan African] markets from off-border economic shocks, will be eroded as investment in [the region’s] assets become[s] part of multinational holdings and subject to investment decisions made without regard to their social impact, and regional and international investment harmonization inserts [the region’s] markets in a global financial domino set, subject to financial contagions from which they may lack the ability to recover.427

Obviously, South Africa harbors no fear of what Pouncy calls deadly “financial contagions.”428 Pouncy also observed that “[u]nlike the developing economies with strong manufacturing and industrial sectors that are able to provide some competition to Western based multinationals,” globalization limits Black African economies to the two primary roles: (1) purveyors of raw materials to international markets, and (2) consumers of technologies and services produced by more developed economies.429 This also does not apply to South Africa.430 The country does not seem like a nation content to limit its role in the world economy to raw material supplier and dumping ground for goods and services from other countries.431 Instead, South Africa is competing globally and investing abroad in a number of countries that include China.432 As a matter of fact, Pouncy’s statement appears to exclude South Africa since the country may qualify as a developing economy

 Luca A. Ricci eds., 2005).

 427 Pouncy, supra note 88, at 115.

 428 Id.

 429 Id. at 109.

 430 According to World Bank figures, South African workers are more productive and work in more capital-intensive industries than Brazil, Kenya, and all but the most productive areas of mainland China. See World Bank, South Africa: An Assessment of the Investment Climate at 7, World Bank Rep. No. 34907 (May 1, 2006).

 431 Unlike similar economies, much of the investment in South Africa has been in portfolio flows, as opposed to foreign direct investment. See International Monetary Fund (IMF), The Composition of Capital Flows: Is South Africa Different?, at 3, IMF WP 05/40 (Mar. 2005)

"with strong manufacturing and industrial sectors that are able to provide some competition to Western based multinationals."433

It is still undetermined which ownership system, dispersed or concentrated, South Africa will end up converging to; or whether it will even converge to one model or maintain a hybrid system.434 The question remains whether South Africa will limit its convergence, assuming it functionally converges at all. Its history and peculiarities will impact enormously in which direction South Africa converges to in its ownership model (assuming it opts to converge).435 As indicated before, local forces, evident in the adoption of a new constitutional system mandating more harmonious balancing of the interests of investors and other shareholders and dispensation with exclusive rules of conventional governance law, count among the three impetuses driving the impending reform of the law of corporate governance in South Africa.436 Assuming they choose to converge, whether fully or partially, it is doubtful that South African companies, or corporations in any other African countries for that matter, will adopt a definition of convergence that includes catching up with developed countries of the type that Professor Pouncy commented on.437

B. Factors that Render South Africa Sui Generis

Although the law of comparative corporate governance resonates well in the South African discourse regarding corporate governance law reform, South Africa is sui generis or the only example of its kind in Africa. Some of the studies in the scholarship on the law of comparative corporate governance focusing on Africa, to the extent that they have a comparative depth, excepts South Africa by name.438 For example, Pouncy

433 Pouncy, supra note 88 at 109.

434 See supra Part V, Section A, Subsection 2.

435 Other exogenous factors, such as the role of non-governmental organizations and other private networks, will also have an effect on the convergence issues. See Lee A. Tavis, Corporate Governance, Stakeholder Accountability, and Sustainable Peace: Corporate Governance and the Global Social Void, 35 Vand. J TRANSAT'L L. 487, 509-510 (2002).

436 See GUIDELINES FOR CORPORATE LAW REFORM, supra note 3 at 13-18.

437 See supra nn. 390-92 and accompanying texts.

438 See, e.g. James C. Owens, Note, Government Failure in Sub-Saharan Africa:
singles out South Africa, Zimbabwe and Namibia as the stock exchanges in sub-Saharan Africa, not resulting from privatizations, and whose initial public offerings, compared to all the others, "have been largely devoted to raising additional capital for listed mid-range firms."439

Critics opposed to classification of the rainbow nation as sui generis will point to the country’s “two-tiered economy,” one developed and the other “marginalized,” complete with characteristics of the kind associated with the least developed societies in Africa.440 They will comment that South Africa posts high unemployment figures,441 high crime rates,442 and that it has more people infected with HIV/AIDS than any other country in the world,443 among other underdevelopment stories.444 While there is merit to these arguments, they are at best only partial truths that are unavailing. Some of the underdevelopment features critics point to are remnants from the apartheid past, not amenable to easy fixes, that the ANC government is working to resolve.445 Also, in contrast to its marginalized sector, South Africa boasts developed components in its economy that many other African countries, steeped deeply in underdevelopment, lack.446 The analogy here will be to call the United States a less developed

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439 Pouncy, supra note 88, at 104.
440 See supra note 62.
442 Supra note 70.
443 See supra note 69.
444 Recently, The Economist ranked South Africa 92nd out of 111 on their quality of life scale. This placed South Africa below Bangladesh, Vietnam and Iran. See The Economist Intelligence Unit’s Quality of Life Index, ECONOMIST (2005), available at http://www.economist.com/media/pdf/QUALITY_OF_LIFE.pdf.
445 Supra parts II & IV.
446 South Africa also has critical spillover effects for its neighbors. It has been estimated that a one percent increase in South African GDP has a one-half or three-quarters percentage point increase in African growth. South Africa also holds substantial portfolio holdings in other sub-Saharan countries’ stocks. IMF, The Implications of South African Economic Growth for the Rest of Africa, at 4, IMF WP 05/58 (Mar. 2005).
country because sometimes or in some areas, America displays features of third worldism—such as the disparities in quality of life between blacks and whites,\textsuperscript{447} electoral malfunctions, such as the 2000 presidential election,\textsuperscript{448} and the governmental response to the hurricane Katrina in New Orleans in August 2005.\textsuperscript{449} Such an analogy is facially absurd. As the experiences of the United States and other developed countries show, even the most economically advanced countries exhibit features that display particularized features of underdevelopment.\textsuperscript{450} Even though South Africa suffers from some of the problems of developing countries because of its “two economies,” the problems do not approach the level of those shown by Congo, Zaire, Chad or Cameroon, to use the countries in Professor Cahn’s study\textsuperscript{451} or Professor Cohn’s Uganda.\textsuperscript{452} Instead, South Africa is “a productive and industrialized economy that exhibits many characteristics associated with developing countries.”\textsuperscript{453} In fact, when observing a region characterized by fledgling economies, many of which have come under World Bank-IMF structural adjustment therapy, South Africa is the only economy that is not “still in a nascent stage.”\textsuperscript{454} Not being under the tutelage of the multilateral financial institutions also means that South Africa is able to insulate itself from globalization pressures such as “privatization,” something many other African countries cannot do.\textsuperscript{455}

\textsuperscript{447} See, e.g., Kimberly A. Skarupski et al., Black–White Differences in Health-Related Quality of Life among Older Adults, 16 QUALITY OF LIFE RES. 287, 287 (2007).

\textsuperscript{448} See, e.g., JULIAN M. PLEASANTS, HANGING CHADS (2004).


\textsuperscript{450} Even in the area of corporate transparency, the United States is not immune from occurrences which have the hint of crony capitalism or market malfeasance. See, e.g., Jonathan R. Macey, Efficient Capital Markets, Corporate Disclosure and Enron, 89 CORNELL L. REV. 394 (2004).

\textsuperscript{451} Cahn supra note 262 at 904.

\textsuperscript{452} Cohn, supra note 353 at 105.

\textsuperscript{453} Economy of South Africa, supra note 50.

\textsuperscript{454} See Joanna Chung, Sub-Saharan Africa Confident It Can Attract Investment, FIN. TIMES (London), May 2, 2007, at 41.

\textsuperscript{455} See Pfeifer, supra note 373, at 23-24.
Another factor which makes South Africa different and renders it *sui generis* in Africa is that it has a strong state with the ability to drive business and corporate reform. Witness the DTI reform initiatives of the corporate governance system, of the kind many developing countries in Africa lack. Recall the statement of Professor Pinto, commenting on the role of the State in corporate governance; "[e]ven where there is no ownership [meaning being a direct investor], the State can try to influence corporate decisions through regulation or influence." The corporate governance reform initiatives in South Africa, led by the DTI, support this assertion. Another indicator of this strong state role, as well as evidence of the leadership capability of the ANC government, is that the tax base in the country has grown enormously in the post-apartheid era, as indicated by figures for the ten-year period from March 1996 to March 2006. Within this period the tax base more than doubled from 1.9 million to approximately 5 million individuals, a record number. As already indicated, under the able stewardship of the ANC, corporate development in the country is experiencing steady and healthy growth. In a region infamous for "government failure[s]," the political performance of the ANC government has been impressive.

To conclude this discussion and to further support the thesis of South Africa's "exceptionality," the country is analyzed using a framework of institutional characteristics of economies in Black Africa that Geoffrey Schneider has devised. The characteristics

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456 For an insightful and exhaustive analysis on the concept of the state in Africa, see CHAZAN ET AL., supra note 42, at 38-42.
457 See, e.g. GUIDELINES OF CORPORATE LAW REFORM, supra note 3.
458 Pinto, supra note 97, at 477 n.2.
459 See GUIDELINES OF CORPORATE LAW REFORM, supra note 3.
460 See Russell, supra note 148, at 4.
461 See id. The reason for the phenomenal increase, as Russell indicates, is that Blacks who refused to comply during apartheid, under ANC directions designed to put an end to white rule, are now choosing to fulfill their civic duties by paying. Id.
462 Id.
463 See Owens, supra note 438.
which Schneider indicated undermine the potential effectiveness of market-based solutions to the economic difficulties African countries confront are

(1) An oligopolistic banking sector; (2) a weak, insecure state; (3) a large agricultural sector dominated by peasant farming and ceremonial behavior; (4) inadequate, deteriorating infrastructure designed during the colonial period to extract resources from Africa, rather than to facilitate internal trade; (5) an export sector dominated by primary products, many of which are facing declining terms of trade; (6) a small industrial sector that usually is not internationally competitive, partly due to the small size of the domestic market; and (7) poorly funded education and health care systems.465

None of these features apply to South Africa, even though there may be questions whether the country is insulated from some of these "institutional" features.466 The factor that deserves comment here is the seventh factor, funding of education and health care systems. Even with the gigantic scale of the HIV/AIDS challenge the South African government is confronted with, the country has a revenue base that is stronger than many African countries and is in a better position to afford increased funding for this and other social problems, including education, than many of those other sub-Saharan African countries.467 To further illustrate the uniqueness of South Africa, the fourth factor relating to "deteriorating infrastructure" deserves further comment. With a landmass comparable to Nigeria,468 but a population of only about one-third the size of Nigeria (Africa's most populous nation), South Africa has more infrastructure, as the table of statistics below shows:

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466 For a comparison and listing of African development features, see AFRICAN DEVELOPMENT BANK, SELECTED STATISTICS ON AFRICAN COUNTRIES (2007).

467 Id. at 34.

468 Nigeria has a surface area of 924,000 square kilometers, compared to 1,219,000 square kilometers for South Africa. World Bank, 2005 World Development Indicators at 23-24 (March 2005). Nigeria's population is 136,000,000, compared to South Africa's population of 46,000,000. Id.
Indicators (all figures as of 2002-03) | South Africa | Nigeria  
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A. Adult Literacy Rate | 87% (Male) 85% (Female) | 74% (Male) 59% (Female)  
B. Communications  
1. Telephone Mainlines (per thousand people) | 107 | 7  
2. Mobile Phones (per thousand people) | 364 | 26  
3. Daily Newspapers (per thousand people) | 26 | 25  
4. Television Sets (per thousand people) | 177 | 103  
5. Internet users (per thousand people) | 68 | 6  
C. Transportation  
1. Total Road Network (km) | 275,971 | 194,394  
2. Total Rail Lines (km) | 20,041 | 3,505  
3. Aircraft Departures | 147,000 | 9,000  


Moreover, the South African infrastructure situation is improving, as the Gautrain project illustrates. To prepare for South Africa’s hosting of the 2010 FIFA World Cup, the South African government has awarded a contract for the construction of a high-speed (160 km an hour) rail link, part underground and part above ground, stretching nearly 80 km.\(^{469}\) Known as the Gautrain project, the railway, which is praised as the first of its kind in all of Africa and likened to the London Heathrow Express, is estimated

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to cost 26 billion rand.\textsuperscript{470}

Briefly, South Africa is not a developed country. To find evidence of this point, one need not look further than the studies of developed economies, such as the one by Professors Kraakman, which omits South Africa.\textsuperscript{471} But the country is also not the type of underdeveloped economy, such as the Third Worlds of the Third World or “failed States” of the kind that Western analysts behold in Africa.\textsuperscript{472} The uniqueness of South Africa confirms Canadian scholar Timothy M. Shaw’s commentary many years ago regarding the place of Africa in the international system.\textsuperscript{473} Professor Shaw argued that contemporary Africa has been a social laboratory for strategies of economic and political change, an occurrence resulting in “continuities, discontinuities, [and] massive differentiation among groups, countries, and regions [within the continent].”\textsuperscript{474} Given that the continent’s place in the world order is marked by “differentiated links to international chains of production[,”]\textsuperscript{475} Shaw counseled that analysts should approach their analysis of the continent with “a sense of heterogeneity.”\textsuperscript{476}

The determination that South Africa is \textit{sui generis} smacks of irony, given that the purpose of comparative studies is to contrast similarities and differences among systems to attempt to provide an accounting of why those similarities and differences exist.\textsuperscript{477} It

\textsuperscript{470} Id.

\textsuperscript{471} See, e.g., KRAAKMAN, ET AL., \textit{supra} note 239.

\textsuperscript{472} For example, South Africa’s GDP growth has greatly outstripped that of Zimbabwe, Cote d’Ivoire and Cameroon. International Monetary Fund, \textit{World Economic Outlook}, at 75 (Apr. 2007).


\textsuperscript{474} Id. at 21-22.

\textsuperscript{475} Timothy M. Shaw, \textit{State of Crisis: International Constraints, Contradictions, and Capitalisms?}, in \textit{The Precarious Balance: State and Society in Africa} 307, 308 (Donald Rothchild & Naomi Chazan eds., 1988); see also CHAZAN ET AL., \textit{supra} note 42, at 33 (noting that “[h]eterogeneity and complexity in conditions of uncertainty have marked the recent history” of the continent).


\textsuperscript{477} See \textit{supra} note 214-17 and accompanying texts.
also raises the question regarding whether, given its exceptional features, South Africa holds any "lessons out [t]here in the field,"\footnote{Cahn, supra note 262, at 893.} for the scholarship on the law of comparative corporate governance.

C. Reasons Why Despite Its Exceptionality, South Africa Still Holds Important Lessons for the Scholarship on the Law of Comparative Corporate Governance

Despite its exceptional features, South Africa still holds important lessons for potential contribution to the scholarship on the law of comparative corporate governance. First, comparative studies, including the scholarship on the law of comparative corporate governance, do not just measure and account for only similarities, they also account for both similarities \textit{and} differences.\footnote{See supra note 214-221 and accompanying texts.} To analogize to the field of statistics, outliers still make it \textit{within} the scattergram—or else there would be no way to determine if they were outliers to begin with.\footnote{See generally James T. McClave & Terry Sincich, Statistics (10th ed. 2006).} The same should be true too of comparative corporate governance. Comparative law seeks to ferret out lessons from various regions of the world that could influence the development of law in an attempt to move scholarship safely away from description to explanation in the best traditions of the field.\footnote{See supra nn. 214-21 and accompanying texts.} Exceptional cases, such as South Africa, have a role here. They can contribute richness, complexity, and even a measure of analytic depth that can save the student of comparative law from the mortal sin of over-generalization. Increasingly, the principles of comparative governance law resonate in the corporate governance discourse in South Africa.\footnote{See supra Part VI Section A.} Moreover, the African country's attempt to reform its corporate governance law can enrich the discussion now in the literature on corporate governance reform.\footnote{See Paredes, supra note 231, at 1055.} Second, South Africa has intrinsic comparative value and utility that many countries in the world lack such comparative scholarship regarding the law on comparative corporate governance, need to exploit or tap. These
exceptional features include its multiracial and multi-ethnic composition; monumental challenges, such as HIV/AIDS; and successful experience with conflict resolution and the reconstruction of a state and society once riven by apartheid. The country is also cited as a rare instance of successful application of human rights in United States’ foreign policy.

VII. Conclusion

Good management of corporations is critical to the corporate and economic development of any country, whether developed or developing. As former World Bank President, James Wolfensohn, once famously predicted: “[t]he proper governance of companies will become as crucial to the world economy as the proper governing of countries.” Despite this wisdom, scholarship on comparative corporate governance gives short shrift to Sub-Saharan Africa. That is changing. In summary, (1) South Africa’s attempt to reform its law of corporate governance identify critical issues and concepts within the scholarship on comparative corporate law, but that (2) South Africa is sui generis, and (3) yet, despite its exceptional features, the African country holds important lessons that form important contributions to the law and scholarship on comparative corporate governance.


485 See Pauline H. Baker, Getting It Right: U.S. Policy in South Africa, in IMPLEMENTING U.S. HUMAN RIGHTS POLICY 85-112, 85 (Debra Liang-Fenton ed., 2004). Professor Baker states that the U.S. “was an important and, in many ways, critical actor in the transition” in South Africa, but also makes clear, as she should, that “[t]he responsibility for moving South Africa from apartheid to democracy lies primarily with the people of South Africa.” Id. at 85.

486 Cited in Mongalo, supra note 2, at 102.

487 Supra Part V. Section B.

488 Supra Part V.

489 Id.
Two possible avenues are open for future research on South Africa that could also increase the scholarship on comparative corporate governance. The first concerns non-speculative confirmation of the ownership model that prevails in the country, whether it be dispersed or concentrated. This determination will be critical in designing "agency costs" abuses for the country.\textsuperscript{490} A second avenue for future research on the country builds into Professor Pinto's counsel concerning the productivity of defining and drawing "stakeholder" too broadly.\textsuperscript{491} That issue is: given the controversial nature of affirmative action in countries as diverse as the United States and South Africa, where these policies are in place, to what extent can preferential programs, of the type mandated by the BEE Act in South Africa, constitute best practice in corporate governance?

\textsuperscript{490} See supra nn. 245 & 406.  
\textsuperscript{491} See supra note 403.