Rethinking Ownership and Control of State-Owned Enterprises in Lesotho

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DECLARATION

I, **Lehlohonolo J Matee**, declare that this thesis is my work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. This thesis has not been submitted before for any degree or examination in this or any other university. I understand the University's policy on plagiarism. Where works by other people have been used, they have been properly acknowledged and referenced.

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DEDICATION

This thesis is dedicated to my beloved mother, wife and daughters whose unwavering support, love, and encouragement have been my guiding light throughout this journey. I am forever indebted to my mother for her endless sacrifices and belief in my dreams. To my wife ‘Matšololo ‘Nyaks’ Matee, for her patience, love and constant motivation. And to my beautiful girls Mpho and Sebabatso whose inspiration has fueled my determination.

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ABSTRACT

States actively participate in their respective economies for a variety of reasons. Common among these are; the need to protect key and sensitive aspects of the domestic economy from foreign control; the need to venture into arears that are largely capital intensive and shunned by the private sector; and the need to establish monopolies around public goods like energy, water, infrastructure and others. One cannot help but emphasise the fact that state-owned enterprises (SOEs) form one of the largest sectors of the economy in most African countries and are important contributors to national development.

A number of states participate in the development and growth of their economy through state SOEs. SOEs are enterprises or institutions that are directly or partly controlled by state and providing public services such as water, electricity, communications and transport amongst others. Thus a strong, transparent and accountable governance is central to such course. SOEs are potentially powerful tools in state's hands that can be used for attainment of the state's developmental goals. The manner in which they operate has a considerable effect on the wider business community and investment climate. Globally, SOEs account for approximately twenty percent of investment and five percent of employment creation. In Africa, SOEs produce approximately fifteen percent of GDP, eight percent in Asia and six percent in Latin America while in Central and Eastern Europe. It follows, therefore, that the SOE sector remains significant at twenty to forty percent.

Although constituted by public resources and, therefore, embodying some element of public interest, most SOEs in Lesotho are incorporated. Therefore, SOEs may face governance challenges as their private sector counterparts. The key corporate governance differentiator between SOEs and their counterparts in the private sector is their proximity to the state power. SOEs are in a unique position of having their shareholder as the same entity that is ultimately responsible for the legal and regulatory environment and being under the direct influence of politicians rather than career businesspeople. This implies that the scope of favouritism and conflict of interest is wide. A conventional view is that corporate governance is motivated by the drive to access finance, however, SOEs tend to be less affected by this because in most cases governments are willing to back SOEs.

The above background highlights at least four problematic areas that require critical investigation. The poor performance of SOEs has often raised a question of their relevance in the modern developing economy such as Lesotho. Thus the first problem that this thesis seeks to unpack is the desirability of state ownership and whether such ownership is in a way synonymous with poor corporate governance. This calls for a need to reconsider the privatisation debate i.e. whether SOEs should be fully privatised such that the private sector becomes the only role player in the economy. Secondly, the governance related role of political principals or shareholder ministries in SOEs requires some attention as well. Thirdly, the issue of ownership and control of SOEs also requires examination. Lastly, the need and/or

mechanisms to protect the government as a minority shareholder should also be explored. This thesis proposes *kharetsa* model of SOEs ownership and control as a response to these and probably many more other problems facing SOEs in Lesotho and elsewhere in the world.

ACRONYMS AND ABBREVIATIONS

AGM	Annual General Meeting
AGOA	African Growth and Opportunities Act
BEDCO	Basotho Enterprise Development Corporation
CEO	Chief Executive Officer
COO	Chief Operating Officer
CSR	Corporate Social Responsibility
ETL	Econet Telecom Lesotho
FDI	Foreign Direct Investment
GLC	Government-Linked Company
IFRS	International Financial Reporting Standards
IoDSA	Institute of Directors in Southern Africa
JSE	Johannesburg Stock Exchange
LEA	Lesotho Electricity Authority
LEC	Lesotho Electricity Company
LEWA	Lesotho Electricity and Water Authority
LNDC	Lesotho National Development Corporation
LPB	Lesotho Post Bank
LTC	Lesotho Telecommunications Corporation
LTDC	Lesotho Tourism Development Corporation
MD	Managing Director
MMB	Maloti Mountain Brewery
MoF	Ministry of Finance
MSME	Micro, Small and Medium Enterprises
NEDLAC	National Economic Development and Labour Council
OECD	Organisation for Economic Co-operation and Development
PFMA	Public Finance Management and Accountability Act
PIC	Public Investment Corporation
PRASA	Passenger Rail Agency of South Africa
PSD	Private Sector Development
PU	Privatisation Unit
QOSSS	Quality of Service and Supply Standards
SAA	South African Airways
SABC	South African Broadcasting Corporation
SACU	South African Customs Union
SCA	Supreme Court of Appeal
SGX	Singapore Stock Exchange
SMEs	Small and Medium Enterprises
SOC	State-owned Company
SOE	State-owned Enterprise/Entity
ToRs	Terms of Reference
UK	United Kingdom
USA	United States of America
WASCO	Water and Sewerage Company

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CHAPTER ONE – INTRODUCTION

1.1 Introduction

The need for corporate governance arises because of the separation of management and ownership in modern corporations.[1] At times, the interests of those who have effective control over the enterprise can differ from the interest of those who supply the enterprise with external finance.[2] This gives rise to a 'principal-agent' problem which is most often reflected when the management of an enterprise pursues activities that may be detrimental to the interests of the shareholders.[3] The core role of corporate governance is to mitigate this problem, reduce the agency cost and maximise the value of the company to investors.[4]

Corporate governance is a central and most dynamic element of modern business.[5] The term governance originates from a Latin word '*gubernare*', which means 'to steer'.[6] This word was most used with reference to the steering of a ship, thus corporate governance involves the function of directing rather than controlling.[7] There is no single definition of corporate governance that is universally accepted among scholars.[8] Early attempts to define corporate governance as a concept appear in the United Kingdom Cadbury Report of 1992[9] and the South African King Report of

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[1] D L Lynne 'Two Modes of Corporate Governance: Beyond Berle and Means' 2(1988) 2 *U. Mich. JL Reform* 19 at 21.
[2] International Financial Corporation *Corporate Governance Manual* 2nd Ed (2010) 7.
[3] C Charles *et al A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (paper prepared for global corporate governance forum dated June 15 2003) 2; The Oxford Dictionary of Economics defines principal-agent problem as follows: 'the problem of how Person (A) can motivate Person (B) to act for (A's) benefit rather than following his self-interest'. In the context of a company, Person (A) would be an investor or shareholder (the principal) while person (B) is the manager or director (the agent). At times, managers or directors may pursue different interest than the investors i.e. building the business empire as opposed to creating shareholder value. According to the International Financial Corporation, this result in three types of agency costs. Firstly, divergence costs (managers that do not maximise investor's returns), secondly, monitoring and replacement costs (investors has to develop and implement control structures) and lastly, incentive costs (managers' remuneration).
[4] International Financial Corporation *op cit*, note 2 at 7.
[5] J Solomon and A Solomon *Corporate Governance and Accountability* (2004) 2.
[6] Ibid.
[7] Ibid.
[8] Ibid at 6.
[9] The Report of the Committee on the Financial Aspects of Corporate Governance (December 1st 1992); The Committee was set up in May 1991 by the Financial Reporting Council, the London Stock Exchange and the accountancy profession to address the financial aspects of corporate governance. The committee was set up to address

1994[10]. Corporate governance was defined as 'the system by which companies are directed and controlled'.[11]

Over the past decade or so, there has been more attempts to widely define the concept of corporate governance, bringing in additional elements or aspects under the term corporate governance. However, the concept is generally understood as 'an umbrella term that includes specific issues arising from interactions among senior management, shareholders, board of directors, and other corporate stakeholders'.[12] As some scholars put it:

> Corporate governance is concerned with the processes, systems, practices and procedures as well as the formal and informal rules that govern institutions, the manner in which these rules and regulations are applied and followed, the relationships that these rules and regulations determine or create, and the nature of those relationships. It also addresses the leadership role in the institutional framework. Corporate Governance, therefore, refers to the manner in which the power of a corporation is exercised in the stewardship of the corporation's total portfolio of assets and resources with the objective of maintaining and increasing shareholder value and satisfaction of other stakeholders in the context of its corporate mission. Corporate governance implies that companies not only maximize shareholders wealth, but balance the interests of shareholders with those of other stakeholders, employees, customers, suppliers, and investors so as to achieve long-term sustainable value. From a public policy perspective, corporate governance is about managing an enterprise while ensuring accountability in the exercise of power and patronage by firms.[13]

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the then perceived low levels of confidence in the financial reporting and the ability of auditors to provide safeguards which users of company reports sought and expected.

[10] The King Committee on Corporate Governance was established in 1992 under the auspices of the Institute of Directors. The main objective of the committee was to consider corporate governance in South African context. The committee published its first report in November 1994. Unlike its counterparts in other jurisdictions, the report went beyond the financial and regulatory aspects of corporate governance. It adopted an integral approach to good governance in the interest of wide range of stakeholders.

[11] Para 2.5 of the Cadbury Report.

[12] B Chiu and MK Lewis Reforming *China's State-Owned Enterprises and Banks (New Horizon in Money and Finance)* (2006) 129.

[13] Charles et al *op cit* note 3 at3.

It is clear, therefore, that corporate governance is the internal means through which corporations are operated and controlled.[14] However, corporate governance is not limited to the internal means, it is more involved and it impacts on a number of stakeholders.[15] The concept of corporate governance provides a structure through which the objectives of the company are set and the means of attaining those objectives and monitoring the performance are determined.[16] In light of these elements, Justice Owen defined the concept of corporate governance as follows:

> Corporate governance – as properly understood – describes the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. Understood in this way, the expression 'corporate governance' embraces not only the models or systems themselves but also the practices by which that exercise and control of authority is in fact effected.[17]

Corporate governance is at the heart of what goes right and wrong in a business.[18] As Cynthia Glassman[19] puts it: 'Good governance tends to channel corporate decisions in the right direction, and conversely bad governance leads to – or at least enables bad decisions'.[20] This is not to suggest that good corporate governance necessarily creates a good company, that depends on the

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[14] OECD *Principles of Corporate Governance* (1999) 5; most definitions that focus on the company itself have the following elements in common: they all see corporate governance as a system of relationships defined by structures and processes. These may include parties with different interests. However, all parties are involved in the direction and control of the company and they aim at properly distributing rights and responsibilities thus increase shareholder.

[15] Ibid; stakeholders in this context includes individuals and/or institutions that have an interest in the company. Such interest may arise through a statute, contract or by way of social or geographic relationships. Thus stakeholders may include but not limited to: investors, employees, creditors, suppliers, customers, regulatory bodies and local communities in which the company operates. The external elements of corporate governance focus on the relationship between the company and its stakeholders. Stakeholders in this context are broadly defined to include all individuals and institutions with an interest in the company.

[16] OECD *Principles of Corporate Governance* (2004) 11 available on https://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf (accessed on June 7 2019)

[17] Report of the HIH Royal Commission, *the Failure of HIH Insurance-Volume 1: Corporate Collapse and its lessons, Canberra, Commonwealth of Australia* (2003) xxxiii.

[18] R Naidoo *Corporate Governance: An Essential Guide for South African Companies* 3rd Ed (2016) 14.

[19] The former Commissioner of the US Securities and Exchange Commission (SEC) which is an agency of the US federal government responsible for overseeing the regulation of and protecting investors on American securities markets.

[20] Naidoo *op cit* note 18.

company's leadership and strategies, however, bad corporate governance can certainly destroy a company.[21]

To date, the contribution of Berle and Means[22] in corporate governance remains not only relevant but highly authoritative as well. The two scholars observed that 'the corporate system not only tends to be the flower of our industrial organisation, but that the public is in a mood to impose on it a steadily growing degree of responsibility for our economic welfare. An endeavor to analyse [the governance of] this institution therefore needs no apology'.[23] These scholars were writing with particular reference to the private corporation, however, their observation is equally valid for in the context of state owned enterprises (SOEs) in Lesotho.[24] These enterprises play an important role in the socio-economic wellbeing of the society.

When examining SOEs, it is important to understand and appreciate that SOEs are not a recent phenomenon. In most developing countries, the origins of SOEs may be traced as far back as the era of colonialism.[25] The main reason for their creation was economic development and growth.[26] The OECD reports that SOEs are indeed a vital tool in the development infrastructure.[27] SOEs were set-up to ensure that states provide effective and efficient public goods and services to the citizens while also providing the state with the revenue for further capital investment.[28] SOEs were

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[21] Ibid.
[22] A Berle, and G Means *The Modern Corporation and Private Property* (1932).
[23] Ibid, preface.
[24] In this research, the term state owned enterprise (SOEs) will be the most preferred term over any other similar expression that may be preferred by any literature. While the reason for this will be explained in better details in the thesis, it surfaces at this point to indicate that there is no standard phrase commonly used in Lesotho. For instance, the South African Companies Act No. 71 of 2008, at section 1 thereof, refers to State Owned Companies (SOCs), our statute does not have a similar provision. However, since SOEs in Lesotho exists in different forms other than companies, the phrase State Owned Enterprise seems more appropriate.
[25] A Chilenga *State Owned Enterprises: A Policy Analysis of South African Airways* (unpublished Master's thesis University of Kwazulunatal 2016) 8.
[26] M Turner and D Hulme *Governance, Administration and Development: Making the State Work* (1997) 78; Economic growth in this context is understood to mean an increase in the production of goods and services over a period of time while economic development on the other hand means a process through which emerging economies become advanced economies.
[27] OECD *Guidelines on the Governance of State Owned Enterprises for Southern Africa* (2014) 4; OECD Principles address both policymakers and businesses, and focus on the entire governance framework (shareholder rights, stakeholders, disclosure and board practices). The OECD Principles have gained worldwide acceptance as a framework and reference point for corporate governance. Published in 1999 and revised in 2004, they were developed to provide principle-based guidance on good governance.
[28]Naidoo *op cit* note 18 at 9.

created worldwide with different public policy agenda, for instance basic infrastructure for the provision of basic utilities. However, this was to be done in a manner that would generate income for the treasury.[29]

This thesis is set out to critically discuss the state of SOEs governance in Lesotho. Thus, the thesis will discuss, amongst others the unhealthy state of corporate governance, lack of board autonomy, questionable board appointments and poor strategic direction. The discussion will be centered mainly around the SOEs' sector in Lesotho.

1.2 Re-Examining the Role of SOEs

Different states intervene in the economy for a variety of reasons. Common among these are; the need to protect key and sensitive aspects of the domestic economy from foreign control; the need to venture into arears that are largely capital intensive and shunned by the private sector; and the need to establish monopolies around public goods like energy, water, infrastructure and others.[30] One cannot help but emphasise the fact that SOEs form one of the largest sectors of the economy in most African countries and are important contributors to national development.[31]

A number of states participate in the development and growth of their economy through state owned enterprises (SOEs).[32] SOEs are enterprises or institutions that are directly controlled by state and providing public services such as water, electricity, communications and transport amongst others.[33] Thus a strong, transparent and accountable governance is central to such course.[34] SOEs are potentially powerful tools in state the attainment of the state's developmental

[29] Chilenga *op cit* note 25.
[30] Lynne *op cit* note 1.
[31] SOE Network for Southern Africa *Guidelines on the Governance of State-Owned Enterprises for Southern Africa* (November 2014) 4.
[32] State Owned Enterprises may at times be referred to as parastatals or public entities. According to the United Nations Department for Economic and Social Affairs (UN DESA 2007) public investment has to play a key role in any pro-poor national development strategy including the achievement of Millennium Development Goals MDGs).
[33] RJ Khoza and M Adam *The Power of Governance: Enhancing Perfomance of State Owned Enterprises* (2007) 4; A state may have total control over SOEs where it is the majority or sole shareholder, but it may have partial control where it is a minority shareholder.
[34] NO Mbele *Corporate Governance of State Owned Enterprices* (unpublished PhD thesis Witswatersrand University 2015)

goals and the manner in which they operate has a considerable effect on the wider business community and investment climate.[35] Globally, SOEs account for approximately twenty percent of investment and five percent of employment creation.[36] In Africa, SOEs produce approximately fifteen percent of GDP, eight percent in Asia and six percent in Latin America while in Central and Eastern Europe, the SOE sector remains significant at twenty to forty percent.

There are well-founded theoretical justification for the existence of SOEs. The most frequently cited justification is the case of natural monopoly.[37] This refers to a situation where the technical requirements of a particular industry are such that only one supplier may exist.[38] The supplier is able to achieve high profit margins by charging high prices. However, natural monopolist may also exploit suppliers by bargaining their prices down. Such eventualities result not only in unequal distribution of economic surpluses but also economic inefficiency. Thus, in such circumstances, there is need for SOE to be set-up and regulated to prevent abuse of such natural monopoly.[39]

The other justification for existence of SOEs in our economy is the failure of capital markets.[40] Private sector investors may decline to finance projects that have high returns in the long-term but carry risks in the short-term.[41] To see most capital projects through, the most ideal solution may be to set-up a development bank to finance these projects. However, most developing economies have entrepreneurial talent deficit within the private sector. Therefore, setting-up SOEs may be the most effective response to the problem of capital markets failure in the developing countries.[42]

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[35] K.A. Mashamaite and P.S. Raseala 'Transgression of Corporate Governance in South Africa's State-Owned Enterprises' *Bangladesh e-Journal of Sociology* Vol.16 No.1 124 at 125.

[36] World Bank 'Held by the Visible Hand: The Challenge of SOE Corporate Governance for Emerging Markets' (2006) *Journal of General Management* 28: 1-28.

[37] UN DESA *State-Owned Enterprise Reform: Policy Notes* (2007) 12.

[38] For instance, water, electricity, railways etc.

[39] UN DESA *op cit* note 37.

[40]OECD. 2005. OECD Guidelines on Corporate Governance of State-Owned Enterprises. Paris: OECD Publishing; D Fourie 'The Role of Public Sector Enterprises in South African Economy' (2014) 7 *African Journal of Public Affairs.*

[41] Capital markets have inherent bias towards short-term gains and do not like risky large-scale projects that have a longer gestation period.

[42] UN DESA *op cit* note 37.

Moreover, the problem which economists normally refer to as externalities justifies state's participation in the economy through SOEs.[43] Externalities is an economic jargon that best expresses the fact that private sector investors do not have an incentive to invest in ventures that benefit other industries without being paid for the service.[44] For instance, a company enjoying a natural monopoly in a certain industry may choose not to abuse its monopoly position to make extra profit, instead it may it may pass on its productivity gains to the direct and indirect consumers of its products and thereby benefit the rest of the economy. The social return, or the return to the whole economy in this instance would be higher than private return or the return to the company alone. In this instance, externalities is the difference between private and social returns.[45]

Lastly, SOEs are better positioned to address equity concerns.[46] If left at the mercy of profit oriented companies or service providers, people living in rural arears are likely to be denied essential services such as water, electricity, postal services and transport. These possibilities then necessitates establishment of SOEs to ensure universal access to essential services for citizens irrespective of their geographical locations. It is for the above reasons that this thesis argues that SOEs remain relevant to the modern day economy of Lesotho.

SOEs have always been an enduring feature of the economy of Lesotho. In the 1970s, the government's policy in Lesotho was geared to promote domestic ownership of strategic industries and services.[47] This was achieved through establishing SOEs and acquiring government shares in some private companies.[48] By the mid 1980s, the volatility of the Southern African Customs Union (SACU) revenues, which constituted about seventy percent of the total government revenue[49]

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[43] Ibid.
[44] SJ Liebowitz 'Are Network Externalities a New Source of Market Failure?' (1995) 17 *Research in Law and Economics* 1-22.
[45] Ibid.
[46] Fourie *op cit* note 40.
[47] J Heath and W Norman 'Stakeholder Theory, Corporate Governance And Public Management: What Can The History Of State-Run Enterprises Teach Us In The Post-Enron Era?' (2004) 53 *Journal of Business Ethics* 247, 255.
[48] By 1992 wholly owned SOEs numbered 32 of which 17 were directly owned by the Government, 12 were owned by the Lesotho National Development Corporation (LNDC) and 3 were majority-owned by financial institutions. In addition the Government owned minority shares in another 31 private companies.
[49] World Bank, 'Lesotho State-Owned Enterprises: A Country Policy Note (Report No.: ACS19193 dated June 30th 2016) at 2.

combined with government driven economy led to the fiscal imbalances.[50] In response to this, the government of Lesotho, through the support of the World Bank and the International Monetary Fund adopted a structural adjustment program which was implemented over the period from 1988-1993.[51] In 1992, the government issued a privatisation policy and began taking measures to restructure the SOE sector.[52]

The need to privatise was mainly precipitated by the prolonged governance deficiencies coupled with the consequent poor performance of the SOEs.[53] This led to the enactment of the Privatisation Act.[54] This Act established the Privatisation Unit within the Ministry of Finance.[55] The Unit then became the agency responsible for the implementation of the privatisation project. This project resulted in the privatisation of most SOEs. However, the government retained shareholding in most of the privatised enterprises.[56] Prior to implementation of the privatisation project, the government was making transfers of USD 18.8 million per annum for operational support of the SOEs.[57] After the privatisation of ten parastatals, the government received USD 42.82 million in privatisation proceeds.[58] Despite this change in ownership, the government retained a few SOEs.

There are currently six SOEs that are wholly owned by the government in Lesotho.[59] These are the Lesotho Electricity Company (LEC), Water and Sewage Company (WASCO), Lesotho National Development Corporation (LNDC), Basotho Enterprise Development Corporation (BEDCO), Lesotho Tourism Development Corporation (LTDC) and Lesotho Post Bank (LPB).

[50] Ibid; in this regard, Lesotho merely followed the international trend. The World Bank Group (2014) reports that from the 1070s through 1980s, many SOEs around the world performed below the expectation. They did not pump the much-needed revenue into the treasury.
[51] World Bank (2016) *op cit* note 49.
[52] Ibid.
[53] The identified reasons for poor performance of SOCs include, amongst others, cadre deployment, political and regulatory capture coupled with outright corruption. It is argued that these have led to 'unbridled chaos' in SOCs. See L Sharp Privatisation is key to real economic transformation (2014) http://www.bdlive.co.za/opinion/2014/09/11/privatisation-is-key-to-real-economic-transformation (Accessed 17, November 2018).
[54] No. 9 of 1995.
[55] See section 4 of the Act.
[56] Some of the privatised entities include Lesotho Airways Corporation, Lesotho Bank, Lesotho Agricultural Development Bank, Lesotho Telecommunications Corporation and Lesotho Flour Mills.
[57] World Bank, PPSADP Implementation Completion Report (available on http://documents.worldbank.org/curated/en/docsearch/document-type/646844
[58] Ibid.
[59] World Bank (2016) *op cit* note 49.

However, as indicated above, the government has retained partial shareholding in a number of enterprises that were partially privatised. These enterprises includes, Lesotho Flour Mills (LFM), Econet Telecom Lesotho (ETL), Maluti Mountain Brewery (MMB) and most mining companies like Letšeng Diamonds.

Just like in most African countries, SOEs in Lesotho are, generally, in an unhealthy state of corporate governance.[60] A record of corporate governance deficiencies in SOEs include lack of board autonomy and authority, questionable board appointments and poor strategic direction.[61] For instance, some of the SOEs in Lesotho have gone for years without proper boards.[62] This is evident in poor delivery of public services offered by these SOEs. In Lesotho, these problems persists despite the adoption of the special 'Policy on Corporate Governance for Lesotho Public Enterprises, Government Agencies and Entities'.[63]

Most private companies in which the government hold shares are rendered less profitable and as a result, the government does not benefit much from its investment. Research reveals that the main tool used to render these companies less profitable is transfer pricing.[64] The majority shareholder, usually a foreign investor, forces the company to trade with its subsidiaries or divisions. When these transactions are honoured, the local company is left with little (at times no) profits and this will affect taxes paid by the company and dividends due to the government.

In light of the above, the Organisation for Economic Cooperation and Development (OECD) issued Guidelines on Corporate Governance of State Owned Entities.[65] The guidelines stress the need to avoid favouritism towards SOEs to ensure even competition between businesses in the

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[60] T Thabane and E Snyman-Van Deventer 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) 21 *PER/PELJ* 9.
[61] Ibid.
[62] T Corrigan 'Corporate Governance in Africa's State-Owned Enterprices: Perspectives on Evolving Systems' (SAIIA Policy Briefing 102, dated September 2014) 3, available on https://saiia.org.za/research/corporate-governance-in-africas-state-owned-enterprises-perspectives-on-an-evolving-system/ (accecced on 10 June 2019).
[63] The date of adoption of the policy is unknown, however, the policy is available online at: http://www.track.unodc.org/LegalLibrary/LegalResources/Lesotho/Laws/Corporate%20Governance%20Policy%20for%20Public%20Entities.pdf (accessed on 17 February 2019).
[64] See the discussion of Econet Telecom Lesotho in chapter three.
[65]First developed in 2005, the Guidelines were updated in 2015 to take into account developments since their adoption and to reflect the experiences of the growing number of countries that have taken steps to implement them.

private and public sector.[66] This requires a clear separation between the role of the state as a shareholder and state's other roles (for instance, state as a regulator) that may influence the environment. This means that the boards of SOEs must act in the best interest of the enterprise that they control, exercise independent judgement and treat all stakeholders equitably. While this is simple and straight forward theoretically, it is practicality not that simple.

1.3 The Problem of Corporate Governance in SOEs

Although constituted by public resources and, therefore, embodying some element of public interest, most State Owned Enterprises (SOEs) in Lesotho are incorporated.[67] Therefore, SOEs may face governance challenges as their private sector counterparts. The key corporate governance differentiator between SOEs and their counterparts in the private sector is their proximity to the state power. SOEs are in a unique position of having their shareholder as the same entity that is ultimately responsible for the legal and regulatory environment and being under the direct influence of politicians rather than career businesspeople.[68] This implies that the scope of favouritism and conflict of interest is wide. A conventional view is that corporate governance is motivated by the drive to access finance,[69] however, SOEs tend to be less affected by this because in most cases governments are willing to back SOEs.

From the context presented above, four problematic areas that require examination may be identified. The poor performance of SOEs has often raised a question of their relevance in the modern developing economy such as Lesotho. Thus the first problem that this research unpacks is the desirability of state ownership and whether such ownership is in a way synonymous with poor corporate governance. This calls for a need to reconsider the privatisation debate i.e. whether SOEs

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[66] See part III of the 2015 version of the Guidelines.

[67] Some SOEs in Lesotho are incorporated thus regulated by the Companies Act no. 18 of 2011 like any other company while some are not incorporated. Those that are not incorporated are subject to regulation by the statute that creates such an entity.

[68] T Corrigan *op cit* note 62.

[69] International Finance Corporation, *Practical Guide to Corporate Governance: Experiences from Latin American Companies Circle* (2009) 13 available on https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/guidelines_reviews+and+case+studies/a+practical+guide+to+corporate+governance+experiences+from+the+latin+american+companies+circle (accessed on 14 June 2019).

should be fully privatised such that the private sector becomes the only role player in the economy. Secondly, the governance related role of political principals or shareholder ministries in SOEs requires some attention as well. Thirdly, the issue of ownership and control of SOEs also requires examination. As indicated above, the current ownership and control model is too decentralised and not certainable. This may be due to the lack of sufficient regulatory framework within which SOEs operate and the impact of this on their governance needs examination. Lastly, the need and/or mechanisms to protect the government as a minority shareholder should also be explored. This is rifer in light of transfer pricing that is normally invoked by major shareholders' to the disadvantage the minority shareholder.

1.4 State Intervention in Economy through SOEs – Re-Considering Privatisation Debate

As discussed above, the intervention of the state in the economy is driven amongst others, by the desire to attain economic growth and developement. Different states intervene in the economy of for a variety of reasons. Common among these are the: the need to protect key and sensitive aspects of the domestic economy from foreign control; the need to venture into arears that are largely capital intensive and shunned by the private sector; and the need to establish monopolies around public goods like energy, water, infrastructure and others.[70]

However, the performance of SOEs in Lesotho has for a long time been a concern. Some have even suggested that phasing out SOEs in favour of complete privatisation might be better. For this reason, this thesis cannot ignore the privatisation debates. It follows, therefore, that before interrogating corporate governance of SOEs, the first issue to be dealt with is the need for the existence of SOEs in the economy of Lesotho. In this regard, what should be considered is whether the state should continue being an entrepreneur and if so, whether it should be a minority or dominant shareholder and under what type of ownership and control.

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[70] J Heath and W Norman 'Stakeholder theory, corporate governance and public management: what can the history of state-run enterprises teach us in the post-Enron era?' (2004) 53 *Journal of Business Ethics* 247, 255.

1.5 Space Occupied by the SOEs Industry

The space occupied by SOEs in any economy may effectively be divided into three categories.[71] First, there are SOEs with true commercial inclination. These are SOEs that serve a public purpose or public good, but in so doing they make profits which they reinvest in the national fiscus as dividends. For instance, Econet Telecom Lesotho (Pty) Ltd serves a public mandate of economic growth and development through provision of bandwidth and telecommunications connectivity. Lesotho Flour Mills (Pty) Ltd on the other hand delivers public good by contributing towards food security by providing mealies. While these entities are unquestionably enablers of economic growth, they are also heavily engaged in economic activities that generate revenue, thus they must declare dividends for the national treasury.

Secondly, there are SOEs whose mandate is primarily the delivery of public goods. These SOEs provide goods and services that makes it easy for the general public to enjoy some constitutionally protected rights that may not be easily limited.[72] These SOEs can generally be categorised as public goods rendering SOEs.[73] These SOEs render essential services such as electricity generation and distribution, water and sanitation. In the context of Lesotho, these are SOEs like Lesotho Electricity Company and Water and Sanitation Company. Although these SOEs are mainly concerned with the delivery of public goods, they are expected to do so in a sustainable and ethical manner that guarantees their continued existence as a business with a going concern.

Thirdly, there are SOEs whose main objective is to regulate different sectors of the economy. SOEs under this category are basically watchdogs of different regulated sectors of the economy. This entails licensing, development and enforcement of regulations. In Lesotho, these SOEs are extensions of different government ministries that have been organised into somehow autonomous

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[71] Thabane, T, & Snyman-Van Deventer, E. (2018). Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection. *Potchefstroom Electronic Law Journal (PELJ)*, *21*(1), 1-32 (available on https://doi.org/10.17159/1727-3781/2018/v21i0a2345); Hans Christiansen 'Balancing commercial and non-commercial priorities of state-owned enterprises' (2013) OECD Corporate Governance Working Papers, No. 6, available at http://dx.doi.org/10.1787/5k4dkhztkp9r-en (accessed 10 May 2020).

[72] For instance, WASCO provides clean water without which the constitutionally recognized right to water may be nothing more than just a dream.

[73] This is in line with the categorization proposed by the Namibian Namibian Public Enterprises Governance Act 2 of 2006 at s4/(2)(a)(ii).

bodies. They operate with some form of commercial philosophy, however, they are not profit driven. Examples of SOEs in this category may be: the Lesotho Communications Authority (LCA) which is the regulator of the communications industry and the Lesotho Electricity and Water Authority (LEWA) which is a regulator of utility companies in Lesotho.

1.6 SOEs Ownership and Control

There are three ownership and control arrangements, namely the decentralised or sector, dual and centralised models.[74] The decentralised model is the traditional model in terms of which SOEs are under the responsibility of the relevant sector ministries.[75] There is no single ministry or agency exercising shareholder's powers or providing oversight role in the management of SOEs. The main advantage and rationale for this model is the greater availability of sector expertise and capacity to implement sector specific policies.[76] For this reason, the key ministry is believed to be the most relevant authority to play an oversight role in the running of SOEs.[77] This model, however, is not without criticism. It has been highly criticised for presenting difficulty in the exercise of ownership and regulatory roles by the ministries.[78] When a single ministry plays various roles (ownership, policy formulation and regulation) *vis-à-vis* a corporation, such a ministry necessarily gets 'too close' to the day-to-day affairs of the corporation, which sometimes leads to an inclination to actually interfere in the operational affairs of the corporation.[79]

[74] M Vagliasindi, *Governance Arrangements for State Owned Enterprises* (2008) 9.
[75] Liu H and Li X 'Government decentralisation and corporate fraud: Evidence from listed state-owned enterprises in China' (2015) *China Journal of Accounting Studies 3*(4) 320-347.
[76] Adebayo A and Ackers B 'Insights on corporate governance practices of state-owned enterprises (SOEs)' (2022) *Journal of Accounting and Investment*, *23*(1), 170-195.
[77] Zaato JJ *Contractualism, Decentralised Management and Autonomization: A Critical Analysis of Value for Money and Democratic Governance in State Owned Enterprise Reforms in Ghana* (2013) (Doctoral dissertation, Université d'Ottawa/University of Ottawa).
[78] Balbuena SS *State-owned enterprises in Southern Africa: A stocktaking of reforms and challenges* (2014).
[79] Nana Yaw Simpson S 2014 'Boards and governance of state-owned enterprises' (2014) *Corporate Governance 14*(2) 238-251.

On the other hand, there is the dual model.[80] Under this model the ownership role is shared between the sector ministry and a central ministry (usually the finance ministry or treasury) or entity.[81] The rationale for this model of ownership is that the ministry of finance (or treasury as the case may be) focuses on the economic efficiency and the impact of SOEs' performance on the fiscus while the sector ministry solely focuses on ensuring that SOEs are successfully run from an industrial point of view.[82] The obvious advantage of this model is that, unlike the decentralised model, it strikes a balance between the financial and industry perspectives. This model, may, however, present a problem in that these ministries may have conflicting shareholder expectations, thus making it difficult for SOEs to fulfil their respective mandates.[83] Finally, there is what is known as the centralised model, in which the ownership role is concentrated under one main ministry or agency.[84] The main advantage of this model is that it brings a clear line of accountability from the SOEs to the government, the ability of the government to exert close fiscal supervision and to form a coherent SOE policy.[85] If well implemented, this model may reduce political interference in the management of SOEs.

Where Lesotho falls within this taxonomy is not clear.[86] The face value impression that is created is that Lesotho follows the centralised model. This thesis is set out to clearly investigate the position of Lesotho SOEs with respect to the taxonomy discussed above. The existence of SOEs in any economy should be rationalised, thus it is imperative that Lesotho should adopt one clear ownership and control model. This might positively impact governance and performance of SOEs.

1.7 Protection of State as a Minority Shareholder in Private Companies

[80] Wang J and Cheng-Han T 'Mixed ownership reform and corporate governance in China's state-owned enterprises' (2020) *Vand. J. Transnat'l L.*, *53*, 1055.
[81] Ibid.
[82] Note 75, supra.
[83] For instance, the finance ministry or treasury may wish to use SOEs to pursue its object of adherence to budget discipline while the relevant sector ministry wants to pursue its quest for job creation and thereby strain the fiscus. This may be even worse in a coalition government where different ministries are under the control of different political parties with different philosophies.
[84] Note 75, supra.
[85] Ibid.
[86] See chapter three.

As discussed above, despite privatisation, the government of Lesotho still holds shares in most private companies that anchor the economy. In all these companies, the majority shareholder is a foreign investor. Audits reports revel that in this companies, profits are transferred to the subsidiaries, holding companies or divisions of the majority shareholders disguised as procurement transactions. As a result, the government loose taxes that would have been remitted to the fiscus but for the transfer pricing. Secondly, the government loses dividends that would otherwise have been declared in its favour.

It follows, therefore, that the research should first interrogate the existence of transfer pricing in SOEs. Then discuss possible balance between ownership and control of the SOEs that would render the much needed protection to the government where the government is a minority shareholder.

1.8 Separation of Control and Ownership of SOEs

Decades ago, Berle and Means observed that the modern day governance requires serious curtailing of the owner's (shareholder's) power to direct the corporation.[87] The power and/or authority that for a long time was within the ownership territory is now entrusted to the board of directors which as a matter of fact has real power to direct the corporation.[88] This is the ideal notion of separation of ownership of control where the autonomy of the board is at the heart of corporate governance.[89] This formation, however, should not be used as rationale for resisting an oversight role to be played by shareholders.

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[87] A Berle, and G Means *op cit* note 22 at 65.

[88] Ibid; The authors further notes that the direct manifestation of shareholders' power is exercised through their right to vote at the annual general meetings. However, over time this has also been weakened by the proxy system, which although convenient, results in further watering-down of the shareholder's power as the proxies are chosen by either management or some committee seeking to exert control; These views has been critically engaged by some scholars for instance, W Bratton 'Berle and Means reconsidered at the century's turn' (2000-2001) 26 *The Journal of Corporation Law* 737; W Bratton and M Wachter 'Shareholder primacy's corporatist origins: Adolf Berle and the modern corporation' (2008-2009) 34 *The Journal of Corporation Law* 99; K Alces 'Revisiting Berle and Rethinking the Corporate Structure' (2009-2010) 33 *Seattle University Law Review* 787; G Davies 'The twilight of the Berle and Means corporation' (2010-2011) 34 *Seattle University Law Review* 1121; and D Tsuk, 'From pluralism to individualism: Berle and Means and 20th-century American Legal Thought' (2005) 30 *Law and Social Inquiry*, 179, 44

[89] Berle and Means *op cit* note 22, observe that shareholders' real power lies in their right to vote. Shareholders have a right to appoint directors through their vote. However, this has been weakened by the proxy system which

The extent to which those at the helm of management of SOEs and the directors thereof enjoy autonomy and are protected from the influence of the shareholder ministries or the main shareholder (normally a foreign investor) should be examined. The impact of such separation and autonomy if at all enjoyed, should also be interrogated, in the event that the much desired autonomy and authority are not enjoyed, the benefits thereof should be discussed. Thus this research attempts to strike a balance between the fact that SOEs in their very nature are designed to serve one or more public good which is set by the shareholder and the need for board's autonomy and authority.

1.9 SOEs Regulatory Framework

Currently, there is no clear regulatory framework for SOEs in Lesotho. Most SOEs are governed by their establishing statutes while those that are incorporated are governed by ordinary corporate laws as any other corporation in Lesotho.[90] Over and above these, some SOEs are subjected to the *Public Finance Management and Accountability Act*[91] and the *Policy on Corporate Governance for Lesotho Public Enterprises, Government Agencies and Entities*.[92] Some scholars have argued for a separate regulatory regime for SOEs through a statute that would meet their peculiar needs and characteristics.[93] However, the OECD guidelines on corporate governance of state-owned enterprises recommend a unitary regulatory regime for all corporations.[94] The guidelines

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undermines shareholders' powers as proxies may be appointed by management. This system has become one of the principal instruments through which the shareholder right to exercise power over management, is taken away from him (p.129). For a critical engagement with the authors views, see generally W Bratton 'Berle and Means reconsidered at the century's turn' (26) 2000-2001 *The Journal of Corporation Law* 737; Bratton W and M Wachter 'Shareholder primacy's corporatist origins: Adolf Berle and the modern corporation' (34) 2008-2009 *The Journal of Corporation Law* 99; Alces K, 'Revisiting Berle and Rethinking the Corporate Structure' (33) 2009-2010 *Seattle University Law Review* 787; G Davies 'The twilight of the Berle and Means corporation' (34) 2010-2011 *Seattle University Law Review* 1121; and Tsuk D, 'From pluralism to individualism: Berle and Means and 20th-century American legal thought' (30) 2005 *Law and Social Inquiry*, 179;

[90] As discussed above, some SOEs like LNDC are established by statute while others like Lesotho Electricity Company are incorporated.

[91] No. 12 of 2011.

[92] The Policy This policy applies in all Public Enterprises, Government Agencies and Entities wholly owned or where the Government holds majority shares.

[93] This argument is motivated by the success of SOEs in Brasil; M Pargendler 'The unintended consequences of state ownership: The Brazilian experience' 2012 (13) *Theoretical Inquiries in Law* 503, 509.

[94] OECD *Guidelines on Corporate Governance of State Owned Enterprises* (2015).

specifically recommends that states should subject their SOEs to the same regulatory regime, accounting and auditing standards as other companies, according to the OECD, this will improve efficiency and good governance of the SOEs.[95]

On the other hand, some scholars have argued that SOEs should be subjected to regulatory dualism.[96] Regulatory dualism envisages a regulatory regime that supplies different rules for SOEs on one hand and private enterprises on the other.[97] In light of these arguments, this thesis examines the nature and extent of the regulatory framework currently applicable for SOEs in Lesotho and how such affects governance within the SOEs. The research will then consider arguments for and against the separate regulatory regime for SOEs, uniform regulatory regime for corporations including SOEs and the dual regulatory regime. The study will then examine all these and recommend a regulatory regime for SOEs in Lesotho.

1.10 Research Questions

The key question that this thesis tackles may be stated as follows: does the current ownership and control matrix for SOEs in Lesotho affect their corporate governance, particularly the principle of board autonomy and authority?

In order to provide an answer to this question, the thesis will attempt the following sub-questions as well:

- What is the relevance of SOEs in the present day economy of Lesotho?
- What is the nature and regulatory framework of SOEs in Lesotho?

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[95] Ibid, Over and above a single regulatory regime, OECD has suggested that incorporation is also necessary to strengthen SOEs insulation from shareholder pressure. For more discussions on this point, see Gomez-Ibanez J, *Alternatives to infrastructure privatisation revisited: Public enterprise reform from the 1960s to the 1980s* World Bank Policy Research Working Paper 4391.
[96] J Gilbson, Hansmann H and Pargendler 'Regulatory dualism as a development strategy: corporate reform in Brazil, the US' (2011) 63 *Stanford Law Review* 475, 480.
[97] P Pargendeler 'State Ownership and Corporate Governance' (2012) 80 *Fodham Law Review* 2917, 2962; The rationale for this approach is that private enterprises and SOEs have different functional characteristics and objectives and as such, would, therefore be best served by different legal regimes.

- How does the regulatory framework of SOEs impact on their corporate governance, particularly on board autonomy and authority.
- Is ownership and control of SOEs separate in Lesotho and what are the implications on corporate governance?
- Does the ownership and control arrangement give an incentive for Shareholder (political or investor) to intervene?
- Are SOEs boards and senior management adequately insulated from shareholder (political or investor) interference?
- Do SOEs and/or the government as minority shareholder need protection against majority shareholders?
- What are the types of ownership and control models in other jurisdictions like Norway, Brazil and China and how do they, if at all, aid board insulation for greater autonomy and authority?
- What lessons can be learned from these other jurisdictions?
- What ownership and control model should be adopted by Lesotho?

The main argument that the thesis makes is that the current ownership and control matrix of SOEs in Lesotho does not conform to the established principles of corporate governance, particularly the principle of board autonomy and authority together with all other principles that seek to insulate the board from an undue influence of shareholders. This argument is made from the stewardship theory point of view.

1.11 Justification of the Study

The thesis argues that despite the fact that corporate governance within SOEs have been neglected by the scholarly debates in Lesotho, SOEs remain important role players in the Lesotho economic development agenda. The purpose of this thesis is to enhance the scholarly dialogue around issues of cooperate governance within SOEs in Lesotho. Governance of SOEs have been relegated to issues of political speech and/or public rhetoric. Therefore, this research aims to destigmatise issues of corporate governance of SOEs and find a logical explanation for governance deficiencies in the SOEs sector.

This thesis critically examines the current governance model of different SOEs then propose what is considered to be an ideal ownership and control structure and regulatory framework based on sound theoretical foundation. The aim is, therefore, to propose a sound ownership and control model for SOEs in Lesotho, a model that insulate boards from undue interference of shareholders caused by the shareholders' proximity from the centre of SOEs control.

1.12 Theoretical Framework

Corporate governance is an interdisciplinary subject. Thus, there is no one theory that can best explain how modern corporations are run. As a matter of fact, corporate governance is a subject in desperate need for a widely accepted theoretical base.[98] This subject is highly influenced by different disciples, particularly: political science, economics and law. For this reason, it might not be easy to find one theoretical base for corporate governance. It is not surprising, therefore, that this research is sustained by theories from different disciplines that influence corporate governance.

In examining the impact of the ownership and control matrix on the governance of the SOEs in Lesotho, the research is directed by a number of theories.[99] For instance, the stewardship theory, in terms of which, directors are considered as good stewards who will act in the best interest of the owners (shareholders).[100] This theory is based more on the many duties that directors owe to the company.[101] Where shareholders' wealth is maximised, the steward's utilities are maximised as well, because organisational success will serve most requirements. The steward's behaviour is pro

[98] B Tricker *Corporate Governance: Principles, Policies and Practices* (2012) 76-77.
[99] These theories are discussed in details in chapter two.
[100] WF Yussoff *et al* 'Insight of Corporate Governance Theories' *Journal of Business and Management* (2012) 52-63
[101] Fiduciary duties and the duty to exercise care, skill and diligence, which are now entrenched in the Companies Act

organisational and collectivist, and has higher utility than individualistic self-serving behavior and the steward's behavior will not depart from the interest of the organisation because the steward seeks to attain the objectives of the organisation.[102]

The other equally important theory is the agency theory. In terms of this theory, agents are the managers, while principals are the owners (shareholders).[103] In this context, Adam Smith, in his classical work, observes that the directors being the managers of other people's money rather than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance as if it were their own.[104] In agency theory terms, the owners are principals and the directors are agents and there is an agency loss which is the extent to which returns to the residual claimants, the owners, fall below what they would be if the principals, the owners, exercised direct control of the corporation.[105]

SOEs are almost always established to pursue political goals. Governments often use SOEs as vehicles to attain legitimacy within their electorate. This approach may easily be justified by the legitimacy theory. Legitimacy theory is defined as 'a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate with some socially constructed systems of norms, values, beliefs and definitions'.[106] To attain this legitimacy, SOEs are sometimes used to benefit cronies and politically connected capitalists. This inevitably undermines good governance.

These theories and many other related theories provides a theoretical framework on which the thesis is based.[107]

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[102] Yussof *op cit* note 87.
[103] Ibid.
[104] Smith A, *The Wealth of Nations* (1776) 990.
[105] L Donaldson and JH Davis, ´Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) *Australian Journal of Management* Vol 16 No.1 49.
[106] MC Suchman 'Managing Legitimact: Strategic and Institutional Approaches' (1995) *Academy of Management Review* 571-610.
[107] There are more theories, for instance stakeholder theory, resource dependency theory, social contract theory, political theory and the law matters theory.

1.13 Methodology

This is a theoretical desk-top research. It seeks to interrogate both primary and secondary sources related to the subject matter. The primary works that are interrogated include domestic and foreign legislation, case law, codes of corporate governance, regulations, and government policy papers. Secondary works includes books, journal articles, and theses from the legal, economics and political science disciplines. Lastly, this thesis seeks to consider research reports, audit reports, newspaper articles and internet sources. The study does not venture into an empirical investigation, however, reliance is made on works of others who have taken that route in examining corporate governance of SOEs.

1.14 Scope and Limitations of the Research

The research interrogates some theories and principles of corporate governance to demonstrate how the current ownership and control matrix currently adhered to in Lesotho give rise to some governance challenges within SOEs. Of particular importance to the study will be the need to insulate the boards and stamp their authority in governance of SOEs. This position is influenced by the fact that boards are seen as key role players in corporate governance of SOEs.[108] For the board to effectively play its role in corporate governance, it must be properly insulated from exterior forces (major shareholders or politicians) and capacitated with necessary authority to run and/or manage the affairs of the SOEs. Once these boards are weak, it will be impossible for them to discharge this key role. These boards may be weak as a result of badly composed boards (due to political or majority shareholder's interference) with under skilled directors or where it lack necessary authority as a result of which it may be easily undermined by the shareholders. This thesis argues that SOEs in Lesotho needs autonomous boards with the necessary authority for the country to realise the much desired economic growth[109] and development.[110]

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[108] J Gilbson, Hansmann H and Pargendler 'Regulatory dualism as a development strategy: corporate reform in Brazil, the US and the EU' 2011 (63) *Stanford Law Review* 475, 480.
[109] I Goldin *The Pursuit of Development: Economic Growth, Social Change and Ideas* (2016) 15.
[110] Ibid.

SOEs in Lesotho are of different kinds, some are incorporated while some have been created by specific statutes and they all have different stakeholders and mandates. Some are purely commercial while some have a socio-political objectives and some are somewhat a hybrid. These differences obviously bring out different corporate governance issues. For this reason, this research interrogates the effect of each control and ownership structure and will try proposing a uniform model and general corporate governance regime for SOEs in Lesotho. The study will, however, interrogate some specific governance issues within some SOEs which have gained a lot of public attention. These are, Econet Telecom Lesotho, Lesotho National Development Corporation, Lesotho Floor Mills and Letšeng Diamonds. These are not homogenous, however, it is believed that the study will reveal different behaviour of shareholder, boards and executives.

Lastly, this thesis has chapters on comparative study. In this chapter, focus will be on examining ownership and control regimes in three different jurisdictions namely China, Norway and Brazil. These jurisdictions have been selected because of the success of their SOEs. The main objective of the comparative study will be to try and investigate whether there are any lessons that Lesotho can learn from these countries' experiences.

1.15 Understanding the Corporate Governance Debate

To properly appreciate the proposals made by this thesis, one should understand that there is an ongoing scholarly conversation or debate around corporate governance. It is this same debate that the this research ventures into with the hope of making meaningful contribution thereto, at least in the context of Lesotho. The thesis joins the debate amid the tension between the shareholder participation and passivity.[111] Shareholders are normally referred to as 'owners' of the company.[112] However, the traditional economics and cost-benefit analysis makes a case for shareholder and

[111] HG Hutchison and RS Alley *Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis* Brooklin Journal of Corporate Finance and Commercial Law Vol 2 No 1 pp41-67 (2007).
[112] *Malone v Brinant* 722 A2d 5, 9 (Del, 1998) where the court held that the board of directors has a legal responsibility to manage the business of a corporation for the benefit of its shareholder owners; LD Solomon *et al* Corporations: Law and Policy (4th Ed) p348, an argument is made that shareholders are considered to be corporations altimate owners.

passivity.[113] From the days of Berle and Means, some scholars have argued that in public corporations the shareholders' 'ownership' does not necessarily translate to shareholder control.[114]

Separation of control and ownership developed naturally as control by professional directors evolved, this had the effect of shareholder depression.[115] This came upon as a result of control being removed as one of features of property.[116] This trend was intensified by the absence of single shareholder with a large portion of stake to exercise effective control.[117] This study agrees with this at least in respect of other corporate entities other than SOEs, particularly in the case of Lesotho. The research will show that SOEs are used by the political shareholder as a channel through which to reward their fellow politicians.[118] As a result, people with political connections are appointed as directors as opposed to carrier business people.[119]

The reality is that the position of shareholders has changed from an active to passive role and share certificates are have become simple pieces of paper with certain financial expectations but provide

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[113] Ibid.

[114]L Stout, 'The Shareholder as Ulysses: Some Empirical Evidence On Why Investors in Public Corporations Tolerate Board Governance' (2003) 152 U. PA. L. REV. 667, 667–78; A Berle and G Means, *op cit* note 22 117; MM Blair Corporate Ownership'(1995) *Brookings Rev.*16, 16-17 an argument that labeling shareholders as 'owners' incorrectly implies that shareholders possess certain rights generally associated with ownership; MM Blair and LA Stout, 'Director Accountability and the Mediating Role of the Corporate Board*',* (2001) 79 *WASH. U. L.Q.* 403, 412-13 the authors argue that the options theory destroys any notion that shareholders can be uniquely described, in economic terms at least, as 'owners' of corporations; Gulati MG *et al* 'Connected Contracts' (2000) 47 *UCLA L. REV*. 887, 893 describes the models in which shareholders are deemed as owners or principals as 'incomplete'; LA Stout 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *S. CAL. L. REV*. 1189, 1192 the author concludes that from both a legal and economic perspective, the claim that shareholders own the corporation simply is empirically incorrect.

[115] Hutchison and Alley *op cit* note 98; J McConvill, 'Shareholder Empowerment As an End in Itself: A New Perspective on Allocation of Power in the Modern Corporation' (2007) 33 *OHIO N.U. L. REV.* 1013, 1039–43.

[116] Ibid.

[117] Marks GS *The Separation of Ownership and Control* available on https://reference.findlaw.com/lawandeconomics/5630-the-separation-of-ownership-and-control.pdf (accessed on June 11th 2019)

[118] Reserch has shown that this is not only the experience of the SOE sector in Lesotho. Quaresima F and F Fiorillo *The Economics of Politics: Patronage and Political Selection in Italy* CESifo Working Paper No 6233 (2016) make a similar finding in respect of the SOE sector in Italy.

[119] F Quaresima and F Fiorillo 'The Economics of Politics: Patronage and Political Selection in Italy' (2016) *CESifo Working Paper No 6233* puts it 'The dominant trend in literature advances political interference in SOEs operations as a negative influence on output targets3 , as stated among others by Boubakri et al. (2008), Menozzi et al. (2012) and Carretta et al. (2012) Also, there is a consensus about how government ownership is an effective channel of redistribution for political dividends. SOEs would tend to answer to political masters instead of market rationales as pointed out by Clarke and Cull (2002), Cragg and Dyck (2003) and Boubakri et al. (2011). Indeed, politicians forfeit an important means of generating political support when they privatize SOEs, losing the possibility to provide public employment and/or lucrative contracts to their supporters, like remarked by Shleifer and Vishny (1994)'.

little or no control at all over the physical property and the instruments of production of the enterprise.[120] In good theory and practice, the control of a corporate entity rests with the board of directors.[121] However, this thesis reveals that political interference in SOEs dilutes this delegation and cripples governance of SOEs.[122] It is this delegation of control that that poses a puzzle for scholars.

A shareholder or investor invests his hard earned money in a company only to relinquish his power to determine how his investment will be used in future. It is the director's responsibility and not the shareholders', to decide how the company is run, who shall work for it and in what it shall invest.[123] Most importantly, it is the director and not an investor who decides whether a portion of the corporate earnings will be declared as dividends or used to build an empire, increase salaries or be used to pursue some corporate social responsibility.[124] This study argues that this delegation and complete insulation of the board is needed to stabilise SOEs, the argument will go further to say that to achieve this level of delegation and insulation, the state as a shareholder, should not be entirely passive, however, it must eliminate undue political interference in the governance of SOEs.[125]

The result of this delegation and insulation is what has been described as 'director primacy' as opposed to 'shareholder primacy'.[126] In terms of this model, neither shareholders nor managers

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[120] Hutchison and Alley *op cit* note 98; Berle and Means *op cit* note 22 at 117.

[121] LA Stout 'The Shareholders as Ulysses: Some Empirical Evidence on why Investors in Public Corporations Tolerate Board Governance' 153 *University of Pennsylvania Law Review* 667, 668.

[122] LA Qhobosheane (2018) *The Impact of Political Interference in State-Owned Enterprises: A Case Study on SABC* (unpublished LL.M Dissertation University of Free State 2018) Available on http://scholar.ufs.ac.za:8080/xmlui/bitstream/handle/11660/9256/QhobosheaneLA.pdf?sequence=1&isAllowed=y (accessed on June 7 2019)

[123] Ibid.

[124] MM Blair & LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *VA. L. REV.* 247, 290-315.

[125] OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (2015) 30; The OECD notes that: 'Multiple and contradictory rationales for state ownership can lead to either a very passive conduct of ownership functions, or conversely result in the state's excessive intervention in matters or decisions which should be left to the enterprise and its governance organs. In order for the state to clearly position itself as an owner, it should clarify and prioritise its rationales for state ownership by developing a clear and explicit ownership policy. This will provide SOEs, the market and the general public with predictability and a clear understanding of the state's overall objectives as an owner.'

[126]Stout *op cit* note 108; S Bainbridge Corporate Law (Concepts and Insight Series) 2nd Ed (2009); The phrase 'director primacy' was used by Stephen Bainbridge to describe corporate law's strong penchant for allocating control over corporate assets and earnings to boards of directors instead of to shareholders; Shareholder primacy model assumes that shareholder control the company and are appropriate beneficiaries of the directors' fiduciary duties.

control the company, the company is controlled by the boards of directors.[127] However, director privacy observes the importance of the directors' accountability for maximisation of the shareholders wealth.[128] The question remains: why do shareholders respect and uphold such an arrangements? The answer may be seen as the fact that it may not be feasible for shareholders, the 'owners' of the corporation, to exercise day-today power over the company's business and affairs.[129] This is so in light of the fact that some shareholders may lack skill required to manage and direct the affairs of the company. This research then explores director primacy as a model and answer the question whether the model may be adopted by SOEs. The research will argue that the state, in its capacity as a shareholder, must retain power to appoint directors for SOEs, however, carrier business people should be appointed trough a transparent process. The research will further argue that SOEs boards are not just agents of the political shareholder, these boards are bodies *sui generis*.[130]

Hutchison and Alley notes that board empowerment through director privacy model has a down side to it.[131] Director privacy may risk entrenchment and self-interested behaviour which may have the effect of reducing shareholder wealth.[132] It is for this reason that scholars and shareholders are concerned about accountability.[133] Hutchison and Alley observes further that accountability alone cannot serve as a basis for shareholders' empowerment.[134] Director primacy may risk an increased agency cost[135] in return for managerial freedom which will result in superior corporate performance.[136] This thesis, therefore, seeks to mitigate the risk of agency cost likely to be brought by the application of director primacy in SOEs governance.

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[127] SM Bainbridge 'Director Primacy: the Means and Ends of Corporate Governance' *Nothwestern University Law Review* Vol. 97 No. 2 p547, 550.
[128] Ibid;
[129] Stout *op cit* note 108.
[130] As Bainbridge (*op cit* note 114) puts it 'board of directors is not a mere agent of the shareholders, but rather is a sui generis body—a sort of Platonic guardian—serving as the nexus for the various contracts comprising the corporation.'
[131] HJ Hutchison and RS Alley 'Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis' (2007) 2:1 *Brooklin Journal of Corporate Finance and Commercial Law* 41-67.
[132] Ibid.
[133] AR Keay and J Loughrey 'The Framework For Board Accountability In Corporate Governance' (2015) 35(2) *Legal Studies* 252 - 279.
[134] Hutchison *op cit* note 118.
[135] Ibid; Stout L, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1200 (2002).
[136] Bruno VG and Claessens S, *Corporate Governance and Regulation: Can There Be Too Much of a Good Thing?* 9 (Eur. Corp. Governance Inst., Finance Working Paper No. 142/2007, 2006) p 6-7 and 39-46, these scholars provide

The risk of agency cost emerges once the interests of the directors are not at par with those of the shareholders.[137] This originates from the agency theory school of thought. As discussed above, proponents of the agency theory argues that shareholders are principals who entrusts their business to their agents, directors.[138] Psychology and sociology scholars have suggested some limits to the agency theory.[139] These scholars correctly points out that assumptions made by proponents of the agency theory about individuals may not hold for all directors.[140] It follows, therefore, that reliance of agency theory is not desirable. This research argues that directors of SOEs should not be viewed as agents of shareholders, they should be viewed more as 'stewards whose motives are aligned with the objectives of their principals'.[141]

The thesis later submits that as stewards, directors of SOEs should not only focus on aligning their motives with the objectives of their principals. SOEs, like most companies, operates within diverse environment, therefore, directors are bound to be ethical and always strike a balance between their principals' objectives and public interest. As Shaw puts it:

> Corporate governance today requires more than profit making. Of course, a primary role is to make the entrepreneurial activity successful, to secure a good balance sheet. But there is increasing recognition of an ethical responsibility and public interest obligation falling upon the leaders of our major corporations, both public and private.[142]

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empirical evidence on a cross-country basis showing that ideal corporate governance does not imply either greater regulation or greater accountability.

[137] Davis JH *et al Towards a Stewardship Theory of Management* The Academy of Management Review Vol 22 No 1 (1997) pp20-47, 20.

[138] KM Eisenhardt 'Agency Theory: An Assessment and Review' (1989) 14 (1) *Academy of Management Review* 57-74.

[139] P Hirsch, S Michaels and R Friedman "Dirty hands" versus "clean models" (1987) 16 *Theory and Society* 317-336; C Perrow Complex Organizations: A Critical Essay (1986).

[140] Supra, note 124; This view is supported in light of the fact that some directors are career business people and whenever appointed to serve on a board, they are more likely to pursue the best interests of the company and make a name for themselves in the process.

[141] Supra, note 124.

[142] Shaw JW *Company Directors: Ethical and Public Interest Responsibilities* Australian Quarterly, Vol. 73, No. 4 (Jul. - Aug., 2001) 7-8.

This thesis, therefore, proposes a model of SOEs ownership and control that it coins and tittles 'kharetsa'. This model acknowledges that the purpose for SOEs existence in Lesotho (and elsewhere) is not only to maximise profits, communities are entitled to expect that SOEs will good citizens and have social conscience. The research proposes that SOEs adopt a model of corporate governance that allows public interest to play some role in corporate thinking and decision making.

1.16 Thesis Outline

The thesis is divided into six chapters. The first chapter is an introductory chapter, generally introduces the thesis laying down the main theme of the thesis, reserch questions that the thesis seeks to answer and the contribution of the thesis into the broader academic discussions. Chapter one justifies the study and indicates limitations of the research and possible viable investigations to be made by other scholars around the subject matter. Basically, the chapter sets the tone for further discussion as the thesis progresses.

Chapter two discusses some theories of corporate governance and lay a theoretical foundation for the thesis. This chapter also recognises the fact that corporate governance as a field of study is influenced by a number of disciplines, namely: political science, economics and law. The chapter considers control and ownership models coined at the international stage, then the chapter elaborates more on the centralized model of control and ownership. The idea of achieving full isolation of SOEs boards through using a selected ministry,[143] or a holding company,[144] or a specialized agency[145] to hold shares in SOEs as opposed to having a decentralized system where

[143] Norway has adopted the highly influential OECD guidelines on Corporate Governance of SOEs. These guidelines are the internationally agreed standard for how governments should exercise the state ownership function to avoid the pitfalls of both passive ownership and excessive state intervention. These guidelines recommends centralization of ownership and control of SOEs. (OECD (2015) *OECD Guidelines on Corporate Governance of State-Owned Enterprises*.)
[144] Singapore has adopted a centralised model of ownership and control of SOEs. It has a holding company that holds the state's interest in different SOEs. Singapore has been celebrated for the efficiently governed and profitable SOEs.
[145] China and Brazil are members of the BRICS block of emerging economies and the emerging economies and they both have large SOEs sector with a number of success stories. In these countries, there are specialised agencies that pursue economic interests of the state.

every ministry and/or agencies may hold shares in SOEs[146] is explored. It is in this chapter that Musacchio and Lazzarinno[147] of 'Leviathan as a minority shareholder' will be discussed.

Chapter three will critically examine the current ownership and control matrix of SOEs in Lesotho. This chapter highlights some governance deficiencies in SOEs (specific to Lesotho). The chapter then ventures into the privitasation debate. At this juncture, the thesis will focuses more on whether there is justification for the state's involvement in economic activities or whether the state should entrust the economy to the private sector. As part of the debate, effects of privatization are considered, particularly in the context of Lesotho. The chapter also considers the relationship between corporate governance and performance of the SOEs. It is in this chapter where a critical analysis of the regulatory framework applicable to SOEs in Lesotho is made.

Chapter two goes on to make an argument that the Lesotho SOEs control and ownership model is flawed much as it leads to shareholders being very close to the center of control and/or management of the entity. This in itself is not *prima facie* bad for corporate governance, provided it takes the form of measured intervention or public interest intervention as opposed to undue interference. This chapter uses selected SOEs as examples to demonstrate undue interference as opposed to justified intervention. The chapter then argues that undue influence compromises boards' autonomy and authority while intervention on the other hand does not compromise the board at all. The discussions then ventures into the cadre deployment debate. Cadre deployment in SOEs poses a serious danger of shareholder (political) interference.

Chapter four will be a comparative study that focuses predominantly on the Republic of South Africa. The chapter critically discusses SOEs' control and ownership in South Africa, then performance is considered. The main focus is SOEs' boards and/or management are properly insulated i.e. whether boards and/or management are autonomous, competent and professional. The chapter also considers regulatory framework of SOEs in South Africa.

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[146] Currently, the position in Lesotho is not clear, it would seem every government ministry or agency may hold shares in a commercial enterprise. This issue is discussed with better details in chapter three.

[147] A Musacchio and SG Lazzarini *Reinventing State Capitalism: Leviathan in Business Brazil and Beyond* (2014) 197.

Chapter five is also a comparative study chapter with a particular focus on Singapore. The Temasek's models is fully unpacked and the merits thereof discussed. The Temasek's governance is discussed at length and how the same principles draggles down to its subsidiaries.

Chapter six discusses lessons from other jurisdictions and propose a centralized model of ownership and control of SOEs tailored for Lesotho. This will be an attempt, not only to insulate SOEs from political interference and/or interference by the majority shareholder, it will be a model that will guarantee's the boards' autonomy and authority for better performance of SOEs and shareholder value.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 Introduction

The previous chapter provided for the context and objectives of this study. This chapter focuses broadly on the definition, evolution, importance and theories of corporate governance. The chapter will consider and discuss a number of definitions of corporate and one definition which will be preferred by this study will be highlighted. Lastly, the chapter will discuss theories of corporate governance. As stated in the previous chapter, corporate governance as a subject cannot be narrowed down to one theory and definition. As such, the ensuing theoretical discussion seeks to create a foundation for the later discussions of the study.

2.2 Corporate Governance Defined

Scholars and entrepreneurs hardly ever agree on many sociological , political or economic issues.[1] Entrepreneurs routinely argue that scholars largely adopt theoretical and less practical approaches to many issues.[2] However, both scholars and entrepreneurs are most likely to agree on the crucial role that corporate governance plays modern capitalism.[3] It is no wonder corporate governance has over the years dominated discussion in boardrooms, academic circles and governments across the world.[4] The importance of corporate governance has been reinforced by recent front page corporate scandals throughout global economies.[5]

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[1] Sharon Alvarez and Jay Barney 'The Entrepreneurial Theory of the Firm' (2007) 44 *Journal of Management Studies* 1057.

[2] Ibid; Andrew Hoffman 'Reconsidering the Role of the Practical Theorist: On (Re) Connecting Theory to Practice in Organization Theory' (2004) *Strategic Organisation* 213 (available on https://www.researchgate.net/publication/238716098_Reconsidering_the_Role_of_the_Practical_Theorist_On_ReConnecting_Theory_to_Practice_in_Organization_Theory accessed on 26 March 2020)

[3] Priyanka K Sharma *Corporate Governance Practices in India: A Synthesis of Theories, Practices and Cases* (2015) 1.

[4] Ibid; Mariana Pargendler 'Corporate Governance Obsession' (2015) (available on https://web.law.columbia.edu/sites/default/files/microsites/public-research-leadership/mariana_pargendler_-_the_corporate_governance_obsession.pdf accessed on March 7 2020)

[5] Anup Agrawal and Tommy Cooper "Corporate Governance Consequences of Accounting Scandals: Evidence from Top Management, CFO and Auditor Turnover" (2017) 7 (1) *The Quarterly Journal of Finance* 106; J. Coffee Jr., A Theory of Corporate Scandals: Why the USA and Europe Differ, J. (2005) 21(2) *Oxford Review of Economic Policy* 198.

This chapter makes an attempt at defining corporate governance and then unpack some theoretical basis underpinning the importance of ccorporate governance. As noted in the previous chapter, corporate governance is a multi-disciplinary subject, [6] and unlike most subjects, it is underpinned by a number of theories, most of which are discussed in this chapter.

Before discussing theories of corporate governance, it is important to understand what corporate governance is. The word 'governance' originates from a Latin word: '*gubernare*' which may be literally translated to mean to rule or to steer.[7] Meaning corporate governance relates to the ruling or steering of corporate entities. Corporate governance covers a complete range of activities with direct or indirect influence on the financial health of the company.[8] It covers a number of fields, from law, economics to management and accounting.[9]

Corporate governance is about the promotion of fairness, transparency and accountability within corporate bodies.[10] As some scholars puts it:

> Corporate governance is not just corporate management; it is something much broader to include a fair, efficient and transparent administration to meet certain well-defined objectives. It is a system of structuring, operating and controlling a company with a view to achieve long term strategic goals to satisfy shareholders, creditors, employees, customers and suppliers and complying with the legal and regulatory requirements, apart from meeting environmental and local community needs. When it is practiced under a well

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[6] Boris Durisin and Fulvio Puzone 'Maturation of Corporate Governance Research 1993-2007' (2009) 17 *Corporate Governance: An International Review* 266 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416357## accessed on 26 March 2020).
[7] Sharma *op cit* note 3 at 1-2.
[8] Sharma *op cit* note 3; Blair Margaret *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington D.C. Brookings Institution,1995); Adrian Cadbury Report Committee on the Financial Aspect of Corporate Governance, Final Report and Code of Best Practices (December 1992) para 2.5; Mervin King, *King IV Report on Corporate Governance for South Africa* (2016) 20; Junega Prachi *What is Good Corporate Governance?* 1, Management Study Guide; Cheffins BR *The Oxford Handbook of Corporate Governance* (2013) 46.
[9] Ibid; Alessio M Pacces *Rethinking Corporate Governance: The Law and Economics of Control Powers* (2015) 54.
[10] Wolfenson J President of the World Bank *Financial Times* June 21 1999.

laid out system, it leads to the building of a legal, commercial and institutional framework and demarcates the boundaries within which these functions are performed. [11]

Thus, corporate governance transcends the parameters of corporate law.[12] Its primary objective is not only compliance with the dictates of the law but also ensuring the boards' commitment to managing the corporate body in a transparent and ethical manner for maximizing the long-term shareholder value.[13] According to Friedman, corporate governance entails conducting corporate business "in accordance with the owner's or shareholders' desires, which generally will be to make as much money as possible, while conforming to the basic rules of society embodies in and local customs'.[14]

Friedman's definition is based on the economic principle of market value maximization that forms the basis of shareholder capitalism.[15] However, in light of the modern-day debates around corporate governance, Friedman's definition appears narrow in scope. In this narrow sense, corporate governance maybe understood as a set of internal arrangements that define the relationship between owners and managers of the corporation.[16] It is now well established that corporate governance extends well beyond the relationship between the shareholders and the corporate managers.[17]

Over a period of time, the definition of corporate governance has evolved and widened. It is now widely understood not only to encompass shareholders' interests but also the interest of a broader community of stakeholders.[18] In an attempt to avoid the debate around the stakeholders, Sir Adrin Cadbury gives a somehow simple and widely accepted definition of corporate governance, which

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[11] Milton Friedman, *New York Times Magazine* 13 September 1970; Shama *op cit* note 3 at 2.
[12] Sharma *op cit* note 3 at 2.
[13] Sharma *op cit* note 3 at 2; Cadbury Committee Report (1992) 'Draft Report on the Financial Aspects of Corporate Governance; These days this is no longer limited to the shareholder value, corporate governance now dictates that corporates have a wide spectrum of stakeholders thus stakeholder valueu is being advocated for.
[14] Bob Tricker *Corporate Governance: Principles, Policies and Practices* (2012) 13-14.
[15] Shareholder capitalism in this context may be understood to mean an economic system in which the dominant corporate form is legally independent companies that can pool capital from many shareholders with limited liability, complemented by an open stock market to trade these shares freely.

[16] AC Fernando *Corporate Governance: Principles, Policies and Practices* (2012) 483.
[17] https://www.businessballs.com/organisational-culture/corporate-governance/ accessed on 27 March 2020.
[18] Sharma *op cit* note 3, 12.

is 'a system by which businesses are directed and controlled'.[19] On the other hand, Standard and Poor asserts that corporate governance can be characterised as 'the way a company is organised and managed to ensure that all financial stakeholders receive their fair share of the company's earnings and assets'.[20] While this definition has merit, it fails to recognise that a community of stakeholders of any given corporate body extends beyond financial stakeholders. Thus, Sir Sydneys Lipworth's[21] sentiments probably offer a fair attempt at avoiding the controversy around the stakeholders. Lipworth contends that good corporate governance is 'there to ensure that the business is being soundly and effectively managed with risks being properly assessed and controlled'.[22]

Lipworth's definition seems to be in line with that suggested by some scholars,[23] who posit that corporate governance is the system of directing and controlling the affairs of a corporation. It refers to a framework of rules and regulations that enable the stakeholders to exercise appropriate oversight over a company to maximise its value and to obtain a return on their holding.[24] Cockham and Wartick[25] seem to agree with that contention they depict corporate governance as 'an umbrella term that covers many aspects related to concepts, theories and practices of boards of directors,

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[19] SEBI's Kumar Mangalam Birla Committee Report, January 2000; in 1999, the Securities and Exchange Board of India (SEBI) set up a committee under the leadership of Kumar Mangalam Birla, a member of the SEBI board. The committee was charged with the responsibility of promoting and raising the standard of good corporate governance in India. The primary objective of the committee was to vie corporate governance from the perspective of the investors and shareholders and to prepare a 'Code' to suit the Indian corporate environment. The committee divided its recommendations into two categories i.e. mandatory and non-mandatory. Recommendations that the committee found as absolutely essential for corporate governance, those that could be defined with precision and which could be enforced through the amendment of the listing agreement were classified as mandatory. On the other hand, recommendations which were considered by the committee as either desirable or which could require change of laws were classified as mandatory; the report is available at https://ecgi.global/code/report-kumar-mangalam-birla-committee-corporate-governance accessed on 27 March 2020.
[20] Sharma *op cit* note 3, 13.
[21] Sir Sydney Lipworth is the former Chairman of the Financial Reporting Council of the United Kingdom.
[22] Sharma *op cit* note 3, 13; Advian Cadbury in a Seminar in Mumbai, November 1996.
[23] Iskander M, G Meyerman, DF Fray and S Hagan (1999) 'Corporate Restructuring and Governance in East India,' *Finance and Development*, (1999) 42.

[24] Sharma *op cit* note 3, 13; Biswajit Nag, Saikat Banerjee and Rittwik Chatterjee (2007) 'Changing Features of the Automobile Industry in Asia: Comparison of Production, Trade and Market Structure in Selected Countries, Asia-Pacific Research and Training Network on Trade,' (available at https://www.researchgate.net/publication/5017458_Changing_Features_of_the_Automobile_Industry_in_AsiaComparison_of_Production_Trade_and_Market_Structure_in_Selected_Countries accessed on 27 March 2020).

[25] Cochran PL and SL Watrick *Corporate Governance: A Review of the Literature* (1988).

their executives and non-executive directors.'[26] This definition may easily be reconciled with that suggested by Grant, namely that corporate governance is a broad theory that is concerned with the alignment of the management and shareholder's interests.[27] Levitt, the former chairman of the Securities and Exchange Committee seems to be in agreement with this view, for him, corporate governance is the relationship between the investor, the management team and the board of directors of a company.[28]

From the above, it is clear that the notion of corporate governance has been defined from different angles and perspectives. The obvious implication seems to be that a consensus on the definition will hardly ever be reached. It is almost certain that scholars and practitioners adapt different approaches to corporate governance.

For purposes of this study, corporate governance is understood as a set of contracts that define the relationship between the three corporate actors, namely: the sovereign, who in the vast majority of modern legal systems (and of particular importance to this study) is the shareowner, the governed, namely all stake holders including the shareholders and the governing, who direct and govern the affairs of the enterprise.[29] It can therefore be argued that corporate governance and modern political governance share similar roots, that is: the voluntary contractual triad of the sovereign, governed and governing which is embedded in a society of natural law.[30]

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[26] Cochran PL and SL Watrick *Corporate Governance: A Review of the Literature* (1988) 2; GF Maassen 'International Comparison of Corporate Governance Models. A Study of the Formal Independence and Convergence of the One-Tier and Two-Tier Corporate Boards of Directors in the United States, the United Kingdom and the Netherlands' (2002) (available at http://www.developmentwork.net/chapter-1-the-introduction-to-this-study/210-11-introduction accessed on 27 March 2020).
[27] Gerry H Grant 'The Evolution of Corporate Governance and its Impact on Modern Corporate America' (2003) *Management Decision* 923 at 925 (available at https://www.emerald.com/insight/content/doi/10.1108/00251740310495045/full/html accessed on March 27 2020)
[28] Arthur Levitt *Take on the Street* (2002) p209.
[29] Pierre-Yves Gomes and Harry Korine 'Democracy and the Evolution of Corporate Governance' (2005) *Corporate Governance: An International Review* 39.
[30] Ibid.

2.3 Historical Development of Corporate Governance

Corporate governance as a discipline is a fairly recent issue.[31] The history of governance has mostly been characterised by tensions between ownership and control of corporate entities.[32] Governance issues normally emergewhen a corporate entity acquires a life of its own, that is: when ownership is practically separated from the control or management of the entity.[33] Shakespeare's *Merchant of Venice* clearly illustrates a case of tension between ownership and control.[34] At that stage of development, some basic practices of were already in place, this is evidenced by the oversight role which was exercised over those delegated to run the enterprise.[35] Some literature suggests that corporate governance has been practiced for a long time, that is, for as long as there has been corporate entities. , Despite that, corporate governance as a subject is less than a century old.[36] Proponents of this perspecive argue that the term corporate governance was scarcely used in the 1989s.[37]

More specifically, the foundation of corporate governance was properly laid down by the British in the nineteenth century.[38] In 1844, the British enacted the Joint Stock Companies Act[39] which brought fundamental transformation to the company law regime. This was the first statute to provide for the incorporation, governance, and regulation of companies.[40] The Act covered certain governance issues such as conducting and managing the company's affairs,[41] appointment of

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[31] Athur Kendal and Nigel Kendal *Real World Corporate Governance: A Programme for Profit Enhanced Stewardship* (1998) 15.
[32] Ibid.
[33] Ibid.
[34] Shakespeare in his play 'The Merchant of Venice' where Antonio, the merchant, agonized as he watched his ships sail out of sight having entrusted his fortune to others demonstrates the core of corporate governance. The merchant has seen his wealth sail away, he has had to leave the management of the ships and all other assets to the captain and his crew. In a similar manner, shareholders leave the management of their wealth i.e. the company to the directors and/or managers.
[35] Bob Tricker *Corporate Governance: An International Review* (2000).
[36] Price NJ 'What ids the Histry of Corporate Governance and hoe has it Changed?' (2018) (available at https://insights.diligent.com/corporate-governance/what-is-the-history-of-corporate-governance-and-how-has-it-changed accessed on March 27 2020).
[37] Tricker *of cit* note 35.
[38] Tshepo Mongalo *Corporate Law & Corporate Governance* (2003) 186.
[39] 7 & 8 Vict c 110.
[40] Mongalo *op cit* note 39.
[41] Section XXVII of the Act.

company officers[42] and calling and holding periodical meetings of the members.[43] The most important provision of the Act was section XXXIV which provided for proper books of accounts to be kept and maintained by the company. The Act went on to provide for the appointment of the Auditor and the registration thereof with the Registrar of Joint Stock Companies,[44] 'a practice that has to this very age in all Commonwealth jurisdictions and beyond'.[45] In terms of the Act, the auditors were to give a report on the balance sheet of the company to the annual general meeting.[46]

During those years, it was well accepted, as it is now, that the board and general membership of the company through the annual general meeting are at the centre of corporate governance.[47] The Act reiterated that the control and management of the company was entrusted in the board.[48] This practice is still being observed to this very day.[49] It follows, therefore, that the Act set the tone and landscape for corporate governance. However, the regime set by the Act and some developments that followed did not provide for sufficient checks and balances to ensure that the company was being run in a manner that benefited shareholders and other legitimate stakeholders.[50] This 'traditional and conventional regime of corporate governance failed to address the concerns that the directors were acting in a self-serving manner and ignoring the interests of other stakeholders.'[51] This setting probably made sense because most enterprises still followed the traditional enterprise model utilising the advantage of the corporate form.[52] Traditional enterprises were ones in which owners were also the controllers, i.e. closely held companies.[53]

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[42] Section XXVII (2) and (3) of the Act.
[43] Section XXVII (6).
[44] Section XXXVIII of the Act.
[45] Mongalo *op cit* note 39.
[46] Section XXXIX-XLIII of the Act.
[47] Mongalo *op cit* note 39;Section XXVII (1) of the Act; Section 59(1) of the Companies Act, 2011 provides that The business and affairs of a company shall be managed by, or under the direction or supervision of the board of the company, which shall have all the powers necessary for managing, directing and supervising the management of the business and affairs of the company, subject to modifications, exceptions or limitations in accordance with the articles of incorporation.

[48] Section XXVIII (1)-(7).
[49] See section 59(1) of the Companies Act, 2011.
[50] Mongalo *op cit* note 39, 187.
[51] Ibid.
[52] Dignam A and J Lowry *Company Law* (2010) 374.
[53] Ibid

Under the traditional corporate governance regime, the directors had almost unlimited powers over the company. This is perhaps demonstrated by the case of *Automatic Self-Cleasing Filter Syndicate Co Ltd v Cuninghame*[54] in which the issue was whether shareholders of a company had power to order directors, through a resolution, to authorise agreement of sale of the whole of the company's assets despite the fact that directors thought that the sale was wasteful, and that the terms on which the sale was to be carried through less favourable to the company. The main argument by the shareholders was that directors were merely agents of the company and as such were bound to obey their principal, the company.[55] It was held that it was not competent for the majority shareholders, at an ordinary meeting, to alter the mandate originally given to the directors by the articles of association. This decision was based on the fact that the company's articles vested the management and control of the company in the board.[56]

The importance of the articles of association in restricting powers of the directors was an important feature of the traditional corporate governance regime. In *Re: Alma Spinning Company (Bottomley's)*[57] the English Court of the Chancery held that where the company's articles of association empowered a specific number of directors to conduct the business, then the business of the company may not be conducted by directors less than the number specified by the articles. This is not to suggest that the traditional corporate law regime only recognises the board as the epitome of governance, the traditional corporate governance recognised the need for a division of powers between the board and members of the company. This was emphasised by the English Court of Appeal in *John Shaw & Sons (Salford) Ltd v Shaw*[58] held that:

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[54] [1906] 2 Ch 35; Mongalo *op cit* note 39, 187; See also *R v Mall* 1959 (4) SA 607 (N), 623; *Louw v WP Kooperasie Bpk* 1991 (3) SA 593 (A) 602; McLennan 1987 *SALJ* 233; Naude (1972) *SALJ* 221, 223.

[55] At 42; This argument was based on the definition of a 'company' as the shareholders in a general meeting. In *Wight Railway Company v Tahourdin* (1883) 25 ChD 320 was normally used as authority for the proposition that the 'company' is actually the majority shareholders. The term 'company' was often used to refer to shareholders as a collective. In *Quin & Axtens Ltd v Salomon* [1909] AC 442 (HL) 443, the Court held that '…the directors should manage the business; and the company, therefore, is not to manage the business unless there is a provision to that effect.' Echoing similar sentiments, the Court in *Worcester Cosertry Ltd v Whitting* [1936] Ch 640, held that directors are not the company, that the corporators in a general meeting constitute the company.

[56] Section 59 of the Companies Act 2011 also bears a similar provision which is supported by article 47(1) of the standard form articles of incorporation which provides that: 'The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company prescribed by the Act or by the articles, required to be exercised by the company in general meeting.'

[57] 16 ChD 681.

[58] [1935] 2 KB 113 (CA).

> A company is an entity distinct alike from shareholders and its directors. Some of its powers may, according its articles be, be exercised by directors, certain powers may be reserved for shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.[59]

It follows therefore, that the board has always been a central feature of corporate governance. Thus, courts adopted a liberal approach in interpreting the board's role in corporate governance.[60] This formulation of corporate governance was highly accepted throughout the commonwealth, of which Lesotho is a member. [61] It followed therefore, that ,the provisions of the articles of association discussed above also applied in Lesotho as one of a few yardsticks in determining restraints on the authority of the directors.[62]

The traditional corporate governance regime offered very few yardsticks through which one could assess the performance of the boards.[63] There were some statutory controls,[64] However, towards the end of the twentieth century, market forces played a critical role in setting the standards for managerial performance.[65] Some pressure on the board to perform efficiently and adhere to certain governance standards would be exerted by the company's external creditors such as financial

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[59] Ibid, at 134.

[60] See for instance *Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 QB 656, at 688, 690, 692 and *Quin & Extensions Limited and Others v Salmon* [1909] AC 442, at 443.

[61] The Companies Act No. 25 of 1967 (Particularly part III thereof).

[62] Ibid.

[63] Mongalo *op cit* note 39, 189.

[64] One such control was the capital maintenance rule which is as old as the company is. In terms of this rule, a company's income should only be recognized after it has fully recovered its costs or its capital has been maintained. A company achieves capital maintenance when the amount of its capital at the end of a period is unchanged from that at the beginning of the period. Any excess amount above this represents the company's profit. The rule was upheld by the Court in *Trevour v Whitworth* (1887) 12 App Cas 409 (HL), at 423-424. The rule was formally introduced into the law of Lesotho by the Companies Act No.25 of 1967.

[65] Eilis Ferran *Company and Corporate Finance* (Oxford University Press, Oxford1999), 118-122.

institutions.[66] These controls on managerial powers, some of which were recognised from as early as 1844 by the enactment of the Joint Stock Companies Act,[67] began to look exceptionally shaky as the modern day company became a reality.[68] Thus the necessity to review corporate governance was inevitable.

Corporate governance review was necessitated by some failures of the traditional corporate governance regime. One of the cases that brought the spotlight to the failures of the traditional regime and brought debate into the corporate governance sphere was the *Guinnes plc v Saunders*[69] where , the company had undertaken to pay a director for his services to the company in relation to a certain major transaction (take-over). The transaction was successful, and the director was duly paid the agreed sum of money. However, the company later learned that the director had a pecuniary interest in the transaction. With this knowledge, the company claimed restitution of the money from the director on the ground that he had received the money in breach of his fiduciary duty as a director in that he had not disclosed his interest in the transaction as was required. The House of Lords held that the payment was made in clear contravention of the company's articles of association that regulated special remuneration of company's directors.

This case highlighted the dangers of delegating the powers conferred, not only on the board, but on other structures of the company as well, without clear policies or guidelines. It became clear that the traditional board needed to be replaced by a dynamic board with checks and balances to overcome challenges.[70] Several corporate failures then followed. The downfall of Maxwell[71] followed by Polly Peck International reinforced the need for checks and balances in corporate governance, more so in cases where the position of the board chairman and chief executive officer were combined with less vigilant non-executive directors.[72] Unfortunately, some of these corporate

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[66] These would be achieved through covenants in the loan agreements; Mongalo *op cit* note 39, 189.
[67] 7 & 8 Vic c 110.
[68] Mongalo *op cit* note 39, 1890; Traditional enterprises were mainly closely held i.e. ones in which owners were also the controllers, however, the modern day company is widely held, most people in control of the enterprise are not shareholders therein.
[69] [1990] 2 AC 663.
[70] Mongalo *op cit* note 39, 194.
[71] The events that led to the collapse of Maxwell are discussed in the Report of Companies Act Inspectors in Minor Group Newspapers plc (13/03/02) available at http://www.dti.gov.uk/insight.html (accessed on 27 March 2020).
[72] *Polly Peck International plc v Asil Nadir and Others* [1992] 2Loyd's Rep 238; Mongalo *op cit* note 39, 194.

downfalls were a result of deliberate expropriation of company's assets and other benefits of the company.[73] These scandals never stopped, WorldCom, Eron, MG Rover Group followed.

Closer to home, South Africa, has not been free from governance failures or scandals. One of the well documented corporate dishonesties involved the collapse of Steinhoff International Limited.[74] Similarly, Lesotho has not been immune of these corporate scandals. Lesotho Airways Corporation (LAC) was formed in terms of the Lesotho Airways Order.[75] It began operations in 1971 with the main objective of providing national and international air transport. Management failures led to its having to rely on government subsidy of at least five million Maloti per annum.[76] This led to the ultimate privatisation of LAC during the later part of 1997. Its assets (aircrafts and spares) were sold to Rossair Contracts (Pty) Ltd, a South African based company.

The downfall of Lesotho Bank is another example of corporate governance failure in Lesotho. Inadequate management coupled with political interference has been cited as major causes of corporate governance failure at the Bank.[77] In 1995, the Bank recoded losses to the tune of fifty-eight million Maloti. The government then had to inject an amount to the tune of twenty million Maloti into the bank monthly which translated to two hundred and forty million Maloti per annum to keep the bank operational and thereby safeguard depositors' funds. By 1999, the government of Lesotho had spent more than six hundred and twelve million Maloti in financial restructuring of the bank. By then, the government had identified the Standard Bank of South Africa as a strategic partner. Eventually Lesotho Bank was privatised in 1999 by divestments of 70% to Standard Bank with the government of Lesotho retaining 30% in the new Lesotho Bank 1999 Limited, 15% of which was later sold to the Lesotho Unit Trust.[78]

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[73] Mongalo *op cit* note 39, 194.
[74] On 5 December 2017 the CEO Markus Jooste resigned after the company announced possible accounting irregularities. The share price immediately plunged 66% and went on to fall by over 90% as it emerged that the company had overstated profits and assets by nearly $12 billion.
[75] No.50 of 1970.
[76] Makafane TV 'The Impact of Privatisation: Ownership and Corporate Performance in Lesotho' (unpublished masters' thesis, University of Kwazulu Natal, 2005) 47.
[77] Ibid, 53.
[78] Ibid.

As a result of these corporate failures, in the United Kingdom, United States, South Africa and elsewhere, corporate governance review became inevitable. In the United Kingdom, the London Stock Exchange together with the accounting profession commissioned the establishment of a committee which was chaired by Sir Adrian Cadbury.[79] This committee published its recommendation sometime in 1992.[80] Amongst its recommendations were the independence of the non-executive directors[81] and the implementation of board committees for effective corporate governance.[82] The committee highly recommended the implementation of the audit committees[83] and separation of the roles of chairman and the chief executive officer.[84] The committee also recommended that its recommendations be reviewed by an independent committee.[85] Thus the Hampel Committee chaired by Sir Ronald Hampel was established[86] and its findings were published in 1998[87] and implemented by the London Stock Exchange.[88] The recommendations

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[79] The *Committee on the Financial Aspects of Corporate Governance*, which was later known as the Cadbury Committee, was established in May 1991 by the Financial Reporting Council, the London Stock Exchange, and the accountancy profession. The spur for the Committee's creation was an increasing lack of investor confidence in the honesty and accountability of listed companies, occasioned in particular by the sudden financial collapses of two companies, wallpaper group Coloroll and Asil Nadir's Polly Peck consortium: neither of these sudden failures was at all foreshadowed in their apparently healthy published accounts. Even as the Committee was getting down to business, two further scandals shook the financial world: the collapse of the Bank of Credit and Commerce International and exposure of its widespread criminal practices, and the posthumous discovery of Robert Maxwell's appropriation of £440m from his companies' pension funds as the Maxwell Group filed for bankruptcy in 1992. The shockwaves from these two incidents only heightened the sense of urgency behind the Committee's work and ensured that all eyes would be on its eventual report. (see http://cadbury.cjbs.archios.info/report accessed on March 27 2020).

[80] The Draft Report was published in May 1992 and around December 1992, the final report of the Committee was published. The full report is available at https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf (accessed on March 27 2020).

[81] See paragraphs 3.15 and 4.1 of the Committee’s Report.

[82] See paragraphs 4.11 and 4.21 of the Committees Report.

[83] See paragraph 4.33 of the Committee’s report.

[84] See paragraph 4.9 of the Committee’s report.

[85] See paragraph 20 of the Committee’s report.

[86] The Hampel Committee was set up in November 1995 to promote high standards of corporate governance both to protect investors and preserve and enhance the standing of companies listed on the London Stock Exchange. The committee developed further the Cadbury Report and recommended that: the auditors should report on internal control privately to the directors; the directors maintain and review all (and not just financial) controls; companies that do not already have an internal audit function, should from time to time, review their need for one; and Introduced the Combined Code that consolidated the recommendations of earlier corporate governance reports (Cadbury and Greenbury).

[87] The Hampel Committee released a preliminary report in August 1997, followed by a final report in January 1998; the report is available at https://ecgi.global/sites/default/files/codes/documents/hampel.pdf accessed on March 27 2020.

[88] The Financial Conduct Authority (FCA) is the current regulator.

were included as an appendix to the listing rules known as the 'yellow book' and the appendix was referred to as the 'Combined Code'.[89]

In South Africa, the King Committee was commissioned[90] and published the King Report on Corporate Governance in 1994. The committee also published the Code of Corporate Practice and Conduct which was adopted by the Johannesburg Stock Exchange and has been part of its listing requirements ever since.[91] The Committee has now reviewed its reports three times, there has been King I[92], King II[93], King III[94] and the current King IV. King IV builds on King III and is meant to align South African Corporate practices with the international governance codes and best practices, and take account of specific corporate governance developments in relation to governing bodies, increased compliance requirements, new governance standards, emerging risks and opportunities from new technologies and new reporting and disclosure requirements. King IV has been structured as a report; however, it includes a code with what may be described as an additional

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[89] Mongalo *op cit* note 39, 195; the Combined Codes consisted of the Principles of Good Governance and the Code of Best Practice; see also the Financial Services Authority, Listing Rules (London 20020) available at https://www.handbook.fca.org.uk/handbook/LR.pdf accessed on March 27 2020.

[90] In July 1993, the Institute of Directors in South Africa requested a retired judge of the South African Supreme Court, Justice Mervyn E King to preside over a committee on corporate governance. King I was the first of its kind in South Africa aimed at promoting the highest standards of corporate governance in South Africa. The purpose of the King Report 1994 was, and remains, to promote the highest standards of corporate governance in South Africa. Unlike its counterparts in other countries at the time, the King Report 1994 went beyond the financial and regulatory aspects of corporate governance in advocating an integrated approach to good governance in the interests of a wide range of stakeholders having regard to the fundamental principles of good financial, social, ethical and environmental practice. In adopting a participative corporate governance system of enterprise with integrity, the King Committee in 1994 successfully formalised the need for companies to recognise that they no longer act independently from the societies and the environment in which they operate.

[91] The King Report (1994) included a code of business ethics for companies and their stakeholders, representing one of the most forward looking codes of corporate governance.

[92] King I established standards of conduct for boards and directors. It advocated for an integral approach to corporate governance that involved all stakeholders. Some of its key principles includes: 1) directors makeup and mandate including roles of non-executive directors, 2) appointments of directors and guideline on maximum term for executive directors, 3) determination and disclosure of directors' remuneration, 4) frequency of director' meetings, 5) annual reporting, 6) effective auditing, 7) affirmative action programmes and 8) code of ethics.

[93] In March 2002, King II came into force. The Code had provisions on sustainability and the roles of corporate boards and risk management. Some of its key principles were as follows: 1) directors and their responsibilities, 2) internal audit, 3) risk management, 4) sustainability reporting and 5) accounting and auditing.

[94] In March 2010, the King III came into effect. The report combined governance, strategy and sustainability. King III extended applicability to all entities in private and public sector as well as non-profits. It contained a number of emerging global trends in corporate governance. Some of its principles included: 1) alternative dispute resolution, 2) risk based internal audit, 3) shareholder's approval of non-executive directors' remuneration, 4) evaluation of board and director's performance, 5) IT governance, 6) business rescue and 7) directors' responsibilities during major transactions.

sector inclusion covering SMEs, NPOs, municipalities and retirement funds.[95] The Code contains governance principles and recommended practices.[96] Like its predecessors, King IV does not have a binding effect of law, it is voluntary unless otherwise prescribed by law or as a listing requirement.[97]

Like many African countries, corporate governance is a new concept in Lesotho.[98] For a long time, there was not much discussion on issues relating to that concept in Lesotho. However, in the wake of few but substantial international corporate scandals, discussions on corporate governance were bound to emerge.[99] Thus the Institute of Directors Lesotho (IoD Lesotho) was formed under the auspices of the Lesotho Institute of Accountants (LIA).[100]

The IoD Lesotho was formed for purposes of sensitising the corporate players in Lesotho on issues of corporate governance.[101] The IoD Lesotho is registered as society under the Societies Act.[102] The IoD Lesotho sets the corporate governance standards in Lesotho. For a long time IoD Lesotho had been recommending standards applicable in South Africa i.e. the King Code on Corporate

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[95] https://home.kpmg/za/en/home/insights/2016/10/king-iv-summary-guide.html accessed on March 27 2020.
[96] The King IV is rooted on 16 principles, these may be summed up as follows: 1)Ethical Leadership, 2) Organisational Ethics, 3) Responsible corporate citizenship, 4) strategy and performance, 5) reporting, 6) primary role and responsibilities of the board, 7) composition of the board, 8) committees of the board, 9) evaluations of the board's performance, 10) appointment and delegation of management, 11) risk governance, 12) technology and information governance, 13) compliance governance, 14) remuneration governance, 15) assurance; and 16) stakeholder.
[97] The King IV's application regime is 'apply and explain', all principles have been phrased as aspirations and ideals that organisations should strive for in their journey towards good corporate governance. The principles are basic and fundamental to good corporate governance; therefore, the code assumes that corporates will voluntarily apply the principles. On the other hand, the code expects corporates to provide explanations in the form of narrative account, with reference to practices and principles. The explanation should address principles and/or practices that have been implemented and how these achieve or give effect to the code.
[98] African Development Bank *Country Governance Profile: Kingdom of Lesotho* (2006) 16 (available at https://www.google.com/search?client=safari&channel=mac_bm&sxsrf=ALeKk03u8-SwKxd_9ZKv6_QjizRgSDHUfQ%3A1586176923297&ei=myOLXtLhEcGUa-aVpKgM&q=corporate+governance+is+a+new+concept+in+Lesotho&oq=corporate+governance+is+a+new+concept+in+Lesotho&gs_lcp=CgZwc3ktYWIQAzoECAAQRzoHCCMQ6gIQJ0oJCBcSBTEyLTkxSggIGBIEMTItNVC_vUNY1NVDYPXcQ2gBcAR4AIABpAOIAaQDkgEDNC0xmAEAoAEBoAECqgEHZ3dzLXdperABCg&sclient=psy-ab&ved=0ahUKEwiSm8HA6dPoAhVByhoKHeYKCcUQ4dUDCAs&uact=5# accessed on March 27 2020).
[99] Ibid.
[100] The Institute of Directors Lesotho was formed in May 2004 with the objective of promoting corporate governance principles and practices in SOEs, private sector and not-for-profit making organisations in Lesotho.

[101] African Development Bank *op cit* note 95, 16.
[102] No. 20 of 1966.

Governance.[103] However, in 2019, through the support of the African Development Bank and the government of Lesotho, Lesotho has developed a code for corporate governance based on the philosophy of chief Mohlomi,[104] the code has been named the 'Mohlomi Code on Corporate Governance'.[105] The Molomi Code has 22 principles divided into six chapters, namely: board leadership, board conduct, board composition and structures, audit compliance and risk, digitalisation governance and sustainability and integrated reporting.

2.4 The Need for and Importance of Corporate Governance

The need for separation of ownership and control give rise to the need for corporate governance.[106] Adam Smith was probably the first scholar to underscore the need for corporate governance way back in the eighteenth century.[107] He was of the view that 'the directors of such companies, …

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[103] The IoD Lesotho was registered in 2004, however, it remained dormant until 2017. Upon its resuscitation, the IoD relied heavily on standards set in the neighboring South Africa, these were predominantly standards set by the king code iv in 2016 as advocated for by the IoD Southern Africa. The Central Bank of Lesotho and the Lesotho Institute of Accountants also promoted corporate governance in their respective areas of influence. The Central Bank of Lesotho has drafted the code of corporate governance for the financial sector. The Lesotho Institute of Accountants is responsible for regulating the accountancy and auditing practice in the Lesotho. In this capacity the Institute encourages firms to adopt international accounting standards. It no longer issues local standards for the purpose. However, the main challenge in Lesotho is the structure of business which is dominated by micro and small enterprises. These find it difficult to adopt such international standards.

[104] According to Lehlohonolo Chefa, the Executive Director of the IoD Lesotho (2019), this philosophy may be summed as: A responsible leader pursues peaceful and productive alliances, accommodates stakeholders and uses new instruments of power to create intergenerational value.

[105] Mohlomi is one of the most celebrated philosophers in the history of Basotho. He is believed to have lived around 1720-1815. History tells us that Mohlomi was not only a philosopher of his times but also a prophet, rainmaker, chief, diplomat and a healer (herbalist). Mohlomi is believed to have started the custom of greeting amongst the Basotho nation and proclaiming 'khotso', peace when meeting or greeting strangers. Mohlomi warned against: the abuse of power by chiefs; conflicts between chiefdoms and clans; witchcraft and abuse of women and children – all of which according to him, symbolized lack of love. He always urged chiefs (leaders) to always learn to bear with human weaknesses and shortcomings; to always be determined to lead their subjects to the paths of truth and purity. Some words of wisdom from Mohlomi includes: the law does not know a poor man; it is better to trash the corn than to shape a spear; conscience is a true guide of man, it always shows him his duty, if he does well, it smiles on him and reproaches him if he does ill; medicine for a village is a good heart; peace is my sister or peace is plenty; a chief is a chief through his people. Mohlomi gave King Moshoeshoe I, the founder of Basotho nation, some leadership lessons. He instilled in him, the need and ability to tolerate dissenting views, make people feel as part of decisions so as to get them to share his vision; to accommodate diversity and respect people's differences; not to antagonize adversaries – but to outsmart them rather than out-short them. (For more details on the history of Mohlomi, see: Ellenberger DF and JC Macgregor *History of the Basuto, Ancient and Modern* (1912); Max Du Preez *A Chief is a Chief by the Grace of His People: Once we had LEaders*; Guma SM *Morena Mohlomi Mor'a Monyane* (1960); 'Mohlomi: Journal of Southern Africa Historical Studies' Volumes I & II) Year?????

[106] Shama *op cit* note 3, p14.

[107] Adam Smith *An Inquiry into the Nature and Causes of the Wealth of the Nations* (1776); For more on Adam Smith and his philosophy, visit the Adam Smith Institute at https://www.adamsmith.org/the-wealth-of-nations accessed on March 27 2020.

being managers of other people's money than their own,… cannot be expected to be as vigilant as they would otherwise be if they were managing their own companies…. it cannot well be expected that they should watch over it with the same vigilance with which the partners in a private copartnery frequently watch over their own.'

> Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company. It is upon this account that joint stock companies for foreign trade have seldom been able to maintain the competition against private adventurers. [108]

Therefore, there is need for corporate governance to manage the relationship between, on the one hand, shareholders and directors and managers of the establishment on the other. However, the need for corporate governance in developing, emerging and transitional economies goes far beyond resolving the problem highlighted by Adam Smith. This is so due to the fact that these economies are constantly confronted with issues such as lack of property rights, abuse of minority shareholders, violating contracts, assets stripping and self-dealing.[109] The current global economy which is mainly market oriented has led to the spread of capitalism, globalisation, liberalisation and privatisation which in turn demand efficiency, corporate culture and adherence to business ethics for the survival of the corporate world.[110]

2.5 Theories of Corporate Governance

As stated above, no one theory is sufficient for understanding, evaluating or designing an effective corporate governance regime. Corporate governance, particularly for SOEs, is entangled in several issues and debates.[111] This implies that reliance on one theory is likely to produce undesired results

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[108] Ibid, 990.
[109] Shama *op cit* note 3, 15; Fernando, A. C. (2010) *Business Ethics and Corporate Governance* 19.2, (available at https://books.google.co.in/books?isbn=8131711730 accessed on March 27 2020).
[110] Shama *op cit* note 3, 15; VK Pandey and R Prabhakar (2003) 'Corporate Governance: Its Origin, Scope and Present Scenario' in PP Arya, BB Tandon and AK Vashisht (2003) *Corporate Governance*, 24.
[111] NS Matsiliza Corporate Governance of the 'State- Owned Enterprises In An Emerging Country: Risk Management And Related Issues' (2017) 7(3) *Risk Governance & Control: Financial Markets & Institutions* 35-

in practical terms for understanding, designing and improving corporate governance systems and practices. For this reason, there is need to interrogate a few theories so as to adopt an interdisciplinary and holistic theoretical approach based on theories that are discussed bellow.

2.5.1 The Agency Theory

The agency theory has been a subject of debate in many and different disciplines. It has been used by accountancy scholars,[112] economists,[113] finance,[114] political science,[115] organisational behaviour[116] and sociology.[117] During the 1960s and early 1970s, economists explored the issue of risk sharing amongst individuals and groups.[118] This literature sought to explain the risk sharing problem that occurs when operating parties have different attitudes towards risk.[119] According to this literature, a corporation is composed of different individuals or groups with different risk tolerance and their actions differs accordingly.[120] Principals or shareholders (owners) who invest their money, take the risk to acquire the economic benefits, whereas agents who manage and direct

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43 (available at https://www.researchgate.net/publication/318121779_Corporate_governance_of_the_state-owned_enterprises_in_an_emerging_country_Risk_management_and_related_issues accessed on March 27 2020); OECD 'Asia Network on Corporate Governance of State-Owned Enterprises: Priorities and Recommendations' (available at https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/41815923.pdf accessed on March 27 2020); Thabane T and Snyman-Van Deventer E "Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection" *PER / PELJ* 2018(21) – (available at http://dx.doi.org/10.17159/1727- 3781/2018/v21i0a2345 accessed on March 27 2020).

[112] Demski JS, Feltham G *Cost determination: A Conceptual Approach* (1976).

[113] Blair MM 'Post-Enron Reflections on Comparative Corporate Governance' (2003) *Journal of Interdisciplinary Economics* (available at https://journals.sagepub.com/doi/10.1177/02601079X03001400202 accessed on March 27 2020).

[114] Fama FE 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288-307 (available at https://www.journals.uchicago.edu/doi/abs/10.1086/260866 accessed on March 27 2020).

[115] Mitnick MB 'The Theory of Agency: The Policing 'Paradox' and Regulatory Behavior' (1975) 24 *Public Choice* 27-42 (available at https://www.researchgate.net/publication/228124400_The_Theory_of_Agency_The_Policing_'Paradox'_and_Regulatory_Behavior accessed on March 27 2020).

[116] Eisenhardt MK 'Agency Theory: An Assessment and Review' (1989) 14 *The Academy of Management Review* 57-74 (available at https://www.jstor.org/stable/258191?seq=1#metadata_info_tab_contents accessed on March 27 2020).

[117] Eccles GR *The Transfer Pricing Problem: A Theory for Practice* (1985).

[118] See for instance, Arrow KJ 'The Theory of Risk Aversion' (1971) (available at https://scirp.org/reference/referencespapers.aspx?referenceid=1924520 accessed on March 27 2020).

[119] Eisenhardt *op cit* note 113, 58.

[120] Brahmader P and NM Leepsa 'Agency Theory: Review of Theory and Evidence on Problems and Perspectives' (2017) *Indian Journal of Corporate Governance* 75 (available at https://journals.sagepub.com/doi/10.1177/0974686217701467 accessed on March 27 2020).

the company, are risk averse and concerned with pursuing their private benefits.[121] Both principal and agent have different risk preferences and their problem in risk sharing leads to the agency problem. Thus, the agency literature broadened the risk sharing literature to include the so called agency problem which arises when cooperating parties have different goals and there is need for division of labour.[122]

In modern day company setting, ownership is held by individuals or groups in the form of stock and these shareholders delegate the authority to their directors to run business on their behalf.[123] Thus, in terms of this theory, agents are the managers, while principals are the owners (shareholders).[124] The issue then becomes whether directors are performing for themselves or the owners. Adam Smith is amongst the first, if not the first, scholar to suspect the existence of the agency problem.[125] In his classical work, Smith forecasted that if an organisation is managed by a person or group of persons who are not the real owners, there is a chance that they will not work for the owners benefit.[126] Berle and Means later highlighted this theory by an analysis of ownership structure of large corporate bodies in the United States of America.[127] The two scholars concluded that agents might use the company property for their own end, which creates conflict between the agent and principals i.e. the agency problem.[128] In agency theory terms, there is an agency loss which is the extent to which returns to the residual claimants, the owners, fall below what they would be if the principals, the owners, exercised direct control of the corporation.[129]

Proponents of the agency theory argue that managers or directors, without stake in the business, can only be expected to work in their own interests.[130] The theory assumes that shareholders holds a singular perspective, being that of maximising their wealth through share price increase or

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[121] Ibid.
[122] Ibid.
[123] Jensen CM and HW Meckling 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure (1976) 3 *Journal of Financial Economics* 305 – 360 (available at https://www.sciencedirect.com/science/article/pii/0304405X7690026X accessed on March 27 2020).
[124] Ibid.
[125] Smith *op cit* note 107.
[126] Ibid.
[127] Berle A and G Means *The Modern Corporation and Private Property* (1932).
[128] Berle and Means *op cit* note 127, xii.
[129] L Donaldson and JH Davis, ´Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) *Australian Journal of Management* Vol 16 No.1 49.
[130] Smith *op cit* note 107.

dividends pay out.[131] Following this reasoning, directors and shareholders share the same economic goal of maximising their personal wellbeing.[132] In pursuing this objective, their interests may diverge, thus giving rise to the agency problem. Agency problem is one of the oldest problems that has persisted since the evolution of joint stock companies.[133] This problem is one that cannot be ignored since every organisation has possibly suffered from this problem in different forms. Most academic research hase been tailored to create a better understanding of the agency problem in its various forms and various costs involved in it to mitigate the problem.

Thus, the agency theory focuses on problems that occur in corporations due to separation of ownership and control and[134] is concerned with resolving the two problems that are associated with in the agency relationship. The agency problem may arise in at least two circumstances; first, it occurs when the desires and/or goals of the principal and that of the agent conflict.[135] Secondly, it arises when it is difficult or expensive for the principal to verify what the agent is actually doing.[136] The problem at this point is that the principal is unable to verify that the agent has behaved appropriately. The second problem that the agency theory seeks to solve is that of risk sharing.[137] As stated above, this problem occurs due to principal and agent attitudes towards risk. The problem here is that the principal and agent will have adopted different risk mitigation plans as a result of different risk analyses.

The agency theory was given shape by amongst others, Ross[138] and Mitnick.[139] For Ross, the agency problem is more of an incentive problem.[140] Ross was of the opinion that the agency problem occurs as a result of compensation decision, that the problem is not only confined to

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[131] Baker HK and R Anderson *Corporate Governance: A Synthesis of Theory, Research and Practice* (2010) 178.
[132] Ibid.
[133] Brahmader and Leepsa *op cit* note 120, 75.
[134] Ibid, 76.
[135] Eisenhardt *op cit* note 116, 58.
[136] Ibid.
[137] Ibid.
[138] Ross AS 'The Economic Theory of Agency: The Principal's Problem' (1973) 63(2) *American Economic Review* 134-139 (available at https://www.researchgate.net/publication/4721698_The_Economic_Theory_of_Agency_The_Principal's_Problem accessed on March 27 2020.
[139] Mitnick *op cit* note 115.
[140] Ross *op cit* note 139.

corporate bodies, rather it prevails in society as well.[141] On the other hand, for Mitnick, the agency problem occurs as a result of an institutional structure.[142] His approach promotes an idea that institutions are built around agency and they grow to reconcile with the agency.[143]

In the context of SOEs, the agency theory may be used to analyse the relationship between different stakeholders. In terms of this theory, separation of ownership and control must be managed through contracts as parties involved in the governance chain are likely to have different goals. For instance, interests of the shareholder ministry may differ with those of the board and those of the board may differ with those of the executive management of the SOE. SOEs are bound to experience conflict of interest brought about by the division of labour which is a necessary consequence of the separation of ownership and control.[144] The agency theory suggests mechanisms to deal with the inherent conflict of interest in agent-principal relationships i.e. the theory deals with aligning the conflicting interests. It also deals with controlling mechanisms intended to prevent acts which are not aligned with the principal's interests such as fraud and corruption on the part of the executive.[145] This basically emphasises the need for board structures, rules on strategy setting and strategic decision making process, reporting and controlling mechanisms and risk management as an integral element of business.

Despite the fact that the agency theory presents the board as one of the control mechanisms that may be used to mitigate the agency problem, it continues to treat management with suspicion.[146] The rationale for this is the fact that information asymmetry is unavoidable in SOEs' setting or other widely held corporate bodies. The principal and agent have access to different levels of information.[147] In essence, the principal (shareholder ministry and at times the board) is at a disadvantaged position because the agent is exposed to more information, at times, the agent may even decide to withhold some information from the principal. This gives rise to at least two agency

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[141] Ibid.
[142] Mitnick *op cit* note 115.
[143] Ibid.
[144] Mbele N *Corporate Govermnance in State-Owned Enterprises* (unpublished PhD thesis, Witswatersrand University 2015) 33.
[145] Ibid.
[146] Ibid.
[147] Mallin CA *Corporate Governance* (2nd Ed) (2007).

problems, namely: adverse selection and moral hazard.[148] Adverse selection is a condition under which the principal cannot easily ascertain where the agent correctly articulated his/or her ability to do the work which he or she has been engaged to do. On the other hand, under moral hazard, the principal cannot be sure whether the agent has put in the best of his or her abilities in discharging his or her duties.

Therefore, the agency theory advocates that there should be contracts between the shareholder ministry and the board, and the board and the executive management, these contracts should be designed to serve the interests of the shareholders.[149] For this to work effectively, there is need for skilled technical personnel with capacity to monitor these contracts within the governance value chain.[150] This oversight capacity is important for both the shareholder and the board, however, technical background or expertise level may differ. This view is based on the belief that agents are inherently more self-interested than humane and cannot be trusted to act in the best interest of others, but rather, maximise their own wealth.[151]

To curb this risk, the agency theory advocates for boards as control mechanisms to monitor and prevent problems that maybe brought by the principal-agent relationship.[152] Thus, some scholars argue that the agency theory establishes the importance of incentives in organisational thinking.[153] The agency perspective insists that the purpose of the corporation is to create wealth for the

[148] Eisenhardt *op cit* note 116.
[149] Demsetz H 'The Structure of Ownership and the Theory of the Firm' (1983) 26 *Journal of Law & Economics* 375 – 390; (available at https://www.jstor.org/stable/725108?seq=1 accessed on March 27 2020); Fama EF 'Agency Problems and The Theory of the Firm' (1980) 88 *Journal of Political Economy* 288 – 307 (available at https://www.jstor.org/stable/1837292?seq=1 accessed on March 27 2020); Fama EF and MC Jansen 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301-325 (available at https://www.scirp.org/(S(351jmbntvnsjt1aadkposzje))/reference/ReferencesPapers.aspx?ReferenceID=1460236 accessed on March 27 2020).
[150] Mbele *op cit* note 145, 34.
[151] Coase RH 'The Nature of the Firm' (1937) 4 *Economica (new series)* 380 – 405 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1506378 accessed on March 27 2020).
[152] Mallin *op cit* note 148.
[153] Perow C 'An Organosational Analysis of Organisational Theory' (2000) 29(3) *Contemporary Sociology* 469-476 (available at https://www.researchgate.net/publication/254138624_An_Organizational_Analysis_of_Organizational_Theory accessed on March 27 2020.

shareholders.[154] Sharing that wealth with the managers and the agency cost[155] will be justified only if the managers create substantially more wealth than they receive.[156] This approach becomes even more relevant in the context of SOEs where the risk is higher due to the complex nature of the institutional arrangement between shareholder ministries, boards and executive management.

The agency theory would dictate that SOEs needs stronger boards which consist of more than just political appointees and cronies of the CEO.[157] People appointed to the SOEs' boards need not be 'big-name trophy' directors who will pay little attention to the SOE business. In terms of this theory, the board should act as controllers of managers or executives of a company.[158] A strong board will, however, present a direct agency cost. When boards are not effective, the theory would then prescribe further layers, including independent audit committees, direct nomination of directors by shareholders, appointing a strong chairman who will be able to challenge the CEO, annual nomination of directors who must be independent to give shareholders confidence that their voice will be represented in the boardroom.[159] All these would be necessary to fetter the agent to the interests of the principal. All these controlling actions involvesa cost. Proponents of the theory argue that the agency costs take care of itself by reducing the cost of unfettered agent.[160]

In the context of the economy of Lesotho that is less developed, it is necessary to outline rules of engagement for all stakeholders in SOEs i.e. shareholder ministries, boards and executive management. In this context, rules of engagement signify an attempt by shareholders to secure return on investment. As indicated above, agency theory advocates for tight controls, however, trust issues cannot be settled through this approach alone. As a consequwnce, there is need for legislative and policy framework designed to encourage principled governance of SOEs in order to align interests of shareholders and those of agents, to curb corruption, malpractice, fraud and wasteful expenditure.

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[154] Baker and Kent *op cit* note 132, 178.
[155] The phrase 'agency cost' in this context refers to the internal costs incurred by the company due to the competing interests of shareholders on one hand and and the management team (agents) on the other, expenses that may be incurred as a result of trying to manage the principal-agent relationship is referred to as the agency cost.
[156] Baker and Kent *op cit* note 132, 178.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.

2.5.2 The Stewardship Theory

To some scholars and businesspeople, the prescripts of the agency theory and how it portrays the corporate executives or managers seems unduly pessimistic.[161] This spurs Scholars and businesspeople to enquire *inter alia* whether corporate executives are really self-serving and whether money or incentives are motivations for the corporate relationship. Donaldson and Davis,[162] arguably the lead proponents of this theory, are of the view that the agency theory captures only one aspect of how corporate executives view their work. These scholars argue that corporate executives generally make an attempt to do a good job of looking after the assets under their control for the good of the company.[163] Donaldson and Davis[164] see company executives as 'motivated by a need to achieve, to gain intrinsic satisfaction through successfully performing inherently challenging work, to exercise responsibility and authority, and thereby gain recognition from peers and bosses.'[165] This approach seeks to suggest that contrary to what agency theory suggests, company executives are not only after creation of personal wealth.

Donaldson and Davis[166] developed the stewardship theory as another perspective to understand the existing relationship between corporate executives and shareholders as a result of the separation of ownership and control.[167] According to the stewardship theory, there is no conflict

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[161] Ibid,179.
[162] Donaldson L and JH Davis 'Stewardship Theory of Agency Theory: CEO Governance Governance and Shareholder Returns' (1991) 16 *Australian Journal of Management* 49 – 64 (available at https://pdfs.semanticscholar.org/b226/d681d20fb646b147ecb3f452fb5de2269cb7.pdf . accessed on March 27 2020). See also Caldwell, C., Hayes, L. A., Karri, R., & Bernal, P. "Ethical stewardship- implications for leadership and trust" (2008) 78 *Journal of Business Ethics*153–164; Hernandez, M. Promoting stewardship behaviour in organisations: A leadership model" (2008) 80 *Journal of Business Ethics* 121–128; Nicholson, G. J., & Kiel, G. C. "Can directors impact performance? A case based test of three theories of corporate governance. Corporate Governance" (2007) 15 *An International Review* 585–608.
[163] Donaldson Ibid, 51.
[164] Ibid, 51.
[165] Ibid.
[166] Donaldson and Davis *op cit* note 164; Donaldson L and JH Davis 1993 'The Need for Theoretical Coherence and Intellectual Rigour in Corporate Governance Research: Reply to Critics of Donaldson and Davis' (1993) 18 *Australian Journal of Management*, 213-225.
[167] Pastoriza D and MA Ariño 'When Agents Become Stewards: Introducing Learning in the Stewardship Theory' (2008) (a paper presented at *1st IESE Conference, "Humanizing the Firm & Management Profession", Barcelona, IESE Business School, June 30-July 2, 2008* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295320 accessed on March 27 2020) 5.

of interest between the corporate executives and shareholders.[168] The theory holds that the goal of governance is to find mechanisms and structures to facilitate the most effective coordination between executives and shareholders.[169] In terms of this theory, there is no problem of executive control as corporate executives tend to be more benevolent in discharging their duties.[170] An essential assumption embedded in the stewardship theory is that the executives' behaviour is aligned with the shareholders' interest.[171] The theory places more value on goal convergence amongst all players involved in corporate governance as opposed to self-interest.[172]

It follows, therefore, that the theory provides an economic benefit for the shareholders as a result of lower cost (or lack of agency cost) and the lower need for economic incentives and monitoring.[173] Corporate executives in stewardship theory believes that pro-organisational behaviour has higher utility as compared with individualistic and self-serving behaviour.[174] In terms of this theory, executives are rationale beings who see greater value in professionalism and accepted corporate behaviour as opposed to self-serving tendencies of agents (under agency theory), they believe that their own utility would be maximised once the shareholder's wealth is maximised.[175] For these executives, value gained from interest alignment and collaborative conduct with shareholders is higher than the value that would otherwise be otherwise be gained through individualistic and self-serving behaviours.[176] For this reason, the theory regards corporate executives as stewards who are motivated by intrinsic rewards, such as reciprocity and mission alignment rather than extrinsic rewards.[177] Unlike the agent in the agency theory, the steward

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[168] Ibid, 5.
[169] Donaldson and Davis *op cit* note 164.
[170] Donaldson L 'Ethics Problems and Problems with Ethics: Toward a Pro-Management Theory' (2008) 78 *Journal of Business Ethics* 299-311.
[171] Pastoriza and Ariño *op cit* note 169, 5.
[172] Van Slyke MD 'Agents or Stewards: Using Theory to Understand Government Non-Profit Social Service Contracting Relationship' (2007) 17 *Journal of Public Administration Research and Theory* 157-187 (available at https://academic.oup.com/jpart/article-abstract/17/2/157/897139 accessed on March 27 2020).
[173] As discussed above, the main objective of agency theory is to reduce the agency cost derived from the principals' internal controls to keep the agent's self-serving behavior in check. Thus, agency theory prescribes several governance mechanisms to protect shareholders' return on investment and facilitate principal-agent alignment. Some of these mechanisms are incentive schemes and the design of the appropriate structures to perfect the oversight role such as increasing the number of non-executive directors to perform audits and evaluations.
[174] Davis JH, F. D Schoorman and L Donaldson Davis, Schoorman, and Donaldson Reply: The Distinctiveness of Agency Theory and Stewardship Theory (1997) 22 *The Academy of Management Review* 611-613 (available at https://www.jstor.org/stable/259407?seq=1 accessed on March 27 2020).
[175] Pastoriza and Ariño *op cit* note 169, 5.
[176] David et al *op cit* note 176.
[177] Pastoriza and Ariño *op cit* note 169, 5.

places greater value on collective rather than individualistic goals, stewards see the success of the company as theirs. .

One of the main objectives of the stewardship theory is to identify situations in which situations in which the interests of the principal and those of the steward are aligned.[178] In terms of this theory, there are situational and psychological factors that influence individual corporate executives to either become stewards or agents. Situational factors in this regard are understood to mean surrounding cultural context as opposed to an organisation's work environment. [179] Donaldson and Davis[180] identified some of the situational factors that may influence an individual towards stewardship. These include: 'working in an involvement-oriented management system, as opposed to control-oriented management system; a collective culture, as opposed to individualistic one;'[181] and corporate governance structures that give authority and discretion to the executive.[182] There are some psychological factors that may also influence executives to become stewards. These may be motivations of higher order, ability to identify with the objectives of the company, value commitment orientation and the use of personal power as a basis to influence others.[183]

The process through which one may decide to be an agent or steward may be summarised as follows: first, it has to be a decision made by both parties to the relationship, i.e. shareholders and executives. Secondly, the situational and psychological factors discussed above must be present. Lastly, the expectation that parties have about each other will also influence the choice between agency and stewardship.[184] A problem would arise where there are conflicting forces between psychological and situational factors. This would translate into a mismatch between the management psychology of the company and the philosophical characteristics of the executives.[185]

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[178] Donaldson and Davis *op cit* note 164; Donaldson L and JH Davis 1993 'The Need for Theoretical Coherence and Intellectual Rigour in Corporate Governance Research: Reply to Critics of Donaldson and Davis' (1993) 18 *Australian Journal of Management*, 213-225.; Pastoriza and Ariño *op cit* note 165, 6.
[179] Pastoriza and Ariño *op cit* note 169, 6.
[180] Donaldson and Davis *op cit* note 164.
[181] Pastoriza and Ariño *op cit* note 165, 7; explanation.
[182] Donaldson and Davis *op cit* note 164; Pastoriza and Ariño *op cit* note 165, 7.
[183] Davis at al *op cit* note 172; Pastoriza and Ariño *op cit* note 165, 6.
[184] Ibid; Pastoriza and Ariño *op cit* note 169, 6.
[185] Ibid.

The agency theory and stewardship theory may be distinguished as follows: first, the agency theory has an underlying assumption that executives will behave rationally, opportunistically and in a self-serving way, on the other hand, stewardship theory assumes that executives are trustworthy and cooperative. Secondly, the agency theory emphasises monitoring and control of the executives while stewardship theory relies on trust and relationship building between the principal and steward. Third, the agency theory focuses on the independence of several board structures or committees which may lead to goal conflict while stewardship theory on the other hand focuses on understanding and identification amongst different board structures to achieve goal alignment.[186]

At this point, it is important to underscore some practical implications of the stewardship theory for SOEs. As indicated above, this theory suggests that executives are not merely self-interested actors, thus proponents of the theory suggest that a dual chair-CEO would provide clear focus and lead to a stronger value creation as opposed to merely controlling cost (agency cost).[187] Donaldson and Davis[188] argued that companies with joined chair-CEO performed better financially irrespective of specific incentives for aligning executive pay with shareholder interests.[189] These scholars question the agency theory's assertion that board's primary role is to monitor executive or managers.[190] In terms of the stewardship theory, the role of the board is to facilitate the executive's work as opposed to monitoring it, in this context, the main function of the board is to advice and support the work of managers.[191]

While the stewardship theory may be adhered to with relative ease in private companies with managers being stewards who seek to maximise the performance of the company, the same may not hold in respect of SOEs. For SOEs, reliance on the stewardship theory without adequate controls measures advocated by the agency theory could be disastrous. Executives in SOEs should

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[186] Wicaksono A 'Corporate Governance of State Owned Enterprises: Investment Holding Structure of Government Linked Companies in Singapore and Malaysia and Applicability for Indonesian State Owned Enterprises' (Unpublished PhD thesis, University of St. Gallen 2009) 24.
[187] Baker and Kent *op cit* note 132, 179.
[188] Donaldson and Davis *op cit* note 164.
[189] These scholars relied on data from the US based companies to arrive at this conclusion.
[190] Baker and Kent *op cit* note 132, 179.
[191] https://link.springer.com/referenceworkentry/10.1007%2F978-3-642-28036-8_107 (last accessed on March 29th 2020).

be kept in constant checks and balances to ensure that they are always acting in the best interest of the SOEs. Unlike in many private companies, SOEs may be exposed to abuse by corrupt public officials. It is therefore crucial to have the control measures advocated for by the agency theory to ensure that executives remain aligned to the main objectives of the SOEs concerned. Governance challenges facing most SOEs exposes weaknesses of the stewardship approach.

2.5.3 Stakeholder Theory

The stakeholder theory owes its existence to the radical thinking of Freedman.[192] To appreciate this theory, it is imperative to restate the meanings of 'stake' and 'holder'. The word 'stake' may simply be understood as a right to do something in response to any act or attachment.[193] There are some liabilities attached to any right, this implies that there are liabilities that may accrue to one for having stake. A stake may be a legal share of something, it may be financial involvement in something, from the organisational theory perspective, scholars have identified three sources of stake: ownership at one extreme, interest in between, and legal and moral at the other extreme.[194] On the other hand, 'holder' may be understood as a person or entity that faces some consequences or need to do something because of an act or to meet a certain need.[195]

Freedman, therefore, defines stakeholder as 'any group or individuals who can affect or is affected by the achievement of the firm's objective.'[196] Carroll defines 'stakeholder' from a more wider perspective as 'any individuals or group who can affect or are affected by the actions, decisions, policies, practices or goals of an organisation.[197] It follows, therefore that shareholders, employees, customers, contractors, competitors, regulators, government and civil society organisations could be stakeholders. To this list, some scholars add future generations and non-human life.[198]

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[192] Freeman RE *Strategic Management: A Stakeholder Approach* (1984).
[193] Rahim MM 'The Stakeholder Approach to Corporate Governance and Regulation: An Assessment' (2011) 8 *Macquarie J. Bus. L* 304, 325.
[194] Ibid; Archie B Carroll and Ann K Buchholtz *Business and Society: Ethics and Stakeholder Management* (2008) 58 in Eva Siljala *Development of Corporate Social Responsibility in Finish Forest Industry* (Masters Thesis, Lappeenranta University of Technology) (2009) 23.
[195] Rahim *op cit* note 195, 307.
[196] Freedman S *Strategic Management: A Stakeholder Approach* (1984) 46; Rahim *op cit* note 191, 307.
[197] Rahim *op cit* note 195, 307; Carroll and Buchholtz *op cit* note 192.
[198] Solomon J and I Solomon *Corporate Governance and Accountability* (2004) 24; Gray R *eat al Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (1996); for more details

Stakeholder theory is based on the management discipline of the 1970s[199] as further developed by Freedman[200] to incorporate corporate accountability to a broad range of stakeholders. In terms of this theory, the corporate executives have a network of relationships that they serve i.e. stakeholders as opposed to only serving shareholders in terms of the agency theory. Insofar as treating shareholders is instrumental to corporate financial performance, it makes sense for shareholders to look after stakeholders' interest.[201] The core idea of the stakeholder theory is that corporate governance has the responsibility to consider the views of their stakeholders in corporate self-regulation.[202] The theory takes account of wider group of constituents rather than merely focusing on shareholders.[203]

Stakeholder may be viewed as 'a conceptual cocktail, concocted from a variety of disciplines and producing a blend of appealing sociological and organisational flavours'.[204] The theory is based mainly on the fact that modern companies are large and their impact on society is so pervasive that they should discharge an accountability to many more sectors of society within which they operate, and not just to the shareholders.[205] The stakeholder theory resonates better with SOEs as they have a wide range of stakeholders. The citizenry has a legitimate claim on SOEs as they are theoretically the owners.[206] The World Bank[207] in its research on complications associated with SOEs ownership found that the ownership of SOEs is not a clear cut as the ownership of private business, its conclusion gave credence to the stakeholder theory.[208] As discussed above, in terms of the stakeholder theory, corporations are embedded in a network of different stakeholders. Proponents of this theory argue that it takes into account a wider constituency rather than merely focusing on

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on the classification of stakeholders, see Carroll A and Buchholtz AK, *Business and society: Ethics and stakeholder management* (2008); Lee MP, 'A review of the theories of corporate social responsibility: its evolutionary path and the road ahead' (2008) 10(1) *International Journal of Management Reviews* 53,61.

[199] Mbele *op cit* note 145.

[200] Freedman *op cit* note 196.

[201] Beker and Kent *op cit* note 132, 181.

[202] Dennehy W 'Corporate Governance – Stakeholder Model' (2012) 7(2) *International Journal of business Governance and Ethics* (available at https://www.researchgate.net/publication/260259161_Corporate_governance_-_A_stakeholder_model accessed on March 27 2020).

[203] Mallin AC *Corporate Governance* (4th Ed) (2013) 20.

[204] Solomon and Solomon *op cit* note 199, 23.

[205] Ibid.

[206] Mbele *op cit* note 145, 38.

[207] http://info.worldbank.org/governance/wgi/pdf/wps4370.pdf (accessed on March 27 2020)

[208] Ibid.

shareholders.[209] Advocates of the stakeholder theory argue further that the traditional Anglo-American view of organisation is too narrow in that it merely focuses on shareholders.[210] They argue that this traditional view should be extended to accommodate interests of other stakeholders including employees and community groups.[211] In some jurisdictions, this theory has influenced governance structures for most SOEs, for instance, composition of SOEs' boards in South Africa is derived from different sectors of the community, such as civil society and business.[212] This in a way is an acknowledgement of the limitations of the traditional model which primarily favours shareholders.

2.5.4 Enlightened Shareholder Theory

The enlightened shareholder theory is an attempt to attain balance between the shareholder supremacy advocated for by the agency theory and the interests of several stakeholders as advanced by the stakeholder theory.[213] Thus the theory builds from both the stakeholder theory and the agency theory.[214] In terms of the enlightened shareholder theory, shareholders and the board should, be concerned with the creation of a long term wealth and survival of the corporate.[215]

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[209] Mallin CA *Corporate Governance* (2007) (2nd Ed).
[210] Mbele *op cit* note 145, 38.
[211] Keasey K *et al Corporate Governance: Accountability, Enterprise and International Comparisons* (2005).
[212] https://www.oecd.org/policy-briefs/south-africa-state-owned-enterprise-reform.pdf (accessed on March 27 2020)
[213] Heenderson EG 'The Possible Impacts of Enlightened Shareholder Value on Corporations' Environmental Performance' (unpublished masters thesis, University of Toronto, 2009) 25 (available on https://tspace.library.utoronto.ca/bitstream/1807/18339/1/Henderson_Gail_E_200911_LLM_thesis.pdf accessed on March 27 2020); Queen EP Enlightened Shareholder Maximazation: Is this Strategy Achievable? (2015) *Journal of Business Ethics* (available on https://link.springer.com/article/10.1007/s10551-014-2070-6 acessed on March 27 2020)See also Pichet, E. (Enlightened shareholder theory: Whose interests should be served by the supporters of corporate governance? (2011) 8(2-3) *Corporate Ownership & Control,* 354-362; Starik, M.. "Reflections on stakeholder theory, Business & society, N° 3382-131, Toronto Conference Proceedings, (1998) pp. 89-95; Agle, B. R., Mitchell, R. K. & Wood, D. J. "Toward a theory of stakeholder identification and salience: defining the principle of who and what really counts" (199722 (4) *Academy Of Management Review* 853-885. .
[214] Pitchet E 'Enlightened Shareholder Theory: Whose Interests Should Be Served by the Supporters of Corporate Governance?' (2011) 8 *CORPORATE OWNERSHIP & CONTROL* 353-362 360 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262879 accessed on March 20 2020).
[215] Chiu IHY 'Institutional Shareholders as Stewards: Towards a New Conception of Corporate Governance?' 2012 6 *Brooklyn Journal of Financial, Corporate and Commercial Law* 387, 398; Brink A 'Enlightened Corporate Governance: Speceific Investments by Employees as Legitimation for Residual Claims' (2010) 93 (4) *Journal of Business Ethics* 641-651,647; Ajibo CC 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' (2014) 2 Birkbeck L. Rev. 37, 50; Henderson 2009: 25; Keay A 'Stakeholder Theory in Corporate Law: Has it Got What it Takes' (2010) 9 Rich. J. Global L. & Bus. 249 (available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/rjnglbs9&div=16&id=&page= accessed on March 27 2020).

Proponents of the theory argue that shareholders are deemed to be enlightened in the actions of the directors and the entity, and that the shareholders would want the entity to have an account dealing with corporate social responsibility.[216]

Enlightened shareholder theory encourages the sharing of control and ownership of the entity between shareholders and directors.[217] This implies that directors should always mind their conduct and its impact on the company and they should know that their actions have consequences.[218] This shared ownership and control rests on the fiduciary duties that the directors owe the company and ultimately to the shareholders in terms of common law and under statute.[219] The theory requires active involvement of shareholders in the management of the business affairs of the company so that they remain informed.[220] While shareholders are required to be active, in terms of the enlightened shareholder theory, directors are also required to be aware of different stakeholder groups and interests.[221] A closer look at the King IV report issued in South Africa in 2016 suggests that the report is specifically based on enlightened shareholder theory.

2.6 Forms of SOEs Ownership and Control

The state ownership in SOEs is traditionally exercised through one of the following four forms: decentralised, dual, centralised, or the twin-track model.[222] Under the decentralisation model, the

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[216] Ajibo CC 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' (2014) 2 Birkbeck L. Rev. 37, 54.
[217] Brink A 'Enlightened Corporate Governance: Speceific Investments by Employees as Legitimation for Residual Claims' (2010) 93 (4) *Journal of Business Ethics* 641-651,648.
[218] Ibid.
[219] Chiu IHY 'Institutional Shareholders as Stewards: Towards a New Conception of Corporate Governance?' 2012 6 *Brooklyn Journal of Financial, Corporate and Commercial Law* 387, 398; Brink A 'Enlightened Corporate Governance: Speceific Investments by Employees as Legitimation for Residual Claims' (2010) 93 (4) *Journal of Business Ethics* 641-651, 648; Ajibo CC 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' (2014) 2 Birkbeck L. Rev. 37, 49; Keay A 'Stakeholder Theory in Corporate Law: Has it Got What it Takes' (2010) 9 Rich. J. Global L. & Bus. 249 (available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/rjnglbs9&div=16&id=&page= accessed on March 27 2020).
[220] Henderson *op cit* note 211, 27.
[221] Ajibo *op cit* note 214, 50.
[222] For the purposes of this research the 'ownership function' of SOEs is understood as an entity that exercises the following authority over the SOE: The power to appoint boards of directors; to set and monitor objectives; and to vote company shares on behalf of the government. The execution of the ownership function usually follows one of the ownership models discussed in this chapter.

state's ownership is spread across government departments (or ministries as the case may be). There is no one agency, unit, ministry, or department exercising shareholder powers on behalf of the state throughout all SOEs and providing oversight over the governance of the same SOEs. The main advantages of this model of ownership lie in the sector expertise that various departments have in their respective sectors and their competence to device an appropriate industrial policy. The decentralised model presupposes that the line ministries or departments have sufficient expertise and the ability to design and implement a practical industrial policy. This is in turn based on the premise that the sector departments or ministries have the capacity to also play meaningful oversight and shareholder roles over SOEs. The decentralisation model has been mostly criticised for failing to appreciate the need for separation of the ownership function from other roles, such as the regulatory role. In most instances, where this model of ownership is employed, a single department or ministry plays several roles i.e. ownership, policy formulation and regulation regarding the SOEs, once this is the case, the ministry or department is likely to get 'too close' to the affairs of the SOEs and this is likely to result in predisposition to interfere in the running of the day-to-day business of the SOE.[223]

On the other hand, under the centralisation model of ownership, the ownership function is centralised in one department or agency that has been tasked by the government to exercise such function.[224] This model may easily be uploaded for making positive movement towards achieving separation of the ownership function from other functions of state, for instance the function of state as industrial policy formulator and that of the regulator. Another advantage of centralisation is that it simplifies the issue of accountability, as SOEs do not have to achieve inconsistent objectives. In some jurisdictions such as Singapore, centralisation manifests itself in the form of a state holding

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[223] OECD *Ownership and Governance of State Owned Enterprises – A Compendium of National* Practices p34; In countries where the decentralized model of ownership is applied (including Argentina, Colombia and Mexico), no one single institution or state actor acts on the responsibilities of the ownership function, for instance, in Agentina, line ministers perform most of ownership functions in majority-owned SOEs. However, the Agentinian government has organized a coordinating agency named SOE Strategic Supervisory Board composed of high-level public officials. Its primary role will be overseeing the strategic direction of SOEs. In Mexico, line ministries perform most of ownership functions. The line ministry by default is the Ministry of Finance and Public Credit (SHCP). The SHCP and the Ministry of Public Function set the standards for SOE performance evaluation, budgeting and financial policy.

[224] OECD *Ownership and Governance of State Owned Enterprises – A Compendium of National* Practices p32; Under this form of ownership financial targets, technical and operational issues, and the process of monitoring SOE performance are all conducted by the central body. This is practiced in China, Finland, France, Korea, Sweden, and Slovenia

company.[225] In such instances, the ownership of all SOEs of the land lies with a single holding entity, which owns shares in all SOEs on behalf of the government. Some advantages of this model may be the fact that it reduces political interference in the running of the day-to-day business of the SOEs, thus giving their boards more flexibility, agility, autonomy and authority.[226]

Then there is a dual model of ownership, this dictates that there should be two departments or ministries that collectively share the ownership responsibility for the state in SOEs.[227] In most cases, this arrangement involves a line (industry) department or ministry and a 'common' department or ministry, usually the finance ministry or department. The justification for the two-pronged approach ownership is that the finance ministry or department will focus more on the financial and economic wellbeing of the while the line ministry or department focuses solely on ensuring that the SOEs are successfully run from a technical viewpoint. This model presents states that subscribe to it with an 'enhanced balance between the government's regulatory, industrial policy and financial perspectives' as the two ministries or departments fulfilling the shareholder role bring different expertise to the ownership arrangement.[228] On the other hand, this may pose a challenge because these departments or ministries may have opposing shareholder expectations and objectives, this would then threaten the SOEs ability to fulfil all of them instantaneously.

Lastly, there is a 'twin track model' of ownership available for states with interest in SOEs.[229] This model is somewhat combination of the dual and centralised models. Under this model, state

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[225] Ho Khai Leong *'Corporate governance reform and the management of the GLCs: Pressures, problems, and paradoxes'* in Ho Khai Leong (Ed) Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulation (2005) 269–299. Leong discusses the evolution of Singapore's Government Linked Corporations (GLCs), with particular interest in Temasak Holdings, which owns most (if not all) Singapore's commercial GLCs. He goes on to discuss the ideology underpinning Temasak, as well as the challenges it faces. (e-book available at https://bookshop.iseas.edu.sg/publication/1150#contents)

[226] OECD State-Owned Enterprises in the Development Process (2015).

[227] This form of ownership and control is practiced in by the following countries: Brazil, Czech Republic, Estonia, Germany, Italy, New Zealand, and Switzerland.

[228] William Witherell *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) available on https://www.emerald.com/insight/content/doi/10.1108/IJPSM-09-2015-0166/full/html (accessed on Jan 5 2024)

[229] This model is applied in Belgium and Turkey; OECD *Ownership and Governance of State Owned Enterprises – A Compendium of National* Practices p33 – 'this model has often been referred to as 'dual', but in practice it differs materially from the dual model in that only one government body is involved in the ownership of each category of

categorises SOEs of. The land into two categories or portfolios that are owned and overseen by two different government, agencies, ministries, or departments. This model appears dual in nature because of the involvement of two state agencies, departments, or ministries. On the other hand, having SOEs grouped into two and each SOE owned by a single institution also makes the model appear centralised. However, the fact is, the twin track model is not dual nor is it centralised. The argument in favour of a dual model is easily crushed by the fact that there are two government establishments that do not exercise the shareholder functions concurrently and they do not discharge the same function over the same SOE. The same goes for the argument in favour of centralised, this argument is flawed since there is no one state establishment that exercises ownership functions over all SOEs of the land, as is the case with a centralised model. To understand the twin track model, one must appreciate that there are two broad portfolios (twin tracks) of SOEs, ordinarily, these SOEs are segmented into commercial and non-commercial tracks, with two distinct shareholder establishments overseeing each track.[230]

2.7 Regulatory Theory

Before engaging in a critical evaluation of the nature of the regulatory universe for SOEs in Lesotho, it is worth pausing to consider the broader notion of regulation in the context of SOEs.[231]

SOE. The execution of the ownership function by each institutional also differs from the 'centralised' model in that two non-competing ownership functions operate within the same domestic setting.

[230] For instance in Turkey, the Privatisation Administration (PA) oversees SOEs considered for privatisation, while the Undersecretariat of the Treasury oversees any SOE that has not yet been subject to privatisation.

[231] For a comprehensive account of the theory of regulation applied in diverse contexts, see Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (2017).

2.7.1 Understanding Regulation[232]

Any sector that has an impact on the citizens needs to be regulated.[233] Thus the SOEs sector needs regulation.[234] As discussed above, the SOE sector in Lesotho dominates public services ranging from water, electricity, transport and telecommunications. It follows, therefore, that there is need to emphasise regulation of SOEs more in Lesotho to ensure that the playing field is well levelled for much needed growth that may be brought by private sector participation.[235] Regulation is important for Lesotho as a developing economy that is without well developed markets that can be relied upon for ensuring that in the process of deregulation and a move towards self-regulation, public monopolies are not replaced by private monopolies.[236] Economists in the developed world like the correction of imbalances to be corrected by the market forces and would not like the government to intervene.[237] To ensure social justice, an element of compulsion on regulation is necessary.[238] Regulation ensures that the economic system operates in a manner consistent with

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[232] For purposes of this thesis, regulation encompasses both binding laws and non-binding instruments.

[233] D. Rodrigo (2005) Regulatory Impact Analysis in OECD Countries – Challenges for Developing Countries p2 (available at https://www.oecd.org/gov/regulatory-policy/35258511.pdf); Rodrigo argues that 'regulation is fundamental to governing complex, open and diverse societies and economies. Regulatory processes allow policy-makers to balance competing interests and have been critical to the development of democracy and the modern state'; OECD (2010) Regulatory Policy and the Road to Sustainable Growth p9 (available on https://www.oecd.org/regreform/policyconference/46270065.pdf); the OECD notes that 'the objective of regulatory policy is to ensure that regulations are in the public interest. It addresses the permanent need to ensure that regulations and regulatory frameworks are justified, of good quality and "fit for purpose". An integral part of effective public governance, regulatory policy helps to shape the relationship between the state, citizens and businesses. An effective regulatory policy supports economic development and the rule of law, helping policy makers to reach informed decisions about what to regulate, whom to regulate, and how to regulate.'

[234] OECD (2021), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices 2021 (available on https://www.oecd.org/corporate/Ownership-and-Governance-of-State-Owned-Enterprises-A-Compendium-of-National-Practices-2021.pdf) at p8; the OECD advises that 'the legal and regulatory framework for SOEs should ensure a level playing field and fair competition in the marketplace when SOEs undertake economic activities, in order to ensure that these activities be carried out without any undue advantages or disadvantages relative to other SOEs or private enterprises.'

[235] Ibid.

[236] T.V. Makafane (2005) The Impact of Privatisation: Ownership and Corporate Performance in Lesotho (an unpublished Masters dissertation) p25; Makafane makes an example of where a sector is marked as a natural monopoly, he argues that deregulation may simply permit the monopoly enterprise to engage in anti-competition, predatory activities designed to eliminate competing firms. He goes further to make a point that market liberalisation often forms one part of the structural adjustment programmes adopted by LDCs on the recommendation of the international development agencies. However, he observes that the experience with these programmes in Latin America and elsewhere has highlighted the difficulties of introducing a more competitive market environment.

[237] S.K. Aikins (2009) 'Political Economy of Government Intervention in the Free Market System' *Administrative Theory & Praxis* Vol. 31, No. 3 pp 403-408.

[238] J.G. Goodwin (2019) Regulation as Social Justice – A Crowdsourced Blueprint for Building a Progressive Regulatory System (available on https://progressivereform.org/publications/regulation-social-justice/).

the public interest and overcomes market failures.[239] Regulation normally comes a s a result of pressures from business, consumers and environmental groups. Thus regulation supports business, protects consumers and the environment.[240]

2.7.2 Defining Regulation

Regulation may be understood as an activity that is carried out by governments through their agencies on regular basis through which it tries to direct, control and modify the behavior of its citizens, organisations and business entities operating within their jurisdictions.[241] This is normally done in a systematic manner so as to achieve the much desired growth and development.[242] Regulation is achieved through a legislative enactment that supervises and controls some specific activities made by the affected citizens, organisations and business entities.[243] An effective regulation is one that is set out in such a way that it protects the general public from exploitation by the regulated.[244]

Regulation may also be defined as an activity aimed at 'influencing the flow of events'.[245] It is worth noting, however, that in reality, the exertion of influence on the flow of events is far more

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[239] Note 139, supra.
[240] Ibid.
[241] G. Gibson (2020) *The A-Z of GRC (Governance, Risk & Compliance)* p1.
[242] Note 136, supra, Rodrigo (2005) highlights that 'better-quality regulation is a key goal of public-sector management reform and is fundamental to the functioning of society and the economy. OECD member countries have recognised that regulatory quality is crucial to economic performance and to improving the quality of life of their citizens. This led the Council of the OECD to establish, in March 1995, a Recommendation on Improving the Quality of Government Regulation – the first internationally accepted set of principles concerning regulatory quality. Among a range of system improvements, the Recommendation included a reference checklist for regulatory decision-making and a commitment to better regulatory impact analysis (RIA).'
[243] Note 144, supra; Rules or best practice standards may be put in place by law or industries. For instance, anti-money laundering legislation and practices. Lesotho chose to follow the requirements of the Financial Action Task Force (FATF) and enacted laws such as the Money Laundering and Proceeds of Crime Act No. 4 of 2008 based on the FATF requirements. However, regulated institutions are free to choose to implement rules that are stricter than the standards laid down by the law.
[244] Note 136, supra, the OECD (2010) recognizes that Regulation, one of the three key levers of state power (together with fiscal and monetary policy), is of critical importance in shaping the welfare of economies and society. The objective of regulatory policy is to ensure that the regulatory lever works effectively, so that regulations and regulatory frameworks are in the public interest. Regulatory policy, a comparatively young discipline, is taking shape in different ways across the OECD membership and beyond. Different pathways, however, are tending towards common objectives. Many OECD countries did not have a regulatory policy ten years ago; nearly all now do.
[245] C Parker and J Braithwaite (2012) 'Regulation' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (2012) 119.

intricate than this definition seeks to acknowledge.[246] Some definitions seek to understand regulation as mainly state-centred legislative action combined with administrative enforcement, this is otherwise known as command-and-control regulation.[247] However, it is now acceptable that regulation has surpassed the public sphere and is now equally promoted within and driven by the private sphere.[248] In the context of this research, a more comprehensive definition is preferred, i.e. one that conceives regulation as 'the act or process of controlling by rule or restriction [or persuasion]'[249] through usage of broad set of binding legal norms contained in statute (and regulations), case law and nonbinding (voluntary) practices often designed and enforced by non-state actors and contained in so-called self-regulation codes. Collectively, these strands of regulation comprise the regulatory universe within which corporations, particularly SOEs exist and operate. Among other things, this regulatory universe sets out numerous standards of governance, defines processes for compliance management, monitoring and enforcement.[250]

Some scholars define regulation as a sustainable and focused control exercised by some public agencies over activities valued by the community.[251] Still on the same wavelength, some define regulation as a system supplied in response to the public demand for the correction of inefficient or inequitable market practices.[252] The main objective of regulation is to benefit and the public at large or a bigger sub-class of the public.[253] Some scholars have dissected and defined regulation

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[246] The flow of events may at times be influenced by issues outside the normal scope of the traditional regulatory instruments, for example, corporate culture, the political environment, and other non-regulatory realities.
[247] See for instance Parker and Braithwaite op cit 126–127. See also B Orbach (2012) 'What is regulation?' (2012) 30 *Yale Journal on Regulation* 1–10.
[248] C Scott (2002). Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance. *Journal of Law and Society*, *29*(1), 56–76. Available on http://www.jstor.org/stable/4489081 (accessed 27 March 2023).
[249] See B Garner and H Campbell (2019) Black *Black's Law Dictionary*.
[250] C Parker, C Scott, N Lacey and J Braithwaite (eds) (2005) *Regulating Law* 1.
[251] P. Selznick (1985) Focusing Organisational Research on Regulation. In: Noll, R., Ed., Regulatory Policy and the Social Sciences, University of California Press, Berkeley, 363-364.
[252] R.A. Posner (1971) 'Taxation by Regulation' *The Bell Journal of Economics and Management Science*, Vol. 2, No. 1, pp. 22-50.
[253] Stigler (1971) 'The Theory of Economic Regulation' The Bell Journal of Economics and Management Science Vol. 2, No. 1, pp. 3-21; H Falkena *et al* (2001) Financial Regulation in South Africa p.2 (available on https://www.researchgate.net/profile/David-Llewellyn-4/publication/265739052_Financial_Regulation_in_South_Africa_Financial_Regulation_in_South_Africa/links/54c223770cf2911c7a46a2bb/Financial-Regulation-in-South-Africa-Financial-Regulation-in-South-Africa.pdf) these scholars observe that Given the general philosophy, it follows that the ultimate objective of regulation should be to achieve a high degree of economic efficiency and consumer protection in the economy.

into three tears.[254] First, regulation may be understood as the government's promulgation of rules accompanied by monitoring and enforcement mechanisms normally performed by some specialist public agency.[255] Secondly, it may briefly be defined as state's intervention in the economy through whatever form that the intervention may take.[256] Thirdly, regulation may also be understood as all mechanisms of social control or influence that affects all aspects of behavior, these may be international or otherwise.[257]

From the definitions discussed above, it is clear that scholars seem to agree that regulation is often used by states to achieve wider social goals, mainly to hold powerful corporations, organisations and professionals to account.

2.7.3 Rationale for Regulation

As discussed above, the term regulation may be used to define various ways through which the government may directly or indirectly intervene in the working of the market in order to influence the allocation of resources.[258] This may include change in the ownership model of enterprises, nationalization of certain sectors, creation of legal barriers to entry into certain sectors and standard setting.[259] The form and shape taken by the regulation may vary from sector to sector depending

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[254] J Black 'Regulatory Conversations'(2002) 29 (1) *Journal of Law and Society* 163-196; The term regulation is used in a generic sense that encompasses regulation (the establishment of specific rules of behaviour), monitoring (observing whether the rules are obeyed), supervision (the more general observation of the behaviour of financial firms) and enforcement (ensuring the rules are obeyed).
[255] H Falkena *et al* (2001) Financial Regulation in South Africa p.2 (available on https://www.researchgate.net/profile/David-Llewellyn-4/publication/265739052_Financial_Regulation_in_South_Africa_Financial_Regulation_in_South_Africa/links/54c223770cf2911c7a46a2bb/Financial-Regulation-in-South-Africa-Financial-Regulation-in-South-Africa.pdf).
[256] Ibid.
[257] International regulatory co-operation is a key pillar of regulatory policy in an interconnected world. And yet, its full scope and potentials remain often unknown to policymakers and regulators. In the past decades, the interconnectedness of countries and the integration of the world economy have increased drastically, partly due to the many technological revolutions of the past 30 years. The rapid flow of goods, services, people and finance across borders is not least testing the effectiveness and the capacity of domestic regulatory frameworks. If not new, the scale of globalisation combined with the dematerialisation brought by digitalisation increasingly present contemporary policy makers and regulators with challenges that cannot be dealt with in isolation. (see https://www.oecd-ilibrary.org/sites/62c39d12-en/index.html?itemId=/content/component/62c39d12-en last accessed on March 31st 2023.)
[258] N Malyshev 'Regulatory Policy: OECD Experience and Evidence' (2006) 22 (2) *Oxford Review of Economic Policy* 274-299.
[259] Ibid.

on characteristics of each sector or the objectives of regulation.[260] There are some economic arguments for regulation. These arguments stem from the perception that there is some failure in the working of the market.[261] Recent debates on regulation has been premised on three main issues, namely: natural monopolies, the existence of destructive competition and the level of networking and networking and coordination externalities.[262]

Natural monopoly exists when production by a single firm takes place at a lower cost as opposed to when production is pursued by several enterprises for any level or combination of output required.[263] This occurs when the production line only produces one output. Natural monopolies are normally precipitated by the existence of the economies of scale.[264] This is so in light of the fact that the average cost of production will decline as production expands. The existence of natural monopoly should accordingly translate into lower cost to the ultimate consumer. This, therefore, suggests that the dominance of the market by a single supplier will be justified and even desirable. However, the traditional theory of market organization shows that the general conduct of the

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[260] OECD (2010) Regulatory Policy and the Road to Sustainable Growth p16 (available on https://www.oecd.org/regreform/policyconference/46270065.pdf), From these different perspectives, there is growing evidence of a convergence, as countries have sought to cover a widening range of issues, building on their initial experiences.

[261] H Falkena *et al,* note 152, *supra*, at page 2 argues that are three important objectives of regulation from an economic point of view viz: 'Securing systemic stability in the economy**:** Forany economy it is of the utmost importance that its financial markets run smoothly and are not subjected to shocks of their own doing, caused *inter alia* by: ineffective or inefficient trading, clearing and settlement systems; poor market infrastructures; or a major lack of market liquidity. Another major consideration in this regard would be the maintenance of the integrity of the payments system and, in financial markets, the securities delivery system. Ensuring institutional safety and soundness: In their efforts to promote efficiency, the regulatory authorities should exercise extreme caution not to impose – even inadvertently – regulatory obstacles or barriers that would impair the safety and soundness of financial institutions *irrespective of whether or not there is a systemic dimension*. Firms have to be adequately profitable, have sufficient capital to cover their overall risk exposures, be able to face global competitive forces and also have 'suitable' directors, management and staff. Promoting consumer protection: Wherever asymmetric information flows are evident, and where the consumer can potentially be exploited, there is an important 'consumer protection' role for the regulatory authorities. Integrity, transparency, and disclosure in the supply of financial services have to be promoted. These services have to be supplied by competent staff and consumers should have access to the full spectrum of retail financial services. In instances where consumers are wronged, there should be effective and cost-efficient compensation arrangements.

[262]E. Ben-Yosef (2005) The Evolution of US Airline industry: Theory, Strategy and Policy.

[263] R.A. Posner 'Natural Monopoly and Its Regulation' (1968)21 *Stanford Law Review* 548-643.

[264] Ibid; Posner argues that 'Indeed, a firm whose monopoly is not justified by economies of scale may be more vulnerable to the inroads of a new entrant than a cartel of smaller firms, for the single firm may encounter diseconomies of scale... A firm that can spread its fixed costs over more sales, in however many markets, is more efficient than a firm with a smaller output. That is what economies of scale-the concept that lies at the heart of natural monopoly means.'

monopolists should be regulated to prevent them from fixing prices that are higher than socially optimal.[265]

As indicated above, regulation is needed to curb negative effects of competition.[266] Destructive competition occurs in circumstances where there is no natural monopoly, yet the industry lacks a stable competitive equilibrium.[267]

2.7.4 Regulatory Taxonomy

Philosophically, scholars of regulation are engaged in an intellectual debate where one school of thought vigorously advocates for robust regulation of business, in various ways, while the opposing school of thought vigorously argues for deregulation.[268] Practically, however, corporations, including SOEs are regulated by the state and the market, these two types of regulation are intricately symbiotic. Deregulation as a school of thought has failed to gain much traction, both in theory and practice.[269] It follows, therefore, deliberating in on this philosophical

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[265] Ibid; At page 561, Posner observes that 'Nevertheless, it is probably the case that unregulated natural monopolists could extract profits somewhat higher than those prevailing in oligopolistic industries; and to eliminate that excess might well be a step in the right direction. As noted earlier, the precise impact of oligopoly on price competition is not known and may not be very great after all, especially in the many industries that are only loosely oligopolistic in structure. And monopolists lack the advantage over potential competitors that the natural monopolist has by virtue of the economies of scale in a natural monopoly market. The monopoly return might, consequently, be higher than one would judge desirable. But the magnitude is uncertain.'

[266] CMA (2020) Regulation and Competition: A Review of the Evidence; CMA made a finding that 'the proper design of regulation can substantially reduce the negative impacts on competition. The research finds that regulation can be used to incentivise innovation in a sector but, as with regulation and competition, the form of regulation can have an important influence on the type of innovation in a sector.'

[267] E. Ben-Yosef (2005) The Evolution of US Airline industry: Theory, Strategy and Policy, p103 the author observes that 'the foundation of laissez-faire economics is that competitive markets have a natural tendency toward stable equilibrium, as built-in economic mechanisms of local negative feedback will cause prices to clear markets at a long-run minimum average-cost level. Marginal cost pricing is expected, in the long run, to drive nonefficient firms out of the market. Obviously, firms that are forced to exit the market are expected to complain about destructive competition, and perhaps even plead for government help.'

[268] See for instance D Levi-Faur (2011) 'Regulation and regulatory governance' in David Levi-Faur (ed) *Handbook on the Politics of Regulation* 3–21.

[269] N Dunne (2017) Perspectives on Liberation, at p16 the scholar argues that: 'Second, liberalisation may reflect scepticism about the effectiveness of the state as regulator, and thus a desire to 'free the market' from inefficient or ineffective regulation. Here, liberalisation functions as a synonym for deregulation. As with our first perspective, the second evinces strong doubts regarding the desirability of state involvement in the marketplace. Where the two diverge is the focus of criticism: whether the state plays a primary role as economic actor or residual one as market regulator. Our second perspective suggests that, even in the latter role, state involvement is suboptimal, thus providing a basis for replacing public supervision with the invisible supervisory hand of the market mechanism. In opening markets by removing state-imposed barriers to competition, liberalisation facilitates this transition.'

debate will derail the primary aim of this chapter, which is to assess the actual impact of the current regulatory universe on the governance of SOEs in Lesotho.[270]

The state and market intervention in regulation may be classified into command-and-control regulation and self-regulation respectively.[271] There are also hybrid forms of regulation. These types of regulation are discussed in order to establish a solid foundation for a critical evaluation of the different strands of regulation of SOEs in Lesotho.

2.7.5 Direct or Command-and-Control Regulation

Command-and-control regulation may be defined as direct regulation of an industry through legislation that states what is permissible and what is not.[272] The command would be in the form of presentation of quality standards/targets by a government authority that must be complied with. On the other hand, control part signifies the negative sanctions that may be attracted by non-compliance e.g. prosecution. In the context of corporate governance, this type of regulation would refer to legally enforceable rules and standards that dictate the 'who, what and how' of the governance of corporations, thereby giving rise to 'regulatory legalism'.[273]

Command-and-control regulation has been celebrated for bringing success in issues of compliance in environmental law space.[274] In the context of corporate governance, regulation would be

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[270] I Ayres and J Braithwaite (1992) *Responsive Regulation: Transcending the Deregulation Debate* 3. The authors have correctly observed that the debate on regulation versus deregulation is unappealing because 'in reality regulation occurs in 'many rooms''.

[271] D Sinclair "Self-Regulation Versus Command and Control? Beyond False Dichotomies" (2002) 19 (4) *Law and Policy* 529 – 559.

[272] M Aalders and T Wilthagen, (1997), Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment. Law & Policy, 19: 415- 443. Available on https://doi.org/10.1111/1467-9930.t01-1-00034 (last accessed on May 4th 2023).

[273] D Levi-Faur (2011) 'Regulation and regulatory governance' in David Levi-Faur (ed) *Handbook on the Politics of Regulation* 7–11; J Braithwaite (1992) 'Responsive regulation for Australia' in Peter Grabosky and John Braithwaite (eds) *Business Regulation and Australia's Future* 81–98 at 81. Braithwaite critiques 'regulatory legalism' as a myopic form of regulation that is concerned only with enforcement of rules without considering the public purpose behind such rules.

[274] Some scholars argue that 'In effect, command-and-control regulation requires that firms increase their costs by installing anti-pollution equipment; firms are thus required to take the social costs of pollution into account. Command-and-control regulation has been highly successful in protecting and cleaning up the US environment. In 1970, the Environmental Protection Agency was created to oversee all environmental laws. In the same year, the Clean

premised on the view that if left unchecked corporations will exploit gaps in the market to maximise profits . These corporate stunts may lead to economic crises with far reaching consequences. It follows, therefore, that proponents of this model of regulation would argue that regulatory instruments must be put in place to prevent the exploitation of the market and to achieve other societal goals, such as 'fair' markets.[275] The argument goes further to say: for these regulatory instruments to be effective in their deterrence and punishment of unbecoming behavior, they must be binding and attract sanctions for non-compliance.

Proponents of command-and-control regulation admit that strict legal rules may not always achieve regulatory efficiency but argue that they are relatively efficient in comparison to other forms of regulation.[276] These scholars profile advantages of this type of regulation to include greater consistency, predictability, accessibility, exposure to judicial review, and less likelihood of manipulative behavior.[277]

2.7.6 Self-Regulation

Self-regulation may be understood as a corporatist arrangement where the corporate sector regulates its own affairs.[278] Alternatively, it may be understood as regulation that is devoid of direct or indirect state intervention.[279] Self-regulation is normally driven by market dynamics that reward and motivate corporations to operate transparently to inspire investor confidence, among

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Air Act was enacted to address air pollution. Just two years later, in 1972, Congress passed and the president signed the far-reaching Clean Water Act. These command-and-control environmental laws, and their amendments and updates, have been largely responsible for cleaner air and water in the United States in recent decades.' (https://www.khanacademy.org/economics-finance-domain/microeconomics/market-failure-and-the-role-of-government/environmental-regulation/a/command-and-control-regulation)

[275] J Stiglitz (2009) 'Regulation and failure' in David Moss and John Cisternino (eds) *New Perspectives on Regulation* 11–23. Examples of areas where command-and-control is firmly entrenched include competition, prohibition and punishment of insider trading, conflicts of interest, disclosure requirements, corporate opportunities, mergers and acquisitions, etc. These are all aimed at achieving some modicum of fairness in the business world.

[276] Cole, Daniel H. and Grossman, Peter Z. (1999) When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection" Articles by Maurer Faculty (available on https://www.repository.law.indiana.edu/facpub/590 last accessed on May 3rd 2023).

[277] H Latin (1985) 'Ideal versus real regulatory efficiency: Implementation of uniform standards and "fine-tuning" regulatory reforms' 37 *Stanford Law Review* 1267–1332 at 1271.

[278] S Billore, T Anisimova and D Vrontis (2023) Self-Regulation and Goal-Directed Behaviour: A Systematic Literature Review, Public Policy Recommendations and Research Agenda *Journal of Business Research* Vol 156

[279] J Black (1996) Constitutionalising Self-Regulation *59 Modern Law Review* pp24-55.

others.[280] Corporate governance codes and principles of good practice may be viewed under this category. Although promoted by the corporate sector, self-regulation is normally geared or designed to complement existing industry state regulation.[281]

Self-regulation may also be understood as a delegated arrangement whereby a public policy function is delegated to the corporate sector to regulate the market and its participants normally through industry soft-regulation.[282] There are four types of self-regulation: mandated, sanctioned, coerced, and voluntary self-regulation.[283] Some view self-regulation as a supplement to the failure or inadequacy of command-and-control regulation because command-and-control is inflexible, not adaptable and cumbersome.[284] Self-regulation offers a number of advantages, including cost-effectiveness, this is so because its development and enforcement rest with the corporate sector and not the state as is the case with command-and-control regulation.[285] Self-regulation is developed or shaped by industry experts who understand their respective industries, thus it responds better to specific industry challenges compared to command-and-control regulation.[286]

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[280] D Graham and N Woods (2006) 'Making corporate self-regulation effective in developing countries' 34 *World Development* 868–883.

[281] I Bartle and P Vass (2005) Self-Regulation and the Regulatory State – a Survey of Policy and Practice; the two scholars describes the nature of self-regulation as follows 'On the face of it, self-regulation appears straightforward. It is the regulation of the conduct of individual organisations, or groups of organisations by themselves. Regulatory rules are self-specified, conduct is self-monitored and the rules are self-enforced. It differs from the condition of no regulation in that there is an explicit attempt to regulate conduct. Pure self-regulation also implies no external (the state or other stakeholders) involvement or control in the regulatory process and the conduct of the regulated organisations. This can be contrasted with strong statutory, or 'command and control' regulation in which the state, by a variety of means, specifies the regulations and monitors and enforces the conduct of the regulated organisations. Very often, however, regulatory schemes have a mixture of self and statutory elements and the term 'co-regulation' is frequently used for regulatory schemes in which there is a combination of self and statutory elements.'

[282] E Mayer (1992) 'Regulatory Enforcement in the Australian Economy' in P Grabosky and J Braithwaite (eds) *Business Regulation and Australia's Future* 97–106 at 101; R Ong Yoke Chan (2010) 'Mobile Communication and the Protection of Children' (PhD thesis, Leiden University 2010) ch 9 (Self-regulation) pp239–268 at 241.

[283] J Black, note 184 supra.

[284] I Bartle and P Vass *op cit.*

[285] C Shearing (1993) 'A Constitutive Conception of Regulation' in P Grabosky and J Braithwaite (Eds) *Business Regulation and Australia's Future* pp 67–79 at 75.

[286] B Refslund (2022) "How Self-regulating can it be? Explaining Limitations in Firms' Compliance with Reflexive Regulation" *International Review of Public Policy*, (available on http://journals.openedition.org/irpp/2590; DOI: https://doi.org/10.4000/irpp.2590 last accessed on May 10th 2023).

Self-regulation has been celebrated for its flexibility and adaptability in response to rapidly changing market and industry dynamics.[287] As indicated above, self-regulatory instruments are developed by the industry, therefore, it is arguable that compliance therewith is more likely to be secured with relative ease compared to compliance with top-down command-and-control instruments. The success of self-regulation, is mainly driven by business case perspective i.e. that it makes good business sense to comply with the regulations as opposed to a threat of sanction in the case of non-compliance.

2.7.7 Co-Regulation and Meta-Regulation

From the above discussions, it is clear that both command-and-control regulation and self-regulation have strengths and weaknesses. It follows, therefore, that the view that seeks to describe command-and-control regulation as hierarchical, burdensome and costly, while self-regulation is viewed as a progressive and relatively flexible, it fails to appreciate the complexities of regulation and the interdependent nature of these two forms of regulation which, in some cases, defy rigid and conservative classification.[288]

Scholars have demonstrated that regulation that is unresponsive to non-legal normative values often fails to achieve the desired regulatory objectives.[289] Thus, in practice, the adoption of both self-regulation and command-and-control principles has been preferred by both regulators and regulated entities, thereby resulting in a hybrid system i.e. co-regulation.[290]

Co-regulation in SOEs is arguably comprehensive, resulting in a heightened plurality of regulation in comparison to ordinary public corporations. In a way, this is unavoidable, this is so in light of the fact that SOEs are by nature a combination of commercial and non-commercial interests, both

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[287] L Han, R Sarathy and J Zhang (2010) Understanding Compliance with Internet Use Policy: An Integrative Model Based on Command-and- Control and Self-Regulatory Approaches (available on https://aisel.aisnet.org/icis2010_submissions/181 last accessed on May 10th 2023).
[288] D Sinclair (1997) Self-Regulation versus Command-and-Control: Beyond false Dichotomies 19 *Law and Policy* 529–559 at 531, quoting A Iles (1996) Commentary 38 *Environment* 4–5.
[289] C Parker *et al* (eds), (2005) *Regulating Law* 7.
[290] E Balleisen and M Eisner (2009) The Promise and Pitfalls of Co-Regulation: How Governments can Draw on Private Governance for Public Purpose, in D Moss and J Cisternino (eds) *New Perspectives on Regulation* 127–149.
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of which are in the public interest.[291] Therefore, regulation of SOEs is arguably situated in command-and-control regulation, which suggests state involvement, and self-regulation, which is synonymous with industry-driven regulation.

For co-regulation to be effective and sustainable, regulators in charge of industry regulation must possess the requisite autonomy, expertise and resources to discharge their regulatory obligations. Moreover, and possibly most importantly, self-regulation must occur within the sphere of a broader co-regulation framework, where the state has articulated clear objectives for, and exercises oversight over private and quasi-public regulators. This is often referred to as meta-regulation, which is basically a process of 'regulating the regulators, whether they be public agencies, private corporate self-regulators or third-party gatekeepers.'[292]

For an effective and sustainable meta-regulation, all role players must have necessary expertise and capacity to evaluate their regulatory performances and must discharge their regulatory obligations in a transparent manner. There are many examples of regulatory bodies failing to hold professionals accountable i.e. auditors, accountants and directors involved unethical behavior. The Lesotho Institute of Accountants,[293] and the Lesotho Institute of Directors have processes to hold audit firms, auditors, and directors professionally liable for their role in the corporate governance failures in SOEs, however, this have at best been marred by a lack of transparency and at worst have been a sham. This is because these private and quasi-public regulators are themselves not

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[291] Christiansen, H. (2013), "Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises", OECD Corporate Governance Working Papers, No. 6, OECD Publishing. (Available on http://dx.doi.org/10.1787/5k4dkhztkp9r-en last accessed on 3rd May 2023); A number of other rationales for public ownership of enterprises have been offered, including: (i) monopolies in sectors where competition and market regulation is not deemed feasible or efficient; (ii) market incumbency, for instance in sectors where competition has been introduced but a state-owned operator remains responsible for public service obligations; (iii) imperfect contracts, where those public service obligations that SOEs are charged with are too complex or malleable to be laid down in service contracts; (iv) industrial policy or development strategies, where SOEs are being used to overcome obstacles to growth or correct market imperfections.

[292] C Parker (2002) *The Open Corporation: Effective Self-Regulation and Democracy* 15.

[293] The Lesotho Institute of Accountants (L.I.A.) was established by the Accountants Act of 1977, which gives the Institute the mandate of regulating the Accountancy practice in Lesotho. This responsibility can further be broken down into the following functions: To determine the qualifications of persons for admission as members; To provide for training, educational and examination by the Institute or any other body of persons practicing or intending to practice the profession of accountancy; To set the standards and rules governing the practice and ensure that compliance with these is maintained. The operations and funds of the Institute are managed by the Council that is elected by the Annual General Meeting.

regulated in a meta-regulatory approach. Consequently, the 'private regulatory tail … wag[s] the commonweal's dog'.[294]

Put differently, the fact that there is no concerted regulation of regulators in Lesotho results in regulatory lapses being left largely unaddressed, which in turn creates a sense of immunity for those involved in either deliberate or inadvertent corporate governance failures. In the long run, this weakness in design impacts negatively on the overall governance of SOEs.

Regulation in Lesotho is manifested in soft, hard, and judicial (as well as quasi-judicial) regulation. These forms of regulation are ordered in a pyramid approach, however this does not necessarily reflect the importance or effectiveness of one over another.

2.8 Conclusion

This chapter covered what may be described as the foundation for this study. The chapter discussed various definitions of corporate governance as a subject of scholarly discussions and or debates. Thereafter, the historical development of and need for corporate governance was discussed. The chapter also highlighted some corporate failures due to governance failure in different jurisdictions, particularly Lesotho. It also considered the different theories of corporate governance in an attempt to create sound foundation for the discussion to be covered in the ensuing chapters.

[294] B Edward and M Eisner (2009) 'The promise and pitfalls of co-regulation: How governments can draw on private governance for public purpose' in D Moss and J Cisternino (eds) *New Perspectives on Regulation* 127–149.

CHAPTER THREE: SOEs LANDSCAPE IN LESOTHO

3.1 Introduction

In developing countries, most of which are in Sub-Saharan Africa, the lack of economic growth and developmental challenges are almost a normality.[1] As intimated in the preceding chapters, to tackle these challenges, these countries normally resort to the establishment of SOEs as an attempt to achieve the most desired economic development and growth.[2] SOEs are financed from the fiscus, therefore, allocative efficiency is always a key concern.[3] The range of institutions that are considered as SOEs differ from one country to another. There is no specific legislation or policy defining what enterprises would qualify as SOEs in Lesotho.[4] It is safe, however, to accept that 'any corporate entity recognized by the domestic law as an enterprise and in which the state exercises ownership, should be considered as an SOE.'[5] The phrase 'corporate entity' in this regard

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[1] JICA Research Institute *Development challenges in Africa Towards 2050* (2013) 14.

[2] K Kane and H Christiansen *State Owned Enterprises: Good Governance as a Facilitator for Developement (*Coherence for Development – Better Policies for Better Lives*)* (2015) 2.

[3] Allocative efficiency, is a characteristic of an efficient market where capital is assigned in a way that is most beneficial to the parties involved. Allocative efficiency represents an optimal distribution of goods and services to consumers in an economy and an optimal distribution of financial capital to firms or projects among investors. Under allocative efficiency, all goods, services, and capital are allotted and distributed to their very best use under allocative efficiency. (https://www.investopedia.com/terms/a/allocationalefficiency.asp).

[4]In Lesotho the term 'state-owned enterprise' is not found or defined in legislation, but is in common usage within government, the media, the public and the management of the companies themselves, to refer to 'public enterprises'. The Public Financial Management Accountability Act (PFMAA) defines a public enterprise as an entity that is (a) established by law to carry out specific commercial activities, (b) is owned and controlled by Government or its agencies; and (c) is a distinct accounting entity producing its own financial statements. A statutory body is similar but is defined as an entity established to carry out specific Government functions. In this chapter SOE represents companies that are either 100% owned and controlled by the State, companies in which the State has a controlling interest either directly or indirectly and companies in which the State holds equity of 50% or less.

[5] OECD Guidelines on Corporate Governance of State-Owned Enterprises (2014) p4 – 'For the purpose of the Guidelines, any state-owned corporate entity recognised by national law as an enterprise should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities are of a largely commercial nature. Whether or not to consider other units of general government as SOEs would need to depend on a value judgement, including regarding their degree of market orientation. For example, entities whose primary purpose is to exercise state powers would generally not be considered as SOEs'.

should be understood to include, but not limited to, companies, partnerships and statutory corporations whose legal personality is established by a specific legislation.

Despite the fact that the phrase state-owned enterprise is widely used in Lesotho, it has not been defined by any legislation or policy document. Instead, the Public Financial Management and Accountability Act[6] (the PFMAA) makes reference to a 'public enterprise' which it defines as an entity which:

a) is established by law to carry out specific commercial activities;
b) is owned and controlled by government or its agencies; and
c) is a distinct accounting entity producing its own financial statements.[7]

The PFMAA further defines a statutory body in a similar manner, but it goes on to state that a statutory body is established to carry out specific government function.[8] These however, do not, inform us of what an SOE is in the context of Lesotho.

The Department of Private Sector Development which is housed within the Ministry of Finance prepares annual reports on SOEs. Much as there is no legislative definition of SOEs, the State Owned Enterprises Annual Report for the Year Ended March 2018 identifies SOEs in the Lesotho context as 'companies that are either 100% owned and controlled by the State and companies in which the State has a controlling interest either directly or indirectly.'[9] The other category covered by the report are companies in which the State holds equity of 50% or less.

It follows, therefore, that the SOE portfolio in Lesotho is diverse. The portfolio may be classified into three categories, the first category are those enterprises in which the government is the sole stakeholder or shareholder, the second category are those enterprises in which the government is a shareholder while the third and last category are enterprises in which the government is a

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[6] No. 12 of 2011. The preamble of this Act provides that it is 'an Act to establish and sustain transparency, accountability and sound management of the receipts, payments, assets and liabilities of the Government of Lesotho'.
[7] Section 2 of the PFMA.
[8] Ibid.
[9] Ministry of Finance, Private Sector Development Department *State Owned Enterprises Annual Report for the Year Ended March 2018*

minority shareholder. In this chapter, an attempt is made to analyse SOEs in Lesotho and highlight governance issues thereof.

3.2 The Genesis of State-Owned Enterprises in Lesotho

The SOE sector in Lesotho was first created in the 1970s in an attempt to promote domestic investment.[10] At that time, the sector accounted for a greater part of the economy.[11] However, many of these has since been fully or partially privatized.[12] Today, there remains six wholly-owned SOEs[13], nine partial Government shareholdings in private companies[14] and five companies in which the Lesotho National Development Corporation (LNDC), an SOE itself under the Ministry of Trade, holds mostly minority shares, but together with Government holdings, controlling influence can be exercised.[15]

Following the enactment of the Privatization Act[16] most SOEs in Lesotho were privatized. These include the Lesotho Telecommunications Corporation[17], Lesotho Bank[18] and the Plant and Vehicle

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[10] World Bank, "State-Owned Enterprises in Lesotho: A Country Policy Note." Report ACS19193, June 30, 2016.
[11] Ibid, p2.
[12] Note 9, supra; the report highlights that the companies that have been privatised and in which the Government of Lesotho maintains a minority interest are (as a group) significantly larger than the SOEs.
[13] Lesotho Electricity Company (Pty) Ltd, Water and Sewerage Company (Pty) Ltd, Lesotho Tourism Development Corporation, Lesotho Post Bank Limited, Basotho Enterprise Development Corporation and Lesotho National Development Corporation.
[14] AON Lesotho (Pty) Ltd, Lesotho Flour Mills Ltd, Letseng Diamonds (Pty) Ltd, Econet Telecom Lesotho (Pty) Ltd, Storm Mountain Diamond Mines (Pty) Ltd, Liqhobong Mining Development Company (Pty) Ltd, Lesotho National General Insurance Company Ltd and Standard Lesotho Bank Ltd.
[15] Maluti Mountain Brewery (Pty) Ltd, Loti Brick (Pty) Ltd, OK Bazaars (Lesotho) (Pty) Ltd, MHG (Lesotho) (Pty) Ltd and Lesotho Housing and Land Development Corporation.
[16] No 9 of 1995; the preamble of the Act provides that the Act is meant to provide for the privatisation of parastatals, the establishment of the Privatisation Unit and for matters connected therewith or incidental thereto.
[17] Lesotho Telecommunications Corporation (LTC) was formed through a parliamentary enactment i.e. Telecommunications Act No. 12 of 1979, it was a limited liability corporation wholly owned by the Government of Lesotho. In June 2000, LTC was incorporated under the Companies Act as Telecom Lesotho, in November 2000 the Government of Lesotho its 70% stake in Telecom Lesotho to Mountain Communications (Pty) Ltd and the Government retained 30%. The company later went through a name change, thus is now trading as Econet Telecom Lesotho.
[18] The Mail & Guardian newspaper dated November 16th 1999 (available on https://mg.co.za/article/1999-11-16-standard-buys-70-of-lesotho-bank/ (last accessed on February 2023)) reports: 'STANDARD Bank at the weekend signed an agreement with the Lesotho government in terms of which the bank acquires 70% shareholding of the Lesotho Bank. The agreements were signed by the regional director of Stanbic Africa, Bob Norval, and the director of the privatisation unit of the Lesotho government, Mothusi Mashologu.

Pool Services.[19] The decision to privatise SOEs was as a result of a decision to move towards a free economy and consequently an extensive recognition of the growing economy of Lesotho.[20] Most SOEs were struggling financially and the government decided that continuous cash injection into the SOEs was unsustainable in the medium to long term.[21] The government's objective was to ensure sustainable economic growth and development in which the private sector was at the forefront with the government merely providing an enabling environment.[22]

The Privatisation Act defined the policy and operational philosophy governing the privatisation process and programme.[23] That statute established the Privatisation Unit (PU) as the responsible agency for carrying out the process on behalf of the government and defined various methods through which privatisation could be implemented.[24] The process began with the establishment of the government of Lesotho privatisation and private sector development programs with the assistance of the World Bank in January 1996.[25] During the late 1990s, the country experienced a huge economic drop due to the political instability, as a result, SOEs were negatively affected, and this then made the decision to privatise them more viable.[26]

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[19] In August 2000 the Government of Lesotho signed a sale agreement with Imperial Fleet Services for the purchase and/or sale of the Plant and Vehicle Pool Services (PVPS), retaining only 20% stake which would later be sold to the citizens.

[20] T V Makafane *The Impact of Privatisation: Ownership and Corporate Performance in Lesotho* (an unpublished Masters Thesis) (2005) p.37. Makafane argues that 'the Government of Lesotho was unable to continue injecting money into the non-performing enterprises. Most companies in the country were originally owned by the Government hence it was believed that to improve the already unstable economy of the country, privatisation had to come into effect. Thus, the [Government of Lesotho] decided to privatise over fifty (50) state-owned commercial enterprises to boost the economy.

[21] Ibid.

[22] Ibid.

[23] See sections 2, 4, 7, 8, 9, 17 and 20 of the Act.

[24] See sections 4 and 9 of the Act.

[25] World Bank *Memorandum and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit in the Amount Equivalent to US$ 11 Million to the Government of Lesotho for the Privatisation and Private Sector Development Assistance Project* (April 25 1994).

[26] Lesotho attained independence on the 4th October 1966, political developments in Lesotho since then have been a major source of instability resulting in economic turmoil and negative impact on human development. The country endured a number of years of undemocratic or dictatorship rule from 1970 to 1986 and military rule from 1986 to 1993. Lesotho returned to multi-party democracy 1993 with the election of a government led by the Basotho Congress Party (BCP) which later split in 1997 and the majority of the members of Parliament followed the then prime minister into a new party, the Lesotho Congress for Democracy (LCD). The last political unrest witnessed in Lesotho in the 1990s came in the wake of the 1998 parliamentary elections, when LCD won all but one of the contested seats. Opposition parties, led by the Basotho National Party (BNP), refused to accept the results, which were declared as 'free and fair'. BNP mobilized their supporters to oppose election results. The political unrest that ensued led to looting and burning of businesses and public property in Maseru. It was stamp out by the Southern African Development Community (SADC) troops from South Africa and Botswana.

The privatisation program was driven by the PU?? whose main objective was to foster a partnership between the government of Lesotho, labour and the general public for generation of greater economic activity, employment, economic growth and development.[27] Each of these stakeholders had a role to play in the process. The PU was the government agency responsible for steering the privatisation process for the benefit of the country.[28] The private sector on the other hand, had to provide fresh investments and thereby increase trade in the country while labour and the general public had to be active participants in the economy. The PU was under the Ministry of Finance, thus it could not take any decisions at its own discretion.[29] Line ministries and SOEs management remained relevant and actively involved in the process.[30]

The PU's objective was to reduce the public sector as quickly as possible and to find active private sector investors.[31] The PU was further tasked with ensuring that the SOEs were sold or privatized at their market value.[32] Other duties of the PU included planning, managing, implementing and controlling the privatisation process as a whole.[33] However, it had to make all material decisions in consultation with the relevant line ministries and management of SOEs concerned.[34] The PU had to set the tender process rules, procedures and approval criteria for public and restricted tenders.[35] It further led negotiations of contracts of sale, lease agreements and prospectus for public offering of shares on behalf of the government.[36] At the tail end of the transaction, the PU had the right to receive proceeds from privatisation, authorise transactions and sign documents.[37]

[27] See sections 4 and 8 of the Privatisation Act.
[28] See section 8 of the Privatisation Act.
[29] See section 8(1) of the Privatisation Act.
[30] See section 10 of the Privatisation Act.
[31] Ministry of Development Planning and European Union Maseru *Action Programme for Development of Lesotho 2001-2010* (Final Report 3 December 2000) (a report presented at the Third United Nations Conference on the Least Developed Countries held in Brussels, 2001 available on https://www4.unfccc.int/sites/NAPC/Country%20Documents/Parties/aconf191cp34les.en.pdf).
[32] See section 9(4) of the Privatisation Act.
[33] Supra, note 28.
[34] See section 8(2) of the Privatisation Act.
[35] Ibid.
[36] Ibid.
[37] Ibid.

However, the government of Lesotho did not privatise utility companies like the Lesotho Electricity Company and Water and Sewage Company which enjoy monopoly in their respective industries.[38] The government further retained stake in some companies that may have been considered as strategic and key industries post the privatization era.[39]

In the early 1970s, the government policy in Lesotho was to promote domestic ownership of strategic industries and services.[40] However, at that time, the domestic private sector was not sizeable enough to meet the policy demands.[41] Therefore, the government intervened through the establishment of SOEs and acquisition of shares in some private companies. As a result, SOEs accounted for a large faction of the economy then, as is the case at present.[42] SOEs that were established include the following: Lesotho Bank, Lesotho Agricultural Development Bank, Lesotho Telecommunications Corporation, Lesotho Airways Corporation, Lesotho Flour Mills and the Lesotho National Development Corporation.

By the mid-1980s, the country suffered a fiscal imbalance.[43] During that period, the South African Customs Union (SACU) revenue which accounted for 70 percent of the government's total

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[38] The Lesotho Electricity Company has only one shareholder i.e. Ministry of Energy and Meteorology while the Water and Sewerage Company is held by two ministries, namely the Ministry of Finance and Ministry of Water.

[39] For instance the Government of Lesotho retained some shareholding in Econet Telecom Lesotho, Standard Lesotho Bank, Lesotho Flour Mills, Lesotho National General Insurance and Minet Lesotho.

[40] The World Bank *Lesotho State-Owned Enterprises: A Country Policy Note* (June 2016) (available on https://openknowledge.worldbank.org/bitstream/handle/10986/29752/ACS19193-WP-REVISED-P156809-PUBLIC.pdf?sequence=1&isAllowed=y last accessed on February 24, 2023) p2.

[41] Ibid.

[42] Currently, there are six SOEs which are 100% owned by the State, twelve enterprises partially owned by the government and nine that are subsidiaries of LNDC.

[43] A M Maruping (1992) Structural Adjustment Program: Lesotho's Experience in a Nutshell in I G Patel (Ed) *Policies for African Development from 1980s to the 1990s* (210-217) International Monetary Fund; Maruping observes that 'Lesotho' s real gross domestic product (GDP) growth rate was a mere 0.2 percent in 1986 and 7.9 percent in 1987. Capital expenditure as a ratio to total government expenditure was 29.1 percent in 1986/87. In 1987/88, the fiscal deficit as a percentage of GDP was 20.3 and as a percentage of gross national product (GNP) was 10.5; gross national savings as a percentage of GNP dropped from 25.5 percent to 20.0 percent; and the current account stood at M 72.6 million. Fixed capital formation declined from 44.8 percent of GDP in 1986 to 43.9 in 1987; and from 22.9 percent of GNP in 1986 to 22.5 in 1987. Domestic credit was rising at an alarming rate; it rose by about 88 percent from 1985/86 to 1987/88. Net foreign assets dropped by 12.13 percent between 1985/86 and 1986/87 and declined further by 6.5 percent between 1986/87 and 1987/88. External indebtedness as a ratio to GNP rose from 31.1 percent in 1986/87 to 34.8 percent in 1987/88. Inflation, using the consumer price index (CPI) stood at 19.7 percent (year-on-year) in January 1986; it dropped to 10 percent in January 1987, but rebounded to 11.6 percent in January 1988—it was, however, still at a double digit level. Clearly, the economic situation was deteriorating. Resolute intervention was needed to put matters back on track.'

revenue became highly volatile.[44] The government then responded by adopting a structural programme from 1988 to -1993[45]which was supported by the International Monetary Fund (IMF) and the World Bank.[46]. In 1992, the government of Lesotho issued a privatisation policy statement and began taking measures to restructure the SOE sector in Lesotho.

As indicated above, currently, the SOEs portfolio in Lesotho is composed of enterprises in which the government, either directly or indirectly has an ownership interest. Further, on account of the fact that there is no specific law regulating SOEs in Lesotho, there is therefore, no correct or incorrect means of determining which enterprises are included or excluded in the definition of SOEs in that context. The government has, either on its own account or through LNDC, retained full or partial ownership rights in a large number of enterprises, some of which were partly privatized earlier as discussed above.[47] Therefore, when discussing or analyzing SOEs in Lesotho, three groupings emerge, *viz:* SOEs with hundred percent government ownership, SOEs under LNDC but with overall government control and enterprises in which the government is a minority shareholder.

The following are SOEs in which the government has hundred percent ownership interest: Lesotho Electricity Company (Pty) Ltd, Water and Sewerage Company (Pty) Ltd, Lesotho Tourism Development Corporation, Lesotho Post Bank Ltd, Basotho Enterprise Development Corporation and the Lesotho National Development Corporation. On the other hand, the following are enterprises in which the government, through its ministries, departments or agencies holds a controlling stake: Loti Brick (Pty) Ltd, Maluti Mountain Brewery (Pty) Ltd, OK Bazaars (Lesotho) Ltd, MHG (Lesotho) (Pty) Ltd t/a Avani and Lesotho Housing and Land Development Corporation. The last category is composed of enterprises in which the government holds minority stake, these are: Lesotho Flour Mills Ltd,[48] Letšeng Diamonds (Pty) Ltd,[49] Econet Telecom

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[44] World Bank (2016) Lesotho State Owned Enterprises: A Country Policy Note p.2.
[45] ibid
[46] Note 43, supra.
[47] MHG Lesotho t/a Avani Lesotho, Loti Brick, Standard Lesotho Bank, Lesotho Flour Mills, Maloti Mountain Brewery, AON Lesotho, National Life Insurance, National General Insurance, Econet Telecom Lesotho, Liqhobong Mine, Kao Mine and Letseng Diamonds Mine.
[48] The Government of Lesotho holds 49% of Lesotho Floor Mills (Pty) Ltd.
[49] The Government of Lesotho holds 30% of Letseng Diamonds Mine (Pty) Ltd.

Lesotho (Pty) Ltd,[50] Storm Mountain Diamonds (Pty) Ltd,[51] Liqhobong Mining Development Company (Pty) Ltd,[52] Lesotho National General Insurance Co Ltd,[53] Lesotho National Life Assurance Co Ltd,[54] Standard Lesotho Bank Ltd[55] and Minet Lesotho Ltd.[56]

The state's relationship with SOEs is mainly based on some legislative framework.[57] As indicated above, most SOEs are now incorporated under the Companies Act, while a few have founding Acts.[58] There are other laws that affect governance or operation of SOEs, these may be the Public Finance Management and Accountability Act and the individual sector legislations. Ownership of SOEs in Lesotho is somewhat decentralized in the sense that for every SOE, there is a line ministry that exercises ownership and oversight roles while the Private Sector Development (PSD), a unit in the Ministry of Finance (MoF) has the responsibility of monitoring SOEs. The office of the Auditor General audits SOEs accounts and the parliament, through the Public Accounts Committee receives the audited accounts and in turn orders remedial action where necessary.

The government supports the SOE sector through subsidies or subvention and provision of capital grants and on lending of international development partners assistance.[59] Generally, SOEs that are 100% owned by the government are the largest recipients of the government's support.[60] The SOE sector also provides inflows to the fiscus through its business transactions, payment of duties, royalties and indirect taxes. In addition, some SOEs provide direct taxation and dividend payments to the government. The highest contributors of direct payments are those SOEs in which the government is a minority shareholder.[61] In a nutshell, one group of SOEs is dependent on receipts

[50] The Government of Lesotho holds 30% of Econet Telecom Lesotho (Pty) Ltd.
[51] The Government of Lesotho holds 25% of Storm Mountain Diamonds (Pty) Ltd.
[52] The Government of Lesotho holds 25% of Liqhobong Mining Development Company (Pty) Ltd.
[53] The Government of Lesotho holds 20% of Lesotho National General Insurance Co Ltd.
[54] The Government of Lesotho holds 12% of Lesotho National Life Assurance Co. Ltd.
[55] The Government of Lesotho holds 10% of Standard Lesotho Bank.
[56] The Government of Lesotho holds 5% of Minet Lesotho (Pty) Ltd previously Known as AON Lesotho.
[57] Most SOEs were privatised following the Privatisation Act and in some cases there would be a different Vesting legislation followed by some shareholders' agreement.
[58] SOEs that are corporations all have their own founding legislations, for instance BEDCO is established by BEDCO Act No.9 of 1980, LNDC was initially formed by LNDC Act No. 20 0f 1967 which was later repealed by LNDC Order No. 13 of 1990 while LTDC was established by the Tourism Act No. 4 of 2002.
[59] Ministry of Finance, Private Sector Development (2020) State Owned Enterprises Annual Report for the Year Ended March 2018, p19.
[60] Ibid, p20.
[61] Ibid.

of government while the other group provides most of the returns to the government from the SOE sector.

Amongst the six wholly owned SOEs, the main recipients of the government financial support or largest beneficiaries of special funding or capital grants are LEC, WASCO, LPB and LNDC.[62] Of these, LEC, WASCO and LNDC.

Some of these SOEs are discussed later in this chapter. Those that are discussed are considered as key for purposes of this study. As these SOEs are unpacked, one would realise that objectives of SOEs may basically be divided into two, being: commercial and service delivery. Commercial SOEs are those that pursue commercial goals while service delivery SOEs are those that provide basic services or social services.

3.3.1 Lesotho Electricity Company (LEC)

The Lesotho Electricity Company (Pty) Ltd was incorporated in 2006 under the Companies Act[63] with the government as the only shareholder. The government's stake in LEC is held in trust by the Ministry of Energy.[64] The incorporation of LEC was done pursuant to the LEC (Pty) Ltd Establishing and Vesting Act 2006. In terms of this Act, the assets, liabilities, rights and obligations of the former Lesotho Electricity Corporation were vested in the incorporated LEC.[65]

The LEC is regulated by the Lesotho Electricity and Water Authority.[66] It generates, transmits and distributes electrical power throughout the country. Its main power sources are the 72MW

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[62] Ibid.
[63] No. 25 of 1967.
[64] Formerly the Ministry of Energy, Meteriology and Water.
[65] Previously, as a corporation, LEC was established in terms of Electricity Act 1967 and later supported with the Electricity Regulations 1970.
[66] From 01 August, 2004 until April 30, 2013 the Authority was mandated with regulating the electricity sector. In 2007 the Government decided that the Lesotho Electricity Authority (LEA) should be transformed to be a multi-sector regulatory body assuming additional powers to regulate urban water and sewerage services in the country. LEWA officially started regulating both electricity and urban water and sewerage services sector on May 01, 2013. The Authority independently deals with matters such as electricity pricing, complaints handling and resolution and the supervision of the implementation of the Quality of Service and Supply standards (QOSSS) by its licensees (https://www.lewa.org.ls/overview/).

Muela hydropower plant at the outflow from the Katse Tunnel in the north of the country which is operated by Lesotho Highlands Development Authority[67] and provides the base load, and South Africa's power utility ESKOM which supplies most of the balance. The LEC participates in the Southern Africa Power Pool and through its rural electrification unit, is also responsible for rural electrification projects for which it receives capital grants from the government (and sometimes donors) to cover the costs.

The LEC's board of directors is composed of nine members appointed by the Minister of energy normally, the appointment is for a three year term and is renewable. The board members are often people with political accolades and less knowledge and experience in corporate governance matters or technical understanding of power generation and distribution. The Managing Director of the LEC is appointed by the Minister acting on the advice of the board. Thus in most instances, the Managing Director has been someone with a better political career compared as opposed to professionalism related to the LEC business.

The LEC's relatively strong financial position owes much to the restructuring of the industry that took place in the early 2000s in preparation for a privatization program that ultimately did not happen.[68] Factors helping to maintain profitable operations include pre-payment of accounts by local authorities and domestic customers which together account for around half of all electricity sales.[69] The performance trend for the LEC is generally positive with year-on-year revenue growth

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[67] The Lesotho Highlands Development Authority (LHDA) was set up in terms of the 1986 Treaty on the Lesotho Highlands Water Project between Lesotho and South Africa. As the project implementing authority, the LHDA is responsible for the implementation, operation and maintenance of the components of the project in Lesotho, including the social, environmental and economic developments of the project such as resettlement, compensation, the supply of water to resettled villages, irrigation, fish hatcheries and tourism. In addition, LHDA is responsible for raising the funding for the hydropower component of Phase II.

[68] Some scholars (S Tsoeu-Ntokoane, M Kali and X Lemaire (2002) *Energy Democracy in Lesotho: Prioritising the Participation of Rural Citizens* Cogent Social Sciences) observe that from 2000 to 2005, the government of Lesotho embarked on privatising the Lesotho electric company. To this end, the government engaged in consultative meetings with consultants to prepare for the process that would allow profit-motivated individuals to own and control the energy sector. Around this period, the Lesotho Electricity Authority was established as the sector regulator. A similar argument is made by L Z Thamae, R I Thamae and T M Thamae (2015) *Assessing a Decade of Regulatory Perfomance for the Lesotho Electricity Industry* Vol 35 Utilities Policy p91-101, they argue that the reforms by the Government of Lesotho (GoL) have included among others, opening of the market to private-sector participation in 2002, the establishment of an independent regulatory agency (Lesotho Electricity Authority – LEA) in August 2004, and incorporation of the incumbent service provider (Lesotho Electricity Company or LEC) in 2006.

[69] Prepayment meters are installed at the customer's premises. They work on the principle that electricity is bought at any LEC vending station and the purchase information is transferred into the meter. Before the customer can use electricity they must insert credit into the meter via a token (credit transfer voucher) that is purchased at conveniently

at a respectable14% to 17% per-year.[70] Revenue growth is the most consistent and reliable measure of growth for an enterprise such as LEC. , However, it needs to monitor costs and seek full transparency and compensation for all social and non-commercial operational activity.

3.3.2 Water and Sewerage Company (WASCO)

Water and Sewerage Company (WASCO) is a 100 percent government owned company. WASCO was established under the Water and Sewerage Company (Propriety) Limited (Establishment and Vesting) Act, 2010.[71] Following the enactment of the Establishment and Vesting Act, WASCO was then incorporated in terms of the Companies Act.[72] Prior to WASCO, the government through the Ministry of Public Works had an obligation to supply clean water and sanitation services throughout the country.[73] In 1992, the government established the Water and Sewerage Authority (WASA) through a piece of legislation, Water and Sewerage Order.[74] The main objective of WASA was to provide water and sanitary services to all designated urban arears in Lesotho.[75]

However, in 2010, the legislature repealed the Water and Sewerage Authority Order by Water and Sewerage Company (Propriety) Limited (Establishment and Vesting) Act. This Act established the Water and Sewerage Company (WASCO) which was later incorporated in September 2010.[76] WASCO was incorporated with two shareholders, *viz*; the Ministry of Finance and the Ministry of Water both holding equal shares. WASCO was set up to take over the assets and operations of WASA, including employees.[77] It is responsible for providing potable water and waste water

located vending station or through cell phone vending. The customer tops up the units as and when it is convenient. When the credit expires the meter automatically disconnects. Reconnection is automatic when the credit is loaded onto the meter (see https://lec.co.ls/metering-services/).

[70] Note 60, supra, at page 27 the Private Sector Development Department records that the performance trend for LEC is generally positive. Since 2014/2015 Revenue has increased by 65% and NOPAT has increased by 86%. However, changes in both year-on-year Revenue and NOPAT are erratic. Annual Revenue growth has been at between 5.42% and 23.35% per year, whilst annual changes to NOPAT have been between -25.37% and 66.38%.

[71] Act No. 13 of 2010.

[72] The shareholders of WASCO are the Ministry of Water and Ministry of Finance each holding 50% stake in the

[73] https://www.water.org.ls/wasco/ (accessed on March 1, 2023).

[74] No. 19 of 1992.

[75] https://www.water.org.ls/wasco/ (accessed on March 1, 2023).

[76] WASCO was incorporated in terms of the Companies Act as a private company.

[77] Water and Sewerage Company (Propriety) Limited (Establishment and Vesting) Act provided for the vesting of the assets, liabilities, rights and obligations of the WASA in WASCO, and provided for the transfer of employees.

disposal for 17 urban areas of Lesotho.[78] In addition to the objectives of providing adequate and expanded service, an important objective is financial sustainability, including a reduction in the volume of non-revenue water.[79]

Soon after the incorporation of WASCO, the then single focus regulator, the Lesotho Electricity Authority (LEA), which regulated generation and distribution of electricity in the country was turned into a multi sector regulator to include the regulation of water and sewerage services.[80] The Authority independently deals with matters such as electricity pricing, complaints handling and resolution and the supervision of the implementation of the Quality of Service and Supply Standards (QOSSS) by its licensees.[81] LEWA is charged with the responsibility to promote the expansion of sustainable supply of electricity, water and sewerage services, to ensure and promote sustainable and fair competition in the regulated sectors, consumer protection and to set the tone for compliance of licensed operators.[82]

Non-revenue water is estimated at around 30 percent and physical losses upwards of 26 percent.[83] Reportedly there are delays in collections from Government customers.[84] Tariff increase requests have not always been met by the regulator.[85] A major challenge is to expand the provision of services in the poorer urban areas while achieving full cost recovery.[86] There appears to be scope for better determination of the costs of public service obligations in providing subsidised services

[78] These are Maseru, Butha-Buthe, Hlotse(Leribe), Mafeteng, Moyeni, Qacha's Nek, Teyateyaneng, Thaba Tseka, Mapoteng, Mokhotlong, Morija, Peka, Roma, Maputsoe, Kolonyama and Semonkong.

[79]Non-revenue water is water that has been produced but does not reach the customer. Losses can be real losses through leaks, sometimes also referred to as physical losses, or they can be apparent losses for example through theft or metering inaccuracies.

[80] http://www.lewa.org.ls/about/default.php (accessed on March 1st 2023); From August 1st, 2004 until April 30th, 2013 the Authority was mandated with regulating the electricity sector. In 2007 the Government decided that LEA should be transformed to be a multi-sector regulatory body assuming additional powers to regulate urban water and sewerage services in the country. LEWA officially started regulating both electricity and urban water and sewerage services sector on May 1st, 2013.

[81] http://www.lewa.org.ls/about/default.php (accessed on March 1st 2023).

[82] Section 21(1) of the Lesotho Electricity Authority

[83] 2017/2018 Water and Sewerage Company Annual Report, p.10.

[84] Ibid, p.18.

[85] The Water and Electricity regulator (LEWA) receives request for approval of tariffs from the utility companies and then conducts public consultations through radio stations, television and public gatherings, after these consultations, the regulator will then apply its mind on whether to approve or reject the request.

[86] Note 85, supra.

to poorer communities, and for updating the tariff structure to ensure cost recovery while encouraging greater efficiency.

WASCO has around 602 employees excluding temporary employees.[87] WASCO's governance is championed by the board of directors. The board is appointed by the Minister of Water and Minister of Finance. There are no guidelines meant to promote transparency and meritocracy in filling board positions at WASCO, thus politicians use the board to reward fellow comrades. This compromises the quality of governance and negatively impacts service delivery at the water utility. The chief executive is at the helm of executive management of the utility company, however, the Minister has direct influence in who ultimately gets appointed as the chief executive. This element of political interference in the operations of the company compromises the quality of governance at the water utility

3.3.3 Lesotho Post Bank (LPB)

Lesotho Post Bank (LPB) is also 100 percent Government owned and was incorporated in 2004 under the Companies Act as a public company.[88] It is also licensed and regulated by the Central Bank of Lesotho (CBL) in accordance with the Financial Institutions Act of 2012.[89] As the sole shareholder, the government has been the main financier of the bank contributing both share capital and working capital.[90] The LPB's mandate is to promote financial inclusion by serving the unbanked and under-banked economically active population of Lesotho.[91] An important objective is to provide financial services in a sustainable manner.[92] LPB is one of four commercial banks in Lesotho, the other three are subsidiaries of South African banks.[93]

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[87] 2017/2018 Water and Sewerage Company Annual Report, p.2.
[88] The current shareholders of the Bank are the Ministry of Communications, Science and Technology and the Minister of Finance, however, initially, some senior government officials had registered themselves as shareholders, these included the then Attorney General Mr Tsokolo Makhethe, the then Minister of Finance Mr Leketekete Ketso and the then Minister of Communications, Science and Technology Mr Tseliso Mokhosi.
[89] Licensed as a commercial bank and as an issuer of electronic payment instruments (mobile money) under the Payment Systems (Issuers of Electronic Payments Instruments) Regulations 2017.
[90] Lesotho PostBank 2016 Annual Report p.4.
[91] Ibid, p25.
[92] Ibid, p5.
[93] These are NedBank Lesotho, First National Bank (Lesotho) and Standard Lesotho Bank.

The LPB board of directors is the pinnacle of corporate governance within the bank.[94] The board assumes overall responsibility in governance, risk management, performance and financial oversight of the bank.[95] The directors are appointed by the line ministry being the Ministry of Communications Science and Technology, on behalf of the shareholder. Directors are appointed for a fixed term of three years.[96] The appointment of directors by politicians may have negative on governance of any institution, however, this point will be subjected to further discussion and scrutiny in the following chapters.

LPB's board has four committees namely the governance committee, audit, risk and compliance committee, information technology committee and the finance and credit committee.[97] These committees are meant to assist the bank achieve its governance objectives. As indicated above, the bank is incorporated under the Companies Act and regulate by the CBL in terms of the Financial Institutions Act. The two pieces of legislation lay a solid foundation for governance of the bank. Regulatory supervision by the Central Bank of Lesotho strengthens governance within supervised institutions.

The performance trend for LPB is, therefore, one of cautious optimism, with the negative results seeming to turn around with better management and continued government support.[98] The trend lines are mostly flat indicating the slow but steady shift towards improvement over recent years.[99]

3.3.4 Lesotho National Development Corporation

The Lesotho National Development Corporation (LNDC) was established in 1967 as a 100 percent government owned statutory corporation.[100] The core mandate of the LNDC is to initiate, promote

[94] In terms of section 59(1) of the Companies Act, the board is responsible for the ultimate governance of the company.
[95] Note 92, supra.
[96] Ibid, p11.
[97] The Board of Directors delegates its powers to these Sub–Committees to promote independent judgment, assist with balance of power and effective discharge of the duties entrusted in the Board. The Board and its Sub – Committees convene formal meetings at least quarterly.
[98] Note 9, supra.
[99] Ibid.
[100] LNDC was established in terms of the Lesotho National Development Corporation Act No. 20 of 1967 which was later amended by Order No. 13 of 1990 and subsequently amended by Act No. 7 of 2000.

and facilitate the development of manufacturing and processing industries, mining and commerce in a manner calculated to raise the level of income and employment in Lesotho.[101] It is the Corporation's key responsibility to contribute to the national economic growth and development. The LNDC carries out this role by promoting Lesotho as an attractive and a preferred investment destination to both foreign and local investors[102] and offers a wide range of investment promotion, facilitation and support services. These include serviced industrial sites, factory buildings, business support services, after care services, financial assistance on a selective basis and where possible, selective limited equity participation in projects considered to be of strategic importance to the economy.[103] Furthermore, it offers a wide range of investor services including the provision of nine industrial zones and factory shells. The LNDC is also engaged in investment and property management and raises most of its finance from property rentals and dividends from investments in different companies.[104] Other sources of revenue include interest on loans.[105]

The LNDC has had many successes over the years in attracting foreign direct investment (FDI). In its early years the LNDC was successful in the development of light manufacturing industry and tourism.[106] From the late 1980s the LNDC was instrumental in attracting investors in the garment industry from East Asia, notably Taiwan.[107] In the 1990s and early 2000s, partially through LNDC's efforts, Lesotho became one of the first countries in southern Africa to qualify for benefits for its garment industry from the US African Growth and Opportunities Act (AGOA) trade agreement and Lesotho became the largest African supplier of apparel to the United States.[108]

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[101] See section 4 of the Act as amended.

[102] https://www.lndc.org.ls/content/investment-promotion (last access March 2nd 2023).

[103] At times LNDC holds shares for the government in different establishment. For instance LNDC holds shares in Maluti Mountain Brewery (Pty) Ltd and Loti Brick (Pty) Ltd.

[104] The 2020/21 audited annual financial statements indicates that the corporations' dividends income was in access of LSL 76, 000, 000.00.

[105]*https://www.lndc.org.ls/sites/default/files/docs/reports/LNDC%20Consolidated%20AFS%202019-20.pdf;* at times LNDC offers credit guarantee scheme, equity participation, wholesale financing and technical support for the private sector.

[106] Lesotho National Development Corporation News (July-September 2011)p 6.

[107] R. Tangri (1993) Foreign Business and Political Unrest in Lesotho *African Affairs* p223 – 238.

[108] Ministry of Trade and Industry (2019) National African Growth Opportunity Act (AGOA) Response Strategy and Action Plan for Lesotho 2019-2025, p10; AGOA is a non-reciprocal unilateral trade preference program that provides duty-free (and largely quota-free) access into the United States (U.S.) market for products from eligible Sub-Saharan African countries. The Act has been in existence for over 18 years and has been amended six times since its enactment on May 18, 2000. The latest iteration from July 2015 to September 2025 is the longest extension in the history of the trade deal with Sub-Saharan Africa (SSA). AGOA program aims to promote a free-market system, expand U.S.-African trade and investment, stimulate economic growth and assist SSA's integration into the global economy. The

More recently due to declines in competitiveness and COVID-19, garment factories have been closing in Lesotho.

Recent studies and reviews suggested the need to diversify away from textiles, to review the mandate and funding structure of LNDC and address perceived over-reliance on its investment in Maluti Mountain Brewery.[109] Reform suggestions in place include splitting the corporation into two entities, one focusing on the core mandate of investment promotion and the second on property management, with the latter function ultimately being privatized.

In 2018, the LNDC announced that it was re-organising its activities into four strategic business units - development finance, property development, investment and trade promotion, and corporate services.[110] Within the bounds of these strategic focus areas, the LNDC must reconsider its role as a shareholder in other trading and manufacturing businesses.[111] The role of an investment promotion and enterprise development institution has evolved in many countries with less emphasis on ownership or participation in ownership, and more emphasis on being an advocate for improving the investment climate and representing Government's view to investors and investors' views to Government.[112]

It is not necessary to retain shareholdings in companies that have been operating in Lesotho for some years to achieve the purpose of the LNDC in promoting investment and economic

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two focus areas for the AGOA program are to increase exports from AGOA eligible countries to the United States, and to encourage investment by U.S. firms into SSA.

[109]World Bank (2013) International Development Association Project Appraisal Document on a Proposed Credit in the Amount of SDT 8.7 Million (US$ 13.1 Million Equivalent) to the Kingdom of Lesotho for a Second Private Sector Competitiveness and Economic Diversification Project, p.2.

[110] See https://www.lndc.org.ls/content/our-organisational-structure; these has since been achieved.

[111] None performing companies that might require capital injection by shareholders.

[112] For instance, the Botswana Investment and Trade Centre (BITC) was established by an Act of Parliament in 2012 as an integrated Investment and Trade Promotion Authority (ITPA) with a mandate encompassing investment promotion and attraction, export promotion and development, and management of the Nation Brand. Through its critical role within Botswana's economy, BITC encourages domestic investment and expansion, promotes locally manufactured goods to regional and international markets, contributes towards improvement of the investment climate through policy advocacy, increases citizen participation in the economy and creates sustainable job opportunities (see https://www.gobotswana.com/who-we-are-and-role); on the other hand the Namibia Investment Centre (NIC) is Namibia's Investment Promotion Agency (IPA) operating as a department within the framework of the Ministry of Industrialisation and Trade, headed by a Deputy Executive Director. The NIC is the first port of call for local and foreign investors established in 1990 under the Foreign Investment Act No. 27 of 1990 (currently under review) with the major responsibility of promoting Foreign Direct Investment (FDI) (https://mit.gov.na/namibia-investment-center#:~:text).

development. Where a national development agency in a country holds shares in company start-ups as a form of support, it usually recycles and sells the shares to use the proceeds for alternative uses or supporting new start-ups. In addition, because the LNDC is mandated to participate in some investments and provide rents at discounted rates as part of the investment incentive, then to the extent that such activities are non-commercial, the LNDC will benefit from identifying market costs and prices and the effective social policy costs attached to the discounted rates that are applied.

Corporate governance remains key in ensuring that the LNDC achieves its main objectives. Currently, the corporation's board positions are all filled by the Minister of Trade, the Chief Executive is also appointed by the Minister through a process that is never transparent. This compromises governance at the helm of the corporation, thereby reducing chances of the corporations' success.

3.3.5 Basotho Enterprise Development Corporation (BEDCO)

Basotho Enterprise Development Corporation (BEDCO) is another 100 percent government owned statutory corporation. It began operations in 1975 as a subsidiary of the LNDC, however, it was formally established as a statutory corporation in 1980 through the Basotho Enterprise Development Corporation Act (as amended).[113] BEDCO has a principal objective of establishment and development of Basotho owned enterprises with particular emphasis on the promotion of indigenous entrepreneurial skills.[114] The focus of its operations is to support this mandate is the development of small and medium enterprises (SMEs) through training, technical and financial assistance, provision of work space and industrial estates and procurement of raw materials.[115]

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[113] No. 9 of 1980.

[114] The mandated of BEDCO is to promote the development of Basotho-owned enterprises and of Indigenous entrepreneurial skills and for connected purposes. BEDCO fulfills this mandate through facilitating the establishment and growth of Micro, Small and Medium Enterprises (MSME)s by performing the following functions: provision of business development support services, promotion and entrenchment of an entrepreneurial culture in Lesotho, facilitation of the establishment of incubation services, advocacy for an enabling regulatory framework and appropriate licensing regime for MSME and facilitation of access to finance and markets; https://www.bedco.org.ls/about-1 (accessed on March 2nd 2023).

[115]https://www.bedco.org.ls/about-1 (accessed on March 2nd 2023).

BEDCO carries out its mandate through activities including: enterprise establishment and development, technical and business management training to entrepreneurs and trainees in the various programmes, counselling assistance to entrepreneurs in all managerial skills providing entrepreneurs with technical know-how for quality control. Further it is involved in designing and marketing products, providing advisory service to entrepreneurs, provision of workspace by means of renting work units at subsidized rental rates in all estates among other responsibilities..[116]

Indications are that in practice BEDCO operates less as a commercial entity and more as a provider of services paid for by Government.[117] The Private Sector Development (PSD) unit of the Ministry of Finance has correctly identified BEDCO as one of the SOEs ripe for restructure and fundamental reform.[118] While its mission remains valid, the government needs to explore more financial effective mechanisms to achieve the same objectives.[119] Its main source of income by far is capital grants, mainly form the government which has grown over the years.[120]

Governance at BEDCO highly polarised by political overreach at the hands of Ministry of Small Business Development, which has since been absorbed into the Ministry of Trade and Industry, Business Development and Tourism. The Board positions are never filled through a transparent process.[121] The performance trend for BEDCO is, therefore, one of concern. Evidence suggests this is a key SOE ripe for restructure and fundamental reform. Its mission is valid, but government needs to explore more financial effective mechanisms to achieve the stated business objectives.

3.3.6 Maluti Mountain Brewery (MMB)

The Lesotho Brewing Company (Pty) Ltd, whose name was later changed to Maluti Mountain Brewery (MMB), was registered in 1980.[122] Through the LNDC the government has a controlling

[116] Note 9, supra p34.
[117] There are two types of SOEs; partially and wholly owned SOEs.
[118] Note 118, supra.
[119] Ibid.
[120] Note 9, supra p34.
[121] https://www.bedco.org.ls/about-1 (last accessed on February 18th, 2024).
[122]https://www.companies.org.ls/lesotho-companies-br/viewInstance/view.html?id=13c857736aeecb0a09b5d94dcd0806b1fbc3886517775839323a6d953c43145b&_timestamp=723515106721929 (last accessed on March 2nd, 2023).

(51%) stake, Lesotho Unit Trust holds 4.75%, Privatisation Unit (c/o Ministry of Finance) holds 5.25% and the minority but significant holding of SAB Miller – Africa BV 39%.[123] While the government has a controlling stake in MMB, SAB Miller – Africa BV t/a AB InBev has management rights, meaning it is responsible for the day to day running of the business operations..[124] MMB brews beer brands owned by AB InBev under license and is a franchised bottler of the Coca-Cola Company.[125] MMB also has distribution agreements with various alcohol companies for distribution of wines, spirits and alcoholic beverages through its subsidiary the Lesotho Liquor Distributors (LLD).[126]

Recently, there was a proposal to separate the soft drinks business to create two companies, with MMB (and AB InBev) concentrating on beer production and alcoholic drinks, while the new company, in partnership with Coca-Cola will produce the soft drinks. Thus Coca-Cola Beverages Lesotho (Pty) Ltd has been incorporated with LNDC holding 55.3%, the Government holding 5.3% Coca-Cola SABCO (Pty) Ltd holds 39.4%. This company has purchased the soft drinks assets of MMB.[127] There may be agreement to share bottling and packing facilities.

The performance trend for MMB has been attractive for LNDC and the government with consistent profitability and dividend payments.[128] That said, profit growth has been a little erratic in recent time, with some annual dips in growth, however the current trend is upward, meaning that there is not just profitability but growth in the profit returns.[129] This is one SOE that may be used to benchmark potential impact of good governance on performance of SOEs in Lesotho. MMB has a benefit of governance standards that comes with the management agreement with AB InBev. This has resulted in less political interference within MMB.

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[123]https://www.companies.org.ls/lesotho-companies-br/viewInstance/view.html?id=13c857736aeecb0a09b5d94dcd0806b1fbc38865177758392e88124ab8320462&_timestamp=974502724348920 (last accessed on March 2nd, 2023).
[124] Note 9, supra p34.
[125] Ibid.
[126] Ibid.
[127]https://www.just-drinks.com/news/coca-cola-beverages-africa-enters-lesotho-with-maluti-mountain-breweries-purchase/ (last accessed on March 2nd 2023).
[128] See the Consolidated Report on the Annual Budget and Estimates of Revenue and Expenditures for the Financial Year 2024/2025 available on https://nationalassembly.parliament.ls/wp-content/uploads/2024/03/Report-on-Performance-and-Estimates.pdf (last accessed on February 18th 2025).
[129] Ibid.

3.3.7 Econet Telecom Lesotho (ETL)

Econet Telecom Lesotho (Pty) Ltd (ETL) is a successor of the Lesotho Telecommunications Corporation (LTC).[130] The need to expand access to telecommunications services, improve affordability, reliability and the quality of telecommunications services and attract investment into the country forced the government to privatise LTC.[131] In pursuance of this policy position, the Lesotho Telecommunications Authority (LTA) Act[132] was passed by Parliament in June 2000 to establish an independent regulatory authority and LTC was concurrently incorporated under the then Companies Act as Telecom Lesotho (TCL) to act as service provider.[133] The regulatory authority was mandated to ensure that telecommunications service providers in Lesotho conduct their business in an efficient, ethical and productive manner that would protect and serve the interests of consumers. Seventy percent (70%) of the Government's shareholding in Telecom Lesotho was sold in November 2000 to Mountain Communications (Pty) Ltd and the Government retained 30% for eventual sale to *Basotho* investors.

Mountain Communication (Pty) Ltd is wholly held by Econet Global Limited.[134] It began operations in 1998 with mobile phone companies in Botswana and Zimbabwe.[135] Today Econet operates in 23 African countries through two strategic business units which cover mobile telephony (Econet Wireless), digital technology and platforms (Casava Technologies) and the corporate social enterprises (Higher Life Foundation). The three entities are represented in the Lesotho market: Econet Telecom Lesotho is in the mobile telephony space, Sasai Econet Financial

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[130] Lesotho Telecommunications Corporation (LTC) was created by the Telecommunications Act No. 12 of 1979 as a limited liability corporation wholly owned by the Government of Lesotho.
[131] T.V. Makafane (2005) "The Impact of Privatisation: Ownership and Corporate Performance in Lesotho" (an unpublished masters thesis) p55.
[132] No. 5 of 2000.
[133] Note 130, supra.
[134]https://www.companies.org.ls/lesotho-companies-br/viewInstance/view.html?id=13c857736aeecb0a09b5d94dcd0806b1521892f98e0e49056f723ce1f5e9f464&_timestamp=1752429859677425 (last accessed on March 3 2023).
[135] https://www.econetafrica.com/about-econet (last accessed on March 3 2023).

Services (former Casava Fintech Lesotho)[136] is in the fintech and insuretech space while Higher Life Foundation Lesotho remains the social enterprise arm.

The Econet Telecom Lesotho board is composed of ten members; representatives of the majority shareholder who are mainly qualified and experienced professionals in various fields and some representatives of the minority shareholder. In most cases, the minority shareholder nominates politicians to the board. This reduces the efficacy of the board, however, the majority shareholder nominees mitigate the risk of too much political interference.[137] In the next chapter, Econet Telecom Lesotho will be considered as a case study of the impact of good corporate governance on the performance of the company.

3.5 Regulatory Universe of SOEs in Lesotho

As discussed above, the SOE sector in Lesotho was first created in the 1970s with the objective of promoting domestic investment and at that time the SOE sector accounted for a large part of the economy.[138] Based on the discussions above, it is safe to conclude that much of the sector has since been fully or partially privatized as part of the government's initiative to downsize the sector and increase its efficiency. The privatisation project was launched mid-1990s, with associated structural changes such as the creation of independent regulators for the public utilities.[139] To date, the sector remains strategic to the country's economic development and growth.[140]

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[136] Sasai Econet Financial Services (Pty) Ltd is a wholly held subsidiary of Econet Telecom Lesotho (Pty) Ltd. Its main focus is to sell two Econet products, namely EcoCash and EcoSure. EcoCash is a mobile money product that aims at ensuring financial inclusion of all, particularly those in informal sector and in the rural areas. EcoSure is an insuretech product that offers affordable life assurance products and various short term insurance products.

[137] For instance, in terms of the Econet Telecom Lesotho's shareholders agreement, 10% stake entitles a shareholder to one board position, now the Government of Lesottho has 30% which gives it three board positions while Mountain Communications has 70% and seven directors. For a long time, former minister of mining, Mr Lebohang Thotanyana was appointed to serve on the ETL board after losing elections at constituency level.

[138] The World Bank (2016) "Lesotho State Owned Enterprises: A Country's Policy" Note – Report No.: ACS19193.

[139] Ibid.

[140] The World Bank, note 165, supra, reports that 'although some SOEs are loss-making, Lesotho has one of the better performing SOE sectors in sub-Saharan Africa, contributing between 2 and 5% of Gross Domestic Product (GDP) to the national budget—mostly due to mining.'

3.5.1 Constitutional Framework

Lesotho's path to democracy has been difficult and uncertain. The country was declared a British protectorate on the 12th March 1868.[141] The then Basotholand protectorate (as Lesotho was known then) gained independence from Great Britain on the 4th October 1966. The newly found independence was premised on the Constitution of Lesotho 1965.[142] Democratic rule ended in 1970 when the then Prime Minister and the leader of Basotho National Party, Chief Leabua Jonathan suspended the Constitution.[143] Chief Jonathan retained power for sixteen years until he

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[141]The proclamation of the Kingdom as a British Protectorate on March 12, 1868 secured the Basotho from Boer aggression, but did not bring an end to its troubles, for conflict within the Kingdom and between the Basotho and the British was to resurface. The annexation of Lesotho in 1868 by Great Britain has been interpreted by historians in various ways (see for instance M.M. Lelimo (1998) The Reasons for the Annexation of Lesotho 1868: a New Perspective). Most have emphasised the economic, humanitarian and moral factors which compelled Lord Wadehouse (1826-1902) to declare Basotho to be British subjects. While these factors were real and cannot be ignored, the more important to the British at that time and the immediate cause of the annexation at that point in time were Britain's regional geo-political concerns: particularly, their quest to prevent the then Orange Free State (OFS) from breaking out of the neo-colonial framework imposed on it by Britain through the Bloemfontein Convention of 1854. Put differently, if the OFS were to overrun Lesotho (as they have always attempted) and head for the Transkei coast, it could then be in a position to establish independent relations with foreign powers through Port St. John's. Lelimo argues that this factor has been down played or even forgotten by most historians. The new perspective articulated by Lelimo in his unpublished thesis seeks to place it back on centre-stage. Prior to the annexation, the Britain had already decided upon a policy of abandoning the OFS, the only question which needed to be answered was this: What status would Moshoeshoe, her traditional ally, enjoy under the new dispensation. Sir Clerk, entrusted with the task of disentangling Britain from the OFS, gave Moshoeshoe strong assurances concerning his land claims while at the same time he told the white settlers in the OFS the opposite, thus leaving the border situation confused and unresolved. Clerk also agreed to the white settlers' request for an embargo on arms and ammunition against the Basotho. Britain's claimed neutrality was thus highly advantageous to the newly formed Orange Free State. In 1861, Moshoeshoe formally asked to become a subject of the Queen. This request was followed up carefully but, unfortunately, came to nothing. However, seven years later Basotho were terribly humbled in battle during the Second and Third Basotho-Boer Wars, the British then acted to save the Basotho from complete defeat, fearing as indicated above that a victorious OFS would then push on to the coast/and break out of the encirclement imposed on it by Britain. The historical legacy of injustice from this period has never been forgotten by the Basotho nation. The issue of Lesotho's Conquered Territory, lost to the Orange Free State with the blessing of Britain, is still alive, thus the recent debates on reclaiming the conquered territory from South Africa by the 11th Parliament of Lesotho was not a surprise to many.

[142] The Constitution provided for responsible self-government and independence. It created a typical Westminster-style political system, with the Paramount Chief in a non-executive position and a prime minister with executive powers, heading the government. The legislature was to be bicameral, consisting of a national assembly of 60 members elected in single-member constituencies, and a senate made up of the 22 principal chiefs and other royal nominees.

[143]https://uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/lesotho-1966-present/ (accessed on March 27 2023), Parliamentary elections were held on January 27, 1970. Basotho Congress Party (BCP) won 36 out of 60 seats in the National Assembly while BNP won 23 seats in the National Assembly. Prime Minister Leabua Jonathan, nullified the results of the parliamentary elections and declared a state-of-emergency on January 30, 1970. He suspended the constitution and stripped King Moshoeshoe II of political authority. The government arrested and jailed Ntsu Mokhehle, the then leader of the BCP, and place Tsepo Mohaleroe, leader of the royalist Marematlou Freedom Party (MFP), under house arrest. On February 10, 1970, Prime Minister Leabua Jonathan issued a decree (Lesotho Order No. 1 of 1970) establishing a provisional constitution.

was toppled in a military coup in 1986.[144] The Military Council ushered the nation to the restoration of democracy through the 1993 general elections.[145] The elections were preceded by the adoption of the current Constitution.[146] The 1993 general election led to the establishment of a political dispensation based on the universal franchise.

The hallmark of the new political environment is the Constitution that was adopted in 1993. As the supreme law in the country,[147] it provides the legal foundation for the existence of the Kingdom,[148] articulates the rights and duties of its citizens[149] and defines the structure of the government,[150] including those of the SOEs.

The SOEs constitute an important delivery arm of the State therefore, human rights must feature prominently. The human rights culture was a deliberate act of the government post 1993, considering the historical past that was characterized by suspension of the constitution and democracy. In an attempt to reverse decades of socio political injustices, the Constitution had to place emphasis on human rights issues. In buttressing these values, Chapter II and III of the Constitution makes reference to rights such as equality, freedom of expression and association, political and property rights, access to health care, education, access to information, and access to courts. The mandates of the SOEs are bound by these provisions, which means their governance and management policies and procedures must reflect the same values systems as enshrined in the Constitution.

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[144] https://www.sahistory.org.za/dated-event/military-coup-deposes-lesotho-government (accessed on March 27 2023), on 15 January 1986, General Justin Lekhanya, the Head of the Lesotho Army, ousted the prime minister in a military *coup*. Lekhanya announced that all executive and legislative powers would be returned to King Moshoeshoe II, who would rule through a military council chaired by Lekhanya.

[145] Ibid, by February 1990, a power struggle had developed between Lekhanya and King Moshoeshoe II and the king was forced to go into exile in the United Kingdom. His son, Letsie III, was crowned king later the same month, but was seen as a puppet of Lakhanya. In April 1991, Lekhanya was removed from power in a military *coup* led by Colonel Elias Tutsoane Ramaema. Ramaema announced a schedule for Lesotho's return to democracy. All political parties were soon allowed to operate in the country and Moshoeshoe returned from exile in July 1992, though not as monarch, but as a tribal chief. Democracy was restored in 1993. The elections were postponed on several occasions because of technical difficulties (flaws in the voters' lists and the need to redraw some constituency boundaries). They finally took place once the date had been set on January 14, 1993, with 241 candidates vying for the 65 seats at stake.

[146] The Constitution was adopted on April 2, 1993.

[147] See section 2 of the Constitution.

[148] See section 1 of the Constitution.

[149] See chapter II of the Constitution.

[150] See chapter V, VI, VII and XI of the Constitution.

3.5.2 Legislative Framework

The state's relationship with the SOEs is mainly based on some legislative framework. Most of the SOEs in Lesotho are incorporated under the Companies Act, the only three exceptions being the LNDC, BEDCO and the Lesotho Tourism Development Corporation (LTDC) which, as discussed above, have their own founding legislation. As alluded to earlier, there is no single legislation laying governance foundation for governance of SOEs, thus information relating to governance of SOEs is not formally documented and easily accessible.

3.5.2.1 Regulation of SOEs Under Companies Act

The Companies Act[151] does not make a specific reference to SOEs, however, as discussed above, most SOEs in Lesotho are incorporated under the Companies Act and, therefore, regulated by the Act. Over and above being incorporated under the Companies Act, SOEs may give the shareholder-representative the latitude to prescribe further compliance obligations for incorporated SOEs.

The Companies Act makes provision for the issuing and transfer of shares[152] and the registration and contents of articles of incorporation of all companies including the corporate SOEs.[153] It sets out shareholder rights and obligations, including those for minority shareholders such as the right to information on company activities.[154] It dictates the role and procedures for appointing[155] and dismissing the Boards of Directors[156] and the need for directors to avoid conflicts of interest,[157] but it does not spell out competency or evaluation criteria for directors. It obliges the companies to prepare annual audited financial statements and to issue these within three months of the end of the financial year.[158] The government as a shareholder in SOEs does not have a compliance unit to ensure that these compliance obligations placed on SOEs are met.

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[151] Act No.18 of 2011.
[152] See sections 22 – 28 of the Act read with regulation 15 of the Companies Regulations 2012.
[153] See section 6 of the Act.
[154] See section 32 – 55 of the Act.
[155] See section 58 of the Act read with regulation 16 of the Companies Regulations 2012.
[156] See section 73 of the Act read with regulation 53 of the Companies Regulations 2012.
[157] See section 65 of the Act read with regulation 49 of the Companies Regulations 2012.
[158] See section 94 of the Act read with regulation 71 of the Companies Regulations 2012.

3.5.2.2 Regulation of SOEs Under the Public Financial Management and Accountability

Other legal instruments governing the sector include the Public Financial Management and Accountability Act (PFMA).[159] Part VI of the PFMA Act governs the management and accountability of those public funds placed under the control of public enterprises.[160] It requires the production by public enterprises of financial statements according to international financial reporting standards (IFRS). It restricts the ability of public enterprises to borrow, dispose of assets or deal in financial derivatives without the prior approval of the Minister of Finance.[161] It requires regular reporting to the Ministry of Finance in consultation with the line minister responsible for the enterprise, including submission of annual financial statements.[162] It also requires the line Minister to submit annual financial and operational reports to Parliament within six months after the end of the financial year with copies to the Minister of Finance.[163] The Act requires the Auditor General to audit the financial statements of all public enterprises.

3.5.3 Soft Regulation of SOEs

3.5.3.1 The Public Sector Development Unit

In practice, the Private Sector Development (PSD) Unit[164] within the Ministry of Finance is tasked with overseeing and monitoring the SOE sector.[165] The PSD Unit is housed under the Ministry of Finance and Development Planning. On the other hand, the Auditor General's Office is charged

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[159] Act No.12 of 2011.

[160] Part VI covers issues like responsibilities of chief executive officers in SOEs, SOEs activities that require prior approval of the minister, integration of SOEs budget with the government budgeting process, SOEs reporting and relationship with line ministries, presentation of AFS to parliament and the role of auditor general in SOEs.

[161] See section 41 of the PFMA Act.

[162] See section 43 of the PFMA Act.

[163] See section 44 of the PFMA Act.

[164] While there are continuing efforts towards improving the legal framework for ownership and control of Government investments, the Private Sector Development Division (PSD) of Ministry of Finance (MoF) currently has an objective to assess and report on the performance of nominated entities, classified for this purpose, as SOEs. The classifications and thus inclusions (and exclusions) may change over time as greater attention is given to the legal issues and efforts are made towards reform of the Government's ownership portfolio.

[165] The Unit has a Director and ten professional staff. PSD Unit provided the mission with a great deal of support in organizing meetings and in ad hoc data collection.

with the responsibility of auditing SOE accounts while the Public Accounts Committee of the Parliament receives these audited accounts for review.[166] While there are opportunities for improving the legal and regulatory framework for the SOEs, more could be done to ensure that the existing system functioned better. The Public Financial Management and Accountability (PFMA) Act[167] empowers the Ministry of Finance to receive audited financial statements from the SOEs on a timely basis, the PSD Unit is not receiving these statements regularly.[168] The Board members of the SOEs are also not reporting back to the SOE oversight unit.[169] The Unit is, therefore, not able effectively to monitor or analyze SOE sector performance or its impact on public finances, including, the net budgetary burden of the sector.

As discussed above, the ownership structure for the SOE sector in Lesotho is fully decentralized, as confirmed in the various legal texts governing the sector, and as seen in practice.[170] The wholly

[166] Note 165, supra.

[167] No. 12 of 2011; Part VI of the Public Financial Management and Accountability Act governs the management and accountability of those public funds placed under the control of public enterprises. It requires the production by public enterprises of financial statements according to international financial reporting standards (IFRS). It restricts the ability of public enterprises to borrow, dispose of assets or deal in financial derivatives without the prior approval of the Minister of Finance. It requires regular reporting to the Ministry of Finance in consultation with the line minister responsible for the enterprise, including submission of annual financial statements. It also requires the line Minister to submit annual financial and operational reports to Parliament within six months after the end of the financial year with copies to the Minister of Finance. The Act requires the Auditor General to audit the financial statements of all public enterprises.

[168] The purpose of the financial statements being submitted to the PSD, as the 'Regulator' is to provide information about the financial results of operations, financial position and cash flows of the SOE. This information is used by the Regulator to make decisions regarding the allocation of resources. At a more refined level, there is a different purpose associated with each of the financial statements. The income statement informs the Regulator about the ability of the SOE to generate a profit. In addition, it reveals the volume of sales, and the nature of the various types of expenses, depending upon how expense information is aggregated. When reviewed over multiple time periods, the income statement can also be used to analyze trends in the results of SOE operations. The purpose of the balance sheet is to inform the reader about the current status of the business as of the date listed on the balance sheet. This information is used to estimate the liquidity, funding and debt position of an entity, and is the basis for a number of liquidity ratios. Finally, the purpose of the statement of cash flows is to show the nature of cash receipts and cash disbursements, by a variety of categories. This information is of considerable use, since cash flows do not always match the sales and expenses shown in the income statement.

[169] Directors nominated by the government to different SOE Boards are required to give quarterly and sometimes annual reports to the nominating Ministry and the PSD. This requirement is normally spelled out in their letters of nominations. However, the reporting is never done, mainly due to the caliber of individuals nominated to serve on SOEs Boards.

[170] OECD (2021) "Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices" 2021; At page 19 the OECD defines decentralized ownership model as follows: 'In countries with a decentralised ownership model, no one single institution or state actor acts on the responsibilities of the ownership function (Argentina, Canada, Denmark, Germany, Japan, Mexico, Saudi Arabia, Tunisia and Ukraine). In the decentralised

owned SOEs and partial shareholdings are supervised by the applicable line ministries, this has the effect of diluting the element of regulation or compliance that may otherwise be instilled by the government if ever SOE sector had a centralized compliance unit. In countries with traditional decentralized SOE ownership structures such as Lesotho, central monitoring and coordination of the SOE sector policy is often a challenge.[171]

Disadvantages of decentralized structures globally include increased scope for political interference in SOE activities, confusion between ownership and regulatory functions in line ministries, fragmented and diffused accountability, insufficient ownership capacity and lack of adequate oversight of the sector as a whole.[172] Lesotho has already taken the positive step of corporatizing most of its SOEs to improve SOE autonomy, this followed privatisation which had the effect of reducing the size of the SOE sector in Lesotho to a more manageable size. Lesotho has also made progress in creating independent regulators for public utilities, which has reduced the conflict between the ownership and regulatory functions. But since the winding down of the privatization program, the central oversight function of the SOE sector within Ministry of Finance has deteriorated to the extent that there is no effective sector wide monitoring. The government does not have the systems to monitor the performance or fiscal implications of the sector that are needed to hold companies to account and to implement an effective SOE sector policy.

3.5.3.2 The Mohlomi Corporate Governance Code

3.5.3.2.1 Brief Background of the Code

In his first political announcement which was on March 9th 1832, Abraham Lincoln, the 16th President of the United States of America wrote, 'I desire to see a time when morality [or ethics in

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model, the ownership of each SOE is conducted by one line-ministry or other government institution. Various institutions are typically involved...In this case, SOEs could be often publicly perceived as an extension of the ministerial powers of the ownership ministries.'

171 Note 165, supra.

172 Ibid.

public administration and governance] shall become much more general than at present.'[173] Like Lincoln Chief Mohlomi (1720-1815), a Mosotho moral philosopher, seemed to have understood the importance and need for moral education in the Basotho society of his time in present-day Lesotho. Chief Mohlomi aimed his moral teachings at the society or community he was living in and the problems of his time. The societal issues that Mohlomi's people struggled with at the end of the 18th century were the abuse of power by chiefs, armed conflict between clans and tribes, alcohol and dagga abuse, witchcraft, and the weak position of women and children. Most of the Mohlomi's proverbial sayings that have become a part of Basotho morality, and indeed survived until present-day Lesotho had to do with these issues, -, that is, the absence of ethics or morality in the public administration and governance of society of his time.[174]

The well documented history of violent and fragmented socio-political dispersal among Basotho tribes was well known to Mohlomi, who was convinced that it was 'a needless and self-defeating way of life'.[175] This conviction shaped his administration and governance of public affairs in confronting the moral problems of his time.

Mohlomi was a chief, a herbalist and a philosopher, he was also popular for predicting rain.[176] He had an academy, where African chiefs brought their heirs to be natured in leadership.[177] He also travelled around Southern Africa delivering lectures on leadership.[178] King Moshoeshoe I, the

[173]Lincoln, A. (1932). First Political Announcement. (Last accessed on August 12, 2022 from http://www.abrahamlincolnonline.org/lincoln/speeches/1832.htm).
[174] K Mofuoa (2021) Chief Mohlomi: A Mosotho Model of Ethics and Morality in Public Administration and Governance *Journal of Public Administration and Governance* Vol 11 No 1. The article is also available online on the following link (last accessed on August 20th 2023) https://www.macrothink.org/journal/index.php/jpag/article/view/17950/pdf This article presents Chief Mohlomi, as a model of ethics and morality in public administration and governance from whom today's public administrators can learn valuable lessons. The article contends that Mohlomi could provide legendary insights (or wisdom) into the adjustments required to thical thinking for public administration and governance in contemporary times.
[175] L.B.B.J Machobane (2008) Mohlomi's Philosophy of Peace and its Infusion in the Southern African Region, 1720-1815, Morija, Lesotho: Friends of Morija Museum and Archives with Embassy of Ireland.
[176] K. Mofuoa and Khau M (2022) Rethinking Constructions of Difference: Lessons from Lesotho's Chief Mohlomi's Activism against the Gendering of Witchcraft (article available on https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2221-40702022000100007 accessed on September 17th 2023)
[177] K. Mofuoa, note 183 supra.
[178] Ibid.

founder of the Basotho nation is one of the disciples of this great leader.[179] His philosophical teachings were mainly based on peace and prosperity.[180] It is believed that his teachings led to the popular Basotho slogan and prayer *'Khotso! Pula! Nala!'* (this may literally be translated as: Peace! Rain! Peosperity!). 'Khotso' (peace) then became a Basotho landmark greeting. The Mohlomi Committee identified some governance themes from the life and teachings of chief Mohlomi.[181] These are prosperity and peace and they formed basis of the Mohlomi Corporate Governance Code, the first governance code for the Kingdom of Lesotho.

3.5.3.2 Brief Overview of the Code

The Code has a total of 22 principles which are divided into six clusters, namely; Board Leadership, Board Conduct, Board Composition, Structures and Remuneration, Audit, Compliance and Risk, Digitalisation Governance and Sustainability and Integrated Reporting. The Code applies to all organisations in all sectors, including: companies, SOEs, non-governmental organisations, corporations, not-for-profit companies[182] and non-profit organisations such as political parties and religious organisations.

The Code was prepared in a realistic manner, in informed by the local context and the local environment with the aim of addressing governance failure in all sectors, at all levels, in small and large organisations.[183] The size and nature of an organisation will inform the level of compliance

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[179] du Preez, M. (2012). The Socrates of Africa and his student: A case study of pre-colonial African leadership. *Leadership*, *8*(1), 7-15. (article available on https://doi.org/10.1177/1742715011426955 last accessed August 17 2023)

[180] Note 174, supra.

[181] The Mohlomi Committee consists of leading governance experts and representatives of key stakeholders in corporate governance in Lesotho. It has three components namely the Secretariat, Task Force and Quality Assurance Committee. The Secretariat was tasked to conduct a research on the status of corporate governance in Lesotho and present the findings to the Task Force for drafting of the Code. It was also responsible for providing all necessary support to facilitate the operations of the committee including keeping proper records and preparations of meetings. The Task Force was charged with the responsibility of drafting a Code based on the status of corporate governance in Lesotho and building on the international principles and practices of corporate governance. The Quality Assurance Committee on the other hand was responsible for testing the applicability of the draft code in order to provide independent analysis from people who were not involved in the drafting process (see https://iodlesotho.org.ls/mohlomi-committee/).

[182] Botlhale, EK 'Corporate governance in state-owned enterprises in Lesotho' (2020) *Social Responsibility Journal*, *17*(3).

[183] Corporate governance is an ecosystem made up of public companies, SMEs, non-profit organisations, and institutional investors such as retirement funds and public sector entities. All of these types of organisations affect the

with the Code, which is based on a value system in which principles and practices are just a guide. Thus, in order to manage the cost of compliance and allow some flexibility in governance, the Code prescribes different compliance approaches to different entities. The Code is principles based and it requires organisations to apply the principles in their own context and/or explain their application.[184]

The Code is based on the three outcomes; peace, productivity and intergenerational value. The Code outline principles in chapters which align to the core theme in a logical manner. To simplify compliance with the Code, there are recommended practices that explain the means and ways of implementation of the Code. The Code appreciates that some sectors have unique organisations that may have challenges aligning with the recommended practices. Such organisations are permitted to adapt their own practices provided that and for as long as those practices are more rigorous and show better accountability that the Code's recommended practices.[185]

The Code recognises that major players in the modern-day economy of Lesotho are subsidiaries of foreign-based companies that claim to be using group governance framework.[186] However, in most instances, governance and reporting of the group and its subsidiaries work in opposite

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governance of one another in the bigger ecosystem. The Mohlomi Code, therefore, is designed to make it more accessible for users across this eco-system by: using a vocabulary that indicates the Code's applicability to all organisations. Thus, the Code talks about 'organisations' rather 'businesses' or 'companies'; providing supplements to help organisations across a variety of sectors and organisational types to interpret and implement the Code to suit their particular circumstances; providing guidance on how to scale the recommended practices in accordance proportionally, in line with the organisation's size and resources, and the extent and complexity of its activities.

[184] It is important to note that there is no attempt to make the Code law, it recognises that ethical behaviour is ultimately a matter of choice, thus the Code is a *voluntary* code. The Mohlomi Code's 'apply and explain' approach reflects this ethos, and prompts the board to apply its mind to achieving the principles, rather than simply following a set of rules blindly. Importantly, this approach also confers a great deal of flexibility on organisations. Each organisation operates in its own context; the Code's is flexible enough to be useful to all types of organisation. Hence, the Code focuses on the principles that inform what should be achieved, not on mandating specific actions. It is important to appreciate that the Code, like other other voluntary codes are intended as guides to help organisations achieve good governance principles through the adoption of governance practices in a way that does not unduly constrain them, and that is appropriate to their particular circumstances.
[185] The flexibility presented to organisations by the Mohlomi Code may still be insufficient and may lead to lack of standardization; as the latter is key for transparency, comparability and accountability. Thus there may be need for the Institute of Directors (Lesotho) to issue sector specific guidelines on the application of the principles contained in the Code.
[186] https://www.state.gov/reports/2021-investment-climate-statements/lesotho/

directions. In most instances, these arrangements undermine minority shareholders as the 'group' coerces the board of the subsidiaries to engage in upward delegation.[187]

The Mohlomi regime is the first attempt to institutionalise corporate governance in Lesotho. Some of the principles and practices contained in the Codes complement the Companies Act. For the SOE sector the Code is an attempt to customise corporate governance principles and practices to meet the specific needs and requirements of SOEs. Effectively, therefore, all principles and practices in the Code are applicable to SOEs. Since the Code has recently been introduced, it is still too early to examine its impact on the quality of governance in SOEs. It is worth noting that the sector has a public interest mandate and for that reason SOEs are set up to be responsible corporate citizens, this is fundamental to their core purpose. This assessment of SOEs merely reinforces the point made earlier in this research; that SOEs are public interest corporations that must be governed with public interest considerations in mind.[188]

One of the challenges with the Mohlomi regime is that it is a self-regulation mechanism that relies on the willingness of each SOE to implement the mechanism. Consequently, the Code faces the same efficacy limitations as other self-regulation instruments.[189] The new philosophy of apply and explain that underpins the Mohlomi regime assumes that all the corporate governance principles will be automatically and voluntarily applied, and an explanation offered on how they have been applied. However, in practice this, in itself, does not aid compliance, because the Code remains an unlegislated instrument to the extent that its principles and practices have not also been legislated.[190]

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[187] Upward delegation is an all too common phenomenon in the workplace where employees pass on their responsibilities and/or tasks back to their managers instead of handling them independently. In the context of board governance, upward delegation refers to instances where a board delegates its authority or power to make decisions to a different board. In Lesotho, this is rather common in subsidiaries of foreign companies where subsidiary boards seem to be delegating their powers to the group executive team.

[188] Thabane T and Snyman-Van Deventer E 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' *PER/PELJ* 2018(21) - DOI (available on http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2345).

[189] Self-regulation is a response to the failure or inefficiency of command-and-control regulation because the latter is inflexible, not adaptable and cumbersome. Self-regulation supposedly offers several benefits, including cost-effectiveness, since its development and enforcement rest with the corporate sector and not the state.

[190] The apply and explain philosophy adopted by the Mohlomi Code was initially adopted by King IV in South Africa. It notes that all principles contained in the Code are aspirations and ideals, fundamental to good corporate governance.

The Mohlomi regime is not a mandated or sanctioned self-regulatory regime. It is a purely voluntary self-regulatory mechanism, and compliance with such is often low, especially in non-regulated entities.[191] The other challenge is that the Mohlomi regime is overseen by an unlegislated voluntary body, namely the Institute of Directors Lesotho that does not possess any enforcement powers. Furthermore, the Institute of Directors Lesotho itself operates in an environment that lacks 'regulation of the regulators', otherwise known as 'meta-regulation'. All these detract from the efficacy of the Mohlomi regime as a mechanism for regulating the governance of SOEs.

3.6 Conclusion

This chapter has highlighted that Lesotho has already made attempts to improve the legal framework governing the SOEs. In line with international best practice most SOEs are now incorporated under the Companies Act and the three that are not have their own enabling acts which include corporate governance provisions similar to those in the Companies Act. The PFMA sets strict financial reporting requirements for SOEs including the use of International Financial Reporting Standards (IFRS) and requires the submission of full financial statements on a timely basis to the Ministry of Finance.[192] Sector specific legislation regulates SOEs operating in the mining and financial sectors and in line with good international practice there are independent regulators for the water, power and telecoms sectors. However, there remains a corporate governance deficit in the SOE sector, as outlined above, and some adjustments may be required to the legal framework to address them, but the absence of the legal framework itself appears not to

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Therefore, it is assumed that companies (and in this context SOEs) will apply them. Additionally, companies are expected to explain the practices they have followed in the application of the principles. For a detailed account of the evolution of the apply and explain philosophy that underpins the King and Mohlomi Codes, see Parmi Natesan 'Onwards and upwards for corporate governance' (2017) 1 *The Corporate Report: Facilitating Business in South Africa* 9–12.

[191] The fact that the Mohlomi Code is not legally binding in itself does not mean that there are no legal consequences arising from non-compliance. A court will consider the Code when evaluating what is regarded as practice in a particular situation, especially where governance duties are involved. Failure to meet corporate governance practice, and by implication the principles set out in the Code, may invoke liability of the board in certain circumstances.

[192] International Financial Reporting Standards (IFRS) are a set of accounting standards that govern how particular types of transactions and events should be reported in financial statements.

be the main obstacle to the practice of good corporate governance in Lesotho's SOE sector, culture seems to be the main obstacle. The adage that ‘culture eats strategy for breakfast’ may be true for Lesotho.[193] A review of the provisions of the laws and regulations governing the SOEs should be done to improve corporate governance practices and a particular emphasis on compliance.

The decentralized ownership model adopted for SOEs in Lesotho requires central monitoring and coordination. The current monitoring and coordination by the PSD in Lesotho is not as effective as it needs to be. As mentioned above, this is not necessarily due to shortcomings in the legal framework. The Ministry of Finance is represented on many SOE boards probably with the intension of introducing some elements of monitoring and coordination. However, there is no effective central coordinated monitoring of SOE performance by either the Ministry of Finance or any other entity in Lesotho. The PSD Unit of Ministry of Finance in theory has this responsibility but in practice is not exercising it fully nor is it capacitated enough for this role. In the context of the growing challenges facing the SOE sector and increasing pressures on public finances, urgent corrective action is needed. Lesotho might consider moving to a more centralized oversight model with emphasis on compliance.

Lastly, the government's representation on SOE boards in Lesotho is inadequate**.** A review of a sample of founding documents shows that there are few requirements for SOE boards to be staffed with individuals who have the necessary competencies. The process for nominating government’s representatives on SOE boards appears to be ad hoc and there are no processes for monitoring or evaluating SOE board directors' performance or holding them accountable. Thus there remains a need to consider revising the nomination process for SOE board membership.

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[193] S. Conmy (2022) What does Culture Eats Strategy for Breakfast Mean? (available on https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-does-culture-eats-strategy-for-breakfastmean/#:~:text=In%20summary%20%E2%80%93%20What%20does%20'Culture,who%20implement%20the%20plan%20matter).

CHAPTER FOUR: COMPARATIVE STUDY – SOUTH AFRICA

4.1 Introduction

This research considers the nature of ownership and control of SOEs in other jurisdictions, namely: South Africa and Singapore. As mentioned in the Chapter one, South Africa has been selected because of its proximity and influence over Lesotho while the Singapore has been chosen because of the successes of its state-owned enterprises and their contribution to the economic growth and development. This chapter focuses on SOEs in South Africa. It discusses the the role played by the government as a shareholder, the nomination or appointment of directors, political influence in governance and considers whether there are lessons that could be drawn from South Africa for Lesotho. This is not to suggest in any way that the any of the two jurisdictions have the best SOEs in the world.

4.2 Brief History of SOEs in South Africa

SOEs have always been an important component of the South African economy as they helped shape the South African economy from the times of the apartheid regime with great success.[1] During apartheid, SOEs had multiple roles but their main objective seems to have been that of economic enablers supplying strategic and cost effective inputs for the industrialisation of the economy, such as energy.[2] Unfortunately, the apartheid regime also used SOEs to pursue one of its strategic objectives of providing race-based employment that empowered one race over the

[1] See William Gumede *The Political Economy of State Owned Enterprises Restructuring in South Africa* (2016) Journal of Governance & Public Policy Vol 6 Iss 2 69-97.

[2] There is one system of industrialisation known as minerals–energy complex (MEC) where certain core sectors of the economy, namely, mining and electricity, are mutually reinforcing as a system for accumulation, to the detriment of other sectors of the economy. See Ben Fine and Zavareh Rustomjee *The Political Economy of South Africa: From Minerals energy Complex to Industrialisation* (1996). One may argue that SOEs played a major role in entrenching MEC in the South African context.

other, particularly the white minority over the majority black. This was known as 'civilised labour', as it reserved employment opportunities for the white minority at the helm of the labour hierarchy.[3]

It follows, therefore, that the same SOEs were instrumental in perpetuating economic suppression of the black South African community.[4] For instance, Armscor was instrumental in supressing the 1976 Soweto uprising and similar uproars by manufacturing and supplying weapons to the apartheid police.[5] On the same wavelength, it is important to note that the South African SOEs played a major role of countering the dominance of foreign companies in the economy, particularly in the mining sector.[6]

When apartheid was at its peak in South Africa, Armscor actively assisted in protecting the government of the day from possible international sanctions by, among other things, beneficiating natural resources so that South Africa was at all material times secure at least in two material aspects of the economy i.e. energy and fuel.[7] Clark concisely encapsulates the nature and role of the apartheid South African SOEs as follows:

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[3] See Edwin Ritchken 'The evolution of state-owned enterprises in South Africa' in OECD State-owned Enterprises in the Development Process (2015) 176–177, available at https://repository.uneca.org/bitstream/handle/10855/45908/b11994538.pdf?sequence=1&isAllowed=y (accessed 10 December 2023).

[4] United Nations Economic Commision for Africa '*Governance of State-owned enterprises in South Africa: enhancing performance, efficiency and service delivery*' (2021), available at https://repository.uneca.org/bitstream/handle/10855/45908/b11994538.pdf?sequence=1&isAllowed=y (accessed on 10 December 2023); South Africa has used State-owned enterprises (SOEs) for economic development, in particular to expand productive capacities and foster economic growth. The first major SOE, the Electricity Supply Commission (Eskom), was established in 1923 to support industrialization while taking advantage of the vast coal resources that the country possessed. Eskom was followed by other entities such as Telkom Limited (wireline and wireless telecommunications provider) and Rand Water (a water utility) in the first decade of the twentieth century, which became the powerhouses of the economy. At various times, these entities suffered governance and operational weaknesses and the Government came under intense pressure to privatize them in the 1960s; however, the two-pronged objective for SOE establishment, which is socioeconomic development and financial sustainability, made it difficult to heed the privatization calls. Furthermore, under the apartheid era, these SOEs were in the service of a small white minority – a key constituency for the apartheid era Government – either through reserving jobs for white South Africans or nurturing a racially exclusive entrepreneurial class.

[5] Nancy Clark *Manufacturing Apartheid: State Corporations in South Africa* (1994) xiii (the preface).

[6] Merle Lipton *Capitalism and Apartheid South Africa*, 1910–1986 (David Philip Publishers,1989). SOCs were used to protect the local economy against foreign domination by propping up white oligarchs.

[77] Rogerson, C. M. "Defending Apartheid: Armscor and the Geography of Military Production in South Africa" . (1990) 3 (22) *Geo Journal* 241–50); Cock, J. & Nathan, L. (eds), War and Society, pp. 217-231, Cape Town & Johannesburg: David Philip, 1989; Simpson, G. (1989) "The Politics and Economics of the Armaments Industry in South Africa" In Cock, J. Nathan, L. (eds), *War and Society*. Cape Town & Johannesburg: David Philip.

> State corporations, rather than embodying narrow political interests, operated on a complex series of political and economic planes. They did not function exclusively as pork barrels, or solely as part of the security apparatus, or, alternatively, as 'tools of capital'. Their histories reveal that, rather than being monolithic and changeless institutions operating under predetermined objectives, they were ever-changing organizations affected by … complex problems ... attendant on enforced racial stratification in South Africa.[8]

It is clear, therefore, that the common foundation on which these apartheid-era SOEs were build on was that the then South Africa was an apartheid state and at the same time, an emerging economy that required growth in a somehow unorthodox socio-political setting. Thus, it was important for the state to create vibrant national icons that could advance and sustain the political, social and economic objectives of the apartheid state while at the same time combatting sanctions and uneasy economic domination by multinational players.[9] These SOEs were successful in sustaining the apartheid South Africa eco-system until the early 1990s, when the apartheid regime succumbed to the domestic and international pressure.[10]

International sanctions which were imposed on South Africa then, forced the apartheid government to reduce spending and generate income. Thus, the government resorted to privatising some SOEs.[11] This coincided with the then-increasing international trend to privatise SOEs.[12] While the apartheid government was determined to move for the privatisation of SOEs, privatisation never actually gained much traction due to the transition negotiations that were simultaneously taking

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[8] Clark *op cit* note 5 at preface xiii.
[9] Edwin Ritchken 'The evolution of state-owned enterprises in South Africa' in OECD State-owned Enterprises in the Development Process (2015) 176–177, available at https://library.oapen.org/bitstream/id/2da37281-52fa-48f3-83a4-dd3b881c1415/9781776342389.pdf (accessed December 15, 2023). See also Clark *op cit* note 5 at 163.
[10] See South African History Online available at https://www.sahistory.org.za/article/negotiations-and-transition (accessed on February 10 2024) - On his opening speech to parliament on 2 February 1990 De Klerk announced the unbanning of political organizations and the release of imprisoned political leaders. This was followed by another announcement at a press conference on 10 February 1990, that Mandela would be released the next day. On 11 February Mandela was finally released from Victor Verster Prison after spending a total of 27 years in prison. These events set the stage for the commencement of negotiations between the ANC and the NP.
[11] Anne Pitcher *'Was privatisation necessary and did it work? The case of South Africa'* Review of African Political Economy Vol 39 No 132 June 2012 243-260.
[12] Sunita Kiken *Privatisation of State Owned Enterprises: A Summary of Experience* The Governance Brief Issue 47, 2022 available at https://www.adb.org/sites/default/files/publication/843206/governance-brief-047-privatization-state-owned-enterprises.pdf (accessed on February 25 2024).

place in an attempt to establish the new South Africa based on democratic ethos.[13] The negotiations led to the 1994 elections that gave birth to the new democratic South Africa. The incoming government aborted the privatisation project. For the new government, privatisation of core SOEs was viewed as a way of 'denying it the jewels of the state'.[14] Clark notes that white labour force was also opposed to privatisation, they feared that the capitalistic drive for profits would result in cheap black labour being favoured post privatisation.[15]

From the discussion above, it is clear that the basic rationale for state ownership during apartheid era was both political and economic. SOEs were instrumental in the modelling and delivery of a racialised domestic economic development. However, the apartheid-era SOEs were also competitive and vibrant economic players that drove growth of the South African economy while preserving the apartheid character.

After the new democratic dispensation had taken over the governance in South Africa, the international pressure to privatise South African SOEs continued. To some extent, the government gave in, the privatisation policy was finally adopted in 1985.[16] However, the government did not go through the full blown privatization.[17] The democratic government's general attitude to a greater extend favoured restructuring of SOEs over privatization.[18] The new government had a different understanding about the role of SOEs in the socio-economic development of the country. In the new and democratic South Africa, SOEs are viewed as strategic enablers of the developmental state.[19]

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[13] Patrick Bond and Greg Ruiters *South Africa's Failed Infrastructure Privatisation and Deregulation* available at https://www.cadtm.org/spip.php?page=imprimer&id_article=22289 (accessed on February 25 2024).

[14] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town).

[15] Clark *op cit* note 5 at 168.

[16] D Mahadea (1988) Returning the State's assets to the private sector: A review of the case for privatisation, Development Southern Africa, 5:2, 142-154 (available on https://doi.org/10.1080/03768358808439390 last accessed on January 17 2025).

[17] James Jude Hentz '*The two faces of privatisation: Political and economic logics in transitional South Africa*' (2000) 38 Journal of Modern African Studies 203–223.

[18] See the Presidential State-Owned Enterprises Review Committee Report (2013) (PRC Report) titled 'Restructuring of state-owned enterprises in South Africa' available at https://www.gov.za/sites/default/files/gcis_document/201409/presreview.pdf (accessed 21 December 2024).

[19] SOEs play a significant role in the South African economy, dominating key network industries. SOEs are prevalent in the utilities, transportation, and communications sectors as well as the provision of developmental financial services. Given SOEs' varied roles in supplying key inputs for businesses and their significant share in real gross capital formation (averaging 13 percent of total in the last five years), SOEs' operations are an important determinant of the

The democratic government has demonstrated lack of conceptual and policy discipline because it has faltered between state ownership and privatisation in a rather confused way.[20] The confusion is aggravated by the lack of an unambiguous ownership policy that clearly enunciates, elucidates and prioritises the national strategic objectives that must be fulfilled through state ownership and that define the role of different stakeholders in governance of SOEs.[21] This confusion arising from a clear ownership policy is demonstrated by the fact that South Africa at some point semi-privatised some SOEs, but then reversed the transactions after a couple of years.[22] For instance, twenty per cent stake in SAA was sold to Swiss Air in 1999 but reversed in 2001.[23] Yet another twenty per cent stake in Airports Company South Africa (ACSA) was sold to an Italian airports management firm in 1998, however, the transaction was also reversed in 2005 and then transferred to the Public Investment Corporation (PIC), a wholly state-owned corporation.[24] Some scholars have argued that this 'flirtation with privatisation in the form of mixed ownership is indicative of a lack of policy direction on state ownership and a confused ownership model'.[25] A clear policy position on ownership and control of SOEs would inform the government's decisions regarding the creation, termination, retention, or co-ownership of SOEs.[26]

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productivity and the competitiveness of the economy. As recipients of substantial support from the budget in the form of transfers and guarantees, SOEs create large direct costs and are an important source of fiscal risks in the form of contingent liabilities. See Simone A and Wang Z *The Role of SOEs in South Africa: Issues and Policy Options* (International Monetary Fund).

[20] Chitty, Clyde. "Privatisation and Marketisation." *Oxford Review of Education* 23, no. 1 (1997): 45–62 (available on http://www.jstor.org/stable/1050656).

[21] As the IMF puts it "There is no formal ownership policy for SOEs nor a periodic re-evaluation of the relevance of their objectives", see See Simone A and Wang Z *The Role of SOEs in South Africa: Issues and Policy Options* (International Monetary Fund) available on https://www.elibrary.imf.org/downloadpdf/journals/002/2022/038/article-A002-en.xml#:~:text=For%20Eskom%2C%20for%20example%2C%20the,the%20relevance%20of%20their%20objectives (last accessed on January 17th 2025); Oqubay A *The Strategy and Governance of SOEs in Africa: Lessons Leart and Policy Implications* (SARChl Industrial Development Working Paper Series – January 2024) available on https://www.uj.ac.za/wp-content/uploads/2021/10/sarchi-wp-2024-01-oqubay-a--january-2024.pdf (last accessed on January 17 2025).

[22] United Nations Economic Committee for Africa – *Governance of State Owned Enterprises in South Afria* (available on https://repository.uneca.org/bitstream/handle/10855/45908/b11994538.pdf?sequence=1&isAllowed=y last accessed on January 17 2025).

[23] See https://mg.co.za/article/2001-11-23-sa-to-buy-back-20-swissair-stake-in-saa/ (accessed on January 17 2025).

[24] See the ACSA Company Profile, available at https://www.airports.co.za/about-us/airports-company/company-profile (accessed 17 December 2024).

[25] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p92.

[26] OECD Guidelines on Corporate Governance of State-Owned Enterprises (2014) p5, the OECD recommends that. The government should develop an ownership policy. The policy should inter alia define the overall rationales for

The privatisation and restructuring agenda of SOEs has changed since the year 2004.[27] The South African SOEs are now geared towards the realisation of the developmental state.[28] It is perhaps important to note that the Freedom Charter advocates for state ownership of the strategic sectors of the economy and views their primary role as the delivery of public goods and services.[29] It is easy and logical, therefore, to argue that the rationale of state ownership in South Africa which is mainly geared for the realisation of the developmental state has its origions in the Freedom Charter.[30]

In pursuit of the Freedom Charter's objective , the Department of Public Enterprises (DPE) adopted a new vision to pursue investment in, and the productivity and transformation of SOEs, in order to unleash the much needed economic growth, economic development, drive industrialisation, and create jobs.[31] This vision is backed by the mission that envisages South African SOEs as 'strategic instruments of industrial policy and core players in the New Growth Path'.[32] It is clear from these objectives that the South African government's ideology of state ownership is to control the market forces in order to foster capital accumulation (private and public) but in a transformative and inclusive manner. It follows, therefore, that it would not be

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state ownership, the state's role in the corporate governance of SOEs, and how the government will implement its ownership policy.

[27] The idea of privatization of SOEs was first introduces in South Africa through a 'white paper on privatisation and deregulation in the Republic of South Africa' in 1987. See United Nations Economic Committee for Africa – *Governance of State Owned Enterprises in South Afria* (available on https://repository.uneca.org/bitstream/handle/10855/45908/b11994538.pdf?sequence=1&isAllowed=y last accessed on January 17 2025).

[28] Edwin Ritchken 'The evolution of state-owned enterprises in South Africa' in OECD State-owned Enterprises in the Development Process (2015) 168.

[29] The Freedom Charter was the statement of core principles of the South African Congress Alliance, which consisted of the African National Congress (ANC) and its allies: the South African Indian Congress, the South African Congress of Democrats and the Coloured People's Congress. It is characterised by its opening demand, 'The People Shall Govern!' The Charter was officially adopted on June 26, 1955 at a gathering of about 3,000 people, known as the Congress of the People in Kliptown, Soweto. The Charter proclaims that strategic sectors must be under state control.

[30] The freedom Charter has a clause titled 'People Shall Share in the Country's Wealth' under which the Charter provides: 'the mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole'. See https://www.anc1912.org.za/the-freedom-charter-2/ (last accessed on January 17 2025)

[31] See the Department of Public Enterprises Strategic Plan 2015/16-2018/19. The Strategic Plan observes that The State's involvement within a developmental state is critical due to its ability to influence change and place the economy onto a new growth trajectory. It can do this through emphasis being placed onto three primary levers: Strategy development, financial intervention and technological capacity creation.

[32] See the vision and mission of the Department of Public Enterprises at https://dpe.gov.za/about/ (accessed 12 December 2023).

wrong to conclude that SOEs are South African vehicles of economic growth, service delivery, and transformation.

4.3 The Nature of State Ownership (in SOEs) in South Africa

As discussed in chapter one, state ownership in SOEs is traditionally exercised through one of the following four forms: decentralised, dual, centralised, or the twin-track model.[33] Under the decentralisation model, the state's ownership is spread across government departments (or ministries as the case may be).[34] There is no one agency, unit, ministry or department exercising shareholder powers on behalf of the state throughout all SOEs and providing oversight over the governance of the same SOEs.[35] The main advantages of this model of ownership lie in the sector expertise that various departments have in their respective sectors and their competence to device an appropriate industrial policy.[36] The decentralised model presupposes that the line ministries or departments have sufficient expertise and the ability to design and implement a practical industrial policy.[37] This is in turn based on the premise that the sector departments or ministries have the capacity to also play meaningful oversight and shareholder roles over SOEs.[38] The decentralisation model has been mostly criticised for failing to appreciate the need for separation of the ownership function from other roles, such as the regulatory role.[39] In most instances, where this model of ownership is employed, a single department or ministry plays several roles i.e. ownership, policy formulation and regulation regarding the SOEs, once this is the case, the ministry or department is

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[33] See 1.3.3 above.
[34] OECD (2021), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices 2021, https://www.oecd.org/corporate/ownership-and-governance-of-state-owned-enterprises-a-compendiumof-national-practices.htm (accessed on January 17 2025).
[35] At some point South Africa had the Department of Public Enterprises, however, the department has not been part of all regimes, even when the department existed, it did not exercise shareholder powers with respect to all SOEs as a policy position. See https://nationalgovernment.co.za/units/view/32/department-of-public-enterprises-dpe (last accessed on January 17 2025).
[36] Ibid.
[37] OECD (2024), Ownership and Governance of State-Owned Enterprises 2024, OECD Publishing, Paris, https://doi.org/10.1787/395c9956-en (accessed on 17 January 2025).
[38] Ibid.
[39] Mazzucato, M. & Gasperin, S. (2023). Transforming the system of SOEs in South Africa: A proposal for a mission-oriented state holding company. UCL Institute for Innovation and Public Purpose, Policy Brief series (IIPP PB 27). Available at: https://www.ucl.ac.uk/bartlett/public-purpose/pb-27 (accessed on January 17 2025).

likely to get ‘too close’ to the affairs of the SOEs and this is likely to result in predisposition to interfere in the running of the day-to-day business of the SOE.[40]

On the other hand, under the centralisation model of ownership, the ownership function is located in one department or agency that has been tasked by the government to exercise such function.[41] This model may easily be applauded for making positive movement towards achieving separation of the ownership function from other functions of state, for instance the function of state as industrial policy formulator and that of the regulator.[42] Another advantage of centralisation is that it simplifies the issue of accountability, as SOEs do not have to achieve inconsistent objectives.[43] In some jurisdictions such as Singapore, centralisation manifests itself in the form of a state holding company.[44] In such instances, the ownership of all SOEs lies with a single holding entity, which owns shares in all SOEs on behalf of the government.[45] Some advantages of this model may be the fact that it reduces political interference in the running of the day-to-day business of the SOEs, thus giving their boards more flexibility, agility, autonomy and authority.[46]

Then there is a dual model of ownership, this dictates that there should be two departments or ministries that collectively share the ownership responsibility for the state in SOEs.[47] In most cases, this arrangement involves a line (industry) department or ministry and a ‘common’ department or ministry, usually the finance ministry or department. The justification for the two-pronged approach ownership is that the finance ministry or department will focus more on the

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[40] Ibid.
[41] Moreno de Acevedo Sánchez, Enrique. 2016. *State-owned Enterprise Management: Advantages of Centralized Models*. https://doi.org/10.18235/0007966 (accessed on 17 January 2024).
[42] Ibid.
[43] Park, Chung-a (2020) : Enhancing the transparency and accountability of stateowned enterprises, ADBI Working Paper Series, No. 1070, Asian Development Bank Institute (ADBI), Tokyo available at https://www.econstor.eu/handle/10419/238427 (accessed on January 17 2025).
[44] Ho Khai Leong *‘Corporate governance reform and the management of the GLCs: Pressures, problems, and paradoxes’* in Ho Khai Leong (Ed) Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulation (2005) 269–299. Leong discusses the evolution of Singapore’s Government Linked Corporations (GLCs), with particular interest in Temasak Holdings, which owns most (if not all) Singapore’s commercial GLCs. He goes on to discuss the ideology underpinning Temasak, as well as the challenges it faces. (e-book available at https://bookshop.iseas.edu.sg/publication/1150#contents)
[45] For instance, the Singapore SOEs ownership model is centered on Temasek, the SOE holding company. See Paiva-Silva, João, 2022. "Understanding the Singaporean approach to state ownership: ‘commercially viable strategic alignment’ in historical perspective," Structural Change and Economic Dynamics, Elsevier, vol. 61(C), pages 43-58.
[46] OECD State-Owned Enterprises in the Development Process (2015).
[47] This model is followed in Australia, Brazil, Croatia, Czech Republic, Indonesia, Romania and Switzerland. See OECD (2021), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices 2021.

financial and economic wellbeing of the while the line ministry or department focuses solely on ensuring that the SOEs are successfully run from a technical viewpoint. This model presents states that subscribe to it with an 'enhanced balance between the government's regulatory, industrial policy and financial perspectives' as the two ministries or departments fulfilling the shareholder role bring different expertise to the ownership arrangement.[48] On the other hand, this may pose a challenge because these departments or ministries may have opposing shareholder expectations and objectives, this would then threaten the SOEs ability to fulfil all of them instantaneously.[49]

Lastly, there is a 'twin track model' of ownership available for states with interest in SOEs.[50] This model is somewhat combination of the dual and centralised models. Under this model, state categorises SOEs of the land into two categories or portfolios that are owned and overseen by two different government, agencies, ministries, or departments. This model appears dual in nature because of the involvement of two state agencies, departments, or ministries.[51] On the other hand, having SOEs grouped into two and each SOE owned by a single institution also makes the model appear centralised.[52] However, the fact is, the twin track model is not dual nor is it centralised. The argument in favour of a dual model is easily crushed by the fact that there are two government establishments that do not exercise the shareholder functions concurrently and they do not discharge the same function over the same SOE. The same goes for the argument in favour of a centralised model. This argument is flawed since there is no one state establishment that exercises ownership functions over all SOEs, as is the case with a centralised model. To understand the twin track model, one must appreciate that there are two broad portfolios (twin tracks) of SOEs, ordinarily, these SOEs are segmented into commercial and non-commercial tracks, with two distinct shareholder establishments overseeing each track.

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[48] William Witherell *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) available on https://www.emerald.com/insight/content/doi/10.1108/IJPSM-09-2015-0166/full/html (accessed on Jan 5 2024)

[49] See Enrique Moreno de Acevendo Sanchez *State-Owned Enterprises Management: Advantages of Centralised Models* available on https://www.researchgate.net/publication/304498501_StateOwned_Enterprises_Management_Advantages_of_Centralized_Models (last accessed on January 17 2025).

[50] This model is applied in Belgium and Turkey. See OECD *op cit* note 47 at 33.

[51] Ibid.

[52] See Thabane T "Rebooting State-Owned Companies in South Africa: Exploring the Viability of Singapore's State Holding Company (Temasek) Model of Ownership and Control" (2024) 27-PER / PELJDOI http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17022 (last accessed on January 17 2024).

Having explained the models of ownership, the next logical step is to try and locate the South African model of ownership with respect to SOEs. The first glance at the South African SOEs landscape appears centralised, this is so since there is a dedicated department i.e. the Department of Public Enterprises (the DPE) that owns 'some' SOEs of the land.[53] However, further interrogation of the SOEs landscape in South Africa reveals that the DPE does not exercise the shareholder functions with respect to all South African SOEs. There are some SOEs that are overseen by different sector departments. This, therefore, is suggestive of the decentralised model.[54] Research reveals that there are instances where the National Treasury plays some ownership function over SOEs that are already under the radar of other departments, such as the DPE.[55] The SOEs in South Africa are subject to the Public Finance Management Act (PFMA), the implementation of this Act is primarily administered by the National Treasury.[56] This adds a different dimension that suggests that the South African ownership model is dual.[57]

A closer look and analysis of South African SOEs leads one to the following findings: some SOEs are owned by their line departments while others fall within the DPE and not their sector departments. There is not enough literature to explain the rationale for the semi-centralised ownership by the DPE and there is no literature explaining why some SOEs get moved from one shareholder to another within the same government's departments. The result of this uncertainty on ownership is that different shareholder expectations, objectives and policies are imposed on businesses that fall within the same environment. The same uncertainty results in failure to control

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[53] For instance, the DPE exercises the shareholder functions over Transnet, SAA, South African Express, Eskom, Denel, SAFCOL and Alexkor.

[54] Several sector departments in South Africa own SOEs that fall within their sector. For example, the Department of Telecommunications and Postal Services owns and oversees the government's shareholding in Telkom, Broadband Infraco, Sentech and the South African Post Office (SAPO), to mention a few. The South African National Treasury exercises sole ownership control over the Public Investment Corporation (PIC) and the Development Bank of Southern Africa (DBSA) and the Department of Transport owns Airports Company South Africa (ACSA).

[55] https://www.treasury.gov.za/publications/other/soe/governance%20oversight%20role.pdf (last accessed on January 17 2025).

[56] For instance, all SOEs must consult and get approval from the National Treasury before purchasing or disposing of any significant assets or borrowing beyond a certain materiality point.

[57] The South African model is confusing in that it appears dual but also decentralised. For instance, SAA was transferred from the DPE to the National Treasury in 2004, the rationale for this move was to capacitate the Treasury exercise the shareholder rights over the SOE so that it could help to stabilise its financial position. The state never advanced reasons why the then shareholder i.e. minister of the DPE could not help to stabilise the airline or why the Minister of Finance could not assist with its stabilisation without assuming the role of shareholder position.

interactions between SOEs that should reasonably be in group ownership.[58] Therefore, one can conclude that the South African SOE ownership model is puzzling at best and irrational at worst.[59]

4.4 Regulatory Universe of SOEs in South Africa

The laws governing South African SOEs can broadly be divided into three categories.[60] These categories are: 'hard regulation', this is basically all legislation (primary or otherwise) and the regulations that are binding on SOEs.[61] It is worth noting that SOEs in South Africa (like in several other jurisdictions), are subjected to laws that only apply to them simply by virtue of being public-sector entities and the same SOEs are bound by other laws that are applicable to all other types of corporations.[62] Second category would be 'soft regulation' which basically refers to all non-binding yet persuasive and at times voluntary principles and practices.[63] There is certain soft regulatory framework that is only applicable to SOEs, simply because they are public entities. The third and last category is difficult to categorise, however, this is regulation that emanates from judicial and quasi-judicial pronouncements which are binding on South African SOEs. It is clear, therefore, that South African SOEs are subjected to stringent and multi-layered regulatory environment compared to ordinary corporate entities registered in South Africa. The question that remains to be answered is whether the SOEs regulatory universe helps to enhance corporate governance of SOEs.

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[58] For instance while SAA was transferred to the National Treasury, other state aviation businesses, like SA Express and Mango Airlines, remained with the DPE, in other words South African aviation businesses were 'owned' by different shareholders with different shareholder objectives and policies.

[59] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p100.

[60] John Farrar *'Corporate governance and the judges'* (2003) 15 Bond Law Review 65–101 at 67. See also Jean Jacques du Plessis et al Principles of Contemporary Corporate Governance (2005) 112–124.

[61] Marc Steffen Rapp, Thomas Schmidb and Michael Wolff *Hard or Soft Regulation of Corporate Governance* (available on https://www.efmaefm.org/0efmameetings/efma%20annual%20meetings/2012-Barcelona/papers/EFMA2012_0540_fullpaper.pdf last accessed on January 17 2025).

[62] The legal framework (legislation) that is particularly applicable to South African SOEs simply because they are state entities includes: the Preferential Procurement Policy Framework Act No. 5 of 2000; Prevention of Unfair Discrimination Act No. 4 of 2000; the Promotion of Administrative Justice Act No. 3 of 2000; Promotion of Access to Information Act No. 2 of 2000; the Promotion of Equality and the Intergovernmental Relations Framework Act No.13 of 2005. However, this research will not interrogate these statutes and the rationale behind this is the fact that they do not have direct bearing on the govern ance of SOEs.

[63] D K Smith 'Governing the Corporation: The Role of Soft Regulation' (2012) UNSWLawJl 16; (2012) 35(1) UNSW Law Journal 378.

4.4.1 Hard Regulation

4.4.1.1 The Public Finance Management Act and Treasury Regulations

The Public Finance Management Act (PFMA) is the anchor of the SOEs' hard regulatory universe. Its objective is to ensure sound management of public funds.[64] It is worth reiteratingthat the principal objective of the PFMA is to govern matters of financial management in the public sector, however, some of its provisions have direct bearing on the governance of SOEs. In terms of the PFMA, SOEs are required to create effective planning and budgeting mechanisms through which the department of finance can monitor their financial performance of the SOEs, and which can then be used by the shareholder representative to test compliance with the PFMA. The shareholder representative in SOEs is typically a member of the executive under whose portfolio the SOE falls and who is accountable to Parliament for the SOEs' performance.[65]

The shareholder-SOE relationship is regulated by an agreement that records the key performance areas which may loosely be viewed as a public interest mandate for the SOEs, this agreement may be referred to as shareholder's compact.[66] The agreement is designed to outline the SOEs' strategic objectives and communicate the SOE's long-term vision viewed as part of the national development priorities as well as clarifying its strategic objectives.[67] Despite the existence of annual agreements, a number of SOEs' performance remain below average while their governance

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[64] The preamble of the PFMA provides that the Act is intended 'to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.'

[65] See section 52 of the PFMA provides that SOEs must submit annual plans to the shareholder representatives indicating strategic objectives, key performance areas (and indicators), financial projections, expenditure etc; Sections 55(2) and 54(2) of the PFMA read with Treasury Regulation 28.3 require the boards to develop a 'materiality framework', which sets out the types of transactions and thresholds that require shareholder approval. This should be contrasted with section 115 of the Companies Act which restricts shareholders' approval powers to fundamental transactions; See also, Treasury Regulation 29.1 and National Treasury Practice Note 4 of 2009/10.

[66] Treasury Regulation 29.2.

[67] The statement strategic objectives would in most cases emanate from government policies, stakeholder engagements and recommendations to a particular SOE by the shareholder representative to ensure operational plans of the SOE remain aligned to the national development goals. These strategic objectives must always be reflected in the SOE's shareholder compact, corporate planning and its executives' performance contracts.

deteriorates to disturbing levels.[68] The efficiency of this agreement as a tool aimed at fostering good governance remains uncertain.

The PFMA tries to regulate ownership and control of the South African SOEs. The Act does this by conferring ownership control of SOEs on the shareholder representative. Section 1 of the Act defines ownership control in the following terms:

> "ownership control", in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities:
>
> a. to appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body;
> b. to appoint or remove that entity's chief executive officer;
> c. to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or
> d. to control all, or the majority of, the voting rights at a general meeting of that entity.

That definition should be read together with section 63 of the same Act which provides:

> 63. Financial responsibilities of executive authorities:
>
> (1) (a) Executive authorities of departments must perform their statutory functions within the limits of the funds authorised for the relevant vote.
>
> (b) In performing their statutory functions executive authorities must consider the monthly reports submitted to them in terms of section 39 (2) (b) and 40 (4) (c).
>
> (2) The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control

[68] Recently, some damning revelations were made by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, which was better known as the Zondo Commission or State Capture Commission. This is a public inquiry established in January 2018 by former President Jacob Zuma to investigate allegations of state capture, corruption, and fraud in the public sector in South Africa.

powers to ensure that that public entity complies with this Act and the financial policies of that executive.

Closer reading of the two clauses cited above reveals a fusion of roles that are normally reserved for the boards of directors with those roles that are typically discharged by shareholder.[69] The power to manage the affairs of a corporate are typically vested in the board of an entity, this is not a foreign concept to South African law.[70] This power that is typically vested in the board of directors includes, though not limited to, appointment of executives to serve the company. However, in the context of South African SOEs, such power is vested in the shareholder-representative. For instance, clause 14.3 of the Eskom's. Memorandum of Incorporation (MOI) provides as follows:

14.3 Process of appointment and removal of the Group Chief Executive

14.3.1 The Shareholder shall, on behalf of the Company, have the exclusive power, in exercising its Ownership Control pursuant to the provisions of sec 63 (2) of the PFMA, to appoint and remove the CE as an employee of the Company in accordance with the Guidelines.

The South African National Roads Agency Limited (SANRAL) Act also bestows similar powers on the shareholder-representative.[71] This approach is inconsistent with the well-established notion of separation of ownership and control. This does not only create two centres of power but also introduces political influence in the SOEs governance. The application of the PFMA goes beyond merely regulating financial management of public entities. The Act goes on to regulate issues relating to governance as well. For instance, the PFMA provides for the appointment and removal

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[69] Section 63(2) vests executive ownership control powers in the shareholder-representative which entails ensuring that SOEs comply with the Act. This role is typically entrusted to the directors with fiduciary duties.

[70] Section 66(1) of the South African Companies Act 2008 provides that: The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

[71] See South African National Roads Agency Limited Act No. 7 of 1998, sections 12 and 20 on the appointment and removal of the chief executive officer.

of directors, standards of directors' conduct, conflicts of interest, directors' personal liability, the role and function of the board, board committees, audits, and financial records.[72]

Some scholars have argued that the 'overlap between the PFMA and the Companies Act has a direct bearing on the quality of corporate governance in SOCs [SOEs] as it creates a lot of confusion'.[73] This confusion has been explained by an illustration that both Acts i.e. the Companies Act and the PFMA as read with the Treasury Regulations require that audit committees be established.[74] Sections 76(4)(b) and 77(a) of the PFMA read with regulation 3.1 of the Treasury Regulations provides that the majority of the audit committee must be non-executive directors. The Act goes on to provide that some of the committee members may in fact not be directors.[75] For one to appreciate the confusion, the above provision of the PFMA should be read side-by-side with the Companies Act. The Companies Act provides that a member of the audit committee must be a director of the company.[76] Moreover, in terms of the Companies Act,[77] the audit committee should be appointed by shareholders at an annual general meeting. The PFMA, however, provides that the audit committee must be appointed by the board in consultation with the executive authority i.e. the shareholder representative.[78] To further deepen the confusion, the PFMA does not require that the audit committee members should be independent directors, however, the Companies Act does.[79] Some scholars have opined that 'these examples exemplify the overlap and inconsistency between the two Acts, and also demonstrate that compliance and governance could, in the circumstances, be problematic, burdensome and confusing'.[80]

[72] See sections 36, 49, 50, 51, 55, and 58–62 of the PFMA as amended.
[73] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p62.
[74] The Regulations are issued pursuant to the provisions of the PFMA and are applicable to government departments, constitutional institutions and public institutions such as the SOEs. Available on https://www.treasury.gov.za/legislation/pfma/regulations/gazette_22219.pdf (accessed on February 15 2024).
[75] See section 77 of the Act.
[76] See section 94(4)(a) of the Act.
[77] See section 94(2) of the Act.
[78] See Treasury Regulation 3.1.2.
[79] Section 77(a)(i) of the Act provides that the audit committee must consist of at least three people one of whom must (in the case of a department, be from outside the public service.
[80] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State-Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p62.

The PFMA goes beyond the confusion discussed above. It goes on to regulate certain matters that other statutes, like the Companies Act does not cater for. The PFMA goes on to regulate powers of the executive authority (shareholder-representative) to approve annual budgets, corporate plans, and the shareholder's compact.[81] The PFMA further regulates the procurement of goods and services, partaking in public–private partnerships, borrowing, and funding by government.[82] It follows, therefore, that South African SOEs are subjected to more regulation compared to public companies operating in the same jurisdiction. Research has revealed that over-regulation of corporate entities does not only compromise corporate governance but also dents performance.[83] It follows, therefore, that one may reasonably conclude that over-regulation is one of the factors contributing to the fragile and weakening of governance within the SOE sector.

4.4.1.2 The Companies Act

The South African SOEs are all registered in terms of the Companies Act.[84] The public entities that are listed in schedule 2 of the PFMA are defined as State-Owned Companies (SOCs)[85] in the Companies Act. The SOEs are not always completely regulated by the Companies Act despite being incorporated under the Act.[86] Section 9(2)(a) of the Act gives the shareholder-representative the leeway to absolve some SOEs from strict compliance with the dictates of the Companies Act either 'totally, partially or conditionally'. In *Minister of Defence and Military Veterans v Motau and Others*[87] the Constitutional Court observed that:

> The effect of that provision [s 9(2)(a)] is that state-owned companies are for all intents and purposes to be treated as public companies unless a cabinet member [shareholder-

[81] See sections 51 and 52 read with regulation 29 of the Treasury Regulations.
[82] See section 66 read with Treasury Regulations 16 and 32.
[83] Bruno Valentina and Claessens Stijn 'Corporate governance and regulation: Can there be too much of a good thing?' (2007) World Bank Policy Research Working Paper No.4140. Available at https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-4140 (accessed on February 17 2024).
[84] See section 1 of the Companies Act No. 71 of 2008.
[85] However, for the purposes. Of this research, these SOCs are referred to as SOEs.
[86] Section 9(1) of the Companies Act provides that all provisions of the Companies Act applicable to public companies are also applicable to SOEs, however, the SOE may be absolved in terms of subsections (2) and (3).
[87] 2014 (8) BCLR 930 (CC); 2014 (5) 69 (CC).

> representative] has procured an exemption (in whole or part) from the obligations to comply with the Companies Act.[88]

The shareholder-representative may invoke the exemption ostensibly to accommodate the peculiar nature of the specific SOE. However, section 9(2)(b) of the Act, which applies to SOEs owned by municipalities, clearly states that an exemption or modification in the application of the Companies Act on such SOEs will only be valid if the purpose thereof is to avoid an 'overlap or duplication' with another applicable regulatory framework.[89] This provision draws a distinction between SOEs listed in schedule 2 of the PFMA (major SOEs) and those that are owned by the municipalities, it seeks to provide basis for the exemption with respect to the SOEs owned by municipalities, however, there is no rationale provided for the similar exemption with respect to major SOEs, this may pose threat to the governance of major SOEs. There is need for legislative guidance on this issue to avoid the impression that the shareholder-representative has unfettered discretion to decide whether to absolve the SOE from compliance with the Companies Act.

The provisions on exemptions or modifications of SOEs compliance obligations with respect to the Companies Act are being applied despite the absence clear legislative frame on regulating circumstances under which such exemption or modification would be justified. For instance, PRASA has been wholly exempted from the application of the Companies Act, without clear reasons for such exemption.[90] The confusion regarding the applicability of the Companies Act on an entity (SOE) is real in practice. Unfortunately, this confusion goes beyond individual entities (e.g. PRASA), it has in some instances affected courts.[91] This is most probably due to the fact that reasons for the exemption are not stated. Some scholars have concluded that 'this is a further example of the inelegance and confusing nature of the regulatory framework applicable' to SOEs.[92]

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[88] See para 74 of the judgement.

[89] SOEs are at liberty to conclude their Memoranda of Incorporation that take into consideration their state-ownership on matters that are not regulated by the Companies Act in terms of s 15(2) and by taking advantage of the alterable provisions of the Companies Act.

[90] See Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p64.

[91] Tebello Thabane *'The removal of directors in state-owned companies: Shareholders' franchise in jeopardy? Molefe and others v Minister of Transport and others'* (2018) 30 South African Mercantile Law Journal 155–171 at 163.

[92] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p65.

The SOEs' regulatory framework anticipates that there may be irreconcilable differences between the Companies Act and other dominant legislations applicable to major SOEs, such as the PFMA.[93] Section 5(4)(b) of the Companies Act, read with s 3(3) of the PFMA, provides that in such instances, the latter Act shall prevail. This have been frowned upon by governance scholars for two reasons.[94] Firstly, this may create legal uncertainty and secondly, this requires the boards of SOEs to have some basic legal appreciation or knowledge to detect legal inconsistencies, the extent of the complexity and then opt to apply the PFMA and not the Companies Act.[95] The exercise of assessing legal inconsistencies amounts to nothing short of legal interpretation which requires legal skills that the collective board may not easily possess at times.

These inconsistencies at times present challenges to the shareholder-representatives in the discharge of their statutory powers. For instance, in the case of *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*[96] the court had to decide whether section 71 of the Companies Act was applicable to the removal of directors of the SABC, an SOE, or whether the procedures laid down in sections 15 and 15A of the Broadcasting Act had to be followed. The court held that the removal provisions of the Companies Act that were relied upon by the shareholder-representative could not trump the Broadcasting Act, because the latter was specifically enacted to govern the affairs of the SABC. At paragraph 141 of the judgement, the court *per* Justice Matojane Held that:

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93 See the list of dominant legislation in section 5(4)(b)(i)(ee).

94 Tebello Thabane *The State Ownership and Control Architecture of South Africa's State Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p65.

95 See Victoria Bronstein and Morne Olivier 'An evaluation of the regulatory framework governing state-owned enterprises (SOEs) in the Republic of South Africa' Annexure to the Presidential Review Committee Report on State Owned Enterprises 2011 Available at https://www.researchgate.net/publication/272676645_AN_EVALUATION_OF_THE_REGULATORY_FRAMEWORK_GOVERNING_STATE_OWNED_ENTERPRISES_SOEs_IN_THE_REPUBLIC_OF_SOUTH_AFRICA_Annexure_to_the_Presidential_Review_Committee_Report_on_State_Owned_Enterprises_2011 (accessed on February 27 2024).

96 *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* (81056/14) [2017] ZAGPJHC 289 (17 October 2017). For a discussion of this case, see Rehana Cassim 'Removing directors of state-owned companies: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited (81056/14) [2017] ZAGPJHC 289' (2019) 40 Obiter 147–162. Available at https://journals.co.za/doi/epdf/10.10520/EJC-16cca27278 (accessed on 27 February 2024).

> The removal provisions of the Companies Act cannot be construed as applying to the SABC because the Broadcasting Act prevails over the Companies Act as it was specifically enacted to govern the operations of the SABC. The removal processes prescribed under the Companies Act denies members of the SABC Board security of tenure and thus undermine the independence of this SABC Board in a manner that is inconsistent with the Constitution.

It is evident, therefore, that though section 71 of the Companies Act is said to apply to the removal of directors of SOEs, there is considerable confusion on the issue in circumstances where the SOE is governed by specific legislation which also regulates the removal of directors. Confusion arises from the fact that SOEs are regulated by both the Companies Act and by their own specific legislation. *Minister of Defence v Motau* illustrates the complexity in this regard in that it may first have to be determined whether the dismissal power constitutes administrative action or executive action, and whether the Companies Act or Promotion of Administrative Justice Act (PAJA)[97] must be applied. Furthermore, the substantive criteria for the removal of directors of the SOEs may be contained in one piece of legislation regulating the SOE, while the procedural aspects may be contained in the other legislation.

In *Minister of Defence v Mutua*, the Constitutional Court succeeded in reading the Armaments Corporation of South Arica Limited Act[98] and the Companies Act concurrently. It is not, however, always possible to read the Companies Act concurrently with a statute that governs the affairs of a specific SOE, as is illustrated by *SOS Support Public Broadcasting Coalition v SABC.* A careful analysis must be made in each case to ascertain whether the provisions of the legislation governing the SOE and section 71 of the Companies Act may be applied concurrently and if not, which legislation should prevail.

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[97] No. 3 of 2000.
[98] No. 51 of 2003.

4.4.1.3 The Founding Legislation of SOEs

In South Africa, just like in Lesotho, some SOEs began trading as part of some government departments (or ministries as the case may be) and were later transformed into parastatals, until they were corporatised by founding legislation and later incorporated in terms of the Companies Act.[99] Unlike other companies, SOEs are not just incorporated under the Companies Act, over and above their incorporation, they are created by a specific statute. It is correct, therefore, to conclude that SOEs are creatures of statute. In most cases, the founding statutes provide for the legal succession of the parastatal into a corporation, its public mandate, and related matters, such as the applicability of the Companies Act to the newly formed SOE and the relationship between the state and the SOE.[100]

When discussing the regulatory universe applicable to South African SOEs, it is difficult or impossible to unpack one founding legislation. This is because the legal framework establishing these SOEs varies from one SOE to another and the limited application or lack of application of the Companies Act does not seem to have any explicable rational basis, particularly for major SOEs. Founding legislation even differ with respect to what may otherwise be referred to as fundamental pillars. For instance, the exemption adopted by the PRASA Act may be argued to be offensive towards section 9(3)(a) of the Companies Act, which provides that the exemption may be justified only if there is an alternative regulatory framework that aims at regulating aspects like those regulated by the Companies Act. The proper approach would therefore be non-exemption, adopted by both the Eskom and SAA Acts.

4.4.2 Soft Regulation

Soft law refers to quasi-legal instruments (like recommendations or guidelines) which unlike traditional law (hard law) do not have any legally binding force, or whose binding force is

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[99] Thabane note 67 *supra* defines corporatisation as the transformation of parastatals into incorporated corporations that are owned by the state but operate substantially independently of the state; See Michael Whincop '*Another side of accountability: The fiduciary concept and rent-seeking in the governance of government corporations*' (2002) 25 University of New South Wales Law Journal 379–407 at 380.

[100] For instance, see the Preamble to the Legal Succession to the South African Transport Services Act No. 9 of 1989 (as amended) establishing the Passenger Rail Agency of South Africa (PRASA).

somewhat weaker than the binding force of traditional law.[101] The term soft law initially emerged in the context international law, although more recently it has been transferred to other branches of domestic law as well.

4.4.2.1 The King Code

In 1994, the King Code which was formed at the instance of the Institute of Directors in Southern Africa, published the King Report on corporate governance, which was composed of a Code of Corporate Practices and Conduct.[102] This report was updated in 2002 by the King Report on Corporate Governance for South Africa 2002 (the King II Report), this was also composed of the Code of Corporate Practices and Conduct.[103] The King II Report was updated and replaced by the King Report on Governance for South Africa 2009 (the King III Report) and the King Code of Governance for South Africa 2009 (the King III Code).[104] From April 2017, corporate South Africa implemented the King IV Code on Corporate Governance.[105] The King IV Code on Corporate Governance builds on the strengths of King III and is based on the same philosophical foundations, but there has also been a refining and re-enforcement of key concepts.[106]

King IV is the first the first outcomes-based governance code in the world and modelled on the international framework.[107] In its own words, King IV 'does not represent a significant departure from the philosophical underpinnings of King III but there has been a refining on some concepts.[108] King IV had been described as the platinum standard of corporate governance codes, it aims at presenting corporate governance as a holistic and integrated set of arrangements that are aspirational outcomes as opposed to a set of rules.[109]

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[101] Dimity Kingsford Smith, 'Governing the Corporation: The Role of 'Soft Regulation' UNSW Law Journal Vol 35(1) 378.
[102] Farouk HI Cassim *et al* Contemporary Company law (2nd Ed) p473.
[103] Cassim note 75 *supra.*
[104] Ibid.
[105] https://www.nhbrc.org.za/wp-content/uploads/2016/11/King-IV-Summary-1-November-2016.pdf (accessed on January 17 2025).
[106] Ramani Naidoo *et al* Corporate Governance: An Essential Guide for South African Companies (3rd Ed) p47.
[107] https://integratedreporting.ifrs.org/news/iirc-welcomes-the-release-of-king-iv-as-south-africa-sets-a-new-global-standard-for-corporate-governance/ (accessed on 18 February 2024).
[108] Ramani Naidoo *supra* note 79, p48.
[109] King IV, p24.

Like its predecessors, King IV is a voluntary governance code, although still similar to King II and King III that came before it, however, some scholars has argued that some elements of the King IV is likely to be enacted into law or being incorporated through judicial interpretation.[110] For instance, in *Myburgh v Barinor Holdings (Pty) Ltd and Another*[111] the court accepted that based on the principles of King III, the executive positions of chief executive and finance director needed to be separate.

The King Code system is an effort by the Institute of Directors to institutionalise corporate governance in South Africa.[112] Thus, the codes are applicable to all companies including SOEs. The King IV contains a special sector supplement that regulates SOEs as unique public corporations.[113] King IV acknowledges that good corporate governance is important for the success of SOEs. The sector supplement on SOEs modifies corporate governance principles and practices to meet the specific needs and requirements of SOEs.[114] The supplement aids on how King IV should be interpreted and applied by SOEs. It follows, therefore, that all the King IV principles and practices are applicable to the South African SOEs as guided by the sector supplement.

Some of the principles and practices recommended by the King IV and the accompanying sector supplement are duplicated in some legislation such as the Companies Act. A practical example in this regard would be section 66(1) of the Companies Act, which is aligned to principle 6 of the King IV sector supplement on SOEs and emphasises that the accounting authority should serve as the focal point and custodian of corporate governance in the SOE. In this instance, therefore, the King system strengthens legislation. It is worth noting that the fact that the King principles are, in

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[110] Some aspects i.e. recommendations of the King II and. King III were incorporated into the Companies Act 2008; foe instance *SABC Ltd v Mpofu* [2009] JOL 23729 (GSJ).
[111] (C 820/13) [2015] ZALCCT 1.AZ
[112] See David Walker, Matodzi Ramashia and Faith Rambau 'Chapter 22: South Africa' in Willem Calkoen (ed) (2013) 3 *The Corporate Governance Review* 314.
[113] See KR Chauke and KN Motubatse *King IV State-Owned Enterprises: the Impact. On the SOE's Approach to. Governance in South Africa* a paper presented at the 5th Annual International Conference on Public Administration and Development Alternatives 07 - 09 October 2020, Virtual Conference, available at http://ulspace.ul.ac.za/bitstream/handle/10386/3216/chauke_king_2020.pdf?sequence=1&isAllowed=y (accessed on 15 February 2024)
[114] See Principle 1.3 of the King IV sector supplement for SOEs.

some details, similar to legislation does not mean that there is duplication or overlap with legislation. King IV is drafted in such a way that it notes that the applicable legislation only sets the minimum standards to be complied with, while the King system (Code and supplements) sets a higher standard. Thus, in line with the King IV, SOEs must work to achieve the higher standard in the interest of sound corporate governance.[115] Where there is clear conflict between the King system and any legislation, legislation takes preference as the King system is not binding.

The main challenge with the King system is that it is a voluntary self-regulation mechanism that relies on the willingness of each SOE to implement the mechanism.[116] Therefore, this system faces the same effectiveness limitations as other self-regulation instruments.[117] The new approach of apply and explain that has been adopted by the King IV assumes that all the corporate governance principles will be applied and an explanation offered on how each principle have been applied. However, in practice this does not help enforce compliance with the King system, the main challenge is that King system remains a voluntary and unlegislated system.[118]

4.4.2.2 The Protocol on Corporate Governance in the Private Sector

After the 1994 elections that led to a democratic majority government, the government found that some of the instruments for delivering basic services and carrying out policy were SOEs. However, their control and governance were not based on any standardized principles or rules.[119] These SOEs were organized in many different ways and subjected to a wide range of legislation and statutory

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[115] See Principle 2 of the King IV sector supplement for SOEs.

[116] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State-Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) p73.

[117] Some scholars have argued that Self-regulation often fails, and this is evidenced by ever-increasing corporate scandals and market failure. Companies such as Steinhoff, Pricewaterhouse Coopers (PWC), KPMG and McKinsey & Company have been implicated in grave accounting and auditing lapses bordering on, at the very least, corporate corruption. This has occurred despite heavy self-regulation of the industry by the South African Institute of Chartered Accountants (SAICA), the Independent Regulatory Board for Auditors (IRBA), the Institute of Directors in Southern Africa (IoDSA), and the JSE, among others. Notably the King regime is neither mandated nor sanctioned self-regulation. It is a purely voluntary self-regulation mechanism, and compliance with it is often low, compared with other forms of self-regulation.

[118] The apply and explain philosophy adopted by King IV accepts that all principles contained in the King Code are aspirations and ideals fundamental to sound corporate governance. Therefore, the assumption is that corporations will apply them. For a discussion of the evolution of the philosophy underpinning the King Codes, see Parmi Natesan 'Onwards and upwards for corporate governance' (2017) 1 *The Corporate Report: Facilitating Business in South Africa* 9–12.

[119] See the historical background as narrated in the Protocol on Corporate Governance in the Public Sector.

regulations. Some SOEs, acted as autonomous entities, having not had substantive direction or control from the previous government for a long period of time. In 1997, the new democratic government adopted the Protocol on Corporate Governance in the Public Sector (Protocol)[120] to bridge the gap in governance standards and with the aim of instilling rigorous corporate governance in SOEs. The adoption of King I by the private sector three years earlier also gave policy makers some motivation to adoption of the Protocol. The Protocol was substantially revised in 2002 to align it with King II, the then international developments, and what was considered as new legislation, such as the PFMA.

The Protocol has no legal force as it has not been passed as law of the land. It is an ambitious policy document designed to guide SOEs towards sound corporate governance. It is instrumental for those serving SOEs both tat the board and shareholder level. It can easily be used as a guiding tool on the practical implementation of the numerous rules and regulations applicable to SOEs. The Protocol adds an important value to the SOE regulatory framework because most founding statutes of SOEs fail to deal with issues of corporate governance in the SOE space. The Protocol was, therefore, adopted to provide the much-needed guidance on governance issues and attempts to set the governance tone applicable to all SOEs in South Africa. The Protocol further lays foundation for the regulatory framework that governs the relationship between shareholder-representatives and the boards of SOEs.

4.4.2 Fostering Corporate Governance through Judicial and Quasi-Judicial Activism

Some judicial and quasi-judicial pronouncements have the effect of entrenching principles of corporate governance with the SOEs environment. It follows, therefore, that regulation of SOEs does not begin and end with hard and soft regulation as discussed above, the two types of regulation merely cover most regulatory issues.

[120] Tebello Thabane and E Snyman-Van Deventer *Pathological Corporate Governance Deficiencies of South Africa's State Owned Companies: A Critical Reflection* (Vol 21) [2018] PER 49 available at https://www.saflii.org/za/journals/PER/2018/49.html accessed on March 3rd 2024.

4.4.2.1 Judicial Activism in SOEs Corporate Governance

As discussed above, corporate governance is highly characterised by legislation (hard regulation). Interpretation of statutes is the only form of art that is constitutionally reserved for the judiciary. As discussed above, legislation is supplemented by soft governance principles that the courts rely on to fill the gaps in legislation. Once litigated and rubber stamped by the judiciary, corporate governance principles and standards becomes justiciable as if they were enacted into law. For instance, the Court in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others*[121], referred to the King Code in interpreting directors' duties and the social responsibility of the company.[122] On the other hand, the principle of *ubuntu* as the preferred philosophical foundation that should guide SOEs board's conscience in making decisions in line with the King Code was stressed by the Court in *South African Broadcasting Corporation Limited v Mpofu and Another*.[123] The Court held that conduct of SOEs must be measured against the corporate governance standards set by the King Code, which directs SOEs to adhere to best practices. The Court went on to hold that directors in SOEs should not only comply with the minimum standards set by hard legislation but must also pursue to apply the best available practices even if set by voluntary regulatory framework.[124] This judgment was cited with the approval by Justice Davis in *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another*.[125]

[121] 2006 (5) SA 333 (W).
[122] See paragraph 16.7 of the judgement.
[123] [2009] 4 All SA 169 (GSJ).
[124] See paragraph 29 of the judgement.
[125] 2015 (6) SA 338 (WCC). There are several cases that also up-held corporate governance principles as contained in the King Codes for instance: *Democratic Alliance v South African Broadcasting Corporation SOC Ltd and Others* 2016 (3) SA 468 (WCC); *Mbethe v United Manganese of Kalahari (Pty) Ltd* (42213/2014) [2016] ZAGPJHC 8 (11 February 2016); Myburgh v Barinor Holdings (Pty) *Ltd and Another* (C 820/13) [2015] ZALCCT 1; *Caxton and CPT Publishers and Printers Limited v Media 24 Proprietary Limited and Others* (136/CAC/March 2015) [2015] ZAWCHC 209 (25 November 2015); *Bytes Technology Group and Others v Michael* (4586/10, 23511/11) [2014] ZAGPPHC 926 (25 November 2014); *Levenstein v S* [2013] 4 All SA 528 (SCA); *Kalahari Resources (Pty) Ltd v Arcelor Mittal SA and Others* [2012] 3 All SA 555 (GSJ); *Council for Medical Schemes and Another v Selfmed Medical Scheme and Another* (561/2010) [2011] ZASCA 207 (25 November 2011); *United Peoples Union of South Africa v Registrar of Labour Relations* (J2252/09) [2011] ZALCJHB 275 (15 February 2011); and *Randles v Chemical Specialist Ltd* [2010] 7 BLLR 730 (LC).

In *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*[126], the shareholder-representative's authority to appoint, remove, suspend and discipline SOE directors were tested. The Court held that the appointment of executive directors was a prerogative of the SOE's non-executive directors, the Court specifically highlighted that there is no requirement that the shareholder-representative should then approve the appointment. The Court went on to strike out a provision of the Memorandum of Incorporation that purported to vest the disciplinary authority over executive directors in the shareholder-representative. The Court held that a proper construction of the SABC founding legislation, the Broadcasting Act, the Companies Act and the Constitution demanded that this power vest solely in the SABC board.[127]

Cases cited above are a clear indication that South African judiciary has been instrumental in coining and entrenching principles of corporate governance in SOEs regulatory environment. Through judicial interventions, SOEs decisions have been aligned to the conventional corporate governance rules, principles and practices.

4.4.2.2 Quasi-Judicial Activism in SOEs Corporate Governance

There are several quasi-judicial bodies that have authority to make pronouncements that have a major role in development of corporate governance of SOEs in South Africa.[128] The first of these is the Companies and Intellectual Property Commission (the CIPC). The main objective of the CIPC is to monitor compliance with the Companies Act.[129] Most rulings of the CIPC are to the

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[126] (81056/14) [2017] ZAGPJHC 289 (17 October 2017).
[127] See paragraph 148 of the judgement.
[128] Companies and Intellectual Property Commission which is an agency of the Department of Trade, Industry and Competition in South Africa, established in terms of the Companies Act No. 71 of 2008 as a juristic person to function as an organ of state within public administration but outside the public service; the Competition Tribunal which is an independent adjudicative body established in terms of section 26 of the Competition Act No. 89 of 1998; and the Public Protector which is an independent institution established in terms of section 181 of the Constitution of South Africa, with a mandate to support and strengthen constitutional democracy. A supreme administrative oversight body, the Public Protector has the power to investigate, report on and remedy improper conduct in all state affairs.
[129] In terms of section 187(2)(b) of the Companies Act, the mandate of the CIPC is monitor compliance with the Act. With respect to SOEs, the CIPC focuses mainly on (but not limited to) the following: section 30 dealing with the preparation of annual financial statements; section 34 dealing with additional accountability requirements including the requirement that SOEs should comply with the extended accountability requirements as set out in Chapter 3 of the Act; section 45 which deals with loans or other financial assistance to directors; section 61(7) dealing with

effect that most SOEs fail to prepare financial statements in accordance with the prescribed international financial reporting standards, as required by both the Companies Act and the PFMA.[130] The CIPC has also made rulings on the involvement of some SOEs' audit committee members in the daily operations of the SOEs, thus lacking independence as anticipated by section 94 of the Companies Act.[131]

Upon realising that some boards of SOEs were not delivering up to the standard of compliance expected of directors, i.e. they were failing to deliver the necessary skill, care, and diligence reasonably expected of directors, the CIPC issued compliance notices directing them to comply or face probation under section 162 of the Companies Act.[132] The CIPC has been innovative with respect to its compliance notices. For instance, it issued a compliance notice directing the Chief Executive Officer and an executive director of a SOE to attend corporate governance classes on directors' duties after an irregular loan of ZAR 6 million was extended to the Chief Financial Officer of the SOE. The CIPC then ordered the reversal of the loan.[133]

The second quasi-judicial body whose pronouncement has ability to develop corporate governance for SOEs is the Competition Tribunal. The Competition Tribunal's main objective is to interpret and apply the Completion Act.[134] in discharging its duties, the Competition Tribunal has maintained that 'public entities [SOEs] enjoy neither preference nor prejudice by virtue of their official status when their actions are considered in terms of the Act'.[135]

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shareholders' meetings; section 66 dealing with board, directors and prescribed officers; then section 84 which covers application of the enhanced accountability requirements to SOEs.

[130] See Section 29(1) and s 55(1)(a) and (b) of the PFMA.

[131] Section 77 of the PFMA provides that the audit committee must consist of at least three persons, of which one must be outside of the public service. Also provided is that the majority of members of the committee may not be employees of the company, except with consent of the relevant shareholder-representative, and that the chairperson may not be an employee of the SOE. This aligns with King IV which recommends that the committee should comprise at least three members, all of whom should be independent non-executive directors.

[132] Section 162 of the Companies deals with the 'delinquency of directors' and provides that a court must declare a director as delinquent where they have failed to discharge their duties in terms of the Companies Act.

[133] Tshepiso Mokhema and Christopher Spillane 'Telkom CEO Risks Prosecution if he Skips Governance Course' available at https://www.bloomberg.com/news/articles/2014-04-14/telkom-ceo-risks-prosecution-fine-if-governance-course-skipped (accessed on February 25 2024).

[134] No. 89 of 1998; The Competition Tribunal is an independent adjudicative body established in terms of section 26 of the Competition Act. It has jurisdiction throughout the Republic of South Africa.

[135] *Phutuma Networks (Pty) Ltd v Telkom Ltd* (37/CR/Jul10) para 24.

Thus, the Tribunal has held that, notwithstanding their public mandate, SOEs cannot engage in anti-competitive behaviour.[136] Where SOEs' corporate decisions have bullied competition, the Tribunal has reigned them in. On two separate occasions, the Tribunal has found the conduct of SAA to be anti-competitive and has imposed hefty fines.[137] For instance, in *Competition Commission v South African Airways*[138], the Tribunal found that some incentive schemes run by SAA contravened the Competition Act. These schemes were known as the 'override incentive scheme' and the 'explorer scheme', they gave incentives to travel agents to divert passengers from competitors of SAA to SAA. The Tribunal found that the schemes had exclusionary effect amounted to abuse of SAA's dominant position in South African domestic market.

On the other hand, in *Competition Commission of South Africa v Telkom SA Ltd and Others*[139] it was held that Telkom had also abused its market dominance and was fined. The Competition Tribunal imposed a penalty of ZAR 449 000 000.00 on Telkom SA Limited for abusing its dominance in the telecommunications market between 1999 and 2004, a period in which Telkom was a monopoly provider of telecommunications facilities. The Tribunal concluded that Telkom leveraged its upstream monopoly in the facilities market to advantage its own subsidiary in the competitive value-added network market. Telkom's conduct caused harm to both competitors and consumers alike, it hindered competition and innovation in the dynamic VANS market. Some scholars have argued that, ordinarily, these hefty fines imposed by the Tribunal for anti-competitive behaviour have a positive effect on SOEs corporate governance, because the board would, in future guard against abusing the corporation's dominance.[140]

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[136] Surprisingly, in *AEC Electronics (Pty) Ltd v Department of Minerals and Energy* (48/CR/Jun09) para 18, the Tribunal ruled that only practices of SOEs themselves may be subjected to a review and not the decisions of the state functionaries i.e. the shareholder-representatives. This ruling is rather disappointing because shareholder-representatives often make decisions that places SOEs in an advantage position.

[137] See Helen Jenkins, Gunnar Niels and Robin Noble '*The South African Airways cases: Blazing a trail for Europe to follow?*' Presentation to the 3rd Annual Competition Conference (14 August 2009) available on https://www.compcom.co.za/wp-content/uploads/2014/09/The-South-African-Airways-cases.pdf (accessed on February 25 2024).

[138] [2005] ZACT 50 (28 July 2005).

[139] [2010] 2 All SA 433 (SCA).

[140] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State-Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town).

Office of the Public Protector also plays a pivotal role in the governance of SOEs in South Africa. The Public Protector's mandate stems from the South African Constitution.[141] The Public Protector is clothed with authority to investigate any conduct in the public administration and to recommend appropriate remedial action.[142] Several reports of the Public Protector are analytical of corporate governance in South African SOEs..[143] The Public Protector was invited to investigate the doubtful qualifications of the former chief operating officer (COO) of the SABC. The Public Protector' investigations revealed that the COO had misrepresented his qualifications, that his appointment was irregular and that his disproportionate remuneration progression was unjustifiable. The report reveals that the shareholder-representative had unduly interfered with the operations of the SABC. The report then concludes that the SABC suffered some pathological corporate governance deficiencies and that the then SABC board had failed to provide leadership expected from a board as tabulated in the Board Charter and the King Code III.[144] The Public Protector recommended that the SABC board should institute disciplinary action against the COO as a remedial action.

The Public Protector also had an opportunity to investigate the role of the chief executive officer of the Passenger Rail Agency of South Africa (PRASA) and other officials in the improper award of tenders, maladministration, conflicts of interest, financial mismanagement, and nepotism.[145] The report was published in August 2015, and directed PRASA to review the policies that manage conflicts of interest and supply chain. The report went on to direct the board to initiate forensic investigations and the Public Protector concluded the report by directing the shareholder-representative to monitor compliance. It is evident, therefore, that while the internal governance

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[141] Section 182 of the South African Constitution.

[142] Section 182(1)(a), (b), and (c) of the South African Constitution read with s 8(1) of the Public Protector Act 23 of 1994.

[143] E.g. Public Protector '*When governance and ethics fail*' Report No. 23 OF 2013/2014 a Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appoinment of Mr. Hlaudi Motsoeneng by The South African Broadcasting Corporation (SABC) - Report of the Public Protector in terms of Section 182(1)(B) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of The Public Protector Act, 1994 (available at https://www.gov.za/sites/default/files/gcis_document/201409/when-governance-fails-report-exec-summary17feb2014.pdf accessed on February 25 2024).

[144] See page 22 of the report.

[145] Public Protector 'Derailed: A report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA)' Report No. 3 2015/16 (available on https://www.gov.za/sites/default/files/gcis_document/201508/publicprotectorinvestigationreportno3of201516prasa24082015a.pdf accessed on February 25 2024).

of the South African SOEs is may often come across ineffective, the Public Protector's office is always ready to investigate any governance shortfalls and recommend remedial action. This is an important layer of regulation that can be utilised more to ensure effective governance in SOEs.

Lastly, for purposes of this research, the South African Parliament plays an important oversight role in the governance of SOEs. The South African Constitution empowers the National Assembly to exercise an oversight role on the executive and all public institutions.[146] To effectively discharge this obligation, the National Assembly is required to oversee all executive action.[147] The Constitution obligates cabinet members, most of whom are shareholder-representatives in the context of SOEs, to regularly report to the National Assembly on matters under their control, these includes matters related to SOEs as well.[148] The National Assembly discharges its authority over SOEs through portfolio committees that evaluates their annual reports that gets tabled and considered by the National Assembly on annual basis.[149] There are different portfolio committees that focus on different SOEs issues. One committee that becomes important in the oversight of SOEs is the Standing Committee on Public Accounts (SCOPA) which focuses on SOEs' compliance with the PFMA, Treasury Regulations, the audit committee and the accounting officer's management report.[150]

4.5 Conclusion

From the above, it can easily be concluded that the South African SOEs, unlike their Lesotho counterparts, are highly regulated and these range from hard and soft regulation to regulation backed by judicial and quasi-judicial pronouncements. Over-regulation of SOEs in not inherently wrong or problematic phenomenon, provided that that the regulatory instruments are enforceable,

[146] See section 55(2).
[147] See section 42(3).
[148] See Section 92(3)(b).
[149] Section 65 of the PFMA, provides that the executive authorities i.e. shareholder-representatives of SOEs are expected to table the annual reports of the SOEs within six months of the end of their financial year.
[150] National Treasury '*Governance Oversight Role Over State Owned Entities (SOE's)*' (available at https://www.treasury.gov.za/publications/other/soe/governance%20oversight%20role.pdf Accessed on February 2024).

implementable, coherent and co-ordinated.[151] Most importantly, SOEs regulation should be geared at fostering competitive neutrality and emphasise the separation of ownership and control. Unfortunately, hard regulation of South African SOEs is characterised by conflicting instruments that fail to draw a clear demarcation between control and ownership of SOEs. Hard regulation of SOEs in South Africa violates basic governance principles by giving both the board and the shareholder-representative executive powers. The duplication and overlaps in the regulatory framework create unnecessary burden on the SOEs. Lastly, hard regulation unreasonably expects boards to have legal background that will facilitate construction and understanding of regulatory instruments, this is not ideal. Regulatory environment should at all times be clear, coherent and easy to implement.

On the other hand, soft regulation of SOEs in South Africa has evolved over time, the evolution has resulted in world class voluntary regulatory scheme. Strict compliance with the established soft regulation is almost guaranteed to produce positive governance results. However, the positive impact of soft regulation is likely to be undermined by hard regulation which gives the shareholder-representative executive powers. This then introduces political interference in the governance of SOEs. Political interference in SOEs does not only derail governance initiatives, but it also affects growth and performance negatively as well. In South African context of, however, this is mitigated by judicialised and quasi-judicialised regulation because it is backed by courts, tribunals and the National Assembly. While courts and tribunals' contribution in governance initiatives are effective and progressive, participation of Parliament in governance matters has its challenges. The political tensions and party lines in the National Assembly have potential of limiting the National Assembly's willingness to intervene and steer SOEs in the right direction.

One other challenge that is presented by the above discussion of the SOEs regulatory environment in South Africa is the lack of regulation for regulators. This is problematic because it produces regulators that regulates in silos and in a non-complementary manner, thus creating unnecessary compliance burden for the SOEs. This presents what some scholars have referred to as 'regulatory trilemma', which is a regulatory environment that lacks effectiveness, responsiveness, and

[151] Tebello Thabane *The State Ownership and Control Architecture of South Africa's State-Owned Companies and its Impact on Governance* (unpublished PhD thesis submitted to the Faculty of Law, University of Cape Town) 71.

coherence.[152] These uncoordinated regulators will in no doubt have a negative impact on the governance of SOEs. To boost corporate governance in SOEs, a more cohesive system, with the regulators setting tone from the top in a coordinated manner is ideal. This system would in turn guarantee:

> 'greater consistency and predictability of results [of regulation], greater accessibility of decisions to public scrutiny and participation, increased likelihood that regulations will withstand judicial review, reduced opportunities for manipulative behavior by agencies in response to political or bureaucratic pressures, reduced opportunities for obstructive behavior by regulated parties, and decreased likelihood of social dislocation and 'forum shopping'…[153]

From the South African SOEs landscape, an important lesson for Lesotho may be that it is important to maintain a cohesive and well-coordinated regulatory system for SOEs at it would lead to what scholars refer to as a 'responsive regulation'. This form of regulation bolsters compliance by providing support to SOEs and by appreciating their compliance efforts and achievements. It further prescribes enforcement practices and sanctions in the event of noncompliance.[154] However, it is equally important to ensure that the regulation is nicely balanced to avoid overregulation which is not ideal.

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[152] See Gunther Teubner and Bremen Firenze 'Juridification: Concepts, aspects, limits, solutions' in Gunther Teubner (ed) Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust and Social Welfare Law (1987) 3–48 at 19–22. See further Parker and Braithwaite *op cit* 126–127.
[153] Howard Latin 'Ideal versus real regulatory efficiency: Implementation of uniform standards and "fine-tuning" regulatory reforms' (1985) 37 Stanford Law Review 1267–1332 at 1274. The author's views are framed in environmental regulation, but they are equally cogent in the broader context of regulation.
[154] Jenny Job, Andrew Stout and Rachael Smith 'Culture change in three taxation administrations: From command-and-control to responsive regulation' (2007) 29 Law & Policy 84–101 at 86.

CHAPTER FIVE: COMPARATIVE STUDY – SINGAPORE

5.1 Introduction

As indicated in the previous chapter, this research considers the nature of ownership and control of SOEs in other jurisdictions, particularly South Africa and Singapore, their ownership and control dynamics This chapter focuses on SOEs in Singapore and it discusses *inter alia*, governance of SOEs in Singapore, the role played by the government as a shareholder, the nomination or appointment of directors, political influence in governance and considers whether there are lessons that could be drawn from that regime.

Singapore is considered as a suitable jurisdiction for a comparative purposes because of the successes of its SOEs ownership and control model which has, in the main been professionalised.[1] The Singapore's Temasek and its subsidiaries are considered may easily be referred to as a rare yet effective SOEs ownership and control model that is evidently producing SOEs that are efficient, profitable and competitive.[2] Singapore's SOE sector is celebrated globally for promoting best corporate governance practices which is not so common with SOEs, Lesotho not being an exception.[3] Importantly, Singapore shares some historical elements with Lesotho, particularly the colonial background. Further, Singapore and Lesotho are both common law jurisdictions.[4] Having a foundation in the English common law system is important for purposes of this thesis, particularly as both counties' corporate law and governance are founded on the Cadbury Report.[5] It follows, therefore, that Singapore is aa goodfit comparator from which Lesotho can draw significant lessons.

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[1] Adebayo, Adeyemi & Ackers, Barry. (2022). Comparing corporate governance practices of state-owned enterprises (SOEs) in South Africa and Singapore. Journal of Accounting and Investment. 23. 170-195. 10.18196/jai.v23i1.13830.
[2] Thabane T"Rebooting State-Owned Companies in South Africa: Exploring the Viability of Singapore's State Holding Company (Temasek) Model of Ownership and Control" (2024) 27)-*PER / PELJ* 22 .
[3] Vietor, Richard H.K., and Emily Thompson. "Singapore Inc" 2008) *Harvard Business School* 703
[4] https://www.commonwealthofnations.org/sectors-lesotho/business/legal/ (last accessed on January 17th 2025).
[5] Cally Jordan 'Cadbury Twenty Years On (2012) https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1003&context=ctls_papers (last accessed on January 17 2025).

5.2 Brief History of Singapore

Singapore is ‘small open economy’ state with a growth and development policy that is firmly rooted on the SOEs which are commonly known as the government-linked companies in Singapore.[6] History reveals that the island of Singapore was known to mariners as early as the third century A.D.[7] By the seventh century, the Srivijaya Empire, the first in a succession of maritime states to arise in the region of the Malay Archipelago, linked numerous ports and cities along the coasts of Sumatra, Java, and the Malay Peninsula.[8] Singapore was one of many outposts of Srivijaya, serving as an entrepot and supply point for Chinese, Thai, Javanese, Malay, Indian, and Arabtraders.[9] An early historians refers to the island as Temasek and recounts the founding there, in 1299, of the city of Singapura (the lion city).[10]

In 1818 Singapore was settled by a Malay official of the Johore Sultanate and his followers, who shared the island with several hundred indigenous tribespeople and some Chinese planters.[11] The following year, Sir Thomas Stamford Raffles, an official of the British East India Company, arrived in Singapore and secured permission from its Malay rulers to establish a trading post on the island.[12] Named by Raffles for its ancient predecessor, Singapore quickly became a successful port open to free trade and free immigration.[13] Before the trading post's founding, the Dutch had a monopoly on the lucrative three-way trade among China, India, and the East Indies.[14] Now Indian,

[6] Low, Linda. ‘Rethinking Singapore Inc. and GLCS.’ *Southeast Asian Affairs*, 2002, 282–302. http://www.jstor.org/stable/27913213.
[7] https://www.nationsonline.org/oneworld/History/Singapore-history.htm last accessed on June 19 2024.
[8] https://www.khanacademy.org/humanities/world-history/medieval-times/cultural-interactions-along-trade-routes/a/the-srivijaya-empire-trade-and-culture-in-the-indian-ocean last accessed on June 19 2024.
[9] Ibid, note 2.
[10] Barbara Leitch LePoer (Ed) Singapore: A Country Study (2nd Ed) p6.
[11] Barbara Leitch LePoer (Ed) *Singapore: A Country Study* (2nd Ed)
[12] https://www.roots.gov.sg/stories-landing/stories/the-singapore-story-through-60-objects/colonial/treaty-of-friendship-and-alliance/story last accessed on June 19 2024.
[13] https://biblioasia.nlb.gov.sg/vol-1/issue1/nov-2005/continuities-changes-port-city/ last accessed on June 19 2024.
[14] Eckel, Paul E. *Challenges to Dutch Monopoly of Japanese Trade During the Wars of Napoleon* (1942) 1 (2) The Far Eastern Quarterly173

Arab, European, Chinese, Thai, Javanese, and Bugis traders alike stopped in their passage through the Strait of Malacca to anchor in the excellent harbor and exchange their wares.

During this period Singapore, Penang, and Malacca were governed together as the Straits Settlements[15] from the British East India Company headquarters in India.[16] Later in 1867, when Singapore was a bustling seaport of 85,000 people, the Straits Settlements were disbanded and converted into the British colony ruled directly from England.[17] Singapore then continued to grow and develop as a British colony. During the 1860s to the late nineteenth century, the opening of the Suez Canal and the industrial revolution that saw the invention of steamships and Singapore managed to establish itself as an important trade and manufacturing centre.[18]

The period between world war I and II then came, Singapore's Chinese took particular interest in socio-political events in China, they supported either the Chinese Communist Party or the Guomindang (Kuomintang-Chinese Nationalist Party).[19] Beginning in the early 1930s, both groups were drawn towards China against the increasing flow of Japanese aggression. However, Japan's lightning attack on Malaya in December 1941 took the British by surprise, and by mid-February that year the Japanese were in control of both Malaya and Singapore.[20] Unfortunately, Singapore suffered greatly during the period Japanese occupation.[21]

In 1945 Singapore came under the British Colonial rule.[22] However, their view of the colonial relationship had changed. The Malayan Communist Party (MCP) organised community strikes

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[15] The Straits Settlements were a group of British territories located in Southern Asia. Originally established in 1826 as part of the territories controlled by the British East India Company.

[16] Ibid. British East India Company is an English company that was incorporated in 1600 to develop trade with the new British colonies in India and southeastern Asia.

[17] Ibid .

[18] Supra.

[19] Kuo-tai, Hu. 'The Struggle between the Kuomintang and the Chinese Communist Party on Campus during the War of Resistance, 1937-45.' *The China Quarterly*, no. 118 (1989): 300–323. http://www.jstor.org/stable/654828.

[20] Bennett, H. Gordon. Review of *The Conquest of Malaya*, by Masanobu Tsuji, Margaret E. Lake, and H. V. Howe. *Journal of Southeast Asian History* 2, no. 3 (1961): 91–100. http://www.jstor.org/stable/20067351.

[21] Huff G 'The Second World War Japanese Occupation of Singapore' (2020) *Journal of Southeast Asian Studies* 243-270.

[22] Tan, K.Y.L., 1989. The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day. *SAcLJ*, *1*, p.1.

and student demonstrations which grew from strength to strength throughout the 1950s.[23] The struggle for independence unfolded in Singapore as it was the case all over the colonial world. In 1953 the British commission recommended partial independence for Singapore.[24] Communities then began organisation that led to formation of political parties.[25] In 1954 a group of freedom fighters which was led by David Marshall formed the Labour Front, a political party that fought for full independence for Sigapore.[26] Still during 1954, another political party, the People's Action Party was formed under the leadership of Lee Kuan Yew, which also campaigned against colonialism.[27]

In 1956-58, freedom talks were held in London to discuss the political future of Singapore.[28] As a result of these talks, Singapore was granted internal self-government, while defence and foreign affairs were left under the British control. Following the talks, Sigapore held elections in May 1959.[29] The PAP won the polls, and Lee became the prime minister.[30] The PAP's understanding of independence included a merger with Malaya. Thus, in 1962 Singaporean approved a merger

[23] MCP can be traced back to Singapore sometime between late 1927 and early 1928 when a group of communists from the Communist Party of China set up the Nanyang Communist Party; Barbara Leiitch LePoer (Ed) *Singapore: a Country Study* p4; Malaya is a former federation of eleven Asian states located in the southern hemisphere of the of the Malay Penensula it was a British protectorate from 1948 to 1957.
[24] S. J. BALL 'Selkirk in Singapore' *Modern British History* (1999) Vol 10, Iss 2, Pages 162–191, https://doi.org/10.1093/tcbh/10.2.162
[25] Wah YK 'A Study of Threee Early Political Parties in Singapore' (1969) 1945-1955 Journal of Southeast Asian History Vol 10, Iss 1, 115- 141.
[26] The Labour Front first contested elections in 1955 Legislative Assembly Election from which it scored the most votes, yet not attracting majority. The Labour Front then formed a coalition government with the Singapore Alliance Party and Marshall became Singapore's first Chief Minister.
[27] The People's Action Party (PAP) was founded in 1954 by Mr Lee Kuan Yew and a group of Singaporeans revolutionaries who were determined to improve the well-being of the Singapore people. The PAP's emphasis on multi-racialism and equality brought peace, progress and prosperity to Singapore within a span of fifty years (see https://www.pap.org.sg/our-party/).
[28] David Marshall led a thirteen-man all-party team in what became the first of the three constitutional talks, which later became known as the Mardeka talks, held in London to determine the terms of full internal self-government for Singapore; see Chan Heng Chee, *A Sensation of Independence: A Political Biography of David Marshal* (Singapore: Marshall Cavendish Editions, 2008), 183. (Call no. RSING 324.2092 CHA); Singapore. All-Party Mission to London, *Report on Singapore All-Party Mission to London, April/May 1956* (Singapore: Printed at the Govt. Print. Off., 1945), 1–3.
[29] The Singapore 1959 elections marked a turning point in the social and political landscape of Singapore. It was the result of what had happened since the restoration of British government in Singapore after the Second World War. The 1959 Singapore constitution and elections were the products of desire for decolonization and struggle for self-determination by people of Singapore. These then led to the internal self-government of Singapore; see Ong Chit Chung *The 1959 Singapore General Elections* (available on https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A3306200F1BD877E20B8EF23B78098BB/S0022463400017112a.pdf/the-1959-singapore-general-election.pdf accessed on 27 March 2024).
[30] Bellows TJ 'Merotocracy and the Singapore Political System (2009) 17 (1) *Asian Journal of Political Scieence* 24.

plan and in 1963 Singapore merged with Malaya and the former British Borneo territories of Sabah and Sarawak to form an independent Malaysia.[31] Unfortunately, Singapore was forced to separate from Malaysia and became an independent state in August 1965.[32]

Following the demerger, Singaporeans and their leaders accepted the challenge of shaping a sustainable nation on a tiny island with few resources other than the determination and talent of its people.[33] The above history of Singapore is important for purposes of putting some perspective to this comparative study. It is particularly important to note that Singapore build its SOEs industry from scratch beginning at around the same time that Lesotho attained her independence. Today, Singapore has a good story to tell and thereby becoming a good benchmark for Lesotho.

5.3 The Nature of State Ownership (in SOEs) in Singapore

In Singapore, state ownership is mainly centralised trough a state holding company i.e.Temasek. This company discharges all the shareholder duties over its subsidiaries. The discussion that follows is an attempt to examine the ownership model of Temasek and the relationship it maintains with its shareholder to maintain sound corporate governance of SOEs in Singapore.

5.4 Unpacking Temasek and its Role in SOEs Governance in Singapore

Temasek holdings (Private) Limited is a global investment company owned by the government of Singapore. , It was incorporated in 1974 to boost industrialisation in Singapore through to offering commercial management or leadership in the interest of the state's investments in GLCs. Tamasek is a product of the Constitution of Singapore and[34] is a private company incorporated in terms of

[31] Borneo territories is a large island in Southeast Asia that is divided among three countries: Malaysia, Indonesia, and Brunei.

[32] Soon LT 'Maylaysia-Singapore Relations: Crisis of Adjustment (1969) 10 (1) *Journal Southeast Asian History* 155.

[33] Barbara Leiitch LePoer (Ed) *Singapore: a Country Study* (1989) available on https://www.marines.mil/Portals/1/Publications/Singapore%20Study_1.pdf (accessed on January 25 2025).

[34] Section 22(c) of the Constitution of Singapore 1965 (as amended) read with part II of the 5th Schedule to the Constitution.

the Singapore Companies Act 1967.[35] The main objective of the company is to exercise shareholder duties and offer commercial leadership to Singapore's government linked companies.[36]

Temasek's initial portfolio in 1974 reflected Singapore's early stages of industrialisation.[37] The net portfolio was valued at S$354 million then, but some of these companies, and others added since, have grown into iconic brands, such as DBS and the Singapore Zoo. Others, like Singtel, Singapore Airlines and PSA, have transformed into regional and global champions, thus the net portfolio growth to S$382 in 2023.[38] Temasek is wholly owned by the government through the Minister of Finance i.e. the Ministry discharges shareholder functions in a representative capacity.[39]

The government's involvement in industrial or commercial activities was deemed necessary because of the lack of private sector funds and expertise.[40] However, it was also clear that these enterprises had to be run on a commercial basis. The Singapore government resolved on the incorporation of Temasek in full realisation that the main objective of the government should be policymaking while the state's investments should be offered commercially viable leadership. Singapore had realised that:

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[35] In terms of the Companies Act 1967, Temasek is an 'exempt private company' which is defined by the Act as 'any private company, being a private company that is wholly owned by the Government, which the Minister, in the national interest, declares by notification in the Gazette to be an exempt private company'.

[36] Some scholars have defined Temasek as Sovereign Wealth Fund (SWF). See for instance Gerard Lyons '*State Capitalism: The Rise of Sovereign Wealth Funds'* (2008) 14 Law and Business Review of the Americas 1–62. The author recognises Temasek is one of the largest seven SWFs, these are known as 'The Super Seven'. There are already seven big SWFs that have over $100 billion in assets. These are the SWFs that dominate and include Abu Dhabi, GIC of Singapore, Norway, Kuwait, China, Russia and Temasek.

[37] See the 'Temasek Review 2021 Highlights' available on https://www.temasek.com.sg/en/our-financials/library/temasek-review (accessed on March 4 2024).

[38] See 'Temasek Review 2023 Highlights' available on https://www.temasekreview.com.sg/ (accessed on March 4 2024).

[39] https://www.temasek.com.sg/en/about-us (accessed on March 27 2024).

[40] Tan, Ling & Ramirez, Carlos. (2004). *Singapore Inc. versus the Private Sector: Are Government-Linked Companies Different?*. IMF Staff Papers. 51. 510-528. 10.2307/30035960 available on https://www.imf.org/external/pubs/ft/staffp/2004/03/pdf/ramirez.pdf (accessed on March 4th 2024).

One of the tragic illusions that many countries of the Third World entertain is the notion that politicians and civil servants can successfully perform entrepreneurial functions. It is curious that, in the face of overwhelming evidence to the contrary, the belief persists.[41]

Separating the policymaking and regulatory powers of the state and shareholding in SOES is globally celebrated as one of the good governance at the helm of state ownership.[42] It is the Singaporean government's appreciation of the fact that fused state roles compromise corporate governance and performance lead to the incorporation of Temasek as an interposition between politicians and state entrepreneurial endeavours.[43] Temasek is viewed as a 'behemoth, comparable with some of the world's largest conglomerates'.[44] It holds and manages a remarkable globalised portfolio with a variety of business interests in various sectors held by its subsidiary GLCs.

It is worth noting that Temasek investment portfolio is not only confined to closely held corporations, but also open to mixed ownership, including foreign ownership in its subsidiaries.[45] Interestingly, in this mixed ownership arrangement, especially where it does not hold the controlling stake, Temasek prefers to hold a 'golden share',[46] especially in the more strategic GLCs.[47] Unlike a number of its subsidiaries, Temasek itself is not listed on the Singapore Stock

[41] This observation was made 1972 by the Deputy Prime Minister, Dr Goh Keng Swee, as quoted in Isabel Sim *et al* '*The state as shareholder: The case of Singapore*' at 15, available at https://state-owned-enterprises.worldbank.org/sites/soe/files/reports/The%20State%20as%20Shareholder-%20The%20Case%20of%20Singapore.pdf (accessed om March 4th 2024).
[42] OECD *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2015); World Bank Group Corporate Governance of State-owned Enterprises: A Toolkit (2014) chapter 3.
[43] Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis) 174.
[44] Ho Khai Leong 'Corporate governance reform and the management of GLCs: Pressures, problems and paradoxes' in Ho Khai Leong (ed) Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations (2005) 276.
[45] https://www.temasek.com.sg/en/our-investments/our-portfolio (accessed on 17 January 2025).
[46] A golden share is a type of share that gives its holder thereof veto power over changes to the company's constitution. It holds special voting rights, giving the holder thereof an ability to block other shareholders from taking more than a ratio of ordinary shares. These golden shares are intended to secure Singapore's national strategic objectives.
[47] Deborah Healey 'Application of competition laws to government in Asia: The Singapore story' Asian Law Institute Working Paper Series No. 025 (2011) 8-11 available on https://www.klri.re.kr/cmm/fms/FileDown.do?atchFileId=FILE_000000000010491veZGw&fileSn=0&stat=journal&param_gubun=U&data_no=2 (accessed on March 20th 2024).

Exchange, this is probably to 'shield it from the unpredictability and turbulence that sometimes affects the capital markets'.[48]

Temasek has a three-pronged approach to its mandate. Firstly, it has strategically positioned itself as an 'active investor' that delivers sustainable value for Singapore over the long term.[49] It has also positioned and valued itself as a 'forward-looking institution', a generational investor that invests in people and good corporate governance.[50] Lastly, Temasek strives to be a responsible investor with corporate conscience, a 'trusted steward' for the people of Singapore and other stakeholders.[51]

5.5 Ownership and Control of Temasek

Temasek is wholly owned by the state.In many jurisdictions, particularly in Lesotho, this type of exclusive ownership typically attracts shareholder exclusive control and interference.[52] Surprisingly, in Singapore, the state is reasonably and ethically distant from Temasek, this does not, however, presuppose that the state is uninterested in the Temasek operations.[53] The Singapore Ministry of Finance, as a shareholder, receives regular updates on the performance of all GLCs and is able to hold Temasek accountable for any unsatisfactory performance.[54] The shareholder

[48] Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis) 174.

[49] See the Temasek Company Profile available on https://www.temasek.com.sg/en/about-us/our-purpose-charter-values#active-investor (accessed on March 15th 2024) it reads 'as an active investor, we shape our portfolio by increasing, holding or decreasing our investment holdings. These actions are driven by a set of commercial principles to create and maximise risk-adjusted returns over the long term…As an engaged shareholder, we promote sound corporate governance in our portfolio companies. This includes the formation of high calibre, experienced and diverse boards.'

[50] See the Temasek Company Profile available on https://www.temasek.com.sg/en/about-us/our-purpose-charter-values#active-investor (accessed on March 15th 2024) it reads 'We foster an ownership culture which puts institution above individual, emphasises long term over short term, and aligns employee and shareholder interests…We pursue excellence as an institution by developing our people, capabilities and processes.'

[51] See the Temasek Company Profile available on https://www.temasek.com.sg/en/about-us/our-purpose-charter-values#active-investor (accessed on March 15th 2024) it reads 'Temasek is a responsible corporate citizen. We engage our communities based on the principles of sustainability and good governance.'

[52] For instance, in Lesotho, the shareholder would constitute the Board, appoint the Chief Executive officer and other senior executives of the SOE.

[53] In terms of the Singapore's Constitution, neither the President nor the Singapore any other official of the Government is involved in Temasek's business decisions, except in relation to the protection of Temasek's past reserves.

[54] Anthony Shome 'Singapore's state guided entrepreneurship: A model for transitional economies?' (2009) 11 New Zealand Journal of Asian Studies 318–336 at 326-327 available on https://state-owned-

affords Temasek the necessary authority and independence required for the effective delivery of its constitutional mandate.[55]

The incorporation of Temasek and imposition of its constitutional obligation between the government and the GLCs was not intended only to cure the agency problem typical in most SOE settings,[56] it was also aimed at protecting GLCs from unnecessary political influence and reinforcing their commercial viability.[57] Given an opportunity to reflect on the importance of separation of roles, the former CEO of Temasek once remarked that:

> As a monitoring arm of the Ministry of Finance, we were responsible for tracking the performance of the various investments and companies, and for reviewing and appointing directors and chairmen to the boards of various companies to represent the government's interest as a shareholder. This…clearly separated the incidental role of government as an owner and shareholder, from its over-arching responsibility as policymaker and market regulator. A mandate was thus tacitly given for government-owned companies to operate purely as commercial enterprises, and for Temasek to deliver value as an investment holding company.[58]

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enterprises.worldbank.org/sites/soe/files/reports/Singapore%27s%20State-guided%20Enterpreneurship%20-%20A%20Model%20for%20Transitition%20Economies.pdf (accessed on March 21st 2024).

[55] Cheng-Han, T., Puchniak, D. W., & Varottil, U. 'State-Owned Enterprises in Singapore: Historical Insights Into a Potential Model for Reform. (2015) 28 (2) *Columbia Journal of Asian Law* 32

[56] An argument has been made that: 'owners of both private sector firms and SOEs have to be concerned about managers' self-interested behaviour. However, SOE owners have to deal with politicians' and bureaucrats' behaviour motivated by political considerations, which adds an additional layer of agency issues. Citizens are the ultimate owners of SOEs. They rely on politicians and bureaucrats to be their agents and to look after their interests. Politicians and bureaucrats are often poor agents because they may not receive direct financial benefits if the SOEs do well. As such, politicians and bureaucrats will rationally seek to avoid anything controversial within their portfolios and are not necessarily interested in improving the performance of SOEs.' – see Wong, S. C. Y. 'Improving Corporate Governance in SOEs: An Integrated Approach'(2004) 7. (2) *Corporate Governance International*5.

[57] Isabel Sim, Steen Thomson and Gerald Yeong *The State as a Shareholder: the Case of Singapore* (2013) Centre for Governance, Institutions and Organisations, NUS Business School available on https://state-owned-enterprises.worldbank.org/sites/soe/files/reports/The%20State%20as%20Shareholder-%20The%20Case%20of%20Singapore.pdf (accessed on 21st May 2024).

[58] Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis); Ho Ching 'Temasek Holdings: Building sustainable value' Institute of Policy Studies, published in Straits Times, 13 February 2004, quoted in Ho Khai Leong 'Corporate governance reform and the management of GLCs: Pressures, problems and paradoxes' in Ho Khai Leong (ed) *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (2005) 282.

It follows, therefore, that the Singapore government keenly gets Temasek to account for its performance from time to time, however, in so doing, it does not go beyond its shareholder precincts.[59] Singapore understands that the very rationale that informed the incorporation of Temasek as a conduit between the government and business activities insulating it from undue political interference.[60] All these can only be possible if politicians and bureaucrats have certain mindset and consensus, the consensus have been maintained in Singapore since the incorporation of Temasek in 1974.[61]

As indicated earlier in this chapter, Temasek is a creature of the Constitution of Singapore, thus issues relating to the appointment and removal of its directors and senior executives are regulated firstly by the Constitution.[62] Similarly, the government as a shareholder of Temasek operates within the same constitutional framework. The exercise of key shareholder rights or duties such as the appointment or removal of directors and key executives of Temasek can happen only succeed if approved by the President.[63] However, the Constitution of Singapore provides for a procedure to be followed where the President unreasonably withholds the approval, in such cases, the Parliament may overrule the President through a resolution supported by at least two-thirds of the members of Parliament.[64] While this may be seen as insulating the SOE from unreasonableness of political elites, the high threshold standard ensures that the decision is supported by the majority.

Parliamentary intervention in shareholder rights may further be seen as offering another layer of protection offered to SOEs against undue influence from politicians aligned to the ruling party.[65] Where the ruling party attempts to appoint party cadres rather than on merit, it would not be easy

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[59] Choon-Yin Sam 'Singaporean Style of Public Sector Corporate Governance: Can Private Sector Corporations Emulate Public Sector Practices?' (2006) 8 (1) *New Zealand Journal of Asian Studies* 41.
[60] Thabane T 'Rebooting StateOwned Companies in South Africa: Exploring the Viability of Singapore's State Holding Company (Temasek) Model of Ownership and Control' 2024(27).*PER/PELJ* 31
[61] Woo, J.J. Gradations of organizational autonomy in Singapore: a comparison of the Monetary Authority of Singapore, Temasek Holdings, and the Development Bank of Singapore. *GPPG* 3, 375–389 (2023). https://doi.org/10.1007/s43508-023-00078-x (accessed on January 17 2025).
[62]See Section 22C of the Singapore Constitution.
[63] See Section 22C of the Singapore Constitution.
[64] See section 22(C)(1B) of the Constitution of Singapore; Yvonne Lee 'Under lock and key: The evolving role of the elected president as a fiscal guardian' (2007) 290 Singapore Journal of Legal Studies 290–322.
[65] Mark J Roe 'Political and Legal Restraints on Ownership and Control of Public Companies' (1990) 27 (1) *Journal of Financial Economics* 22.

to push the resolution through the Parliamentary process because the ruling party would not enjoy the opposition's support.

The right to consider major shareholder activities for approval is not the only constitutional power granted to the President with respect to Temasek and its subsidiary GLCs.[66] Another constitutional power that the President has over Temasek and its subsidiaries is the power to exercise his discretion to refuse the approval of any budget or transaction, provided that such budget or transaction has the effect of drawing on past government reserves.[67] This has the effect of compelling SOEs in Singapore to maintain healthy balance sheets, this is generally characteristic of sound corporate governance practices.[68]

One may safely argue that the role of government in terms of the Singapore Constitution are aimed at ensuring that the boards and management of SOEs in Singapore pursue public interest.[69] It follows, therefore, that the incorporation of similar constitutional guarantees would make sense in Lesotho as well where SOEs are constantly underperforming and are forever being bailed out by the government. Such constitutional provisions would make more sense in the Lesotho environment because board appointments are mostly viewed as nothing less than cadre deployment, while removals are sometimes informed by political convenience rather than public interest. However, the downside of having such provisions enshrined in the constitution may be that, the constitutional guarantees would not be flexible to accommodate the ever-changing business landscape. This is mainly because constitutions are typically difficult to amend, compared to ordinary legislation. How the Kingdom of Lesotho should approach the question of composition of SOEs' boards, including the issues of the appointment and removal of SOEs directors, will be explored in the next chapter and a model of ownership and control is proposed.

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[66] Lee, Y. C. (2007). Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian. Singapore Journal of Legal Studies, 290–322. https://search.informit.org/doi/10.3316/informit.292568635719287 (accessed on January 17 2025)
[67] Ibid, note 64.
[68] Ali, Ayalew & Zelalem, Bayelign. (2024). Does corporate governance and balance sheet feature influence the financial policy of cooperatives? PLS-SEM approach. PLOS ONE. 19.
[69] Christopher Chen 'Solving the puzzle of corporate governance of state-owned enterprises: The path of the Temasek model in Singapore and lessons for China' (2016) 36 Northwestern Journal of International Law and Business 303–370 at 321.

5.6 Corporate Governance of SOEs in Singapore

Like many economies across the world, Singapore's corporate governance framework comprises of a mixture of mandatory rules and best practices recommended through some codes. For Singapore, the mandatory rules are contained mostly in the Companies Act[70], the Securities and Futures Act[71] and the Listing Rules of the SGX. The other critical component of Singapore is best practice recommendations as contained in the Code of Corporate Governance issued by MAS.[72] This framework applies to all public companies registered in Singapore and GLCs in equal measure.

Temasek, being the holding company has attained high corporate governance standards, this in turn sets the bar high for its subsidiary SOEs i.e. the GLCs.[73] Some scholars have, however, questioned Temasek's authority on the governance of its subsidiary SOEs. The issue is whether Temasek 'really imposes good corporate governance standards on its domestic portfolio or is Temasek's good image merely public relations puffery?'[74] To answer these questions there is need for a deeper analysis of the relationship that Temasek (as a shareholder) has with its subsidiaries. To analyse the relationship, one must unpack Temasek's role in the appointment and removal of its subsidiaries' boards, their structure and composition, their independence and authority, all these will be necessary, to establish the true nature of the relationship and how it affects the governance of the Temasek held GLCs.

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[70] Companies Act 1967 (as amended).
[71] Securities and Futures Act 2001.
[72] Annabelle Yip and Joy Tan 'Chapter 21: Singapore' in Willem Calkoen (ed) The Corporate Governance Review (2013) 290–303 at 290.
[73] Christopher Chen 'Corporate Governance of State-Owned Enterprises: An Empirical Survey of the Model of Temasek Holdings in Singapore' *21st Century Commercial Law Forum: 13th International Symposium 2013, 1-29.*
[74] Christopher Chen 'Solving the puzzle of corporate governance of state-owned enterprises: The path of the Temasek model in Singapore and lessons for China' (2016) 36 *Northwestern Journal of International Law and Business* 303 at 306.

5.6.1 SOEs Boards in Singapore

Singapore has adopted a single-tier board system whose responsibility is to oversee and supervise the executive management of the company.[75] The constitutional documents of companies registered in Singapore provides for the roles of the chair and board in fulfilling their responsibilities. On the other hand, the Companies Act, read with the Code of Corporate Governance, details the roles and capabilities of the chair and the entire board.[76] The Companies Act goes on to provide for a mandatory audit sub-committee of the board for listed companies while the Code has provisions for additional sub-committees of the board.[77]

The Companies Act provides that only natural persons aged 18 years old and above may be appointed as directors provided that there is no factor vitiating their consent.[78] Singapore is a common law jurisdiction, thus, directors' duties are founded partlyon common law and partly in the Companies Act.[79] As fiduciaries, directors owe the duties of honesty, good faith, care, and skill to the company and always must act bona fide and in the best interests of the company.[80]

Temasek introduced a distinctive feature to its board and introduced some international expertise that serve the board through advisory panels set up by the board.[81] In 2004, Temasek board resolved to establish an International Panel which comprised of well-established international businesspeople and political figures. The main role of this panel is to provide Temasek with global

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[75] Where a one-tier or unitary board system (monistic governance model) is followed, there is only one board that consists of both the management and the supervisors. The supervisors are part of the board. Within the one-tier board a distinction is made between executive directors and non-executive directors. Only a non-executive director may fulfil the task of chairperson of the board. In the two-tier system (dualistic governance model), there is a separation between management and supervisors. The board is responsible for the day-to-day management of the company. A separate supervisory board supervises the management.

[76] Willie Cheng *One and Two-Tier Governance Systems* (available on https://www.eguide.sid.org.sg/images/SIDeGuide/articles/BM/5.%20Boardroom%20Matters%20Vol%20I-One%20And%20Two-Tier%20Governance%20Systems.pdf accessed on March 27 2024).

[77] Isabel Sim et al 'The state as shareholder: The case of Singapore' at 27, available at https://state-owned-enterprises.worldbank.org/sites/soe/files/reports/The%20State%20as%20Shareholder-%20The%20Case%20of%20Singapore.pdf (accessed 20 April 2024); The Temasek and GLCs boards are composed of predominantly non-executive directors, and the roles of the Chairman and the CEO are separated.

[78] Section 145(2) of the Companies Act.

[79] Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis) 181.

[80] Annabelle Yip and Joy Tan 'Chapter 21: Singapore' in Willem Calkoen (ed) *The Corporate Governance Review (*2013) 290–303 at 295.

[81] These advisory panels are created pursuant to s 157C of the Companies Act.

business perspectives.[82] Temasek has not only welcomed international expertise on its board but it also encourages and allows the boards of its various subsidiary SOEs (GLCs) to recruit expatriate CEOs, provided there is no local talent. This allows Singapore to be more competitive globally.[83]

From the above discussions, it is clear that the board structure, composition and duties of directors as stipulated in the law of Singapore, is almost identical to that of Lesotho , the main difference is the structural or constitutional set-up of Temasek. However, the quality of corporate governance and the overall performance of Temasek and its subsidiary GLCs is far superior to that of SOEs in Lesotho. This then forces one to ask the following questions: could the difference be attributed to the implementation of rules and codes or to individuals serving on boards and how they are appointed and removed? Could the independence of the board and its insulation from political interference be the basis for SOEs success in Singapore? Put differently,: If the content of company law and corporate governance standards in Singapore are generally comparable to that of Lesotho, what makes the Singapore model successful, and the Lesotho model not so effective?

5.6.2 Appointment and Removal of SOEs Board in Singapore

As indicated above, the structure of the boards of SOEs in Singapore is regulated by the Companies Act.[84] The Act does not, however, prescribe for the number of board members. The Companies Act does not have prescriptive provisions requiring the state to be represented on the boards of SOEs. Interestingly, Temasek, as the shareholder in SOEs, does not control the directors of the boards of its subsidiaries.[85] This has a significant importance with respect to SOEs in Singapore, it limits political interaction or interference and thereby guarantees some level of board independence in SOEs. However, within Temasek, the law requires that two board members out of a board of nine members be representatives of the government, namely, the Permanent Secretary

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[82] Christopher Chen 'Solving the puzzle of corporate governance of state-owned enterprises: The path of the Temasek model in Singapore and lessons for China' (2016) 36 *Northwestern Journal of International Law and Business* 303.
[83] Ho Khai Leong 'Corporate governance reform and the management of GLCs: Pressures, problems and paradoxes' in Ho Khai Leong (ed, 2005)) *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* 282.
[84] See section 145 of the Companies Act 1967.
[85] Christopher Chen 'Solving the puzzle of corporate governance of state-owned enterprises: The path of the Temasek model in Singapore and lessons for China' (2016) 36 Northwestern Journal of International Law and Business 303–370 at 339

of the Ministry of Trade and Industry and the Permanent Secretary for the Ministry of Finance.[86] Other than these legal requirements, the practice is to appoint retired ministers and leading professionals with proven track record and integrity.[87] These practices are strategically aimed at securing implementation of government's policy objectives.

5.6.2 Independence of SOE Boards in Singapore

An effective board is one that enjoys independence from management and shareholders so as to enable it to effectively monitor the management and protect the shareholders' interests.[88] Coupled with board independence is the need for boards to be capacitated with requisite and sufficient authority to make decisions for leading the company. For the board to enjoy both independence and authority, the shareholders must not infringe on what is otherwise the territory of the board. As discussed in previous chapters the shareholders' role in governance can either be 'offensive' or 'defensive'.[89] An offensive shareholder governance attitude may be demonstrated by a shareholder who engages management on business issues over and above, for instance, suggesting next possible business ventures and giving inputs on strategy. A defensive governance attitude on the other hand is one where the shareholder's role is almost passive, restricted to voting at AGMs, approval of major transactions, and other conventional shareholder functions as stipulated by the law and applicable governance practices.

In Lesotho and many other jurisdictions,[90] the shareholder-representatives in SOEs adopt an offensive and mostly unhealthy governance attitude, interfering in issues and decisions that are

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[86] Anthony Shome 'Singapore's stateguided entrepreneurship: A model for transitional economies?' (2009) 11 New Zealand Journal of Asian Studies 318–336 at 324;

[87] Lay-Hong Tan and Jiangyu Wang 'Modelling an effective corporate governance system for China's listed state-owned enterprises: Issues and challenges in a transitional economy' (2007) 7 *Journal of Corporate Law Studies* 143.

[88] Marchesani, D., "The Concept of Autonomy and the Independent Director of Public Corporations" (2005) 2 *Berkeley Bus. LJ 315*

[89] Abasi, Alex & Agbloyor, Elikplimi & Abor, Joshua. (2017). "Corporate Governance, Shareholder Activism and Firm Performance in Ghana." Available at https://www.researchgate.net/publication/377721123_Corporate_Governance_Shareholder_Activism_and_Firm_Performance_in_Ghana (last accessed at on 20 April 2024).

[90] Kuzman, T., Talavera, O. and Bellos, S.K., 2018. Politically induced board turnover, ownership arrangements, and performance of SOEs. *Corporate Governance: An International Review*, *26*(3), pp.160-179.

traditionally within management and the board's purview.[91] However, as seen in the above discussions, Singapore is an exception to this bad governance culture in SOEs. The Ministry of Finance in its capacity as the sole shareholder of Temasek and Temasek as a shareholder in its subsidiaries adopt a defensive attitude towards governance of SOEs. Some scholars have argued that SOE boards in Singapore are more independent than those of their private counterparts.

> We found a strong focus on independent boards at GLCs compared to non-GLCs. GLCs had a higher proportion of independent Directors at the board and an independent Chairman compared to non-GLCs. Notably, 89% of GLCs had a Chairman who is independent or a Non-Executive Director who is not related to the CEO versus 32% for non-GLCs. Moreover, GLCs appeared to emphasise independence from the major shareholder and disclosed how they assess director independence. In contrast, non-GLCs frequently had the same independent Directors sitting on multiple board committees and did not disclose director information.[92]

A study that was conducted revealed that that SOEs in Singapore have a higher proportion of independent directors and most have an independent chairman, compared to the private companies.[93] According to the finding, 64% of the SOEs had independent boards while the figure dropped drastically to 48% for privately owned companies, 89% of SOEs had independent chairmen while only 32% of private companies had an independent director discharging the roles of independent chairperson.[94] The report further established that the boards of SOEs appeared to be more independent from the major shareholder than the boards of non-SOEs.[95] The level of independence of SOE boards has, however, been questioned because of Singapore's practice of appointing retired bureaucrats and apparatchiks.[96]

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[91] Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis).
[92] Isabel Sim Steen Thomson Gerard Yeong *State as a Shareholder: The Case of Singapore* (2010) Centre for Governance, Institutions and Organisations, NUS Business School at 34.
[93] Ibid.
[94] Ibid, 27.
[95] Ibid.
[96] Ibid.

From the above discussions, it is clear that the boards of SOEs in Singapore enjoy the necessary independence and authority to make decisions unhindered by the political considerations that are usually brought by the political elites in other jurisdictions. This is one factor that makes the Singapore model attractive and most ideal.

5.6.3 General Observations on Singapore SOEs' Governance

Various aspects of corporate governance have been discussed above. Thus, it may be relatively simple to depict the general state of corporate governance, first of Temasek as the main SOE and then of its subsidiaries. This section discusses the general overview of the state of corporate governance of SOEs in Singapore, a specific emphasis is made on features that set Singapore SOEs apart as good companies with sound governance structures and/or practices.

Firstly, it is important to note that Temasek and its subsidiaries are regulated and managed through a unitary legal and regulatory environment which is enforced by a statutory regulator in a well-coordinated manner which embraces self-regulation and thereby ensuring receptive regulation. These SOEs are led by fit and proper directors who are mostly professional and highly skilled. These professionals enjoy the support of domestic and international advisory services provided by international panels and advisory teams. This then entrenches professionalism in governance and constructs meaningful engagements at board level which will, almost invariably, productive, and sustainable SOEs.

The SOEs boards in Singapore generally have a culture of compliance with applicable laws and governance practices.[97] These boards are composed of the right mix of executive directors and non-executive directors with the majority being non-executives. The roles of CEO and board chairman are well defined and separated. In compliance with best governance practices and recommendations, these SOEs maintain adequate board committees. As discussed above, the appointment and removal of Temasek directors is constitutionally regulated while political

[97] Chen, C. (2022). Corporate Governance Standards for Insurers in Singapore. In: Marano, P., Noussia, K. (eds) The Governance of Insurance Undertakings . AIDA Europe Research Series on Insurance Law and Regulation, vol 6. Springer, Cham.

deployment in Temasek's subsidiaries is discouraged, thereby ensuring limited political interaction and interference in SOEs governance.

The Ministry of Finance as a shareholder of Temasek and Temasek in respect of its subsidiaries prefers a defensive governance attitude as opposed to an offensive attitude. This in turn gives the SOEs boards and their management the necessary independence and authority to lead SOEs. Moreover, as discussed above, the shareholder of Temasek and Temasek in respect of its subsidiaries prefer a pure commercial alignment and to that end it encourages amongst others, listing on stock exchanges, and this in turn forces these SOEs to observe high corporate governance standards as a compliance requirement for remaining listed on different stock exchanges.

As discussed above, the main Singapore's SOE, Temasek together with its subsidiaries (government linked companies) have sound audit and accountability arrangements and measures in place. This has the effect of entrenching good governance, compliance and risk management in these SOEs. Due to their effective and transparent remuneration mechanisms, these SOEs are able to attract and retain talent, thus they have more accountable CEOs and executive directors, some of whom are expatriate.[98] The performance and corporate governance standards set by SOEs in Singapore is undoubtedly most ideal and may be viewed as a blueprint for SOEs success in Lesotho. It is for this reason that almost all the major credit rating agencies rate Temasek and its subsidiaries at 'AAA' being the highest possible rating, which does not only affirm creditworthiness of these SOEs but also the quality of their corporate governance.[99]

It follows, therefore, that what remains unanswered at this stage is the question whether the Temasek's model is replicable, given that it is a product of Singapore's distinctive features, such as history, culture, and political orientation, to name a few. The following section attempts answering this question with the Lesotho SOEs in mind.

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[98] Grant Kirkpatrick 'Managing state assets to achieve developmental goals: The case of Singapore and other countries in the region' available on https://www.oecd.org/daf/ca/workshop_soesdevelopmentprocess_singapore.pdf (accessed on March 20 2024).

[99] Christopher Chen 'Solving the puzzle of corporate governance of state-owned enterprises: The path of the Temasek model in Singapore and lessons for China' (2011) 36 *Northwestern Journal of International Law and Business* 303

5.6.4 The Upsides and downsides of Temasek Model

From the onset, Temasek's undeniable success story presents two suppositions that the veracity of which may be the subject of a different research. First, the success of the Temasek model suggests that privatisation is not a remedy for failing governance in SOEs. The Temasek model is a living testimony that state ownership can still result in successful economies, economic development and growth. This is contrary to the common neo-liberal economic world market-oriented view, that promotes a free-market premised on private ownership. Second, the Temasek model discounts the view that state ownership is synonymous with poor corporate governance and performance of SOEs. For purposes of this thesis, this is the main take away from the Temasek way of ownership and control which presents the first benefit of the model, particularly for the developing economies such as Lesotho that is longing for a economic growth and development.

As to whether Temasek model may be replicated in Lesotho, it is important to appreciate that the model is unique to Singapore. However, this does not necessarily suggest that the model cannot be replicated. For the Temasek's model to be successfully replicated, certain conditions must be met. Scholars have suggested that there are certain factors that provided suitable environment for and sustained the Temasek model in Singapore, these are largely peculiar to Singapore. It follows, therefore, that any attempt to replicate or adapt the Temasek model must be mindful of these factors.[100] The first factor to appreciate is that there is both political and economic logic behind the model.[101] The Temasek model underscores that the future of the ruling party and that of the state itself are intertwined with the future and success of the Temasek model such that if the model were to fail, the ruling party will most probably lose power and the socio-political viability of the state will be at risk. This reasoning would not apply to Lesotho. The performance of all strategic SOEs in Lesotho is poor and this is largely because the ruling political elites has identified and uses these SOEs as political amor for short to medium term financial gain of the political elite..

[100] Ibid.
[101] The Temasek model was developed because of a need for survival, not only of the state but of the ruling party as well.

The most important feature of the Temasek model is the fact that it is underlined by a corruption-free environment based on high standards of accountability and integrity.[102] The environment in Singapore is propelled by Confucian values that emphasise ethics and order in society.[103] The Lesotho SOE and public sectors in general are mired in corruption, the two can be defined as the epicentre of enormous corruption.

The sustainability of the Temasek model is founded on a culture of meritocracy, efficiency, and an exceptional work ethic in the workforce, where skills are unattainable locally, international talent is brought in to lead SOEs and serve on boards.[104] As seen in previous chapters, in Lesotho, meritocracy is substituted with political patronage and high levels nepotism, so that SOCs are not always led by the most talented individuals. Overturning this culture of patronage will be key before making attempts to replicate the Temasek model in Lesotho.

One other equally important feature of Temasek model is that it was founded on the unitary legal and regulatory space, and it remains sustained by such regulation which is responsive, thereby ensuring compliance with both rules and practices of good corporate governance. As established in chapter three, the legal and regulatory framework in Lesotho is the complete opposite. It is dual in nature, inept and unresponsive, thus resulting poor compliance and unsatisfactory performance.

The main feature of the Temasek model that distinguishes it from various models of state ownership is that the model is essentially commercial in nature, with a strong emphasis placed on shareholder value creation, this is totally different from the Lesotho model of SOEs management and governance which is characterised by multiple objectives. While the Temasek model unashamedly prioritises shareholder value, it also creates room for some flexibility through co-ownership, competition, listing on various stock exchanges, and investment (or divestment) as dictated to by the market and commercial interests from time to time. As discussed above, this has the effect of reinforcing corporate governance and improving credit ratings of SOEs in Singapore.

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[102] Tan Chen-Han 'The Beijing consensus and possible lessons from the "Singapore model"' in Weiteng Chen (ed, 2011) *The Beijing Consensus? How China has Changed Western Ideas of Law and Economic Development* 69–93.
[103] Tan, C. "Our Shared Values' in Singapore: A Confucian perspective" (2012) 62(4), *Educational Theory"* 449-
[104] Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis) 189.

In Lesotho, the idea of co-ownership and divestment have been abused to pursue patronage interests.[105]

The Temasek model contributed significantly towards the construction of the modern-day Singapore that is a reputable international financial centre with a culture of good corporate governance that anchors both the public and private sectors and is shaped by domestic and foreign investors. It is highly important to note that the Temasek model is strengthened by utter political will to respect the role of the government as a shareholder from the state as a regulator. Some scholars observe that the Temasek model is primarily premised on the notion of separation between the state and SOEs so as to augment SOEs ability to be pursue commercial interests without unjustified government interference, and to guarantee checks and balances within Temasek itself and each SOE.[106]

Chapter three establishes that the political will to observe the separation of roles of the state and non-interference in SOEs affairs is almost non-existent in Lesotho. Interestingly, the government, through different shareholder-representatives, seeks closer proximity to SOEs.[107] This should not be construed to suggest that the Temasek model, though appealing, is a perfect model. The model has a few downsides that may be challenging for the Lesotho context, these are considered below.

The first downside of the Temasek model is that the model was designed to operate in a one-party state characterised by authoritarian tendencies displayed by the ruling political elites, which is loosely referred to by some scholars as a 'soft authoritarian' arrangement or a 'restrained democracy'.[108] Some scholars argue that authoritarian in Singapore and the fact that the country is

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[105] For instance the Government of Lesotho held shares in Vodacom Lesotho after its incorporation, however, the shares were later sold to an investment company linked to some political elites.

[106] Cheng-Han op cit note 102 at 89; Hyungon Kim and Kee Hoon Chung 'Can state-owned holding (SOH) companies improve SOE performance in Asia? Evidence from Singapore, Malaysia and China' (2018) 11 Journal of Asian Public Policy 206–225 available on https://www.tandfonline.com/doi/abs/10.1080/17516234.2018.1450624 (accessed on April 20 2024)

[107] It is almost common to have a change of senior executives of SOEs immediately following change of government in Lesotho.

[108] See Thabane, Tebello (2021). *The ownership and control architecture of South Africa's state-owned companies and its impact on corporate governance* (unpublished PhD thesis) p192 where he argues that Singapore scores 52/100 in the Freedom House 'Freedom in the World' 2018 index, which makes it a partly free country; see also Chen-Han *op cit* note 92 at 93.

smaller in size facilitates policy implementation and easily builds a strong compliance culture.[109] It is worth noting, however, that Singapore citizens are seemingly happy with the *status quo* because through these SOEs the state secures the nation's wellbeing.

While Lesotho is smaller than Singapore in terms of size and population,[110] the situation in Lesotho is different, Lesotho is a constitutional monarchy with all the accessories of constitutionalism. The state is often called to account by the media, civil society and trade unions. The judiciary is free to hold any laws, regulations and administrative conduct of those in power unconstitutional. It follows, therefore, that unlike in Singapore, the state could be challenged for attempting to implement a law, regulation or a policy that violated the spirit of the Constitution, even if such policy is good for the running of SOEs and the country.

The second downside of the Temasek model, from the Lesotho perspective, is the fact that the SOEs are mostly run by retired bureaucrats and political deployees. It follows, therefore, that the politician's proximity to SOEs is a huge problem in Lesotho. This proximity them compromises governance of SOEs and may be a perfect starting point for what has become commonly referred to as state capture. Thus, an attempt to adapt the Temasek model in Lesotho should not include cadre deployment to SOEs.

5.7 Conclusion

This chapter had four objectives. First, it sought to understand the historical background architecture of the Temasek model and the political and socioeconomical factors that sustains the model to date. It then discussed the current regulatory framework for SOEs in Singapore. Having unpacked the architecture of the model, the chapter then discussed the control and ownership model that underpin the Temasek model. The chapter's discussions were then wrapped up by considering the ups and downs of the Temasek mode and asked whether the model may be adopted in Lesotho with relative ease.

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[109] Chen-Han *op cit* note 102 at 82.
[110] As of 2022, Singapore's population stood at 5,6 million while Lesotho has citizens slightly above 2 million.

Through this chapter and using the Singapore's Temasek, the study has demonstrated that the conundrum that seeks to drive the analogy that economic prosperity and the open market economy theory are at best anchored by deregulation and state non-intervention is not entirely correct. From the facts presented in this chapter, it is evident that a state-holding company like Temasek is a foundation on which the Singapore success in SOEs governance is rooted. The government's understanding of the sanctity of the SOEs insulation from political power is key to this success. Yet, the model is not fool proof because politicians and bureaucrats can interfere if they so wish.

The next chapter concludes and makes recommendations for a better governance of SOEs in Lesotho. Key to these would be the need to master the art of non-interference of political characters in SOEs affairs and thereby respect the sanctity of the insulation that protects SOEs from political interference.

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The previous chapters of this thesis highlighted limitations of the current ownership and control model of SOEs in Lesotho and also considered the impact of the model on the SOEs governance. This chapter will make some recommendations on how these limitations may be addressed. The chapter seeks to make an argument for pursuing public interest in governance of SOEs, trimming shareholder control powers and emphasising board primacy, thereby entrenching the board as the locus of governance in SOEs. An attempt is made in this chapter, building from the foundation laid in previous chapters, to get to a point where a well-structured and balanced model of governance characterised by board primacy and less shareholder activism resulting in less political interference in governance of SOEs crystallises and answers the question of ownership and control with the aim of improving governance of SOEs in Lesotho.

In coining the proposals made in this chapter with respect to the ownership and control architecture in SOEs, this chapter reflects on the Singapore ownership and control architecture i.e. the Temasek model, government's proposed policy directives and other proposals made in the legal and governance scholarly space regarding the governance of SOEs as well as best practices as advocated for by the OECD.

6.2 Limitations Posed by the Current SOEs Governance in Lesotho

The current governance architecture for SOEs in Lesotho is underpinned by at least by four limitations. First, the governance formulation for Lesotho SOEs is not based on a particular theoretical framework and it is not characterised by a clear economic and political policy framework.[1] Second, there is no clear rationale for state ownership, this then leads to too much

[1] See the discussions in 3.6 above.

political influence in the governance of SOEs as each regime comes with own rationale for ownership. Third, the legal and regulatory framework governing SOEs is not rooted in a particular theoretical and/or ideology foundation, is fragmented and in most cases uncertain.[2] Finally, the power and control that the state, as a shareholder has over SOEs is unnecessarily excessive and the political interference yielding therefrom results in less productive boards that easily fail their core mandate in governance.[3]

The discussions that follow is geared to mitigate these limitations and formulate an ideal governance framework for SOEs in Lesotho. The formulation is underpinned by the idea that there is need to limit the state's power and control (limit political influence) and restrict such to true powers of shareholder then empower boards in promotion of board primacy and sound SOEs' governance.

6.3 Intoducing Public Interest in Governance of SOEs in Lesotho

This thesis seeks to advocate for public interest-based approach to the governance of SOEs in Lesotho. This approach is based on the understanding that a theoretical foundational basis is key for a governance regime as it will then become key in policy development aimed at implementing the governance model. It is important to accept at this point that the SOEs governance infrastructure in Lesotho is in uphauling state mainly due to the lack of clear and concise theoretical foundation.[4] Previous chapters revealed the unpredictability and qualms of SOEs control and ownership architecture in Lesotho. This weakness has an overarching impact on governance and performance of SOEs. The current undefined model of ownership and control makes it difficult for shareholder representatives and appointed directors in SOEs to appreciate where their loyalty lies with respect to the mandate and operations of the SOE. A clear theoretical foundation is proposed to curb this anomality as it will then inform policy, laws and regulatory formulation at least in the space of governance of SOEs.

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[2] Ibid.
[3] Ibid.
[4] See the discussions on the Lesotho SOEs in chapter three above.

The proposed public interest-based approached to SOEs governance in Lesotho aims at impacting the ownership and control architecture in at least two ways. The approach proposes a governance architecture that entrenches public interest as an uncompromising pillar of governance in SOEs., The best way of entrenching this is through an introduction of a new duty specifically for directors appointed to serve on the SOEs boards i.e. the duty to act in the public interest. Secondly, the approach proposes a reformulation of SOEs as not just corporates but as corporates aimed at promoting public interest. This has the effect of introducing the concept of *botho* in the governance of SOEs.[5] It follows that this approach will now give certainty and predictability to the roles of shareholder representatives and directors in SOEs.

The concept of public interest is one of those that are difficult to define with precision. However, scholarly literature has over the years has helped with a pragmatic and functional definition of the phrase. As some scholars put it:

> Public interest is a wide and diverse concept that cannot, and should not, be limited in its scope and application. The definition of what constitutes public interest varies across jurisdictions and should be assessed on a case-by-case basis. In its very basic formulation public interest is the notion that an action or process or outcome widely and generally benefits the public at large (as opposed to a few or a single entity or person) and should be accepted or pursued in the spirit of equality and justice.[6]

The phrase has come to be understood as signifying public a policy alternative which in most cases deserves enactment.[7] Put differently, public interest may be understood as highest standard of governmental action, measure of creates wisdom or morality in government.[8] This thesis, proposes, therefore, that in governance of SOEs, what is likely to be considered as morally sound should be factored in designing governance architecture. Over and above acceptable governance

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[5] Botho describes a set of the Basotho societal values that emphasize the interconnectedness of people with their environment or broader ecosystem. It is sometimes translated as one's understanding that 'I am because we are' or just as 'humanity towards others'.
[6] Thaldar D. Research and the meaning of 'public interest' in POPIA. S Afr J Sci. 2022;118(3/4), Art. #13206. https://doi.org/10.17159/ sajs.2022/13206 (available on file:///Users/lehlohonolomatee/Downloads/SAJS+118_3+-4_Thaldar_Commentary_approved_3mar22%20(1).pdf (accessed on 11 November 2024).
[7] F.J. Sorauf *The Public Interest Reconsidered* (1957) The Journal of Politics Vol 19, No 4 p616.
[8] Ibid.

practices, what is conscionable should at all material times guide the proximity of political influence on directors appointed to serve on SOEs boards.

It is important to infuse public interest in SOEs governance model because SOEs are generally viewed as public interest companies.[9] It follows, therefore, that it is necessary to appreciate the different types of these public interest companies so as to properly design a suitable ownership and control framework within which governance may take place without compromising the public interest.

SOEs may effectively be divided into three categories.[10] First, there are SOEs with true commercial inclination. These are SOEs that serve a public purpose or public good, but in so doing they make profits which they reinvest in the national fiscus as dividends. For instance, Econet Telecom Lesotho serves a public mandate of economic growth and development through provision of bandwidth and telecommunications connectivity. Lesotho Flour Mills on the other hand delivers public good by contributing towards food security by providing mealies. While these entities are unquestionably enablers of economic growth, they are also heavily engaged in economic activities that generate revenue, thus they must declare dividends for the national treasury.

Secondly, there are SOEs whose mandate is primarily the delivery of public goods. These SOEs provide goods and services that makes it easy for the general public to enjoy some constitutionally protected rights that may not be easily limited.[11] These SOEs can generally be categorised as public goods rendering SOEs.[12] These SOEs render essential services such as electricity generation and distribution, water and sanitation. In the context of Lesotho, these are SOEs like Lesotho Electricity Company and Water and Sanitation Company. Although these SOEs are mainly

[9]A public interest company in this context is understood as a company that operates with a primary objective of benefiting the public as opposed to maximizing profits for shareholders.
[10] Thabane, T, & Snyman-Van Deventer, E. (2018). Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection. *Potchefstroom Electronic Law Journal (PELJ)*, *21*(1), 1-32 (available on https://doi.org/10.17159/1727-3781/2018/v21i0a2345); Hans Christiansen 'Balancing commercial and non-commercial priorities of state-owned enterprises' (2013) OECD Corporate Governance Working Papers, No. 6, available at http://dx.doi.org/10.1787/5k4dkhztkp9r-en (accessed 10 May 2020).
[11] For instance, WASCO provides clean water without which the constitutionally recognized right to water may be nothing more than just a dream.
[12] This is in line with the categorization proposed by the Namibian Namibian Public Enterprises Governance Act 2 of 2006 at s4/(2)(a)(ii).

concerned with the delivery of public goods, they are expected to do so in a sustainable and ethical manner that guarantees their continued existence as a business with a going concern.

Thirdly, there are SOEs whose main objective is to regulate different sectors of the economy. SOEs under this category are basically watchdogs of different regulated sectors of the economy. This entails licensing, development and enforcement of regulations. In Lesotho, these SOEs are extensions of different government ministries that have been organised into some how autonomous bodies. They operate with some form of commercial philosophy, however, they are not profit driven. Examples of SOEs in this category may be: the Lesotho Communications Authority (LCA) which is the regulator of the communications industry and the Lesotho Electricity and Water Authority (LEWA) which is a regulator of utility companies in Lesotho.

The above categories manage to balance the need to deliver public goods and still be commercially oriented. However, in any economy, there is always need for an independent overseer of different industries. Fairness would then dictates that the state should be involved somehow in the various industry watchdog. Thus, the third category of SOEs would be regulators of different industries within the economy. The objective of these regulators is promotion of consumer rights and protection thereof, development and enforcement of industry regulations, licensing of industry players and generally setting the industry tone from the top. In Lesotho, most regulators sprang out of different government ministries and development. While they are semi-autonomous in operation, these entities still maintain close relationship with the sector ministry. In most cases, SOEs in this category, unlike the two categories discussed above, are not structures with a purely commercial purpose or set out to make profit.

There three categories have one common denominator i.e. they all pursue public interest. It follows, therefore, that all three categories of SOEs as discussed above would benefit from a reformulation of SOEs governance with public interest as an anchor. The idea here is to position SOEs in Lesotho as public interest entities. This positioning is crucial as it then informs the ownership and control architecture that will be most ideal to pursue the public interest that each SOE is setup to achieve. The three categories discussed above will be important as they informs the framework of ownership and control for each category, which in turn informs governance for each category.

6.4 Regulating SOEs in the Public Interest

As discussed above, SOEs are in nature, public interest establishments because they are established by and normally sustained by public resources to deliver a public mandate.[13] It follows, therefore, that governance of SOEs should be in the public interest. The thesis support this view, thus the thesis will suggest that external governance or regulation of SOEs should also be in the public interest. Internal governance refers to the management or directing of SOEs by their boards of directors as well as the authority delegated to their executive management.[14] On the other hand, external governance or regulation refers to oversight over the organisation imposed by either legislation or self-regulatory codes.[15] This thesis will argue that SOEs, particularly those in Lesotho, must apply both forms of governance in pursuance of the public interest.

Regulation has been defined, however, in this context regulation may be understood as public administrative policing of a private activity with respect to a rule prescribed in the public interest.[16] A closer look at this definition reveals three main elements: firstly, regulation is aimed at private activities, secondly it is achieved through administrative tools; and lastly, it occurs in the public interest. The main objective in regulation is the protection of the public interest against private

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[13] T Corrigan (2014) Corporate Governance in Africa's State-Owned Enterprises: Perspectives on an Evolving System' South African Institute of International Affairs Policy Briefing 102, Governance and APRM Programme, p2.
[14] Corporate governance has a wider scope and includes issues that concern the shareholders and other stakeholders of an institution, internal governance focuses on the responsibility of the board of directors and senior management. It is mainly concerned with setting the institution's business objectives and its appetite for risk, how the business of the institution is organised, how responsibilities and authority are allocated, how reporting lines are set up and what information they convey, and how internal control (including risk control, compliance, and internal audit) is organised.
[15] K Anand and SL Suremya (2021) External and Internal Rules of Corporate Governance, *International Journal of Law Management & Humanities* Vol. 4 Iss 4 pp2887-2901, these scholars argue that corporate governance mechanisms can be categorized into two types: internal and external governance mechanisms. The internal governance mechanisms primarily focus on boards of directors, ownership and control, and managerial incentive mechanisms, whereas the external governance mechanisms cover issues related to the external market and laws and regulations.
[16]B Mitnick (1980) *The Political Economy of Regulation* (1980) 7, as quoted in J G Christensen (2011) Competing theories of regulatory governance: Reconsidering public interest theory of regulation in D Levi-Faur (ed) *Handbook on the Politics of Regulation* 96–110 at 96.

commercial interests.[17] This thesis argues that the main objective of regulation in SOEs should be the protection of public interest, especially because SOEs are publicly owned and intended to serve public interest.

Public interest regulation entails the regulation of commercial interests within the confines of public law.[18] This form of regulation is underpinned by the tenets and principles that shape public law and administration, *viz*: accountability, transparency, equity and freedom.[19] Thus, self-regulatory codes and regulation imposed by law applicable to SOEs must be informed by these principles and values so as to align with public interest at all times.

Corporate governance failures in SOEs demonstrates failure of regulatory bodies in upholding fundamental principles of transparency and accountability.[20] It follows, therefore, that there is need to determine when self-regulation works for the SOE sector and when it fails, so as to develop an appropriate complementary regulatory responses to address the regulatory gaps.[21] This is the only way through which public interest can be entrenched in regulation.

The regulatory strategy of SOEs must aim at fostering several things in order to imbed the public interest in regulation.[22] First, corporate efficiency must be key in the delivery of the public mandate by SOEs. Therefore, SOEs must always aim at discharging their respective objectives in the most efficient way possible. It follows, therefore, that objectives and economic targets of SOEs must be

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[17] E.S Redford (1954). The Protection of the Public Interest with Special Reference to Administrative Regulation. *The American Political Science Review*, *48*(4), 1103–1113. (Available on https://doi.org/10.2307/1951013 last accessed on May 17th 2023).
[18] S. Rose-Ackerman (2010). Regulation and Public Law in Comparative Perspective. The University of Toronto Law Journal, 60(2), 519–535. (Available on http://www.jstor.org/stable/40801417 last accessed May 17th 2023).
[19] V van Doeveren (2011) Rethinking Good Governance, Public Integrity, 13:4, 301-318.
[20] Ibid.
[21] S Clifford (1993) 'A Constitutive Conception of Regulation' in P Grabosky and J Braithwaite *Business Regulation and Australia's Future* 67–80.
[22] T Thabane and E Snyman Van Deventer (2018) Pathological Corporate Governance Deficiencies in South Africa's State Owned Companies: A Critical Reflection *Potchefstroom Electronic Law Journal, Vol. 21, 2018* (Available at SSRN: https://ssrn.com/abstract=3122230 last accessed on May 20th 2023.)

clearly defined in their regulatory universe. Thus, there is need to avoid soft budget constraints as such may lead to tolerance of non-performance.[23]

Second, there is need to align element of public mandate in regulation of SOEs with broader national development agenda. Lastly, SOEs regulation must at all material times be based on: accountability, transparency and equity.

The following recommendations are proposed:

6.4 Repositioning Legislative Framework for Ownership and Control of SOEs

As illustrated in the previous chapters, SOEs governance in Lesotho is currently a subject of both public and private law. Some legislation that forms a corner stone of SOEs governance are: Companies Act[24], the Public Financial Management and Accountability Act[25] and various founding legislation which would be specific to individual SOE. Over and above this legislation, SOEs have demonstrated a welcoming culture towards the adoption of a voluntary governance code i.e. Mohlomi Code on Governance and there is a policy specifically designed for governance of SOEs. This governance scheme poses one main governance challenge. The Companies Act and the Mohlomi code are designed in such a way that they seek to achieve separation of ownership and control while the policy and the Public Financial Management and Accountability Act read with establishing statutes are not shy to cluster the two together. This then results in some conflict and uncertainty within the regulatory environment.

To overcome these challenges, the thesis proposes an all-encompassing SOEs legislation and a single corporate governance code. It is important to highlight at this stage, however, that the

[23] E Maskin (1996) Theories of the Soft Budget-Constraint (1996) 8 *Japan and the World Economy* pp125–133 at 125. According to Maskin, '[a] soft budget-constraint arises whenever a funding source finds it impossible to keep an enterprise to a fixed budget, i.e., whenever the enterprise can extract ex post a bigger subsidy or loan than would have been considered efficient ex ante.'
[24] Act no. 18 of 2011.
[25] Act no. 12 of 2011.

approach taken by the thesis is not to discuss details and/or content of the proposed legislation. However, for the code of governance, the proposal is that SOEs should adopt the available code i.e. the Mohlomi Code. The thesis merely makes suggestions relating to ownership and control of SOEs within the existing framework and suggest high level improvements to be made then discusses possible gains from the proposed legislation.

While it is acknowledged that the Public Financial Management and Accountability Act is applicable to the SOEs, this thesis argues that it is not an ideal legislation for SOEs. The Act's main objective as captured in the preamble is to establish and sustain transparency, accountability and sound financial management within the government. The Act regulates governments ministries, spending units, local authorities and public enterprises (SOEs).[26] It is important to underscore, at this stage that SOEs are different from other institutions regulated by the Act. What is unique about SOEs is the fact that management of SOEs is mostly informed by basic principles of corporate law. This then distinguishes SOEs from other government institutions. This is reason enough to win SOEs away from the application of the Act. Regulating SOEs like any other government institution is likely to undermine the need for separation of ownership and control of SOEs.

The OECD recommends that SOEs should be governed by the Companies Act because the Companies Act is usually broad enough in terms of coverage or content.[27] While this approach may be plausible in some jurisdictions, it is submitted that it would not be ideal for Lesotho. As indicated above, SOEs are different from ordinary companies that are profit driven. The main distinguishing feature is the fact that SOEs are public interest driven. It follows, therefore, that there is need for legislation dedicated to SOEs legal governance and regulatory needs.

The thesis proposes a dedicates SOEs legislation. However, the thesis does not attempt to design a complete legal framework, it merely proposes consolidation. Public interest should be an anchor

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[26] See 3.6 above.
[27] See OECD OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) 26.

of the proposed legislation. It is important, however, to appreciate that the proposed legislation would not apply in isolation, thus the proposed legislation must first and foremost, as a preamble, position itself and demonstrate relationship with the existing legal infrastructure. Some key features of the proposed legislation are tabulated below:

- Legislation should clearly set out the three categories of SOEs;
- There should be specific strategic objective for each category of SOEs;
- SOE should be clearly defined giving particular emphasis to public interest;
- Incorporation, registration and deregistration of SOEs;
- Capitalisation of SOEs;
- Nomination, appointment and removal of directors;
- Duties of directors giving emphasis on the duty to act in the public interest;
- Relationship between SOEs and Shareholder;
- Management of SOEs;
- Financial Management of SOEs;
- Rescue of financially distressed SOEs;
- Performance and Reporting of SOEs
- Repeal of existing legislation (e.g. individual SOE founding legislation)

It is important for the proposed legislation to position SOEs in Lesotho as public interest companies, the legislation should in no uncertain terms state roles and duties of different stakeholders involved in the SOEs governance. Importantly, the proposed legislation should define the element of ownership and control of SOEs, minimizing the involvement of the government as a shareholder in SOEs issues.

6.5 Rethinking Soft-Regulation for SOEs

As discussed in the previous chapters, over and above legislation, SOEs are currently expected to comply with the dictates of either Mohlomi or King IV and the Policy.[28] These multiple compliance obligations create unnecessary compliance and reporting burden for SOEs. These governance instruments, other than the policy, are not properly cut out for SOEs governance. They are primarily designed for profit making companies. This does not, however, negates the need for an ethical and public interest-oriented approach to SOEs governance.

To relieve SOEs of the burden, the thesis proposes a comprehensive governance code for the SOEs. Like the proposed legislation, the proposed code should be public interest cantered and have regard to the peculiar economic and socio-political position that Lesotho as a country is in. The proposed code should also have regard to a special and peculiar role played by SOEs in developing economies such as Lesotho. The code should be geared to promoting ethical governance practices within the SOE sector, advocate for accountability, transparency, sustainability and above all good corporate citizenry build on the quest to promote public interest.

It is ideal to avoid creating a number of compliance instruments for the SOEs to ensure reasonable focus and compliance with the core compliance obligations created in terms of the above proposals. Thus the thesis proposes a single document i.e. for soft regulation of SOEs as opposed to the current position.[29]

6.6 Rethinking Ownership in SOEs Context

In the previous chapters, state ownership was discussed and broken down into three forms i.e. centralised, decentralised and dual.[30] As discussed in the previous chapters, Lesotho does not religiously follow one of these forms in its approach to SOEs ownership. It is difficult to try and

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[28] See 3.6 above.

[29] This approach was followed in Malta where 'Principles of Good Corporate Governance for Public Interest Companies' was adopted to guide SOEs.

[30] See 2.6 above.

characterise the model of ownership and control of SOEs adopted by the Kingdom as a different form of ownership is presented from one SOE to another.

It follows, therefore, that there is need for adoption of an ownership model tailor made for SOEs in Lesotho. The model should be tailored towards achievement of the objective or rationale for state ownership in Lesotho. Most importantly, the ideal ownership model for SOEs in Lesotho should be geared towards ensuring that SOEs in Lesotho serve some public interest. Given the hostile political environment in Lesotho, the SOEs ownership model ideal for Lesotho will be one that restricts or limits shareholder or political interference in the governance of SOEs.[31] The easier way of achieving this would be through promotion of board primacy and independence. To fully crystallise these ideas into one solid ownership model, a clear policy on SOEs should be adopted entrenching public interest as a key pillar of all SOEs.

6.6.1 Policy on SOEs Ownership in Lesotho

There is need for a broad SOEs ownership policy which should be developed to address, the following issues amongst others: the rationale for state ownership in Lesotho, categories of SOEs (e.g. SOEs with that a truly commercially inclined, those that render public goods etc). The policy should also be a guiding too regulating how and when the state should either invest or divest. The most important theme of the policy should be that state ownership should promote and protect public interest.

As discussed in the previous chapters, the government of Lesotho's policy position on ownership of SOEs has never been clear.[32] Initially, the government of Lesotho owned institutions that drove economic growth and development for instance: Basotho Food Packers, Lesotho Air Ways, Lesotho Telecommunications Corporation etc.[33] However, post 1994, the government entered into a privatisation project which sow the government divesting in these SOEs.[34] The privatisation

[31] Mosabala, T.D. and Fombo, G.F., 2021. Elite Conflict and the Negation of Economic Development in Lesotho. *European Journal of Behavioral Sciences*, *4*(1), 12-28.
[32] See 3.6 above.
[33] Maleke, B.M., 1988. *Strategic change process in a SOE in Lesotho*. University of Bath (United Kingdom).
[34] Makafane, T.V., 2005. *The impact of privatisation: ownership and corporate performance in Lesotho* (Doctoral dissertation).

project mainly left the government as a minority shareholder in most entities.[35] It is worth noting, however, that the privatisation project did not extend to core utility SOEs. These were only incorporated and moved but the government remained as the sole shareholder. It is important, therefore, for Lesotho to have a clear policy direction on SOEs ownership.

It is evident that there is confusion whether the government of Lesotho is interested in ownership of SOEs that are considered as strategic or not and whether there is appetite to continue investing or to divest. This perplexity extends to the establishment or formulation of SOEs in Lesotho, their mandates or strategic objectives and role in the modern-day Lesotho socio, economic and political landscape, the duties and obligations of different stakeholders in their governance and management.

6.6.2 The 'Kharetsa' Ownership Model for Lesotho

Different types of ownership models have been discussed above[36] and in previous chapters, this thesis proposes a bespoke SOEs ownership model for Lesotho i.e. the 'Kharetsa' SOEs ownership model. Kharetsa is a spiral aloe which is only found in Lesotho, thus this thesis proposes a control and ownership model that will be unique to Lesotho just as kharetsa is unique to the Mountain Kingdom.

Under the 'kharetsa' model, SOEs should broadly be categorised into two portfolios i.e. SOEs that are purely commercially inclined and those that are not commercially inclined. Under this model, the shareholder can be a state holding company or a state agency. For commercially inclined SOEs, it is proposed that the government of Lesotho should incorporate the existing Lesotho National Development Corporation (LNDC) into a state holding company like the Singapore's Temasek.[37] On the other hand, there should be a state agency established through legislation which should hold shares in non-commercial SOEs.

[35] Ibid.
[36] See 2.6 above.
[37] See the Temasek discussions at 5.6.4 above.

The rationale underlying formulation of the ‘kharetsa’ model is the appreciation of the distinct nature and mandates of these two categories SOEs highlighted above. The first category is made of SOEs that are, for all intends and purposes, like any other company incorporated in terms of the Companies Act.[38] The second category is made of SOEs that are, as a matter of fact, structured like any other incorporated company with the distinction being that these SOEs are not commercially oriented.[39] Unlike the first category, this category of SOEs are not profit driven in nature despite the fact that at times, these SOEs may be incorporated.

It is common cause that the two categories of SOEs proposed above are different and are driven by different objectives and mandate, thus their ownership and control cannot be identical. It follows, therefore, those who discharge ownership and control functions on behalf of the state should poses different skills sets and it should actually be different entities with different boards that will have differing degrees of primacy. Each of the proposed shareholder in the ‘kharetsa’ model are discussed below.

6.6.3 The State-Owned Enterprises Authority

As stated above, the proposed ‘kharetsa’ model would advocate for the establishment of a state agency to hold shares in all non-commercial SOEs. The thesis proposes that the agency be referred to as the State-Owned Enterprises Authority (SOEA). The main objective for the establishment of the non-commercial SOEs is to render some essential socio-economic services. Some of the services rendered by this category of SOEs are constitutionally entrusted on the state thus the government is duty bound to ensure that these services are rendered in terms of the underlying constitutional tenants, namely efficiency, transparency and accountability.[40] It is not surprising, therefore, that SOEs in this category attract reasonable and expected public interest thus the government, as the ultimate shareholder, may have to stay closer to the SOEA to ensure protection and promotion of public interest.

[38] See 1.6 above.
[39] Ibid.
[40] The Constitution of Lesotho 1993 chapter 2 and 3 provides for these rights.

To better protect and promote public interest in SOEs, SOEA should be a tripartite body representing the state, employers or the business community and labour. Having these three constituencies represented in SOEA will guarantee that these non-commercial SOEs do promote public interest. This is so because the tripartite formulation of SOEA will ensure effective oversight of the SOEs in this category by members of the business community with good sense of business, fair appreciation of community interests as represented by the labour and the state with government policy direction.

There is need to minimise political interference in the governance of SOEs, thus members of the proposed SOEA should be appointed by parliament as opposed to the executive. The appointment should, however, be preceded by nomination by thre three constituencies represented in the SOEA. It is easy for the appointing minister to have unnecessary influence over the appointees, however, this would not be possible where parliament appoints as the appointment will not be made by an individual but by a collective made of individuals from different political background. The SOEA constituted following this guideline will have reasonable level of independence as members of the SOEA from different walks of life will be able to check on each other. Following this formulation, SOEA, as a shareholder in non-commercial SOEs, will be guided by public interest.

6.6.4 Commercially Oriented SOEs

Commercially oriented SOEs, like ordinary companies, are incorporated in terms of the Companies Act, the main difference is that a shareholder for SOEs is the state. As explained in the previous chapters, Lesotho does not have one particular ownership model, thus in some SOEs, a line ministry would be a shareholder while in some a state agency will be a shareholder representative. The 'kharetsa' model proposed by this thesis proposes a state holding company to hold shares in all commercially inclined SOEs in Lesotho. The proposal goes further to suggest that the existing Lesotho National Development Corporation (LNDC) be incorporated into a state holding company.

Having a state holding company will in a way insulate SOEs and ensure that the ultimate shareholder i.e. the government does not have unnecessary control powers that has the effect of undermining the SOEs' boards. The proposal at this stage is to follow the Singapore Temasek model. The objective is to set up an independent operative arm to exercise shareholder rights on behalf of the government. This will improve the governance efficiency in SOEs and limit unnecessary political influence.

The state holding company will ensure that the state shareholding is exercised in a non-armature manner and with less political influence. At the helm of the holding company shall be a highly qualified board and supported by equally skilled executive team. Thus, the state's shareholder functions shall be exercised with adequate level of professionalism, thereby promoting the public interest. This will undermine the current problem of having some political elites at the helm of SOEs' leadership.

Reorganising or restructuring the shareholder function in commercially inclined SOEs through a state holding company is that it will help address the issue of instability in SOEs created by forever changing shareholder representatives and at times senior executives following change occasioned because of elections or any other political change in government. Change in government in most instances precipitates change in policy direction to try and deliver on promises made during pre-elections campaign.[41] The change in policy government and policy direction in most cases, in current SOEs dispensation, translates into dissolution and re-composition of SOEs boards and at times change of some executives.

The state holding company proposed by the 'kharetsa' model will help insulate SOEs from the instabilities caused by change and/or instability in the political landscape of the country. Following 'kharetsa', the holding company will limit the government's access to the SOEs boards and executives. This will in turn promotes board independence and SOEs efficiency. This independence will extend to the holding company's ability to structure and arrange its subsidiaries in a manner that is considered best and beneficial to the holding company and ultimately to the government as its shareholder.

[41] See the discussions in chapter three above.

The ’kharetsa’ model advocates for real insulation of SOEs from the political elites. Thus, the holding company under ‘kharetsa’ will govern its subsidiaries without any political interference thereby increasing their competitiveness in the open market economy. The holding company will have unfettered authority to set objectives and targets for its subsidiaries, with the boards supported by executive teams being responsible for execution. On the other hand, the holding company will be accountable to its shareholder for the performance of its subsidiaries, just as is the case with Temasek.

The ‘kharetsa’ model’s proposed holding company will have the net effect of freeing up government for the government to focus on policy formulation and core government business while the proposed holding company concentrates on governing all other SOEs in the best interest of not only the state as a shareholder but the public as well as ultimate beneficiaries of the SOEs. The separation of ownership and control as suggested by ‘kharetsa’ is ideal for realisation of SOEs full insulation from political influence that would otherwise be exerted by the state on SOEs where the state has close relationship with the SOEs.

The holding company suggested by the ‘kharetsa’ model in Lesotho needs certain safeguards for it to succeed. Firstly, the core objective and/or mandate of the holding company should be clearly defined in legal instruments to protect the holding company from being infiltrated by political elites to the demise of the entire SOE sector in Lesotho. To achieve this safeguard, the holding company should be clearly defined as public interest company with a commercial mandate from the state.

Secondly, the holding company’s relationship with the state as a shareholder should be clearly defined in the legal instrument. Legislation should go on to clearly define the role of the shareholder and how the shareholder exercises powers within the holding company. Thirdly, one important control that is necessary to ensure the success of the ‘kharetsa’ model is the guaranteed board independence of the proposed holding company. The board should be at liberty to independently appoint its own executive team to manage daily affairs of the holding company. Put differently, the holding company’s board, should be in a position to appoint senor management and executives of the company and even constitute boards of subsidiaries without any political interference.

To further ensure the success of the ‘kharetsa’ model, one other important layer of control would be to ensure that the holding company’s board is not served by politically exposed persons (PEPs). When constituting the proposed holding company’s board people of high calibre and in good standing should be considered, these would be leading industrialists, professionals with authority in various business communities, men and women with business acumen and most importantly, vast experience in business.[42]

It is submitted that for commercially inclined SOEs in Lesotho, the proposed holding company with attributes discussed above is the most ideal and appropriate for SOEs to survive the current challenges. The proposed holding company route will result in a depoliticised and professional SOEs that are sustainable and with potential of returning value to the shareholder.

The holding company and all its subsidiaries should be regulated and managed through a unitary legal and regulatory environment which is enforced by a statutory regulator in a well-coordinated manner which embraces self-regulation and thereby ensuring receptive regulation. These SOEs are led by fit and proper directors who are mostly professional and highly skilled. These professionals enjoy the support of domestic and international advisory services provided by international panels and advisory teams. This then entrenches professionalism in governance and constructs meaningful engagements at board level which will, almost invariably, productive, and sustainable SOEs.

[42] This is in line with the Temasek model and the recommendation made in the OECD Corporate Governance Working Paper No. 18 – Stocktaking of Anti-Corruption and Business Integrity Measures for Southern African SOEs (available on https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/09/stocktaking-of-anti-corruption-and-business-integrity-measures-for-southern-african-soes_g17a26fe/5jrtd6fghvf1-en.pdf last accessed on December 20th 2024).

6.6.5 Mixed Shareholding for SOEs

As discussed in previous chapters, some SOEs in Lesotho have a mixed shareholding structure. It would be remis for this thesis to turn a blind eye on this form of SOEs. Thus, the importance of this section of the thesis. In the above discussions, the thesis is centered around proposals for restructuring SOEs in Lesotho. However, the discussion did not touch on the SOEs in which the state is not a sole shareholder. The discussion that follows seeks to make proposals that are geared towards state participation in mixed shareholding SOEs.

Having a state as a sole shareholder has a negative side that usually dilutes board primacy because of political interference in SOEs. As discussed in the previous chapters, the practice has been that political elites and those close to them gets appointed to serve on these SOEs boards when the state is requested to nominate people to the board. These would be people without skills relevant to the SOEs that they have been appointed to serve, it most cases, their appointments would be politically driven as opposed to being based on merits. As if this is not enough, the shareholder representative is, in most cases, a minister or a principal secretary, these are career politicians who in most cases does not have experience in business.

Mixed shareholding has some benefits for SOEs, these benefits ranges from financial to governance benefits. It is common cause that private businessmen and women are always driven by return on their investment. Thus, having private business co-invest in SOEs may have a positive impact both on governance and finances of the SOEs. This will be precipitated by the fact that private business will push for efficiency and robust governance practices that will guarantee return on investment. SOEs in mixed shareholding benefit from a wealth of experience in governance, management and industry expertise brought by private business. However, there is need to neutralise private business participation in SOEs because if left unchecked, private business is likely to undermine public interest and prioritise profits.

The proposed 'kharetsa' model embraces this type of SOEs because Lesotho ha a number of them that came as a result of privatisation project that happened between 1995 and 2000.[43] Some of

[43] See the discussions around privatization at 3.2 above.

these SOEs offer services that are key to the economic development and growth in Lesotho. Under 'kharetsa', the proposal is that the shareholder representative in mixed shareholding SOEs should be the state holding company discussed above. The holding company should then nominate directors to the SOEs board to represent the state and ensure promotion of public interest.

To get to a point where state nominated directors well represent the state on theis type of SOEs' boards, it is important to redefine the nomination process and criteria. Thus the thesis proposes that under the 'kharetsa' the government should not promote the deployment of political elites without experience and/or knowledge of business in SOEs. The state holding company must hold the government stake in these SOEs. Nomination of individuals to represent the state on these SOEs' boards should also be handled by the state holding company. Proper job descriptions should be developed and tailor made to match the skill requirements matrix of each SOE.

Whenever the state holding company is invited to nominate individuals to the SOE's board, as a matter of policy, the state holding company should request for the SOE's skills matrix with an indication of skills already represented at board level. Once this is done, the state holding company will then have an idea of the skillset that would make commercial sense if added to the SOE's board. The board vacancy should then be advertised publicly by the state holding company, interviews held and best candidate nominated and recommended for appointment to the SOE's board. The proposed process is more transparent, ethical and has potential of improving SOEs' boards performance. It is submitted that this process is better than the current process which in the main results in political interference in SOE. The proposed process will ensure insulation of SOEs boards from political interference and thereby promote their independence and professionalism.

However, in these SOEs, the state holding company should ensure that there are controls in place that will guarantee promotion of public interest. The holding company as a shareholder representative and ultimately its nominated directors should not merely take the back seat and watch as the private business takes over the SOE. Where the state is a minority shareholder, the Companies Act offers remedies for minority shareholder protection which may be invoked whenever private business attempts to bulldoze the state.

If well managed, the mixed shareholding ownership model of SOEs is likely to yield a number of positive benefits, particularly in commercially inclined SOEs. The obvious benefits would be financial, however, there is more. Mixed shareholding SOEs are likely to benefit from private sector participation on their management. The private sector would normally engage professionals and highly qualified individuals in the management of the business and their lack of political affiliation guarantees maximum concentration on the business and ethical leadership thereof.

Private sector is driven and motivated by return on investment, this requires efficiency, ethical leadership and robust governance. These qualities will be represented in the individuals nominated and recommended for appointment to the SOE's boards. This will facilitate skills and experience exchange as the private sector nominated directors will bring wealth of governance and industry expertise. This will improve general performance and governance of SOEs. Unfortunately, if left unchecked, private sector partners may prioritise profits over everything else, hence the need for strong state representative on the board to balance the capitalistic nature of private equity partners and thereby balance SOEs profitability with public interest.

The most important benefit that the mixed shareholding is that private equity partners provide somewhat effective checks and balances between SOEs' management and the board on the one hand and the board and shareholders on the other. This is so because private sector prioritises governance as a driver for enterprise success. It is for this reason that mixed shareholding SOEs' displays sound performance and corporate governance practices compared to other SOEs in which the government is a sole shareholder. A practical example that supports this analogy is that in Singapore, SOEs are mostly co-held by Temasek and some strategic private sector investors.

6.7 Conclusion

The thesis took a journey through the SOEs landscape in Lesotho. In particular, the study focused on the control and ownership of the Lesotho SOEs. Different ownership models as well as control arrangements were discussed. The journey began by first unpacking the theoretical foundation of state ownership, the nature and rationale for SOEs. The legal and regulatory environment within which the SOEs operate was also considered. The thesis then examined roles and powers of different shareholder representatives in various SOEs as well as the role played by state nominated directors serving on SOEs boards and the impact of state ownership on the governance of SOEs. The thesis further considered the relationship of the SOEs boards and the state, particularly the impact of such relationship on the independence of SOEs boards and productivity of SOEs.

In the main, the thesis demonstrated that the current ownership and control architecture of SOEs in Lesotho is flawed and has a negative impact on the governance of these entities. The thesis also considered a comparative study with two jurisdictions as comparators, namely South Africa and Singapore. Lessons were drawn from these jurisdictions and the proposals made by the thesis are mainly inspired by the Singapore Temasek model. The proposals are bundled up in the proposed 'kharetsa' model of ownership. The name 'kharetsa' is adopted from an aloe plant that is unique to Lesotho, thus the 'kharetsa' proposes the ownership and control model that is unique to Lesotho. The 'kharetsa' model of ownership and control proposes SOEs that are fully insulated from political interference. Given a chance, 'kharetsa' can ensure that Lesotho has competitive, productive and well governed SOEs.

This body of work proposes a direct response or solution to the contemporary SOEs problem of poorly governed SOEs that are embroiled in politics. The thesis is a contribution to the ongoing scholarly discourse on corporate governance, state ownership and control of SOEs. It proposes a clear and unequivocal solution to the apparent problem facing SOEs that are near collapse in Lesotho. Given the current sociopolitical landscape of Lesotho, the thesis is a timely input that may yield positive results in the quest towards much needed economic development and growth in the country. The proposals made by this contribution have potential of restructuring the SOE sector and Lesotho and positioning it to reclaim its glory of the 1970s. It follows, therefore, that this scholarly contribution is a useful guide to policy makers, lawyers, legislators, scholars, regulators and students of contemporary corporate governance. Those that embrace the proposed 'kharetsa' will be introduced to new ways of viewing the role, ownership and control of SOEs. At the centre of the proposed 'kharetsa' is public interest. This is meant to ensure that economic growth and development that is driven by SOEs does not triumph on solely capitalistic foundation.

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