The legal status of South African universities and the concomitant effect on their corporate governance structures

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ABSTRACT

South African universities play a tremendously influential role in the development of a sustainable future in South Africa. It is at these institutions where many of our future leaders will be educated and moulded. Higher education institutions bear a fundamental ethical obligation to augment the attitudes, knowledge, skills and intelligence required to construct a sustainable future (Cortese, 2013). Given the vital role played by universities in society, their own achievement of good governance is of paramount importance.

In order to sufficiently determine which pieces of enacted legislation or code, if any, affect the corporate governance requirements of South African universities, it is critical to investigate the nature of South African universities' legal personality. The determination of South African universities' legal personality shall enable the author to satisfactorily determine what, if any, corporate governance requirements should be applied within South African universities, irrespective of their source. The determination of universities' legal personality and applicable governance provisions shall be done through extensive legal doctrinal analysis of the relevant legislation, case law and code.

The results of the research unambiguously demonstrate that universities' governance requirements are unique in that they are held to an immeasurably higher standard of corporate governance than that of normal juristic persons such as companies (of any nature) and close corporations, as they must not only comply with their enabling legislation, the Companies Act and the King Code, like normal juristic persons, but they are required to accede to the governance provisions set out in the Constitution, whilst meeting their positive obligation to uphold and safeguard the rights enshrined in the Bill of Rights ("BOR").

DECLARATION

I, Alain Michel Giraud, declare that this research report is my own work except as indicated in the references and acknowledgements. It is submitted in partial fulfilment of the requirements for the degree of Master of Business Administration at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at this or any other university.

Signed at ……………………………………………………

On the …………………………….. day of ………………………… 2015

DEDICATION

This thesis and the hours and hours spent working on it, is dedicated to my wife, Kerry-Lynn Giraud, without whom this would not have been possible.

TABLE OF CONTENTS

CHAPTER 1. INTRODUCTION

1.1 Purpose of the Study

The first aim of this research is to establish what type of legal personality South African universities possess. The second aim or purpose of this research, taking into account South African universities' legal personality, is to determine the corporate governance legislation – the Constitution, Higher Education Act and Companies Act − and code − King Code of Corporate Governance − with which South African Universities ought to comply.

Once one has established the legal personality of South African universities and the possible corporate governance requirements set out in terms of the various pieces of legislation and code governing this area of the law, this information can be used to determine two aspects:

1) Which governance structures are currently implemented by South African universities by virtue of the aforementioned legislation; and
2) Compare the differences between the corporate governance provisions that apply to normal juristic persons, for example companies, and those provisions that apply to universities and the legal ramifications thereof.

1.2 Context of the Study

There are a number of public institutions in South Africa that perform a public function, are funded by the public purse and are vital to the welfare and future of South African society. Often such institutions are established in terms of Acts of Parliament which *inter alia* prescribe the manner in which such institutions are to be regulated. The Acts often contain provisions that prescribe governance measures that must be enacted within such institutions. An example of such institutions is South African universities. South African universities, both public and private, are established and incorporated in terms of the Higher Education Act 101 of 1997. The purpose of the Act is to *inter alia;*

> "…regulate higher education; provide for the establishment, composition and functions of a Council of Higher Education; provide for the establishment, governance and funding of public higher education institutions; to provide for the appointment and functions of an independent assessor; provide for the registration of private higher education institutions; and provide for quality assurance and quality promotion in higher education ("Higher Education Act 101 of 1997," 1997).

This research shall focus on the provisions of the Constitution of the Republic of South Africa and the Higher Education Act that prescribe governance measures that must be implemented by the South African universities, in conjunction with those provisions prescribed by other relevant, but secondary Acts, such as the Companies Act 71 of 2008; and soft law, such as the King Code of Corporate Governance, a compendium of three governance reports and principles, providing a framework for the measurement and implementation of corporate governance structures within South African institutions and organisations.

Corporate governance has − since the outset of public ownership of corporations in South Africa − been contemplated by the stakeholders of such companies. The release of the King Report on Corporate Governance in 1994, piqued South

Africans' interest in corporate governance (G J Rossouw, Watt, & Malan, 2002). The rapid and pervasive globalisation of the world economy through *inter alia* information and communication technology has established the need for more effective corporate governance structures in order to ensure organisational survival and prosperity (Ljubojevic, 2011). Corporate governance can narrowly be defined as a framework of rules and regulations in terms of which an organisation is directed and controlled (Ljubojevic, 2011). This framework of rules and regulations specifies;

> "…the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders; and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance" (Ljubojevic, 2011; pg 3).

Corporate governance was originally introduced within companies to ensure that the board of directors carry out their roles in a manner which served the interests of the owners of the companies (G J Rossouw et al., 2002). In light of the role played by the lack of comprehensive corporate governance, the failure of companies such as Enron, the financial crisis in 2008 in the United States and other similar events − highlighting the need for the implementation of adequate corporate governance structures − the role of corporate governance has been developed to include interests of not only the company's stakeholders, but also the interests of the society or community within which the company operates (Davies, 2008).

Given the financial investment in public universities made by the South African Government and the importance of the role played by South African universities as set in paragraph 1.4 hereof, it is vital to determine the legal personality of universities and thereafter any possible concomitant corporate governance requirements – from whichever source − that ought to be implemented by such institutions, and further identify inconsistencies between currently existing corporate governance structures and those corporate governance structures required by law that are considered best practice, despite the fact that most corporate government requirements − especially those in South Africa − have a voluntary basis of compliance (M. King, 2009).

1.3 Problem Statement

1.3.1 The main problem

The intention of this research is to establish the legal personality of South African universities as defined by the Constitution, case law and the Companies Act, and using this information to determine with which corporate governance legislation and codes South African universities ought to comply, to establish the most comprehensive and effective corporate governance structure that can be applied in South African universities.

1.3.2 The first sub-problem

The first sub-problem is to determine the legal personality of South African universities and thus determine the applicability of various pieces of legislation, including but not limited to the Constitution and the Companies Act.

1.3.3 The second sub-problem

The second sub-problem is to determine the corporate governance requirements in terms of the Constitution and more specifically the BOR, and thereafter the corporate governance requirements provided for by the Higher Education Act.

1.3.4 The third sub-problem

The third sub problem is to determine, taking into account universities' legal personality, whether the Companies Act and the King Code of Corporate Governance can be applied to universities, and if so, to what extent they apply.

1.3.5 The fourth sub-problem

The fourth sub-problem is to determine, whilst taking into account the various formal corporate governance requirements in terms of the Constitution, the Higher Education Act and perhaps the Companies Act and the King Code of Governance, what differences exist between the corporate governance provisions that apply to normal juristic persons, for example companies, and those provisions that apply to universities and the legal ramifications thereof.

1.4 Significance of the Study

Given the public nature of universities and the substantial sums of money − tax payers' money − allocated to South African universities by the South African Government in its budget each year, universities must be seen to serve not only their immediate stakeholders, their students, academics and staff, but the broader community within which they are situated. Universities play an essential role in the generation and dissemination of knowledge within the communities or societies within which they exist. This augmentation and dissemination of knowledge provides people within such communities with the requisite higher level of knowledge and skills to contribute to the local economy and ensure social and economic well-being (Avram, 2013).

So broad are the communities within which South African universities exist, one may conclude that South African universities serve South African society as a whole and, therefore, must be seen to have governance structures in place that serve not only the community, but also the society within which universities exist. Given the South African Government's significant financial investment and the vital role played by South African universities in creating sustainable economic development and social welfare in South Africa, the aforementioned governance structures, once in place, should provide society with the confidence that each university is fulfilling its mandate, in a manner that is transparent, ethical and accountable. Such corporate governance structures ensure that these institutions continuously act within the scope of their objectives and budgetary constraints. Corporate governance structures within universities also ensure that universities and their stakeholders maintain and adhere to predetermined, specified and strict ethical standards. Corporate governance structures further ensure that the financial resources provided to universities, are used for the purposes for which they were intended, and not squandered due to mismanagement and/or corruption.

A significant gap exists in the research surrounding the application of corporate governance regulations and code to South African universities when compared to the application of the said legislation and codes to private companies, non-profit companies and/or publicly listed companies. This research aims to identify the gap that exists between the governance measures provided for by the Higher Education Act and those provided by the various pieces of South African legislation and code.

1.5 Delimitations of the Study

- The focus of this research is on public institutions and it should be noted that the Higher Education Act regulates both public and private universities in South Africa, and as a result the findings of this research shall only extend to those institutions that are considered public institutions.
- The comparative portion of the research, more specifically the comparison between the corporate governance structures in place in South African universities, shall only be limited to those South African universities.
- The doctrinal legal analysis shall only be conducted from an external point of view, the study shall not include interviews with key individuals from South African universities and as a result, the author shall not be privy to the internal workings and actual effectiveness of the corporate governance structures already in place.

1.6 Definition of Terms

For the purposes of the research, the following terms shall bear the following meanings:

1. The Bill of Rights ("BOR") – The Fundamental rights contained in Chapter 2 of the Constitution.
2. The Constitution – shall mean the Constitution of the Republic of South Africa, 1996.
3. The Higher Education Act ("HEA") – shall mean the Higher Education Act 101 of 1997.
4. The Companies Act – shall mean the Companies Act 71 of 2008.
5. The King Code – shall mean the King Code of Corporate Governance and shall include all three of the King Reports on Corporate Governance.
6. Organ of state shall mean:

a) any department of state of administration in the national, provincial or local sphere of Government; or

b) any other functionary or institution

I. exercising a power of performing a function in terms of the Constitution of South Africa or a provincial constitution, or

II. exercising a public power or performing a public function in terms of any legislation"

as defined in Section 239 of the Constitution.

CHAPTER 2. LITERATURE REVIEW

2.1 Introduction

This section contains a literature review concerning the fundamental themes that are relevant to the study, the section aims to provide clarity in respect of a number of concepts that shall enable the reader to have a greater understanding of such concepts, the purpose of this study and as a result the significance of the results of the study.

The literature review shall encompass a number of concepts that shall be investigated during the course of the study;

- Firstly, the concept of legal or juristic personality and its concomitant effect on the applicability of relevant legislation and code;
- Secondly, the concept of corporate governance, including its origin, sources and reason for its existence within the South Africa context;
- Thirdly, the concept of best practice corporate governance codes or legislation; and
- Finally a comparison between what is considered best practice and what is currently put into practice within the top universities in the country. This section concludes with a summary of the key research questions that provide the foundation, structure and purpose of the study.

2.2 Background Discussion

South African universities play an extremely important role in the development of a sustainable future in South Africa. It is at these institutions where many of our future leaders will be educated and moulded. Higher education institutions bear a fundamental ethical obligation to augment the attitudes, knowledge, skills and intelligence required to construct a sustainable future (Cortese, 2013). The critical role played by higher education institutions in creating a sustainable future for South Africa, becomes even more pronounced within South Africa's historical context, given the inequities of the past perpetuated by the oppression of the vast majority of the population during the rule of the apartheid-era government (Barac & Marx, 2012). The promulgation of the Higher Education Act 101 of 1997 further highlights the important role played by higher education in post-apartheid South Africa, as the Higher Education Act has as its goals, the reconstruction of higher education and its structures to address the needs of an open and democratic society (Odhav, 2009). The Act's vision is to create a single nationally coordinated system of higher education to address developmental needs expressed within South Africa, whilst placing great emphasis on the transformation of South African society into an open and democratic society (Odhav, 2009). The Act aims to address the imbalances and inequity created by apartheid by providing equal access and opportunities for all students who attend higher education institutions, whilst providing for local and national community needs (Odhav, 2009).

Given the critical role played by South African universities as expressed above, one can only conclude that it is vital to ensure that the corporate governance provisions that affect South African universities, are critically reviewed in an effort to ensure that the precious resources set aside by our government and allocated to such universities, are properly utilised to achieve societal goals and ensure that the critical role played by these institutions is correctly met. Consequently, it is imperative to determine to what extent South African universities ought to apply to the corporate governance provisions and soft law set out in the various sources of corporate governance, with the aim of establishing or identifying where deficiencies or gaps exist, and sounding out a viable manner in which to address such deficiencies and provide a solution to the problems created by such deficiencies.

2.3 Legal Personality

In order to determine which pieces of enacted legislation or code, if any, affect the corporate governance requirements of South African universities, it is critical to investigate the nature of South African universities' legal personality. The determination of South African universities' legal personality shall enable the author to satisfactorily determine what, if any, corporate governance requirements should be applied within South African universities, irrespective of their source.

Legal subjects can be defined as an entity that is capable of being the bearer of rights, duties and obligations. This means that the law recognises that an entity has the capacity to be the bearer of such rights, duties and obligations. The capacity to be the bearer of such rights, duties and obligations can be defined as legal capacity. The recognition by the law that an entity can be the bearer of rights, duties and obligations can be defined as the law conferring legal personality upon an entity (Heaton, 2012). A legal subject's legal personality determines what rights, duties and obligations an entity can be the bearer of and the extent of such rights, duties and obligations. We can conclude that legal personality is only bestowed on entities that the law recognises as legal subjects (Heaton, 2012).

Legal systems in different countries differ from country to country and therefore some legal systems recognise specific entities as legal subjects capable of being the bearers of legal personality, whilst a the legal system of a different country may not recognise the same entities as legal subjects and therefore not recognise such entities as being capable of being the bearer of legal personality (Heaton, 2012). It is therefore important to determine which entities constitute legal subjects in terms of South African law. Two categories of legal subjects can be identified within South African law, namely, **natural** persons and **juristic** persons (Heaton, 2012).

Once one has determined the legal personality of South African universities in the broader sense, distinguishing between natural and juristic persons, it is important to consider universities' legal personality through a more in-depth analysis to determine if universities can be defined as organs of state as envisioned by Section 239 of the Constitution.

Universities' legal personality can be determined by the legislation in terms of which they are incorporated and any subsequent legislation enacted with the purpose or aim of directing or controlling the universities and their governing councils. The following pieces of legislation and soft law determine South African universities' legal personality: the Constitution of South Africa and the Higher Education Act 101 of 1997.

2.3.1 *Universities, public power and the Constitution*

It is, by now, a trite proposition of law that the utilisation of all public authority is subject to the dictates – the strictures and the dictates − of the Constitution (Woolman, Roux, & Bishop, 2007). The Constitution, and subsequent case law, suggests that universities, particularly public institutions, meet the criteria for an organ of state that exercises public power.

Section 239 of the Constitution of the Republic of South Africa defines an **"organ of state"** as follows:

> "c) any department of state of administration in the national, provincial or local sphere of Government; or
>
> b) any other functionary or institution
>
> i) exercising a power of performing a function in terms of the Constitution of South Africa or a provincial constitution, or

ii) exercising a public power or performing a public function in terms of any legislation” ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

Section 8 of the Constitution further states that the BOR is applicable to all law and binds the legislature, the executive, the judiciary and all organs of state ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996). Section 8 goes on to state that the BOR applies to juristic persons to the degree required by the essence of the rights and the corresponding nature of the juristic person. While some of the foundational rights contained in the BOR would not apply to organs of state such as a university (for example those rights identified with criminal procedure protections), the case law suggests that the majority of the rights would.

An early High Court decision, **Baloro and Others v University of Bophuthatswana and Others**, found that while the university did not qualify as an organ of state in terms of the Interim Constitution, the Constitution’s contemplation of the horizontal application of fundamental rights meant that its activities and its operation in the public domain as public institution of higher learning would make it subject to most constitutional rights ("Baloro and Others v University of Bophuthatswana and Others," 1995).

In a more recent judgment, **Gardner v Central University of Technology, Free State**, the Labour Court held that:

> “The Central University of Technology, Free State was both a higher education institute in terms of Section 1 of the Higher Education Act and an organ of state as defined in Section 239 (b) of the Constitution ("Gardner v Central University of Technology Free State ", 2012).

2.4 Corporate Governance in South Africa

Corporate governance can be described as the system by which organisations, more particularly commercial entities, are directed and managed by their respective shareholders and directors (van der Waldt, 2009). Solomon & Solomon (2004), described corporate governance as:

> "…the system of checks and balances, both internal and external to companies, that ensure that companies discharge their accountability to all their stakeholders and act in a socially responsible way in all areas of their business activity" (Solomon & Solomon, 2004).

The board of directors of a corporation is tasked with ensuring that a company provides value to its shareholders; financial profitability is a primary aspect of such value. However, to some authors this indicates the irresponsibility of business, in the face of pervasive globalisation and the ever-widening gap between the rich and the poor (Lleywellyn, 2004). Corporate governance within a specific company sets outs regulations and procedures, in respect of the decisions to be made regarding the company's corporate affairs; it provides a means by which an organisation's goals can be set; and it provides a system by which such goals can be achieved whilst simultaneously measuring performance in a number of key areas that affect both the internal and external stakeholders of the company (van der Waldt, 2009).

The concept of corporate governance originates and is a consequence of the agency problem that arose as a result of the distinction between ownership and control of companies, as the owners of companies entrusted the management and running of their companies to the directors of such companies, and as a result, the responsibility for control of such company shifted to the managers or directors of such companies (G J Rossouw et al., 2002). This separation of ownership created a situation in terms of which directors and managers could abuse the power bestowed on them by the owners of companies, and utilise such power for personal gain and not in the best interests of the shareholders of the company (G J Rossouw et al., 2002). Corporate governance is implemented to address the potential conflicts of interest that may or may not arise between the owners of a company and those charged with running it (Andreasson, 2011). The prime reason for the existence of corporate governance structures is to instil investor confidence in companies and their board of directors through the provision of structures which provide transparency, fairness, corporate responsibility and accountability (Davies, 2008). The majority of the corporate governance codes and principles are (what is termed) soft law, voluntary in nature, and therefore failure to comply does not result in sanctions being imposed on a company, as long as they can provide a reasonable explanation for the company's lack of compliance (Wiel, 2002).

Theoretically, corporate governance systems are based on two models, the **shareholder** model, generally found in liberal market economies, for example, the United Kingdom and the United States of America – it must be noted that these countries are also common law countries − and the **inclusive or stakeholder** model which is commonly found in coordinated market economies, for example Germany and Japan (Andreasson, 2011).

The shareholder archetype of corporate governance advocates that the company or corporation is essentially an extension of the owners of the company, and as a result, the board of directors is responsible only to the shareholders of the corporation. This ideology is perpetuated by the primary assumptions of the model: firstly, that violation of private ownership is prohibited despite possible negative consequences of such ownership and the objectives set by the relevant owners; and secondly, that economic efficiency can only be achieved through unfettered market forces (Andreasson, 2011).

The inclusive or stakeholder model of corporate governance espouses a model in terms of which the directors of a company are no longer accountable merely to the shareholders in respect of the company's operations and business dealings, but are also accountable to various other stakeholders of the company (G.J Rossouw, 2005). The inclusive or stakeholder model of corporate governance was introduced in South Africa, and was contained in the First King Report on Corporate Governance published in 1994 (G.J Rossouw, 2005). The inclusive or stakeholder model, as practiced in South Africa, can be regarded as a being concerned with creating a balance between a corporation's profit-driven objectives versus its social objectives and/or obligations prescribed by the society within which the corporation exists, and wherever possible align the two often contrasting aspirations (van der Waldt, 2009). It must also be borne in mind that developing countries and emerging markets face different challenges, requirements and demands, in contrast to those nations with developed economies. Developing economies or emerging markets require corporate governance structures that balance the relevant country's need to attract extensive international and foreign direct investment, whilst enhancing economic growth and meeting the needs of the country's population, within both the economic and political spheres (West, 2009). Each country's set of corporate governance codes or regulations is unique and shaped by many factors; for example, the country's economic structure, level of economic development, legal framework and financial systems (Davies, 2008).

This study will focus on the corporate governance requirements or provisions that apply to South African universities, having due regard for international best-practice corporate governance principles as prescribed by organisations such as the Organisation for Economic Cooperation and Development (OECD). In order to do so, it is vital to determine the various sources of corporate governance provisions in South Africa and comparable international sources. Once the legal personality of South African universities has been determined as set out in paragraph 2.3 hereof, it enables the determination of which of those corporate governance provisions identified can or must be applied to South African universities.

Given that this study is focused on South African institutions and therefore based within the South African context, the study shall focus on the inclusive or stakeholder model of corporate governance, as it is the prevailing model within South African corporate governance. The guiding principles and sources of South African corporate governance, and the creation and review of the King Report on Corporate Governance, include:

a) The Combined Code published in the UK in 1988, which addresses a broad range of corporate governance aspects, for example financial reporting, auditing and transparency, executive remuneration and the role of the shareholders. However the code did not address stakeholders issues such as employment equity and employee participation (G J Rossouw et al., 2002);
b) The Principles of Corporate Governance in the Commonwealth, published in 1999, Commonwealth Association for Corporate Governance. There are 15 principles that cover a range of issues, but most importantly, in contrast to the Combined Code mentioned in point a) above, include a number of stakeholder issues (G J Rossouw et al., 2002).
c) The Principles of Corporate Governance, first pronounced in 1999 by the Organisation for Economic Cooperation and Development, these principles address five preeminent issues: shareholder rights, the function of the board of directors, complete disclosure and transparency, equitable treatment of the shareholders, and finally the role of the company's internal and external stakeholders (G J Rossouw et al., 2002).

Akin to many other Commonwealth countries, South African corporate structures are similar to those of the United Kingdom. South African corporate law was influenced by the English Companies Act of 1908, which lead to the formation and promulgation of a South African Companies Act of 1973 (West, 2009). The development of South African corporate governance began in 1992, with the establishment of the King Committee, headed by Mervyn E King; the Committee was tasked with creating a set of corporate governance guidelines for South Africa (West, 2009). The first King Report identified many corporate governance issues within the South African context. However, it focused predominantly on the board of directors – its structure − and the protection of shareholders. As an *obiter,* the report did raise some nonfinancial concerns together with the issue of engagement with stakeholders (West, 2009). The subsequent King II and King III Reports on corporate governance both provided for numerous additional principles. The Committee understood that society required a balance between the freedom to manage a company held by the directors, and the requirement of accountability to the different stakeholders of a company, both internally and externally (G J Rossouw et al., 2002).

Throughout its history, the King Committee has been unfaltering in its view that for South Africa to achieve long-term sustainable corporate success, it is imperative that an inclusive or stakeholder model or approach be adopted as opposed to the shareholder model adopted by countries like the United States of America (G J Rossouw et al., 2002). Given the vital role played by South African universities in the development of a non-racial, equitable and sustainable future for South Africa, the King Committee's commitment to the inclusive or stakeholder model demonstrates the existence of a coinciding commitment to the development of such non-racial, equitable and sustainable future for South Africa.

2.5 Relevant Corporate Governance Legislation

There are a numerous of pieces of legislation and code − soft law − that have an effect on the possible corporate governance structures that are in place or ought to be in place in South African universities. The analysis of each piece of legislation shall occur, taking into account the hierarchy of the relevant legislation.

2.5.1 *The Constitution*

The Constitution of the Republic of South Africa is the highest law in South Africa and as a result, any legal norm or rule set out in the final Constitution takes precedence over any non-constitutional law whether it be parliamentary legislation, subordinate legislation, customary law and/or common law (Michelman, 2007). Section 2 of the Constitution provides that the final Constitution “is the supreme law of the Republic; law that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled” ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

It is clear from Section 8, the BOR is applicable to both the natural and juristic person, including organs of state. Section 8 does, however, make the proviso that the fundamental rights contained in the BOR are applicable to juristic persons, having regard for the essence of the right and the extent of the duty imposed by such right, in relation to the bearer’s ability to perform the duty imposed by the right and be the bearer of that right. Section 8(4), provides that juristic persons (for example universities) are entitled to the rights provided for in the BOR to the degree required by the nature of the rights and the nature of the specific entity in question ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

The judgements handed down by the Constitutional Court in the case law cited below demonstrate that the Constitution is preeminent law of the land and that all other legislation is secondary to the Constitution, as in each case the Constitutional court decided that despite enabling legislation in respect of the relevant governing bodies conferring specific powers on that governing body to govern that specific institution using its discretion, the governance of that institution is at all times subject to the provisions of the Constitution, especially those contained the Chapter 2, the BOR.

In **MEC For Education, Gauteng Province and Others** v **Governing Body, Rivonia Primary School and Others**, the Constitutional Court held *inter alia* that the governing body of the school's decision to refuse entry to a grade one student on the grounds that the number of students in that specific grade would exceed the number of students as prescribed by the school's admission policy (which policy was determined by the governing body of the school), was unconstitutional and violated the child's Section 29 right to basic education; it further held that the Head of the Education Department was empowered to instruct the principal of the school to admit the learner ("Mec for Education, Gauteng Province, and Others V Governing Body, Rivonia Primary School and Others," 2013).

In **Head Of Department, Mpumalanga Department of Education and Another** v **Hoërskool Ermelo and Another,** the Constitutional Court held that the Head of the Education Department had the authority to withdraw certain powers or functions bestowed upon the school's governing body by its enabling legislation ("Head Of Department, Mpumalanga Department of Education and Another V Hoërskool Ermelo and Another," 2010).

The aforementioned decisions demonstrate the overarching applicability of the Constitution in respect of all law in South Africa, but more specifically in this instance the governance of public institutions. These decisions demonstrate that the provisions of enabling legislation in respect of public institutions is subject to the dictates of the Constitution, its purpose and its intention, and should at all times comply with the Constitution and shall be found invalid should it not comply.

2.5.2 *The Higher Education Act*

All South African universities are currently regulated in terms of the Higher Education Act 101 of 1997. The purpose of the Higher Education Act ("HEA") is to "regulate higher education; provide for the establishment, composition and functions of a Council of Higher Education; provide for the establishment, governance and funding of public higher education institutions" ("Higher Education Act 101 of 1997," 1997).

Most universities, in their own constituting documents, allude to the fact that they are established in terms of the Higher Education Act 101 of 1997, for example the Statute of the University of the Witwatersrand, Johannesburg provides that the university is established in terms of the HEA.

Section 2 of the HEA states that the Act applies to higher education in South Africa. Moreover, Section 1 of the HEA defines an organ of state as envisioned by Section 239 of the Constitution ("Higher Education Act 101 of 1997," 1997). That definition buttresses the contention above that public universities are an organ of state subject to the constraints, responsibilities and duties of the BOR and other applicable sections of the Constitution.

Chapter 4 of the Higher Education Act deals specifically with governance of a public higher education institution. This chapter provides for *inter alia* the formation of a Council and a Senate within the institution, institutional rules and statutes and their approval by the Minister of Education, composition of the university's board, term of office of the chairperson and its members, and the university's annual audit and report ("Higher Education Act 101 of 1997," 1997). Chapter 4 also provides for *inter alia* the appointment of a principal, vice principal, a student's representative council, an institutional forum and other structure or offices determined by the institutions' statue ("Higher Education Act 101 of 1997," 1997).

The Act further provides that the Council of a particular institution is accountable for the governance of that organisation, subject to policy determined by the Minister of Education and Training. The Act contains provisions regarding the composition of the Council and the Senate, as well as their establishment, powers, functions and termination. The act further determines the establishment, functions, powers and termination of principals ("Higher Education Act 101 of 1997," 1997).

The Act also contains various provisions in respect of the establishment of institutional statutes and rules and provides that each institution's statute and rules shall govern the establishment of a Student's Representative Council, disciplinary procedures and measures, and finally the admission policy of that specific institution ("Higher Education Act 101 of 1997," 1997).

The Act briefly provides that the Council of an institution must, in the method prescribed by the Minister, keep record of its proceedings and keep complete accounting records of all assets, liabilities, income and expenses and any other financial transactions of the institution as a whole ("Higher Education Act 101 of 1997," 1997); thereafter such information must be provided to the Minister of Education and Training in the manner and form as prescribed by the Minister ("Higher Education Act 101 of 1997," 1997).

Given that the Act stipulates in Section 70, that the Act prevails over all other legislation relating to higher education, other than the Constitution, one can conclude that the legislature intended for the Act to be the primary source of legislation governing higher education institutions in South Africa, while still being subservient to the Constitution, therefore ensuring that its application and interpretation is performed taking into account the BOR and the Constitution. This, however, does not prevent universities from taking into account other legislation and codes, such as the Companies Act and the King Code of Corporate Governance, in order to improve their corporate governance and transparency.

2.5.3 *The Companies Act*

Section 7 of the Companies Act 71 of 2008 provides that that the objective of the Act is to *inter alia*,

a) “promote compliance with the Constitution, more specifically the BOR, in the application of company law
b) promote the development of the South African economy by *inter alia* encouraging transparency and high levels of corporate governance, taking into account the role played by enterprises within the social and economic realms of South Africa,
c) balance the rights and obligations of directors and shareholders of companies
d) encourage effective and responsible management of companies” ("The Companies Act 71 of 2008," 2008).

It is clear that the people tasked with drafting the Companies Act intended to include and further promote efficacious corporate governance within the ambit of the Act.

Section 8 of the Companies Act 71 of 2008 provides that only two types of companies may be formed and incorporated under the Act namely, for profit companies (state owned enterprises, private companies, personal liability companies and public companies) and not for profit companies("The Companies Act 71 of 2008," 2008). It seems counter intuitive that institutions such as universities and similar institutions would have been excluded, given the regulatory purpose of the Act. In addition, the Act provides no indication that any class of corporation is excluded from its ambit.

2.5.4 *King Code of Corporate Governance*

The King Code of Corporate Governance is a compendium of Corporate Governance Codes, authored by Mervyn E King. The reports released in 1994, 2002 and 2009, King I, II and III respectively, provide a set of codes that contain various sub codes and principles that address numerous issues of corporate governance. The preeminent principles contained in the King Code of Corporate Governance 2009, address the following issues:

“ 1. Ethical leadership and corporate citizenship;

2. Boards and directors, the formation and governance;

3. Audit committees and their formation and independence;

4. The governance of risk;

5. The governance of information technology;

6. Compliance with laws, rules, codes and standards;

7. Internal auditing;

8. Governing stakeholder relationships;

9. Integrated reporting and disclosure.” (M. E. King, 2009)

The King Code of Governance for South Africa 2009 – not to be confused with the Code of Governance Principles (King III) − applies to all entities whatever the manner or form in which such entities where incorporated or established; it does not discriminate between the public, private or not for profit sectors or organisations. Clause 13 of the Code provides insight into the intentions of the authors of the code and provides guidance as to which entities the authors intended to include in respect of the application of the Code. Clause 13 provides that the King Report of Corporate Governance 2009 is applicable to all entities regardless of the manner or in which form they were incorporated or established, whether the entity exists in the private or public sphere. It states that the principles contained within the Code are drafted in a manner in which they can be applied by any entity in order to achieve good governance (M. King, 2009).

The Code should not be read to displace the Constitution or the Higher Education Act, but rather to supplement those provisions and the Higher Education Act that concern the governance structures of South African public institutions, more specifically South African universities.

2.6 Best Practice Corporate Governance Structures

As described above in paragraph 2.2 hereof, corporate governance could be described as a compedium of rules or constraints that is placed on a company, more specifically its board of directors and its managers to ensure that a company performs in the most efficient manner possible whilst limiting conflict, ensuring transparency, lowering risk, increasing returns for shareholders and investors and finally creating a system by which directors and managers can be monitored and held accountable in the event that inappropriate or unethical action has been taken (Aluchna, 2009).

Countries around the world have developed codes of best corporate governance practice in an effort to increase corporate awareness and set standards of governance for local companies (Aluchna, 2009). Despite differences that exist between different national corporate governance codes, often the set of guidelines proposed in each country remains remarkably similar; the codes commonly refer to *inter alia* equality in respect of the treatment of shareholders (focusing on the protection of minority shareholders), monitoring and evaluation of the board of directors together with the structure of the board of directors and the functions they perform; the procedures in respect of voting rights of both the shareholders and the board of directors; and finally transparency and accountability of the company to its stakeholders (Aluchna, 2009). Research indicates that the benefit of superior corporate governance structures is that corporations perform better and have higher market value (Aluchna, 2009).

The Organisation for Economic Cooperation and Development (OECD) in its report entitled OECD Principles Corporate Governance, published in 2004, identifies the following key standards of corporate governance (Ingram, 2004):

1. "The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the

division of responsibilities among different supervisory, regulatory and enforcement authorities;

2. The rights of shareholders and key ownership functions;
3. The equitable treatment of shareholders;
4. The role of stakeholders in corporate governance;
5. Disclosure and transparency;
6. The responsibilities of the board."

Principles published by a worldwide organisation such as the OECD provide an exemplary basis from which to analyse corporate governance best practices. However, it should be borne in mind that different countries require outcomes from their own set of corporate governance codes; notwithstanding any underlying similarities that may occur in each country, each country's corporate governance codes depend on the relevant country's legal, financial, regulatory, and economic environment, and as a result differ from country to country according to each country's needs (Ingram, 2004).

2.7 Comparison between Established Corporate Governance Structures and Best Practice Structures

Each country’s set of corporate governance codes and principles is adapted and evolves as a function of the environment within which the codes exist, each country’s legal system, financial system and economic situation determines that country’s corporate governance system, its requirements and its evolution, and − although underlying similarities between each country’s system of corporate governance may exist − an international homogenous set of principles or codes does not seem possible (Davies, 2008).

When comparing those corporate governance structures in place and those that are seen to be best practice, and thereafter making recommendations addressing the disparities that may exist between the two, it is important to remember that each country’s corporate governance requirements differ, and that any recommendations made should reflect the needs of the institutions in question, having regard for the country and context in which that institution finds itself.

2.8 Conclusion of Literature Review

The systematic analysis undertaken as described above, the analysis of the legal doctrine encompassing case law, statute and soft law – codes – will enable the author to determine the relationship between those corporate governance structures already in place in South African universities and those that are considered best practice and perhaps ought to be in place, having regard to the unique set of circumstances in which South Africa and its universities find themselves, thus answering the following research questions:

2.8.1 *Research Question 1*

What is the legal personality of South African universities, and more specifically can universities be defined as organs of state as envisioned in Section 239 of the Constitution, and if so, what does this entail for such institutions?

2.8.2 *Research Question 2*

Taking into account South African universities' legal personality as determined in research question 1, what corporate governance requirements are provided for by the Constitution of South Africa, more specifically the BOR, and what corporate governance requirements are provided for by the Higher Education Act?

2.8.3 *Research Question 3*

Taking into account South African universities' legal personality as determined in research question 1, to what extent, if at all, do the Companies Act 71 of 2008 and the King Code of Corporate Governance find application in respect of universities in South Africa?

2.8.4 *Research Question 4*

How does the unique application of governance legislation and codes in respect of organs of state, and therefore universities contrast with the operation of corporate governance provisions in respect of normal juristic persons?

CHAPTER 3. RESEARCH METHODOLOGY

This section shall provide the reader with a framework in respect of the research methodology utilised in this study. The section will discuss the qualitative research methodology, more specifically the methodology of legal doctrinal analysis. It will then continue by addressing the research design and then a discussion of the analysis and interpretation of the research material.

3.1 Research Methodology

A qualitative research methodology will be employed in this research, more specifically, the method of legal doctrinal analysis shall be utilised. In order to understand what is meant by legal doctrinal analysis, the concept shall be broken down for further analysis and explanation. Legal research methodology as a subject has not been broadly covered in South African legal literature and as a result there is very little published material regarding legal research methodology in South Africa (Kroeze, 2013).

The word doctrine is derived from the Latin term “doctrina” which means education, knowledge or possession of knowledge. The doctrine that is to be analysed in this study, encompasses various legal concepts and principles, case law, statute and rules or code (Hutchinson & Duncan, 2012). Doctrine can be defined as the amalgamation of various rules, values, principles and norms, which expound a genus of the law as part of the greater framework of law, and further provides its readers with a greater understanding and coherence in respect of the principles contained within the doctrine in question (Hutchinson & Duncan, 2012).

The word doctrinal is associated with the doctrine of legal precedent – which is practised in South Africa − legal principles become doctrinal in nature because they are not merely occasional or spontaneous, but are rules that are applied persistently and in a similar manner over a number of years, and have adapted organically over a number years (Hutchinson & Duncan, 2012).

3.2 Research Design

This study shall employ a hybrid legal research methodology, using both the doctrinal research methodology and the reform-orientated research methodology.

The doctrinal research methodology entails a systematic discussion of the rules governing a specific category of law, an analysis of the relationship between such rules together with analysis of the area’s complexity within the category of law and possibly an indication of future developments in the specific category of law under discussion (Hutchinson & Duncan, 2012). The doctrinal research methodology shall be utilised in connection with research questions 1 to 3 of this study, as these questions concern the in-depth analysis of specific legislation and the applicability thereof.

The reform-orientated research methodology entails an assessment of the sufficiency of the existing rules of the category of law being evaluated, together with a proposal of possible changes to areas where the rules are considered to be inadequate (Hutchinson & Duncan, 2012). The reform-orientated research methodology shall be utilised in connection with research question 4 of this study, as this research question highlights the possible difference in standard of compliance between universities and normal juristic persons.

3.3 Analysis and Interpretation

Legal doctrinal analysis entails the interpretation of statute, case law – the decisions made by the court in question – and code. Section 39 of the Constitution provides instruction for the interpretation of not only the BOR contained within the Constitution, but also any other legislation, the development of common and customary law. Section 39 states:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum

> *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> *(b)* must consider international law; and
>
> *(e)* may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill” ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

The analysis and interpretation of the various pieces of legislation, case law and code must strictly adhere to the guidance prescribed in Section 39 of the Constitution, for the analysis and its concomitant results and recommendations to be of any significant academic value.

CHAPTER 4. ANALYSIS, DISCUSSION AND PRESENTATION OF RESULTS

4.1 Introduction

Chapter 4 shall provide the reader with analysis, discussion and presentation of the results of the proposed research. Each research question shall be addressed individually. Each question shall be addressed in the following manner;

- Firstly, by presenting the evidence – case law, literature and the provisions of various pieces of legislation − in substantiation of the finding
- Secondly, the actual result or finding will be revealed
- Thirdly, the result shall be briefly explained and discussed.

For ease of reference, each research question shall be stated, and thereafter the relevant analysis shall follow.

4.2 Analysis, Discussion and Presentation of Results in Respect of Research Question 1

Research Question 1: What is the legal personality of South African universities, and more specifically, can universities be defined as organs of state as envisioned in Section 239 of the Constitution, and if so, what does this entail for such institutions?

4.2.1 Legal personality

The determination of an organisation's legal personality is essential, as an organisation's legal personality is the determining factor in the assessment of the extent to which an organisation can be the bearer of recognised rights, duties and capacities, and furthermore which different pieces of legislation can or may be applicable to it; and to what extent the relevant legislation may by applicable, in turn affecting the organisation's compliance requirements, its ability to effectively conduct its business or effectively perform the function for which the entity was established.

South African universities are by their very nature juristic persons. Juristic persons can be described as an association of people that the law recognises as having the ability to be the bearer of rights, duties and capacities (Heaton, 2012). Section 20 (4) of the Higher Education Act further confirms that South African universities are in fact juristic persons, as it states:

> "Every public higher education institution established, merged, deemed to have been established or declared as a public higher education institution under this Act, is a juristic person"("Higher Education Act 101 of 1997," 1997).

The only conclusion that can be drawn from the aforementioned is that South African universities are in fact juristic persons, and therefore the law recognises universities as having the ability to be the bearer of rights, duties and capacities.

4.2.2 Can South African universities be defined as organs of state as envisioned in Section 239 of the Constitution?

The Constitution of the Republic of South Africa in Section 239 defines an organ of state as:

a) "any department of state of administration in the national, provincial or local sphere of government; or

b) any other functionary or institution

   I. exercising a power of performing a function in terms of the Constitution of South Africa or a provincial constitution, or

   II. exercising a public power or performing a public function in terms of any legislation.

but does not include a court or judicial officer" ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

There have been numerous decisions by the Constitutional Court of South Africa in terms of which the Court had been required *inter alia* to decide what entities or institutions constitute organs of state as envisioned by Section 239 of the Constitution and therefore whether the provisions in the Constitution relating to organs of state are applicable. Whilst considering what entities constitute organs of state, the Constitutional Court had also deliberated the question concerning what factors should be considered when determining if an entity does indeed constitute an organ of state.

Prior to the finalisation of the Constitution, during the existence of the Interim Constitution, the Bophuthatswana Supreme Court in the matter of **Baloro and Others v University of Bophuthatswana and Others**, found that: whilst the university could not be defined as an organ of state under the Interim Constitution, the Constitution’s contemplation of the horizontal application of fundamental rights contained in the BOR indicated that its activities and the university’s operation existed in the public domain as public institution of higher education and therefore resulted in the university being subject to most constitutional rights ("Baloro and Others v University of Bophuthatswana and Others," 1995). This decision was the inception of a trend recognising that institutions or organisations that provide a fundamentally public function can be considered as organs of state.

In a judgment made subsequent to the advent of the final Constitution, **Gardner v Central University of Technology, Free State**, the Labour Court held that: The Central University of Technology, Free State was both a higher education institute in terms of Section 1 of the Higher Education Act and an organ of state as defined in Section 239 (b) of the Constitution ("Gardner v Central University of Technology Free State ", 2012). This Judgment was later confirmed by the Labour Appeal Court.

In the most recent Constitutional Court judgement that concerned the subject matter, **AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others**, the court held that when identifying whether an entity constitutes an organ of state, the existence of state control (the control test) in respect of the entity in question is not the determining factor, but rather whether the entity performs a “fundamentally public function” is considered to be the determining factor as to whether an entity constitutes an organ of state ("AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others ", 2014).

The Constitutional Court further held in AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others, that Section 8 of the Constitution binds all organs of state, and further that even if an organ of state is not a state department or part of the administration of a sphere of government, such an organ of state must “respect, protect, promote and fulfil the rights in the BOR” ("AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others ", 2014).

In a similar matter also heard by the Constitutional Court, referred to by the Constitutional Court in its judgement in respect of the AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others judgement, namely **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another**, the court similarly held that the state could not be released from duty to uphold, promote and protect the rule of law and most importantly the rights contained in the BOR, merely because the state elected to delegate some of its functions to other entities. The court held that the state’s delegation of its functions through a comparatively expansive meaning of an organ of state − an entity performing a function or exercising power by virtue of the constitution or provincial constitution or an entity performing a function that is public in nature in terms of any legislation – meant that the entity to which a state function is delegated, is subject to the legality principle and privacy protection ("AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another," 2007). The court went on the elucidate this statement by declaring that South Africa’s constitutional structure does not necessitate an entity to form part of the government in order to be bound by the Constitution as a whole ("AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another," 2007).

In addition to the aforementioned case law evidencing the fact that universities can be defined as organs of state, Section 2 of the Higher Education Act provides that the Higher Education Act applies to higher education in the Republic of South

Africa. Section 70 of the Higher Education Act further clarifies the pre-eminence of the Higher Education Act stated in Section 2, by further providing that the Act preponderates any other law concerning higher education save for the Constitution ("Higher Education Act 101 of 1997," 1997). Section 2 read with Section 70 of the Act, clearly demonstrates the legislature's intention to guarantee that the Higher Education Act is the preeminent legislation in respect of both public and private universities in South Africa, subject only to the provisions of the Constitution. The wording of Section 70 clearly envisions the supremacy of the Constitution. This, coupled with the definition of an organ of state as set out in Section 1 of the Higher Education Act, which defines an organ of state to mean an organ of state as defined in Section 239 of the Constitution, further buttresses the contention above that public universities in South Africa are organs of state subject to the constraints, responsibilities, principles and duties of the BOR and other applicable sections of the Constitution ("Higher Education Act 101 of 1997," 1997).

South African universities undoubtedly perform a fundamentally public function in terms of legislation, namely the Higher Education Act. This, together with the definition of an organ of state as set out in Section 239 of the Constitution, unambiguously demonstrates that South African universities conform to the definition of an organ of state as envisioned by the legislature. The findings in the **AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others** case, together with findings in respect of the other case law cited above, further buttress the contention that the mere fact universities do not directly form part of a state department or state administrative function does not exclude universities from being defined as organs of state and therefore South African universities can be defined as organs of state, as envisioned by the legislature, as the function they perform is undoubtedly fundamentally public in nature.

4.2.3 *What does this mean?*

Section 8 of the Constitution pertains specifically to the application of the Constitution. Section 8 states:

"(1) The BOR applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the BOR binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the BOR to a natural or juristic person in terms of Subsection (2), a court:

(*a*) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(*b*) may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36 (1).

(4) A juristic person is entitled to the rights in the BOR to the extent required by the nature of the rights and the nature of that juristic person." ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

It is clear from the provisions of Section 8 of the Constitution that the BOR applies to both the natural and juristic person, including organs of state. Section 8 does, however, include the proviso that the fundamental human rights contained in the BOR are applicable to juristic persons, considering the nature of the right (that the right can actually be applied to the juristic person in question or the juristic person can be the bearer of such right) and the extent of the duty imposed by such right, relative to the bearer of that right's ability to perform the duty imposed by the right and be the bearer of that right. Section 8(4), stipulates that juristic persons, such as universities, are entitled to the rights set out in the BOR to the degree required by the essence of the rights and the nature of the specific entity in question ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

In **Khumalo and others v Holomisa**, the Constitutional Court found that Section 8(1) clearly envisions that organs of state are bound by the BOR ("Khumalo and others v Holomisa," 2002). This finding by the court translates into two propositions, firstly that all law governing disputes between the state and natural persons or juristic persons is subject to the direct application of the BOR; and secondly that all state conduct, including the conduct of organs of state, that results in a dispute between the state and natural or juristic persons is also subject to the direct application of the BOR (Woolman, 2007a). In respect of Section 8(2), the court found that where a dispute arises between natural persons and/or juristic persons it **<u>may</u>** be subject to the direct application of the BOR (Woolman, 2007a). This distinction is of tremendous significance as it highlights a critical difference in the application of the BOR; in respect of organs of state and other normal juristic persons, the conduct of organs of state is at all times subject to the direct application of rights contained in the Constitution and more specifically the BOR, whilst the normal juristic persons **<u>may</u>** be subject to the direct application of rights contained in the BOR, demonstrating a greatly increased burden of compliance or obligation on organs of state in comparison to that of normal corporations or juristic persons.

The Holomisa judgement, read with Section 8 and Section 2 regarding the supremacy of the Constitution, dictates that universities and therefore by extension the governance within universities and the development of such governance are emphatically subject to the strictures of the Constitution and the values and principles enshrined therein.

4.3 Analysis, Discussion and Presentation of Results in Respect of Research Question 2

Research Question 2: Taking into account South African universities' legal personality as determined in research question 1, what corporate governance requirements are provided for by the Constitution of South Africa, more specifically the BOR, and what corporate governance requirements are provided for by the Higher Education Act?

After having established, in **Research Question 1,** that South African universities are in fact juristic persons, but more specifically organs of state as envisioned by Section 239 of the Constitution, we now analyse the concomitant effect this has on the corporate governance of South African universities, focusing on the Constitution, the BOR and the Higher Education Act, and the provisions contained therein which specifically provide for corporate governance in respect of organs of state, and therefore universities.

4.3.1 Supremacy of the Constitution

It is a firmly entrenched principle in South African law that the Constitution is the supreme law of the land and that all other law is subject to the strictures of the Constitution and its founding values. Section 1 of the Constitution states that the Republic of South Africa is a democratic state founded on values including the "supremacy of the Constitution and the rule of law" ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996). Section 2 of the Constitution goes on to state that the final Constitution "is the supreme law of the Republic; law that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996). It is common cause that any constitutional norm or rule expressed by the final Constitution, when matched, compared or contrasted with that of a non-constitutional rule or norm − be it legislation, customary law and/or common law −

the constitutional norm or rule shall at all times take precedence (Michelman, 2007).

The Constitutional Court of South Africa expressed the following remarks in respect of the supremacy of the Constitution in its ruling in respect of **Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa** (Pharmaceutical manufacturers' case, 2000):

> "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including common law, derives its force from the Constitution and is subject to constitutional control"("Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa," 2000)".

The Constitutional Court's comments validate the conclusion that all law – be it legislation, code, common law − within South Africa, is subject to the Constitution and the principles and values contained therein and that when interpreting and developing such law, such law must be based on the principles, norms and rules espoused by the Constitution. Section 39 of the Constitution, the Interpretation Clause, further provides that when interpreting legislation and developing common law and customary law, the court, tribunal or forum must "promote the spirit, purport and objects of the BOR", further reinforcing the conclusion that all forms of law are subject to the Constitution.

In addition to the Pharmaceutical Manufacturers case and the Constitutional Court's affirmation of the supremacy of the Constitution, a number of Constitutional Court decisions exist which discernibly demonstrate the pervasive nature of the Constitution within South African law, more specifically in respect of the governance of public education institutions.

In **MEC For Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others**, the Constitutional Court held *inter alia* that a decision taken by the governing body of the school, that a grade one student would not be permitted admission to the school due to the fact that the number of students in respect of the grade for which the child applied, would exceed the number of students as dictated by the school's admission policy (which policy was determined by the governing body of the school), was unconstitutional and constituted a violation the child's right to basic education in terms of Section 29 of the Constitution. The Court further held that the Head of the Education Department was empowered to order the principal of the school to admit the child to the school, despite the contravention of the school's admission policy. ("Mec for Education, Gauteng Province, and Others V Governing Body, Rivonia Primary School and Others," 2013).

In **Head Of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another**, the Constitutional Court held that the Head of the Education Department had the power to withdraw certain capacities or responsibilities bestowed upon the school's governing body by its enabling legislation ("Head Of Department, Mpumalanga Department of Education and Another V Hoërskool Ermelo and Another," 2010).

In a recent judgement, the Constitutional Court in **The Governing Body of Juma Musjid Primary School and other v Essay N.O. and Others**, found that the MEC for Education in KwaZulu-Natal had a positive obligation in terms of the Constitution to:

> "respect, protect, promote and fulfil the rights in the BOR" ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996)

The Constitutional Court further confirmed that the source of the positive obligation was based upon Section 8(1) of the Constitution that infers that the BOR is applicable to all law and that the legislature, the executive, the judiciary and all organs of state are bound by the rights entrenched in the BOR ("The Governing Body of Juma Musjid Primary School and other v Essay N.O and Others," 2011).

The Witwatersrand Local Division (now called the Gauteng Local Division of the South African High Court) in the matter of **Goodman Bros (Pty) Ltd v Transnet Ltd** similarly held that the Constitution has a profound effect on every relationship that an organ of state may have with a natural person and/or juristic person, and specifically the manner in which the organ of state conducts its activities ("Goodman Bros (Pty) Ltd v Transnet Ltd," 1998).

The aforementioned decisions demonstrate the overarching applicability of the Constitution in respect of all law in South Africa, and in particular relating to the governance of public education institutions. These decisions indicate that the provisions of the enabling legislation regulating public institutions is subject to the dictates of the Constitution, and the purpose and intention of such legislation should at all times comply with the Constitution, and shall be found invalid should it not comply. These decisions also clearly confirm that the enabling legislation of the South African universities, the Higher Education Act 101 of 1997, is subject to the dictates of the Constitution and more specifically those related to the governance of South African universities.

4.3.1 Corporate governance provisions and the Constitution

The Constitution contains a number of provisions relating specifically to governance of departments in all spheres of government, including organs of state. The provisions in question apply directly to public administration and the financial aspects thereof. The provisions provide a broad overview of the manner and ethos in which governance of these state institutions is expected to be dealt with. In addition, the Constitution’s legal supremacy (as discussed above) and the relevant application and interpretation clauses directly affect the development, promulgation and application of existing and proposed governance requirements contained in various pieces of current and proposed legislation in South Africa by virtue of the fact that such legislation, common law and code are subject to the

Constitution and its underlying values; and must further promote the values enshrined in the Constitution in order to give effect to such principles.

The Witwatersrand Local Division (now called the Gauteng Local Division of the South African High Court) in the matter of **Goodman Bros (Pty) Ltd v Transnet Ltd** held that Transnet (a state-owned company) constituted an organ of state and as a result was bound by the provisions prescribed by the Constitution relating to organs of state. This decision further emphasises that organs of state, including universities, are bound by the provisions of the Constitution and have a duty to uphold the provisions of the Constitution and protect and promote the values contained therein.

In the case of **Rail Commuters' Action Group and Others v Transnet Ltd t/a Metrorail and Others**, the Constitutional Court held that, taking into consideration the purport and object of the BOR, the principle of accountability, Transnet − as an organ of state performing a public function − had a positive duty arising from the provisions of its enabling legislation and the Constitution to promote, uphold and respect the rights contained in the BOR ("Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others," 2005).

As ascertained by the Constitutional Court in **The Governing Body of Juma Musjid Primary School and Other v Essay N.O. and Others**, universities as organs of state are subject to the direct application of rights contained in the BOR. Certain rights espoused in the BOR will have a direct impact on corporate governance and its development in South Africa, as the many rights entrenched in the BOR affect the rights of the various stakeholders of companies and organs of state, and as result must be taken into account when considering the governance of such organisations.

The Constitutional court in its judgement in respect of **The Governing Body of Juma Musjid Primary School and Other v Essay N.O. and Others** referred extensively to its judgement of **Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South**

Africa, which addressed the issue of the positive obligations on organs of state to protect and promote the rights contained in the BOR versus the negative obligation on private parties to protect and promote the rights contained in the BOR. The Court, in **Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa**, held in reference to private juristic persons, that the rights contained in the BOR, more especially the socio-economic rights, may be negatively protected from improper invasion. The Court stated that a breach of this negative obligation may occur directly where a private party fails to respect a right, or indirectly when a private party fails to avert the direct infringement of a right by a third party or where a private party fails to respect the existing protection of a right by conducting itself in a manner which diminishes such protection. The Court went on to elucidate this statement by stating that Section 8(2) of the Constitution does not prevent private autonomy or impose on private parties the duty of the state to protect the rights contained in the BOR; Section 8(2) instead requires private parties not to interfere with or inhibit the exercise of a right by a another party. The Court went on to add that the application of Section 8(2) is also contingent on the intensity of the constitutional right in question, coupled with the invasion of that right by a private party who is **not** an organ of state ("Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa," 1996). The Constitutional Court in **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** also confirmed the existence of positive duty arising from the Constitution, on organs of state to protect the rights entrenched in the BOR ("Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others," 2005).

The Western Cape High Court in **Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Foods (Pty) Limited and others**; **Mukaddam and others v Pioneer Foods (Pty) Limited and others**, held the provisions in the BOR do not place a positive duty on private parties such as companies to protect and uphold the rights contained in the BOR, and that at most the provisions of the BOR contain a negative duty to do so ("The Western Cape High Court in Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Foods (Pty) Limited and others; Mukaddam and others v Pioneer Foods (Pty) Limited and others," 2013).

These judgements distinctly highlight the contrasting standards to which organs of state and juristic persons are held in respect of the protection and promotion of the rights contained in the BOR. Organs of state are undoubtedly held to a higher standard of protection of the rights contained in the BOR as they have positive obligation to uphold and safegaurd the rights contained in the BOR, whilst juristic persons must merely not interfere with or inhibit the enjoyment of a right by a another party. It is with this positive obligation, conferred on organs of state, in mind, the analysis of the provisions of the Constitution and the BOR that relate to specifically governance and corporate governance of universities in South Africa shall take place.

Because of certain rights (in the BOR), universities as organs of state have a positive duty to ensure that the rights discussed below are protected and upheld.

Section 9 of the Constitution deals with to equality and states:

> “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of Subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in Subsection (3) is unfair unless it is established that the discrimination is fair" ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

The application Section 9 will *inter alia* directly affect universities' conduct and governance in respect of the treatment of its employees and students as stakeholders within the university, the universities' admission policies and how such polices will rectify the injustices of South Africa's apartheid past, and universities' institutional statute, code of conduct and ethics. The rights to equality in the context of a university will specifically relate to preventing unfair discrimination on one or more of the grounds contained in Subsection 3, for example race or gender.

Section 10, the right to human dignity states:

> "Everyone has inherent dignity and the right to have their dignity respected and protected" ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

The application of Section 10 will directly affect the governance of universities and the contents of the institutional statutes and polices in order to ensure that such documents and the manner in which universities conduct themselves does not infringe upon any parties rights to human dignity.

Section 15 of the Constitution provides for the right to freedom of religion, belief and opinion, and Subsection 1 states:

"(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that:

(*a*) those observances follow rules made by the appropriate public authorities;

(*b*) they are conducted on an equitable basis; and

(*c*) attendance at them is free and voluntary” ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996)

Universities must ensure that their institutional statutes and polices are not discriminatory towards a religion or beliefs, and that the conduct of their staff and students is in line with the policies drafted.

Section 16 refers to the right to freedom of expression and is of particular importance to universities, given their role in society; universities are responsible for the dissemination, development and application of knowledge throughout society (Barac & Marx, 2012). Section 16 states:

“(1) Everyone has the right to freedom of expression, which includes:

(*a*) freedom of the press and other media;

(*b*) freedom to receive or impart information or ideas;

(*c*) freedom of artistic creativity; and

(*d*) academic freedom and freedom of scientific research” ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996).

Universities must ensure that their institutional statutes and polices provide for academic freedom and scientific research freedom to fulfil their role in society, as set out above. The protection afforded to academic freedom and freedom of scientific research, under Section 16 (4), was intended by the legislature to prevent a reoccurrence of historical state interference with the independence and autonomy of higher education institutions, their academic staff and students, under the apartheid regime (Dario Milo, 2007).

The right defined in Section 32, the right to access to information, shall have a direct impact on the governance of universities and the access to information provided by the university as an organ of state. Regarding the right to just administrative action, universities must ensure that the institutional statues and other polices provide for effective administrative action within each institution. The Court, in **Goodman Bros (Pty) Ltd v Transnet Ltd,** recognised that Sections 32 and 33 of the Constitution provide that organs of state are required to act in the spirit of the Constitution and that parties whom organs of state have dealings with are entitled to expect fairness, openness and equitable conduct from the organ of state through their interaction with the organ of state in question ("Goodman Bros (Pty) Ltd v Transnet Ltd," 1998).

Universities have a positive obligation to protect, promote and give effect to the other rights in the BOR in so far as the content of such rights is applicable to universities, taking into account the facts of each dispute that may arise. Many of the rights in the BOR are interrelated, for example the rights to equality and the right to dignity are often entwined; the determination of whether discrimination is fair or unfair often turns on the extent to which the aggrieved parties' dignity has been infringed upon (Woolman, 2007b).

Section 39 of the Constitution, the Interpretation Clause, read with Section 36, the Limitation Clause, should be used by the universities as a strict guideline in the interpretation and development of their own institutional statutes and other policies. This shall aid universities in meeting their positive constitutional obligation to protect the rights enshrined in the BOR, in respect of the governance of these institutions.

In addition to the entrenched rights contained in the BOR, the Constitution contains several provisions in respect of the governance of organs of state. Chapter 3 of the Constitution is titled “Co-operative government”. This chapter contains those provisions regulating the interrelationship between the different spheres of government, national, provincial and local government, as well as organs of state. It highlights that these different entities are dependent on one another whilst being separate entities. Section 41 of Chapter 3, set out various principles of co-operative government and intergovernmental relations, these include *inter alia*:

> “…provide effective, transparent, accountable and coherent government for the Republic as a whole;
>
> a) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> b) not assume any power or function except those conferred on them in terms of the Constitution;
>
> c) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
>
> d) co-operate with one another in mutual trust and good faith by:
>
>   I. fostering friendly relations;
>   II. assisting and supporting one another;
>   III. informing one another of, and consulting one another on, matters of common interest;
>   IV. co-ordinating their actions and legislation with one another;
>   V. adhering to agreed procedures; and
>   VI. avoiding legal proceedings against one another.” ("The Constitution of the Republic of South Africa Act 108 of 1996," 1996)

The aforementioned principles provide a broad governance regime through which different governmental entities are expected to perform their various functions whilst respecting the function performed by each different entity. The Court, in **The South African Broadcasting Corporation Limited, the Chairperson, the Board of the South African Broadcasting Corporation Limited v Dali Mpofu**, recognised that Chapter 3 and in particular Section 41 of the Constitution imposes a number of general obligations on all organs of state to promote cooperative governance ("The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu," 2009).

Chapter 8 of the Constitution is titled, “Public Administration” and contains various provisions that regulate governance within the sphere of public administration. Section 195 of the Constitution provides that public administration must be governed by the values and principles enshrined in the Constitution and goes on to list specific principles to which the government institutions and organs of state must adhere in performing their public administration function. These include:

“

a) A high standard of professional ethics must be promoted and maintained.

b) Efficient, economic and effective use of resources must be promoted.

c) Public administration must be development-oriented.

d) Services must be provided impartially, fairly, equitably and without bias.

e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.

f) Public administration must be accountable.

g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”("The Constitution of the Republic of South Africa Act 108 of 1996," 1996)

Section 195 goes on in Subsection 2, to further state that the aforementioned principles apply to administration in every sphere of government, organs of state and public enterprises. The principles listed in Section 195 clearly demonstrate the intention of the legislature to prioritise efficacious governance. This is a clear indication, given the fact that the author has established that South African public universities constitute organs of state, that universities are thus bound by these principles and, therefore, in their own constituting documents and institutional statutes universities include the necessary provisions to give effect to the principles and the underlying values mentioned in Section 195.

In 2009, what was then named the South Gauteng High Court (currently named the Gauteng Local Division, Johannesburg), in **The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu**, observed that the Constitution in Section 195 recognises the value and importance of good governance, and further that those principles set out in Section 195 are applicable to organs of state and public enterprises. The Court held that the Constitution compels the state in all its forms, including organs of state, to heed the principles of good governance. It further held that the leadership of state owned enterprises and organs of state is not only charged with considering their responsibilities in terms of the King Code of Corporate Governance, but also their responsibilities within a constitutional democracy ("The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation

Limited v Dali Mpofu," 2009). This decision clearly demonstrates that organs of state are held to a higher standard of corporate governance compliance; not only are they required to take cognisance of the voluntary codes contained in the King Code, but they are bound by the Constitution, its provisions in relation to governance and more especially the direct application of the rights contained in the BOR.

Section 216 of the Constitution provides for Treasury control within each sphere of government and in respect of the various organs of state. Section 216 provides that national legislation together with the National Treasury must designate measures to address the need for transparency and expenditure control in respect of the various government departments and organs of state, through the introduction of generally accepted accounting practices, homogenous expenditure regulation and finally through homogenous Treasury norms and standards. The inclusion of Section 216 in the Constitution further demonstrates the intention of the legislature to prioritise efficacious governance, more specifically in respect of prudent financial management.

Section 217 of the Constitution deals specifically with the procurement of goods and services by state departments and organs of state. The section states that in the event that an organ of state or state department contracts for goods and services, “it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”("The Constitution of the Republic of South Africa Act 108 of 1996," 1996). Section 217 specifically states that Subsection 1 of Section 217 does not preclude such entities from implementing procurement policies that cater for preference for specific categories of persons or entities in the awarding of such contracts and further that such system of preference may protect those categories of persons disadvantaged by unfair discrimination. The Witwatersrand Local Division (now called the Gauteng Local Division of the South African High Court) in the matter of **Goodman Bros (Pty) Ltd v Transnet Ltd**, confirmed that Section 217 makes it clear that any natural and/or juristic person dealing with an organ of state is entitled to expect fairness, openness and equitable conduct from the organ of state in all its conduct, the Court further held that an organ of state is required to act in the spirit of the Constitution and the consequences of acting in this manner is that organs of state are required to act “fairly, responsibility and honestly” ("Goodman Bros (Pty) Ltd v Transnet Ltd," 1998).

The specific wording of Section 217 is a clear indication of the purpose of addressing the inequality that was brought about by the apartheid regime and its policy of racial segregation; this premise is further alluded to by the South Gauteng Court in **The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu**, that holds that leadership of state owned enterprises must consider “their responsibilities in our constitutional democracy in terms of the African leadership philosophy and values”; the Court goes on to state South Africa as a country must emerge from a past of subjugation and exploitation.

The BOR and the various provisions of the Constitution, as set out above, provide comprehensively for governance of organs of state, and as organs of state universities are bound by and have a positive obligation to respect and promote the rights enshrined in these provisions. These provisions − and the manner in which they are applicable as discussed above − incontrovertibly demonstrate that organs of state are held to a greater standard of governance than that which is expected by normal juristic persons.

4.3.2 Governance requirements set out in the Higher Education Act

Each and every university in South Africa must be established in terms of the Higher Education Act 101 of 97. The Act regulates the establishment, management and functioning of each university. The Act states its purpose as being:

> “To regulate higher education; provide for the establishment, composition and functions of a Council on Higher Education; provide for the establishment, governance and funding of public higher education institutions; provide for the appointment and functions of an independent assessor; provide for the registration of private higher education institutions; provide for quality assurance and quality promotion in higher education; provide for transitional arrangements and the repeal of certain laws; and to provide for matters connected therewith” ("Higher Education Act 101 of 1997," 1997)

The Act achieves this purpose by setting out provisions that *inter alia* provide for the establishment, governance and funding of public higher education institutions. The provisions that deal specifically with governance of universities are contained in the sections of the Act mentioned below.

Chapter 4 of the Higher Education Act deals specifically with the governance of public higher education institutions. Section 26 of Chapter 4 provides for the establishment of various different offices within an institution, including the office of chancellor, vice chancellor, principal, vice principal and also the establishment of various structures within the university, including a Council, a Senate, a Student Representative Council (“SRC”), an institutional forum and any other structure or offices that are required in terms of stature. The Section goes on to legislate that, the Council, the Senate, the SRC and the institutional forum must elect a chairperson, vice chairperson and any other required office from among its members, using the process set out by the Act. Section 26 further stipulates who the chairperson of the Senate must be, who the secretary to the Council must be and finally excludes certain persons from acting as the chairperson and vice chairperson of the council ("Higher Education Act 101 of 1997," 1997).

Section 27 stipulates that the Council of a university is responsible for the governance, performance, financial affairs and reputation of that institution in question; the provisions deal with the governance of the university by the Council of the university (Marx, 2007). It provides for *inter alia* the make-up and composition (specifically excluding members the university's Senate) of the Council itself, the manner in which the members of the Council must be elected, qualifications of such members and the manner in which resignation of Council members is to be dealt with. If one were to draw a comparison between corporations and universities, one could liken the board of directors of a company to that of a university's Council, both are responsible for determining the strategic direction, together with those decisions that steer the entity in question in the chosen direction ("Higher Education Act 101 of 1997," 1997).

Section 28 of the Higher Education Act concerns the Senate of a public higher education institution. It designates that the Senate of a university is accountable to the Council for academic and research functions of the university, whilst also being responsible for any other functions delegated to it by the Council of the university ("Higher Education Act 101 of 1997," 1997). Section 28 further stipulates the composition of the Senate as well as the manner in which such persons must be elected. Similarly, if one were to draw a comparison between corporations and universities, one could liken the chief executive officer and the executive management team of a company to that of a university's Senate, both are responsible for the operations and management of the entity ("Higher Education Act 101 of 1997," 1997).

Section 29 of the Higher Education Act empowers the Council and the Senate of a university to establish committees to perform any of their functions. The provision further regulates the composition of the committee and election of such committee members. The establishment of such committees does, however, not divest the Council or Senate, as the case may be, of the responsibility in respect of any function delegated to a committee under Section 29 ("Higher Education Act 101 of 1997," 1997).

Section 31 of the Higher Education Act concerns the formation of an institutional forum at universities. Section 31 provides that an institutional forum must advise the Council on matters affecting the institution, including the implementation of the Higher Education Act, equity policies, selection criteria for management positions, codes of conduct and the fostering of an institutional culture that promotes respect of human rights and creates an appropriate environment for learning, research and teaching. It also sets out the criteria for the composition and election of the representatives of the institutional forum ("Higher Education Act 101 of 1997," 1997).

Section 32 read with Section 33 provides for the creation of institutional statute and institutional rules which give effect to such statute. The purpose of the institutional statute is to address those matters not expressly provided for in the Higher Education Act. The promulgation of such statute and rules is subject to submission and review by the Minster of Education ("Higher Education Act 101 of 1997," 1997).

Section 35 provides for the establishment of a Student Representative Council; however, the composition, manner of election, term of office and function of the SRC are determined by each university's own institutional statute and rules ("Higher Education Act 101 of 1997," 1997).

Section 40 and 41 deal with the financial aspects of public higher education institutions. Section 40 prescribes from which sources a university may obtain funding; the criteria for entering into a loan agreement; the manner in which financial and accounting information and records are to be kept; appointment of a financial administrator; and the penalties to be levied for failure by a university Council to comply with the regulations set out in Chapter 5 of the Higher Education Act ("Higher Education Act 101 of 1997," 1997). Section 41 of the Act further stipulates which record and information must be kept by the university's Council, it plainly states that the Council must keep a record of all proceedings as well as complete accounting records of all assets, liabilities, income and expenses and any other relevant financial information. The Council is also required to present such information to the Minister of Education on an annual basis ("Higher Education Act 101 of 1997," 1997).

The Higher Education Act lays out a broad framework to address the governance issues at a university. However, it appears from the Act that the university's institutional statute that is subject to the Higher Education Act, is in actual fact responsible for dictating the university's governance provisions in accordance with the provisions of the Higher Education Act, and whilst each university's statute is subject to the Higher Education Act, each university's statute will differ in accordance to the university's requirements as identified by university's Senate (Barac & Marx, 2012).

Section 70 of the Higher Education Act stipulates that the Act prevails over all other legislation relating to higher education, other than the Constitution. Therefore, one can conclude that the legislature intended for the Act to be the primary source of legislation governing higher education institutions in South Africa, while still being subservient to the Constitution, therefore ensuring that its application and interpretation of the Act is performed, taking into account the BOR and the Constitution. The pre-eminence of the Constitution and thereafter the Higher Education Act, however, does not prevent universities from taking into account other legislation and codes, such as the Companies Act and the King Code of Corporate Governance, to improve its corporate governance and achieve effective corporate governance.

4.4 Analysis, Discussion and Presentation of Results in Respect of Research Question 3

Research Question 3: Taking into account South African universities' legal personality as determined in research question 1, to what extent, if at all, do the Companies Act 71 of 2008 and the King Code of Corporate Governance find application in respect of universities in South Africa?

Having regard for the fact that South African universities are considered organs of state, it is imperative to determine the significance and impact of the King Code of Governance, including Reports I, II and III and the Companies Act 71 of 2008 on the universities' codes of governance.

The primary consideration of corporate governance is the accountability of top level management and the boards of directors of entities, given the considerable powers vested in such people ("The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu," 2009). The board of directors of a company command substantial power and their decisions affect the profitability of the company in question and the company's stakeholders; like the board of directors of a company, the Senate of a university is vested with the considerable power in order to successfully run such an institution. However, in direct contrast to a company, universities are public in nature and their success or failure − due to Senate decisions − is far-reaching, affecting not only universities' stakeholders, but also the broader communities within which the universities exist. This difference highlights the reason behind the legislature's intention to create a high standard of compliance and care in respect of organs of state.

4.4.1 Application of the Companies Act 71 of 2008

Companies in South Africa have always been incorporated in terms of the Companies Act of South Africa. There have been three different Company Acts in the history of South Africa: the Companies Act 46 of 1926 which was repealed and replaced by the Companies Act 61 of 1973; and finally the most recent Act, the Companies Act 71 of 2008 (Nevodwe, Odeku, & Raligillia, 2014). The Companies Act 71 of 2008 was the first Companies Act in South Africa's history to incorporate into statute aspects of corporate governance, resulting in governance, strategy and sustainability becoming inseparable (King, 2010).

Section 7 of the Companies Act 71 of 2008 sets out the purpose of the Companies Act. In the context of this research, only those provisions that deal with governance shall be focused on. Section 7 states that the purpose of the Act is *inter alia:*

"(*a*) promote compliance with the BOR as provided for in the Constitution, in the application of company law;

(*b*) promote the development of the South African economy by

....

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

....

(*d*) reaffirm the concept of the company as a means of achieving economic and social benefits;

....

(*h*) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

(*i*) balance the rights and obligations of shareholders and directors within companies;

(*j*) encourage the efficient and responsible management of companies;

....

(*l*) provide a predictable and effective environment for the efficient regulation of companies” ("The Companies Act 71 of 2008," 2008).

The Interpretation Clause of the Companies Act, Section 5, states that interpretation and application of the Act must be performed in a manner that shall give effect to the purposes set out in the Section 7 of the Companies Act. It is clear from the Act’s stated purpose, as set out above, that the Act seeks *inter alia* to provide a means for the implementation of efficacious corporate governance, and its provisions should be interpreted and applied to give effect to such a purpose. Section 7 of the Act specifically states that the purpose of the Act is to “promote compliance with the BOR in the application of company law”, further evidencing the Constitution’s, and more specifically the Bill of Right’s influence on the development and application of corporate governance provisions in South Africa.

Section 8 of the Companies Act stipulates that two types of companies can be incorporated under the Act, namely profit companies, including state owned companies, private companies, personal liability companies and public companies, and non-profit companies. Section 10 of the Act goes on to state that all the provisions of the Act also apply to non-profit companies except for those exceptions set out in Section 10.

The Companies Act includes a chapter entitled “accountability and transparency”, the provisions of this chapter include setting out director’s duties of good faith, care, skill and due diligence. These provisions are primarily aimed at financial prudence, and standardised financial reporting.

The Companies Act lays down a framework within which companies must attend to the governance of their organisations, whilst King III set outs various recommended practices that lend guidance to companies and their relevant leadership, as to how they should conduct and direct the business of their companies and further make decisions on behalf of their companies. Given this interaction between the Act and the Code, one can conclude that these pieces of legislation and code are complementary (King, 2010). Adv. King further states that compliance with the Code of Governance Principles, in King III will result in compliance with the provisions in the Companies Act relating to corporate governance (King, 2010).

In the various cases cited throughout this research, namely, **Goodman Bros (Pty) Ltd v Transnet Ltd, The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu**, **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others**, and **AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others**, the Constitutional Court in each matter concluded that state owned companies constitute organs of state as defined in Section 239 of the Constitution, by virtue of the fact that these institutions provide a fundamentally public function, and thus are bound by the provisions in the Constitution relating to organs of state, especially those in relation to the governance of such institutions. In addition to being bound by the governance provisions of the Constitution, these institutions are also bound by the provisions of the Act under which they are incorporated.

Universities play a vital role in society, as they are responsible for the dissemination, development and application of knowledge throughout society (Barac & Marx, 2012). Universities perform this function whilst being subjected to ever-increasing demand from society, increasing limitations in respect of state funding and increased competition from both the public and private sectors. Governments are increasingly delegating authority over universities to the universities themselves, whilst demanding a higher level of institutional accountability. This delegation of authority has resulted in shifts in universities from being state agencies subject to centralised control by the state, to universities becoming more akin to public corporations (Barac & Marx, 2012).

Having regard for:

a) The purpose of the Companies Act as set out in Section 7;
b) The fact that public universities constitute organs of state as ascertained in research question 1,
c) The fact that state owned companies are also organs of state which are bound by the provisions of the Companies Act,
d) The mere fact that universities are creatures of statute, being their enabling legislation does not prevent the relevant provisions of the Companies Act being applicable to universities;
e) The fact that the Companies Act does not specifically exclude institutions such as universities.
f) The fact that South African public universities perform a fundamentally public function.

One can conclude that universities as organs of state, which are so similar in nature to state owned companies (despite being non-profit organisations), should be bound the provisions of the Companies Act relating to corporate governance. Compliance with the provisions of the Companies Act would assist universities to achieve good governance.

4.4.2 *Application of the King Code of Corporate Governance*

Before one can consider the application of the King Code in respect of the corporate governance within South African universities, it must first be noted that the King Code of Corporate Governance is what is termed soft law; this means that the principles and the recommendations contained therein are voluntary in nature, and therefore failure to comply does not result in legal sanctions being imposed on an organisation. The organisation in question is, however, requested to provide a reasonable explanation for the company's lack of compliance (Wiel, 2002).

Corporate governance can be implemented on a statutory basis or as a code of principles and practices or as a combination of the two. Implementing corporate governance on a statutory basis through codification, results in a statutory regime known as "comply or else", meaning that failure to comply with the relevant statute results in legal sanctions for non-compliance (M. King, 2009). The most notable and prevalent argument against the statutory regime of corporate governance is that a "one size fits all" approach is not appropriate, given the size and differences of the companies that are subject to the relevant statute. A further argument advanced in opposition to the "comply or else" regime, is the hefty monetary cost incurred together with the time utilised to ensure compliance, which creates a large burden on the management of the company (M. King, 2009).

The implementation of corporate governance, using the "comply or explain" principle, means that a company is not sanctioned for non-compliance of the governance code, but must merely explain the reason why it has failed to comply and justify its non-compliance or its reduced level of compliance. The "comply or explain" approach has developed into different approaches, for example "adopt or explain" and "apply or explain" (M. King, 2009). The King Code of Governance Principles or King III is implemented on an "apply or explain" basis, meaning that, taking into account the legal duty of a company's directors to act in the best interests of a company, a company's directors must evaluate each principle recommended by the Code and determine if each principle can be applied; assess if the result shall be in the best interests of the company and if not, either explain why the principle could not be applied or apply the principle in a different manner which may suit the company's best interests, whilst still seeking to attain compliance with the Code (M. King, 2009). Since the advent of King II, and now continuing in King III, the Johannesburg Stock Exchange requires all listed companies to include a statement detailing how they have complied with the relevant principles, and any reasons for non-compliance with the recommended principles.

The King Code of Governance provides a compendium of practices and principles that regulate the way in which a company is directed and controlled by its directors and senior managers. Some of the practices set out in the Code must be complied with, these are those practices and principles that are in line with the Companies Act; and where the principle or practice is not contained with the Companies Act, then that practice forms part of those principles that are regarded as “apply or explain”. The result is that should an entity achieve complete compliance in respect of the Code, then they will also achieve compliance with the Companies Act, but not *vice versa* (King, 2010).

The need for corporate governance is underpinned by the recognition that effective corporate governance can contribute to the sustainability and economic success of organisations as well as act as a deterrent to corrupt and unethical practices (G.J Rossouw, 2005). When determining what constitutes corporate governance best practice, it important to first determine which model of corporate governance South Africa ascribes to and thereafter briefly look at its development over the years in order to determine the corporate governance objectives being sought. South Africa subscribes to the stakeholder or inclusive model of corporate governance which espouses that the directors of a company are no longer merely accountable to the shareholders in respect of the company’s operations and business dealings, but are also accountable to various other stakeholders of the company, including its employees, the community within which it exists (G.J Rossouw, 2005).

The inclusive or stakeholder model of corporate governance was first introduced in South Africa 1994, and was the foundation for First King Report on Corporate Governance (G.J Rossouw, 2005). The inclusive or stakeholder model of corporate governance seeks to create a balance between an organisation's financial objectives and its social and ethical obligations prescribed by the society within which the corporation exists, and wherever possible align the two often contrasting aspirations (van der Waldt, 2009). Throughout its history, the King Committee has been unfaltering in its view that for South Africa to achieve long-term sustainable corporate success, it is imperative that an inclusive or stakeholder model or approach be adopted (G J Rossouw et al., 2002). Given the vital role played by South African universities in the development of a non-racial, equitable and sustainable future for South Africa, the King Committee's commitment to the inclusive or stakeholder model demonstrates the existence of a coinciding commitment to the principles and values set out in the Constitution of transparency, accountability, equality and fairness (Barac & Marx, 2012). It is from this point of reference that the application of corporate governance structures and principles in respect of South African universities must be determined.

The Organisation for Economic Co-operation and Development (OECD) was the first international organisation to compose a schedule of comprehensive, internationally sanctioned corporate governance standards. The Principles of Corporate Governance, first published in 1999 by the OECD, states these principles that address five preeminent issues: shareholder rights; the role of the board of directors; complete disclosure and transparency; equitable treatment of the shareholders; and finally the role of the company's internal and external stakeholders (G J Rossouw et al., 2002). The principles set out by the OECD provided countries with a framework from which they could develop and establish a system of corporate governance suited to their own legal, institutional, financial and regulatory environment (Davies, 2008). The World Bank, in its report on the Observance of Standards and Codes, relating corporate governance in specific countries, benchmarks the corporate governance frameworks of the country being assessed against the OECD Principle of Corporate Governance. The six principles contained in the original 1999 schedule and the annotations thereto were reviewed and amended in 2004 and again 2014. The principles have remained the same; however, the annotations in respect of the principles have been amended to reflect changes proposed by the member countries, in relation to the changes in the economic and political environments of the years.

The Commonwealth Association for Corporate Governance (CACG) published a set of corporate governance principles in 1999, similar to that of the OECD principles (Davies, 2008). The CACG set of principles comprised of a set of 15 principles, covering a wide range of governance issues, including: leadership, values, strategy, compliance, shareholder and stakeholder communication, risk management and financial management, but importantly also included a number of stakeholder governance issues (G J Rossouw et al., 2002). CACG intended for these principles to provide support in the formulation of national strategies for the advancement of corporate governance.

The King Report on Governance for South Africa 2009 states that all organisations and entities should apply the nine principles set out in the King III Report and further take cognisance of the "best practice recommendations" aligned with each individual principle (van der Waldt, 2009). The principles contained in King III are:

1. "Ethical leadership and corporate citizenship;
2. Boards and directors, their formation and governance;
3. Audit committees and their formation and independence;
4. The governance of risk;
5. The governance of information technology;
6. Compliance with laws, rules, codes and standards;
7. Internal auditing;
8. Governing stakeholder relationships;

9. Integrated reporting and disclosure." (M. E. King, 2009)

All corporate governance systems are constantly changing and adapting to the ever-changing international economic environment. There are many different factors that exist within a country's economic and political environment that will shape that country's corporate governance system and the adaption and development thereof. A country's legal system, structure of corporate ownership and financial system are the preeminent factors that determine a country's system of corporate governance (Davies, 2008). These differences render a "one size fits all" approach to corporate governance impossible. However, certain fundamental principles are common features internationally in most systems of corporate governance. These include shareholder protection, independence of directors, IT governance and environmental sustainability (Davies, 2008). These common features can almost certainly be considered corporate governance best practices.

The inclusive or stakeholder model of governance appears from the literature to be considered the best practice model or approach to corporate governance and is the approach used in each of the different sets of principles alluded to above. The Principles of Corporate Governance in the Commonwealth, published in 1999 by the Commonwealth Association for Corporate Governance and the Principles of Corporate Governance, and originally published also in 1999 by the Organisation for Economic Cooperation and Development, were the sources from which the development of the King Code of Corporate Governance took place (G J Rossouw et al., 2002). South Africa's increasing participation in the world economy, after years of economic isolation, required the development of corporate governance in South Africa. This is coupled to the King Committee's recognition that society requires a balance between the directors' freedom to manage a company and to do so takes into account the best interests of the company. This is includes a company being accountable not only to its shareholders, but also its internal and external stakeholders, and demonstrates that these principles espoused by each set of principles can be considered the best practice principles to be implemented within a South African context.

The King Code of Governance Principles or King III and the principles contained therein are a framework for the measurement and implementation of corporate governance structures within South African organisations. This framework is used as a yardstick that can used to measure the conduct of companies (of any nature), state owned enterprises and organs of state against what is considered by the King Code as best practice and determine the extent to which these entities comply with the governance requirements set out in the Code. The Code does not set out specific conduct that must be adhered to, but rather sets out principles and best practice recommendations that − if followed − will lead to effective corporate governance. It aims to achieve that companies adhere to its best practice recommendations, and in doing so achieve good corporate governance.

Clause 13 of the King Report of Governance in South Africa deals with the application of the Code of Governance Principles (King III). It states that King III is applicable to all entities, notwithstanding the manner or form of the entities' incorporation or establishment; the Code applies to the public sector, private sector and non-profit organisations. The principles are drafted in a manner so as to allow all entities to utilise them to achieve good governance (M. King, 2009).

The Constitutional Court, in **The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu**, recognised the importance of the King Codes, and further confirmed that organs of state are charged with considering and adhering to their responsibilities in terms of the King Code of Corporate Governance, together with their responsibilities within a constitutional democracy ("The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu," 2009). The Court's recognition of the principles of accountability were further recognised in **Rail Commuters Action Group and Others v Transnet Ltd t/a**

Metrorail and Others, in which the Constitutional Court held that institutions that were organs of state performing a public function or providing a public service must be held accountable for the provision of that service or the performance of that function. The comments made by the Court in these cases evidences the relationship between the principles of accountability and transparency espoused by the governance provisions of the Constitution and the governance objectives of accountability to all stakeholders and transparency as set out in the King Code.

The Code cannot not be read to displace the Constitution or the Higher Education Act, but rather to supplement those provisions in the Higher Education Act that concern the governance structures of South African public education institutions, to achieve accountable and transparent governance. After all, the Constitution is the supreme law in South Africa and as organs of state, universities have a positive obligation to uphold, promote and protect the provision of the Constitution. The King Code merely provides a number of generic codes of good practice whose compliance is voluntary, and that assist institutions to achieve good governance.

4.5 Analysis, Discussion and Presentation of Results in Respect of Research Question 4

Research Question 4: How does the unique application of governance legislation and codes in respect of organs of state, and therefore universities contrast with the application of corporate governance provisions in respect of normal juristic persons?

There have been numerous Constitutional Court decisions that consider the application of governance provisions of the Constitution, enabling legislation and the King Code of Corporate Governance, in respect of organs of state and therefore universities.

The Court, in **AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others**, recognised that Section 8 of the Constitution binds all organs of state, and went on to confirm that even if an organ of state does not form part of a state department or part of an administrative or a sphere of government, such an organ of state must respect, protect, promote and fulfil the rights enshrined in the BOR.

The Court, in **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another**, held that organs of state could not be released from duty to uphold, promote and protect the rule of law and most importantly the rights enshrined in the BOR, merely because they did not form part of state administration or a government department by virtue of the fact that the state elected to delegate some of its functions to other entities. The court declared that South Africa's constitutional structure did not require an organ of state to form part of the government in order to be bound by the entire Constitution ("AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another," 2007).

The High Court in **Goodman Bros v Transnet Ltd** acknowledged that the Constitution has a profound effect on every relationship that an organ of state may have with a natural person and/or juristic person, and specifically the manner in which the organ of state conducts its activities, and that organs of state have a duty to always act in a manner that is accountable and transparent in its dealing with both public and private parties ("Goodman Bros (Pty) Ltd v Transnet Ltd," 1998).

The Court, in **The Governing Body of Juma Musjid Primary School and Other v Essay N.O and Others**, found that the MEC for Education in KwaZulu-Natal had a positive obligation to uphold and protect the rights contained in the BOR; the Court further confirmed that the source of the positive obligation was based upon Section 8(1) of the Constitution that provides that the BOR applies to all law and that the legislature, the executive, the judiciary and all organs of state are bound by the rights contained in the BOR ("The Governing Body of Juma Musjid Primary School and other v Essay N.O and Others," 2011).

The Court, in **Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa**, held that the rights in the BOR, more especially socio-economic rights, may be negatively protected from improper invasion. The Court stated that a breach of this negative obligation may occur directly where a private party fails to respect a right or indirectly when there is a private party that fails to avert the direct infringement of a right by a third party or where a private party fails to respect the existing protection of a right by conducting itself in a manner which diminishes such protection. The Court went on to clarify this statement by stating that Section 8(2) of the Constitution does not obstruct private autonomy or imposes on private parties the duty of the state to protect the rights contained in the BOR; Section 8(2) rather requires private parties not to interfere with or inhibit the enjoyment of a right by another party ("Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa," 1996).

The Western Cape High Court, in **Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Foods (Pty) Limited and others**; **Mukaddam and others v Pioneer Foods (Pty) Limited and others**, held the provisions in the BOR do not place a positive duty on private parties such as companies to safeguard the rights in the BOR and further that that institutions that are organs of state, performing a public function or providing a public service, must be held accountable for the provision of that service or the performance of that function ("The Western Cape High Court in Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Foods (Pty) Limited and others; Mukaddam and others v Pioneer Foods (Pty) Limited and others," 2013).

The various court decisions set out above demonstrate that the Constitution, together with the Courts of South Africa, appreciate the important role that state departments and organs of state play within our society and more importantly the importance of good governance of these institutions. The courts recognise that the BOR and the various provisions of the Constitution, as set out above, provide comprehensively for the governance of organs of state. Organs of state and therefore universities are not only bound by the Constitution, and have a positive obligation and duty to protect the rights contained in the BOR and the Constitution, they are also bound by the provisions of their enabling legislation namely the Higher Education Act and the provisions of the Companies Act. The judiciary even recognises the importance of organs of state meeting their responsibilities in terms of voluntary codes of the King Code of Corporate Governance. This is in stark contrast to the standard of compliance expected in respect of juristic persons such as companies and close corporations; these institutions have a negative obligation to protect the rights enshrined in the BOR; this obligation entails merely not interfering with or inhibiting the enjoyment or exercise of a right contained in the BOR by a another party; they do not have a duty to actively protect the rights contained in the BOR as the judiciary recognises this as the state’s duty. Normal juristic persons are also not bound by the governance provision set out in the Constitution, and need only comply with the governance provisions set out in the Companies Act or their enabling legislation and thereafter may voluntarily comply with the principles set out in the King Code of Corporate Governance.

This unambiguously demonstrates that universities’ governance requirements are unique in that they are held to immeasurably higher standards of corporate governance than that of normal juristic persons like companies (of any nature) and close corporations.

4.6 Summary of Results

<u>Research Question 1</u>

It was determined that universities constituted juristic persons and satisfied the definition contained in the Constitution of an organ of state as envisioned by Section 239 of the Constitution. Universities were, therefore, bound by those provisions in the Constitution pertaining to organs of state, more specifically those provisions in respect of governance.

Research Question 2

It was established which of the provisions of the Constitution found application in terms of the governance in universities, and further that as organs of state, universities have a positive obligation to promote and protect the rights contained in the BOR and are bound by the Constitution in its entirety.

Research Question 3

It was established that, given the nature of universities and the performance of a fundamentally public function, and their similarity to state owned enterprises, there is a case to be made that the provisions of the Companies Act must be applied to universities where appropriate. It was further determined that the principles of governance set out in the King Code of Corporate Governance 2009, although voluntary in nature, certainly apply to universities, and that universities should voluntarily apply the principles contained therein or explain and justify their reasons for failing to apply the principles as recommended, in order to achieve good governance.

Research Question 4

It was established that universities as organs of state are held to much higher standards of compliance in respect of their corporate governance compared to those of normal juristic persons such as companies. Universities are required not only to comply with the provisions of their enabling legislation, the Higher Education Act, they must also comply with their positive duty to protect and uphold the rights contained in the BOR, and the governance provisions in the

Constitution; they also have a responsibility to meet the governance requirements set out in the King Code of Corporate Governance.

CHAPTER 5. CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Chapter 5 will provide the reader with a brief overview of the conclusions of the research, whilst setting out any recommendations that have arisen as result of the findings of the research. Thereafter, some suggestions as to further research surrounding the topic will be discussed.

5.2 Conclusions of the Research

There has been very little, if any, research done in respect of the contrasting application of corporate governance provisions pertaining to universities as organs of states versus that of normal juristic persons. The principal aim of this research was to determine the legal personality of South Africa's public universities and subsequently determine the concomitant effect of such legal personality on universities' corporate governance compliance requirements and thereafter compare the standard of compliance prescribed by legislation and code with the standard required in respect of normal juristic persons.

The research proved that universities are in fact organs of state as envisioned by Section 239 of the Constitution, and as a result have a positive duty to protect and promote the rights contained in the BOR, which entails actively ensuring that their institutional statutes, rules and the conduct of the university itself not only comply with the rights enshrined in the BOR, but actively promote and protect these rights.

The research further proved that universities, as organs of state, are also bound by the provisions contained in the Constitution relating to the governance of state institutions and therefore are bound by the principles of accountability and transparency that underpin the provisions in the Constitution relating to governance. The research also determined that there is a strong case to be made out that, universities as organs of state similarly to state owned companies should be bound by the provisions of the Companies Act relating to corporate governance. The research also proved the judiciary strongly recognises that there is a duty on universities to consider and adhere to the principles contained in the King Code of Corporate Governance.

The results of the research incontrovertibly demonstrate that universities' governance requirements are unique in that these institutions are held to immeasurably higher standard of corporate governance than those of normal juristic persons such as companies (of any nature) and close corporations.

Universities are required to comply with, the various governance provisions in the Constitution, namely, Section 41 which addresses co-operative government and intergovernmental relations, Section 195 which provides for accountable, effective and transparent governance, and Sections 216 and 217 which provide for financial prudence, transparency and accountability. Normal juristic persons in contrast are not bound by these provisions and are often only bound by the Act in terms of which they are incorporated.

In addition, the Constitution clearly places a positive duty on universities to protect and uphold the rights in the BOR. As a result universities are required through their conduct and policies, to actively safeguard and uphold the rights enshrined in the BOR, whilst normal juristic persons merely have a negative obligation to protect such rights.

Universities are also required to comply with the various provisions in the Higher Education Act, as set out above, pertaining to the governance and running of their institutions.

This research presents substantial evidence buttressing the contention that universities should be bound by the provisions of the Companies Act that relate to governance and financial prudence, given their similarity to state owned companies and the important public function they perform. Whilst, normal juristic persons, more specifically private companies need only comply with the majority of these provisions if their memorandum of incorporation requires them to do so.

The principles contained in the King Code of Corporate Governance are voluntary for all entities, however, the judiciary appear to hold the view that organs of state have a duty to strongly consider and adhere to the principles contained in the Code, whilst such a burden is not placed on normal juristic persons.

5.3 Recommendations

Given that universities are organs of state and thus have a positive duty to protect the rights contained in the BOR, universities should conduct corporate governance audits within their own institutions in order to determine whether in fact they comply with the extensive corporate governance provisions applicable to them, as established in terms of this research. This will assist universities in determining their actual compliance with the aforementioned governance provisions and determining whether gaps exist between current governance structures in place and those structures which are required and considered best practice. This process will go a long way to ensuring that universities fulfil their obligations in terms of the applicable corporate governance legislation and code, whilst ensuring that universities achieve good governance and enhance the integrity of the institutions in question as perceived by their stakeholders.

5.4 Suggestions for further research

Areas identified for further research include an assessment of the levels of actual compliance by universities in respect of the substantial corporate governance provisions set out by the Constitution, the Higher Education Act, the Companies Act and finally the King Code of Corporate Governance, and the effect an increased standard of compliance has on the universities' further ability to comply. This could also reflect were gaps exist between required and actual compliance and assist in eliminating these disparities.

A further area of research that could be explored is the application of the Public Financial Management Act 1 of 1999, in conjunction with the Companies Act 71 of 2008, in order to assist universities to achieve exemplary good governance and be brought in line with the accounting standards of the state owned companies.

References

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another, 2007 (1) SA 343 (CC).

AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others 2014 (1) SA 604 (CC).

Aluchna, M. (2009). Does good corporate governance matter? Best Practice in Poland. *Management Research News, 32*(2), 185-198.

Andreasson, S. (2011). Understanding Corporate Governance Reform in South Africa: Anglo-American Divergence, the King Reports, and Hybridization. *Business & Society, 50*(4), 647-673.

Avram, M. E. (2013). Universities – Success Key in Developing Knowledge Based Society. *International Journal for Human Capital Development, 1*(1), 44-49.

Baloro and Others v University of Bophuthatswana and Others, 1995 (4) SA 197.

Barac, K., & Marx, B. (2012). Corporate Governance effectiveness and value added at South African Higher Education Institutions: A Registrar's View. *Journal of Economic and Financial Sciences, 5*(2), 351-372.

Republic of South Africa (2008). The Companies Act, Number 71. Government Gazette Number 34243. Pretoria. Government Printer.

Republic of South Africa (1996). The Constiution of the Republic of South Africa, 1996. Pretoria. Government Printer.

Cortese, A. D. (2013). The Critical role of Higher Education in Creating a Sustainable Future. *International Journal for Human Capital Development, 1*(1), 44-49.

Dario Milo, G. P. A. S. (2007). Freedom of Expression. In S. Woolman (Ed.), *Constitutional Law of South Africa* (Second Edition ed., pp. 42-41 - 42-193). Cape Town: Juta & Co.

Davies, M. (2008). The impracticality of of an international "one size fits all" corporate governance code of best practice. *Managerial Auditing Journal, 23*(6), 532-544.

Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC).

Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa, 2000 (2) SA 674 (CC).

Gardner v Central University of Technology Free State, 2012 JDR 1492 (LC).

Goodman Bros (Pty) Ltd v Transnet Ltd, 1998 (4) SA 989 (W).

The Governing Body of Juma Musjid Primary School and other v Essay N.O and Others, 2011 (8) BCLR 461 (CC).

Head Of Department, Mpumalanga Department of Education and Another V Hoërskool Ermelo and Another, 2010 (2) SA 415 (CC).

Heaton, J. (2012). *The South African Law of Persons*. Johannesburg: Lexis Nexis.

Republic of South Africa (1997). The Higher Education Act, number 101. Government Gazette Number 20844. Pretoria. Government Printer.
Hutchinson, T., & Duncan, N. (2012). Defining and Describing What We Do: Doctrinal Reseach. *Deakin Law Review, 17*(1), 83-119.
Ingram, V. (2004). The OECD principles of Coporate Governance. Paris, France: Organisation for Economic Cooperation and Development.
Khumalo and others v Holomisa, 8 (The Consitutional Court South Africa 2002).
King, M. (2009). The King Report on Governance for South Africa. Johannesburg, South Africa: The Institute of Directors Southern Africa.
King, M. E. (2009). King Code of Governance Principles Johannesburg, South Africa: The Institute of Directors Southern Africa.
King, M. E. (2010). The synergies and interaction between King III and the Companies Act 61 of 2008. *Acta Juridica : Modern company law for a competitive South African economy*, 446-455.
Kroeze, I. (2013). Legal Research Methodology and the Dream of Interdisciplinary. *Potchefstroom Electronic Law Journal, 16*(3), 35 - 65.
Ljubojevic, G. (2011). Development of Corporate Governance in Transition Economies and Achievement of Competitiveness. *Ekonomska Istrazivanja, 1*(24), 253-263.
Lleywellyn, G. (2004). Corporate governance, best practice. In J. Hancock (Ed.), *Investing in Corporate Social Responsibility* (pp. 111-123). London: Citigate, Dewe & Rogerson.
Marx, B. (2007). Corporate Governance at Higher Education Insitutions in South Africa. *Journal of Economic and Financial Sciences, 1*(2), 105-122.
Mec for Education, Gauteng Province, and Others V Governing Body, Rivonia Primary School and Others, 2013 (6) SA 582 (CC).
Michelman, F. I. (2007). The Rule of Law, Legality and the Supremacy of the Constitution. In S. Woolman (Ed.), *Constitutional Law of South Africa*
(pp. 11-11 - 11-44). Cape Town: Juta & Co.
Nevodwe, L., Odeku, K., & Raligillia, K. (2014). Ethics in the State-Owned Compnaies in the Public Sector: A Thin Line between Corporate Governance and Ethical Leadership. *Mediterranean Journal of Social Sciences, 5*(15), 661-668.
Odhav, K. (2009). South African post-apartheid Higher Education policy and its marginalisations: 1994 - 2002. *SA-eDUC, 6*(1), 33-57.
Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others, 2005 (2) SA 359 (CC).
Rossouw, G. J. (2005). Business Ethics and Corporate Governance in Africa. *Business & Society, 44*(1), 94-106.
Rossouw, G. J., Watt, A. v. d., & Malan, D. P. (2002). Corporate Governance in South Africa. *Journal of Business Ethics, 3*(37), 289-302.
Solomon, J., & Solomon, A. (2004). *Corporate Governance and Accountability*. Chichester: John Wiley & Sons.
The South African Broadcasting Corporation Limited, the Chairperson, The Board of the South African Broadcasting Corporation Limited v Dali Mpofu, 2009 (4) ALL SA (GSJ).

van der Waldt, D. (2009). *Corporate Governance in Developing Countries: The South African Experience*. Paper presented at the IJ SISEM Sci Co for 2009 ICIEOM Conference: Production engineering and sustainable development, Salvador Brazil.
West, A. (2009). The ethics of Corporate Governance, A (South) African Perspective. *International Journal of Law and Management, 51*(1), 10-16.
The Western Cape High Court in Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Foods (Pty) Limited and others; Mukaddam and others v Pioneer Foods (Pty) Limited and others 30043 (Western Cape High Court 2013).
Wiel, G. M. L. (2002). Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Memeber States (Vol. Final Report). Brussels: Internal Market Directorate General
Woolman, S. (2007a). Application. In S. Woolman (Ed.), *Constitutional Law of South Africa: Student Edition* (pp. 31 - 31 - 31 - 161). Cape Town: Juta & Co.
Woolman, S. (2007b). Dignity In S. Woolman (Ed.), *Constitutional Law of South Africa* (2nd ed., pp. 31-31 - 36-75). Cape Town: Juta & Co.
Woolman, S., Roux, T., & Bishop, M. (2007). *Constitutional Law of South Africa: Student Edition*. Cape Town: Juta & Co.