TOWARDS A "HYBRID" AFRICAN CORPORATE GOVERNANCE MODEL: EVIDENCE FROM POST APARTHEID SOUTH AFRICA

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Abstract

This paper investigates how unique socio economic conditions have hybridized the Anglo-American corporate governance (CG) model in South Africa (SA). The paper evaluates two key questions. (1) Are the Anglo-American and the continental European CG models converging to a hybrid model?(2) How Does the infusion of the "ubuntu" philosophy and affirmative action rules into the Anglo-American CG model create a "hybrid" African CG model in South Africa? In making these assessments we explore the shareholder and the stakeholder models of CG and assess these models are converging. We next explore CG in SA and examine how the African "ubuntu" philosophy and the inclusion of the various affirmative action rules in South African CG have created a "hybrid" African CG model.

Keywords: Corporate Governance, Shareholder, Stakeholder, Globalisation, International Trade

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1 Introduction

Rampant corporate collapses over the past few decades have put CG issues under the spotlight. Shareholders have become increasingly participative, corporate boards are no longer asleep while regulators are constantly seeking to implement more effective CG mechanisms. It has been argued that countries can benefit immensely from CG if their practices follow international norms (Samaha et al. 2012). However, despite the numerous CG models proposed, international CG practices follow two main models- the shareholder and the stakeholder CG models (Salacuse, 2002; Jeffers, 2005). The shareholder CG model focuses on advancing shareholder interests while the stakeholder CG model makes firms accountable to various stakeholders including shareholders.

Generally, a country`s choice of a particular CG model is greatly influenced by its legal origin (LaPorta et al. 1997). For example, the shareholder model is primarily common in common law countries while civil law countries mainly adopt the stakeholder model of CG. However, it has also been argued that these CG models are actually converging with each adopting several aspects of the other. Therefore countries may actually practice governance practices which are "hybrid" of the shareholder and stakeholder models of CG. In the case of emerging markets, globalisation in international trade practices, and cross border investments put extra pressure on their CG practices (Reed, 2002). As a result most CG practices in emerging markets have mainly mimicked that of developed markets to which they have a close affinity (Andreason, 2009; Samaha et al. 2012) despite evidence pointing several differences that give rise to CG in emerging markets and developed markets(Rabelo and Vasconcelos, 2002).

In the middle of these developments, post-Apartheid South Africa has notoriously pursued an integrated CG framework in the form of the King reports. Within the South African CG landscape, firms are required to disclose their compliance with recommended good practices on both shareholders and stakeholders. That is, on one hand the South African corporate governance require firms to maximise shareholder wealth. On another hand, firms are required to identify relevant stakeholders and respond to their needs.

The objective of this article is threefold. First it attempts to unravel the differences and similarities between the shareholder model and the stakeholder model of CG. Second the paper attempts to wage into the convergence of CG models debate. Specifically, it unearths the various sources of convergence and attempts to explain how the world is moving towards a hybrid CG model. Third, despite the argument that CG practices in emerging markets mostly tend to mimic that of the developed markets, this paper attempts to tease out how culture and various affirmative action rules has influenced CG practices in post apartheid SA. In effect it discusses how a "hybrid" African CG model that does not arise by merely adopting aspects of the shareholder and stakeholder CG models has evolved.

2 Models of corporate governance

Even though several CG models have been proposed, a fundamental distinction can be made between the

shareholder and the stakeholder model (Salacuse, 2002, Jeffers, 2005). Typically, companies' choice of a particular model is greatly influenced by their country of origin as well as the legal system prevailing in that country (La Porta, et al. 1997).

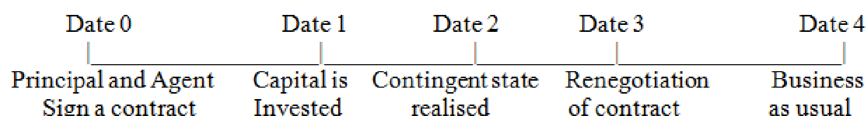
The shareholder model of CG is characterised by a strong concern for shareholder wealth maximisation. This model is popular in Anglo-American countries such as the UK and the US. By contrast, the stakeholder model makes managers accountable to the various stakeholders of the organisation including but not limited to shareholders. This model is familiar in Japan and other continental European countries such as Germany, France and Italy.

3 The shareholder model of corporate governance

Shleifer and Vishny (1997) narrowly defined CG *"as a way in which suppliers of finance to corporations assure themselves of getting a return on their investments" (Shleifer and Vishny 1997,P.2)*. This definition myopically places CG within the spectrum of the shareholder model. This model of CG suggests that shareholders are the owners of the company. Shareholders therefore employ the services of an agent (managers) and entrust them with the day-to-day running of the business. Therefore managers have a fiduciary relationship with shareholders and hence a duty of care to create shareholder value. This shareholder value doctrine emanates from the popular agency theory which postulates that both the principal and the agent are self-interested parties and therefore, the segregation of ownership from control creates the agency problem (Jensen and Meckling, 1976; Berle and Means, 1932). The separation of ownership from control may incentivise managers to misappropriate shareholder value especially when managerial interests deviate from that of shareholders. The shareholder model identifies profit maximization as the sole objective of the firm and argues that any other activity that deviates from this objective constitute shareholder wealth misappropriation and hence the agency problem. The major problem of the shareholder model arises from the principal-agent relationship which is rooted in the segregation of beneficial ownership from executive decision-making (Maher and Anderson, 1999). A typical example is where managers place much emphasis on esteem and ego which causes them to embark on costly mergers and takeovers which might not necessarily be in the interest of shareholders (Jensen and Meckling, 1976).

It is imperative to state that the narrow agency problem is a function of the incomplete contract written between the shareholders and the managers (Coase, 1937; 1960; Oliver, 1975; Williamson, 1975; 1985). The incomplete contract theory is underpinned by the fact that both the principal and the agent are concerned about the possibility of opportunistic behaviour from the other with regards to their investments, e.g., wealth transfers and/or managerial discretion. Therefore these parties constantly strive for contractual safeguards in a bid to reduce the possible inefficiencies which such an incomplete contract would create. As can be seen from Fig.1, the principal (shareholders) sign a contract with an agent (managers) which empowers the agent to manage an investment on behalf of the principal.

Figure 1. Typical time line



Source: Adapted from Lyons (2001)

However, at the contract signing date, both parties anticipate that events might change but it is not possible to incorporate those unforeseeable events into the contract. This could be because such events are not contractible. An incomplete contract will subsequently be signed between the principal and the agent. The contract thus becomes "trust built" and bestows on both the principal and the agent residual control rights that permit the exercise of discretion in times of events not covered by the contract. In this way, the parties also open themselves up for renegotiation as and when there is a change in circumstance. For example, the principal could redesign or alter the design of the compensation structure of the agent when there is the need to align his interest more closely to that of the agent. This is also the basis for corporate governance. CG structures thus become the referent point in making decisions not covered by the incomplete contract between the principal and the agent (Hart, 1995).

The prevalence of incomplete contracts leads to the exercise of managerial discretion (Williamson.1985). Therefore, these coupled with the segregation of ownership from control creates information asymmetry problems which exacerbate the agency problem. (Berle and Means, 1932).Therefore, in the shareholder model, the main corporate governance problem to be dealt with is the agency problem.

The shareholder model of CG is normally practiced in common law countries such as the US, the UK, and other commonwealth countries. In these countries, companies are owned by dispersed shareholders and controlled by managers (LaPorta et

al, 1997). For example, the average largest stake of equity in Germany was 55.9% in 1996 (Becht and Bohmer, 1999), 24.5% in the US (Prowse, 1994); and 14.4% in the UK (Goegen and Renneboog, 1999). Therefore, in these countries the agency problem is normally between weak owners (generally due to diffused ownership) and strong managers. With widespread ownership the incentive to monitor therefore diminishes due to shirking induced by the high cost of monitoring and shareholders resort to exit instead of voice (Maher and Anderson, 1999). It therefore becomes vital for the legislative environment and CG to adapt to the particular needs of these dispersed shareholders.

The shareholder model can therefore be described as market oriented. This is because strong minority shareholder protection results in active stock market participation. It can therefore be inferred that this system strongly supports stock market activity. It relies on market efficiency and also relies on the market as a disciplining mechanism. The market for corporate control is therefore more active within the shareholder model. Takeovers are more common. For example, Maher and Anderson (1999) documented that on average, 200 mergers and acquisitions take place in the UK every year compared with an average of 50 in Germany. Besides, the US in particular has gained popularity for its active market for corporate control. However, when other direct corporate governance mechanisms fail, there will be the need to design executive remuneration to stimulate managers to act in the interest of shareholders. The high level of managerial discretion as well as the possibility of asymmetric information between managers and shareholders necessitates constant restructuring of executive remuneration contracts to align the interests of these parties (Kole, 1997). Executive remuneration in countries that practice the shareholder model is therefore higher than their counterparts practising the stakeholder model (Conyon and Leech 1993, Brenner, 2011).

Further, firms practicing the shareholder model usually have a one tier board which consists of executive and non-executive directors. Even though the number of independent and non-independent directors varies from company to company, it is generally recommended that a substantial number of the directors are independent of management. However, since the Cadbury Report in 1992, the percentage of non-executive directors on the board has increased considerably in the UK. Typically, the number of non-executive directors on boards has been increasingly used as a proxy for board independence.

Further, in these countries the Board sets committees to deal with specific tasks - be it ad hoc or recurrent. However, even though the number of members on each committee is normally left at the discretion of the board, it has strongly been recommended that some committees including the audit committee, the risk committee, and the nomination committee be composed of entirely non-executive directors and have a minimum of three members (Cadbury 1992, Greenbury 1995).

4 The stakeholder model of corporate governance

The stakeholder model of CG is rooted in the stakeholder theory of Freeman (1984). Freeman defined stakeholders as organisations or individuals who can impact or affect the activities of the firm. Within this model, organisations are managed for the wellbeing of society or stakeholders. In this context, stakeholders include governments, shareholders, employees, customers, suppliers etc. Therefore, contrary to the shareholder model, the main objective of the firm is not profit maximization but the maximization of the varied interests of diverse stakeholders which may include provision of employment, growth in trading relations, profitability etc. The model is therefore in tandem with the view that the organisation is a “nexus of contracts” (Jensen and Meckling, 1976; Williamson 1975, 1985; Hart, 1995; Macey and O`Hara 2003). This view posits that an organisation is a nexus of contracts and as in the ordinary case of contracts, the rights and responsibilities of all parties are defined in the corporate endeavour, therefore every party gets exactly what they bargained for without the need to prioritise the interest of one over the other. Consequently, whereas the shareholder model focuses only on a few number of contracting parties, the stakeholder concept considers all implicit and explicit contracts. Arguably, this could be the reigning concept underpinning the non-prioritization of shareholder value maximization in the stakeholder model of corporate governance. These notwithstanding, there could still be conflict of interests within this model instances where the interests of some powerful stakeholders may not be aligned.

However the major problem with this model is the difficulty involved in meeting the diverse interests of these varied stakeholders. For example Blair (1995) contended that the stakeholder model does not give managers and directors a clear direction and a set of priorities to help them with the efficient allocation of resources. By contrast, Jensen (2001) argued that whenever any of the stakeholders are ignored, firm value maximization become meaningless. Practically, even within the context of the shareholder model, best performing firms are more likely to have committed employees and suppliers, be socially responsible and loyal to customers. These generically amount to serving the interest of stakeholders hence the stakeholder model is seen as an extension of the shareholder model.

The stakeholder model proposes a two tier board--the management board and the supervisory board. The management board consists entirely of executive directors who are also managers and entrusted with the day-to-day running of the firm. The supervisory board on the other hand is made up of a representation of the various stakeholders including

employees, creditors, government appointees etc. The supervisory board have the overall oversight of the activities of the management board. To this end they have the power to hire and fire managers as well as dissolve and reconstitute the management board. Intuitively, the constituent of the supervisory committee is a reflection of the fact that the stakeholder model of governance advocates stakeholder empowerment and participation compared to the shareholder model.

Generally, the stakeholder model encourages wider stakeholder participation. For example, the German CG code prescribes that if a company has more than 500 or 2000 employees in Germany, employees should constitute 1/3 or ½ respectively of the total number of members on the supervisory board (The German Corporate Governance Code, Section 1). However, even though the German code also makes provision for the chairman of the supervisory board to be a representative of shareholders, the number of employees' representation on the board could be a put off for international investors. This also explains why capital markets in countries practicing the Stakeholder model are relatively underdeveloped. This form of governance is therefore characterized by strong relationships with banks, cross shareholdings and pyramidal structures, leaving capital markets a relatively small role to play in CG (Maher and Anderson 1999).

Moreover, concentrated ownership and voting power can have counterproductive effects. Firstly, it could also incentivise controlling shareholders to expropriate rent at the expense of outside minority shareholders. Hence, in countries where this model is practiced, the legislative environment seeks to protect the interests of minority shareholders (La Porta et al. 1997).

5 The shareholder model versus the stakeholder model: a case of convergence

Despite the differences in approach involved in the various models of CG, there is rarely a country that practices one model entirely. Salacuse (2002) argued that even though the shareholder model emphasises shareholder value maximisation, in countries that practice this model, companies are still required to obey the law. For example, labour laws, environmental laws etc. in these countries oblige company directors to also pay attention to the needs of employees and other agents on whom the company`s activities affect. This is irrespective of the fact that, they are not considered as stakeholders within this CG model. However, even when the rights of these non-shareholding groups are not protected by law, various pressure groups induce company boards to pay attention to the needs of other stakeholders.

Salacuse (2002) further opined that the rights of the various stakeholders in countries practicing the stakeholder model may also vary. For instance, whereas employee representation on boards is mandated by law in countries such as Denmark, Germany, Luxembourg, Sweden, and Austria, these privileges may only be voluntarily conferred on employees in Finland by the articles of association. By contrast, employees in France are only able to nominate board representative/s when their shareholding reaches 3%. However, in any other European Union country, the right to elect board members is only reserved for shareholders.

Leading convergence theorists, Hansmann and Kraakman (2000) suggested three main catalysts for the convergence of CG models- force of logic, force of example and force of competition. According to them, the force of logic is the compelling reason/s or arguments for the superiority of one model over the other while the force of example refers to the unflinching, tried and tested success of one model over the other. The force of competition on the other hand refers to the demonstrated competitive advantages of one model over the other. They further argued that policy makers make regulatory changes aimed at convergence towards other countries' model when they are persuaded by the invisible hands of these forces (force of logic, force of example or force of competition) that one model is better than others at promoting economic growth. These forces work in the same direction when influential shareholders or company managers adopt international governance structures that are perceived to work together (Thomsen, 2003 pp. 34).

Hansmann and Kraakman (2000) further recommended convergence to the shareholder model.

"*The shareholder-oriented model of corporation promotes better economic performance than do other models. The outcome of a simple comparison between jurisdictions in which firms are organised and operated under a shareholder-oriented model and jurisdictions in which firms are organised and governed pursuant to different models reveals the main reasons why the developed common-law countries which are strongly in alignment with the shareholder-oriented model and the regions such as continental Europe and East Asia which adhere principally to other models differ in terms of economic performance which has been found higher in the former types of countries and lower in the latter ones"(Hansmann and Kraakman, 2000, pp.450).*

However, Palmer (2011) disputed their argument. Palmer called for a clearer distinction between being a reason and being the main reason. He further argued that adherence to a shareholder-oriented model may only be a reason rather than being the main reason of a country`s economic performance being superior to the other. To buttress this point, he questioned why the UK which is the second major common law country ranks behind countries like Japan and Germany in terms of economic performance even though the latter two countries are civil law countries and practice the stakeholder oriented model.

Generally, it has been relatively easy to shift the convergence argument in favour of the shareholder-oriented model. This could be traced to the global bull market period that occurred between 1980-2000.

During this period, even conservative stakeholder oriented model practitioners like the continental Europe experienced a boom which is a trace of convergence towards the Anglo-American model (Thomsen, 2003). Even now, a relatively small European country like Switzerland has a higher ratio of stock market capitalisation to GDP than the US (Thomsen, 2003). Besides, the growing popularity of globalisation and international trade means the era when companies limited their sources of financing to local investors is over. Companies including those in continental Europe compete for international capital. It is not uncommon to see UK and US investors investing directly into European companies (Berghe 2002). The dwindling nature of family and individual ownership, cross listing of shares, coupled with the international diversification of European pension funds mount extra pressures on European companies to adopt international corporate governance standards with a strong focus on investor protection (LaPorta et al. 1997). Indeed, the Anglo-American code of corporate governance is gaining prominence in Europe.

The European takeover directive also shows glimpses of convergence towards the shareholder-oriented model. This directive was adopted on April 21, 2004 but came into force on 20th May, 2006. However, European Union member states were given until 20th May 2006 to see to its full implementation. The main objective of this directive is to streamline takeover transactions in Europe, increase minority interest protection, and remove all bottlenecks that could stifle takeover activities. This directive could be seen as an attempt to encourage stock market participation and create an active market for corporate control- a characteristic reminiscent of the Anglo-American model. However, in the area of cross boarder takeovers, the adoption of the directive is yet to achieve the level of harmonization required by the EU.

Despite the popular acceptance of convergence towards the Shareholder model as described above, other evidence suggests that the shareholder model has also clandestinely converged towards the stakeholder model (Berghe, 2003). This convergence is as a result of the desperate attempt to solve the agency problem associated with the shareholder model (Thomsen, 2003). The shareholder-oriented model has also recognised the powerful monitoring incentives of concentrated ownership and has progressively encouraged institutional investors to actively partake in corporate governance (Maher and Anderson, 1999). In fact Holderness et al. (1998) showed that between 1935-1995 executive share ownership in the US increased by 8.2%. This is evidence in support of the fact that US share ownership has converged in the direction of the stakeholder-oriented model which is characterised by insider ownership.

Further, it is evident that a clear distinctive feature of the stakeholder-oriented model is the two-tier board system. This feature automatically forbids CEO duality and represents the separation of the two important functions - function of decision and function of control (Thomsen, 2003). By contrast, the shareholder model has a single board consisting of both executive and non-executive directors which represents the merging of the control and management functions. However, the post-Cadbury (1992) period has witnessed the inclusion of more non-executive directors on US and UK boards. Also, following the recommendations of the Cadbury Committee (1992), Anglo-American companies now establish committees like audit, remuneration, etc. which consists entirely of non-executive directors. Further, the adoption of the separation of the role of the CEO from that of the chairman as part of the UK corporate governance Code as recommended by the Higgs report (2003) strongly mimics the separation of functions in continental Europe.

Overall, it is evident that there is convergence between these two competing corporate governance models, however, this convergence is multi-directional. The shareholder model has adopted certain features of the stakeholder model and vice versa. Nevertheless, since corporate governance systems have legal, cultural and historical backgrounds (La Porta et al, 1997), there may never be complete convergence. By contrast it may be argued that there is a global convergence towards a hybrid CG model with each of the two models adopting attributes of the other.

6 Corporate governance in South Africa

As a former British colony South Africa has strong ties with the UK. Even though the UK has recently fallen below the pecking order to countries like China and the USA in terms of trading volume, it has still remained a major trading partner over the past decade (Weimer and Vines, 2011). This colonial legacy resulting in subsequent ties with the UK have led to South Africa adopting British corporate law and practices (West, 2006). South African corporate culture and CG are therefore firmly rooted in the British tradition (Wixley and Everingham, 2005). Consequently, the first code of CG in South Africa (King I) drew substantial inspiration from the Cadbury report in the UK (Sarra, 2004; Ntim et al. 2012). Similar to the UK Cadbury report, South African CG codes (King I, II and III) recommend a unitary board structure consisting of both executive and non-executive directors, a market driven economy, and an active stock market. Further, similar to the happenings in most Anglo-Saxon countries, South African banks only play a secondary role and avoid too close relations with clients (Andreason, 2009). Specifically, King I, recommended that boards should be chaired by a non-executive director and also meet at least four times in a year. King I frowned on CEO duality and prescribed the formation of audit and remuneration committees. The second CG code (King II) was also introduced in 2002. King II also made several far reaching recommendations with most of them within the remit of the Anglo-Saxon CG

practices in the UK and USA. Similar to its predecessor King II also frowned on CEO duality and recommended that boards meet at least once every quarter. Moreso, it recommended that majority of board members should be non executive directors. In addition, it prohibited insider dealing and allowed share options for non-executive directors. The third CG code (King III) was also released in 2009. Like its predecessors, King III also reinforced most of the provisions in King II. However, King III required among other things shareholder vote on executive remuneration, the establishment of a statutory audit committee and the preparation of an integrated annual reports. These structures typically tilt CG in South Africa towards the shareholder model of CG.

7 Hybridization of corporate governance in South Africa - the effect of affirmative action rules and culture

Even though the adoption of international CG practices with a view to maintaining business friendly and stable macroeconomic environment remained a priority in the post-apartheid period, it was also important that corporations played a vital role in the country`s development (Andreason, 2009).

In the case of South Africa, apartheid- a system of legal racial segregation of whites from blacks from 1948-1993 brought in its trail deep seated discrimination (Natrass, 1991), as well as poverty and racism (Hickson and Kriegler, 1991) against a section of the South African country`s population. Apartheid brought white supremacy to a whole new level and led to the categorization of the non-white community as Coloured, Asiatic or Natives who had neither voting rights nor representation in government (Butler, 1998). With Apartheid, humanity was defined on the basis of race, all aspects of life including healthcare, living conditions, jobs and even burials were based on racial classification (Hammond et al., 2009). It limited access to quality education to the few minority "white" population and two decades after the death of apartheid, a high number of the "black" majority population still remain functionally illiterate (Statistics South Africa, 2011). During this period, the black community were forced to relocate to villages where there were lack of basic amenities like electricity, good drinking water and schools. White colour jobs were also reserved and firmly kept in the hands of whites- a situation which left the black community with no other option than to compete for the available unskilled jobs. As shown in table 1.

Table 1. A compilation of annual per capita income by race

	Race	White	Coloured	Asian	African
	Year				
	1917	13 069	2875	2894	1184
	1924	13 853	2770	2694	1099
	1936	19 212	3000	4443	1462
Apartheid- Period	*1946*	26252	4280	6037	2311
	1956	30494	5158	6668	2627
	1960	31230	4877	5340	2532
	1970	45751	7929	9248	3133
	1975	49977	9688	12687	4289
	1980	48340	9238	12304	4088
	1987	45828	9572	13823	3879
	1993	46486	8990	19537	5073
Average % Change 1917-1993		**23%**	**19%**	**52%**	**30%**
Post Apartheid Period	*1995*	*48387*	*9668*	*23424*	*6525*
	2000	*56179*	*12911*	*23025*	*8926*
	2008	*75297*	*16567*	*51457*	*9790*
Average % Change 1995-2008		**19%**	**24%**	**40%**	**17%**

Adapted from: Leibrandt, Woolard, Finn, and Argent, (2011)

As indicated in table 1, the apartheid period clearly witnessed an unequal income distribution in South Africa albeit in favour of the minority white race. Nevertheless, whilst the absolute per capita income of "whites" clearly dwarfs that of "blacks", the average per year growth in per capita income is higher for Africans than whites. This may be attributed to the numerous efforts made by various pressure groups to eliminate the income inequality. However, the Asian group had the highest average yearly growth in per capita income, with coloured people seeing the least growth in yearly per capita income during the apartheid period. These figures were not disturbing but shameful given that the South African population constitute over 79% Africans (Blacks) as per the 2011 population census. Ostensibly, the natives had become minorities in their own land in terms of income distribution. This attracted the attention of various stakeholders in South Africa, putting further pressure on the South African government to address the income inequality.

In response to the social pressure, the SA government in an attempt to create a fair level ground for all irrespective of race introduced several

stakeholder policies. These stakeholder policies also resulted in comprehensive changes in the country`s CG regime. For example, these policies featured prominently in the first CG report of South Africa (King I) which came into effect in 1994, nevertheless compliance was only on a voluntary basis. More so, after the publication of King I in 1994, the anti-racial campaign had gathered enough momentum. This led to the enactment of several other legislations such as the Employment Equity Act (No.55 of 1998), the Skills Development Act (No. 9 of 1999) as well as the Promotion of Access to Information Act (No.2 of 2000). The purpose of these legislations among other things was to reduce or eradicate the level of inequalities created by apartheid. For example while the employment Equity act obliged companies to develop an employment equity plan and to report on progress in their achievement of these objectives, the Promotion of Access to Information Act was to encourage and enhance transparency so that anyone can have access to information held by companies. On the other hand, The Skill Development Act also required companies to provide resources for skills development and training, nevertheless this should be done without recourse to any form of discrimination. Further, the Black Economic Empowerment Act (BEE) was also promulgated during this period. The aim of BEE was to take the discrimination eradication campaign over and above employment practices. Its major objective was to help redress the continued unequal distribution of ownership, management and the control of South Africa`s economic and financial resources. However, even though compliance of BEE was voluntary companies were required to report in their annual reports the progress they have made in its implementation. These interventions were also made part of the second corporate governance code for South Africa (King II) which was published in 2002.

However, the South African government decided to combine and legalise the anti-discrimination policies and legislations under one umbrella. This gave birth to the Broad-Based Black Economic Empowerment Act (No.53 of 2003) (Hereafter called BBBEE). Even though the BBBEE was enacted in 2003, its code of good practice was gazetted on 7th February 2007.

The BBBEE Act (2003) has seven pillars namely, ownership, management control, employment equity, skills development, preferential procurement and enterprise development.

The ownership pillar seeks to increase the percentage of black people that owns productive assets in South Africa. Subsequently, it requires companies to ensure a reasonable percentage of their shares are in the hands of black people. To augment this pillar the Johannesburg Stock Exchange (JSE) introduced the BEE Share Scheme Trading as part of its main trading board. This ensured that trading under this scheme is only restricted to people categorized as "blacks" within the context of BBBEE. This also made it easier for companies to list their BEE share schemes and to ensure that patronage of these shares are only restricted to "blacks".

Similarly, the management control pillar requires companies to ensure the appointment of blacks at board and managerial levels in the organisation. Employment equity on the other hand encourages the employment of blacks at various levels of the organisation while skill development ensures black people are not left out in the company`s skill development plan. Preferential procurement encourages companies to award procurement and other contracts to companies that have significant black ownership and control while enterprise development facilitates investments in enterprises that are owned by black people.

The BBBEE code of good practice also included a generic and industry specific scorecard with various weightings assigned to each of the seven pillars. These scorecards are intended to be used by businesses to measure their performance or compliance level in relation to the BBBEE Act (2003). Assessment is normally done annually by a BBBEE certification agency and based on their overall performance companies are assigned a status and given a certificate.

Even though compliance with the BBBEE Act (2003) is voluntary Section 10 of the BBBEE Act (2003) clearly states;

"Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in-

(a) Determining qualification criteria for the issuing of licenses, concessions or other authorisations in terms of any law;

(b) Developing and implementing a preferential procurement policy;

(c) Determining qualifications criteria for the sale of state-owned enterprises; and

(d) Developing criteria for entering into partnerships with the private sector."

It may thus be argued that section 10 of the BBBEE Act (2003) makes it difficult if not impossible for companies in South Africa to operate smoothly and competitively without complying with this Act.

It is imperative to state that even though King I was completely silent on BEE issues, King II explicitly required companies to consider them and report on them. By contrast, King III was silent on BEE issues. However, this could be due to the fact that prior to the release of King III BEE had already become an Act. King III subsequently required companies to abide by all binding and non-binding laws in South Africa and specifically asked firms to disclose in their integrated report what non-binding laws they have complied with. King III therefore impliedly required firms to comply with the BBBEE Act (2003). It may thus be argued that firms need to comply with these affirmative action laws gives South African CG a stakeholder flavour albeit not in the way prescribed by the stakeholder CG model practiced in continental Europe.

More so, Andreason (2009) argued that for a hybrid model to be successful, it must be capable of addressing the concerns of both shareholders and

stakeholders and also be effective in anchoring these concerns in a cultural framework that confers popular legitimacy on the system as a whole. At the centre of African culture is the *ubuntu* philosophy. *"Ubuntu is the capacity in African culture to express compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining community"* (*Nussbaum, 2003 p. 1*). *Ubuntu* emphasises the strong interdependence of human beings (Battle, 1997). It stresses the importance of communication and reconciliation in the interest of harmony and understanding. Africans have a short memory of hate, and expect their children to reconcile, communicate and devise ways to cleanse and let go of hatred due to the *ubuntu* philosophy (Mazrui, 2001).

The second CG code of South Africa (King II) clearly states *"The Company remains a key component of modern society. In fact, in many respects companies have become a more immediate presence to many citizens and modern democracies than either governments or other organs of civil society" (King Report 2002. Section 8.).* In fact, at the introductory page of Section 4, of King II clearly stressed the intention to infuse the ubuntu philosophy into CG when it stated that

"Umuntu ngumutu ngabantu

(I am because you are, you are because we are)

(Humanity is interdependent) " King Report 2002. Section 4. P.91)

Commenting on this Rossouw (2005a) retorted *"taking this African value system seriously would render an exclusive focus on shareholder issues impossible as it would fly in the face of values central to the philosophy of Ubuntu".* Agreeing with this thinking Andreasson, (2005) resonated that an African corporate governance model embedded in an African philosophy can only be a hybrid of both the shareholder and the stakeholder stakes. By contrast, Rossouw (2005b) argued that the reason companies in South Africa take on other responsibilities is to create stable and strong communities to streamline their operations. He contended that to achieve this, companies will have to concern themselves with activities such as the eradication of backlogs in education, health, training etc. created by apartheid.

King II was particularly dismissive of the shareholder centric view when it stated that the "*shareholders have only limited rights" (King Report 2002:9)* - a right to vote and a right to dividend.

Nevertheless it is still unclear whether the various reforms have actually succeeded in bridging the income inequality. For example, in table 1.0 above, the post-apartheid period actually witnessed an average yearly per capita income growth of 19% and 17% for whites and Africans respectively. This represents a reversal of the growth trend in the pre-apartheid period where that of Africans exceeded whites. This trend is ably supported by the 2011 population census which documented a growth in income inequality in the post apartheid period (Statistics South Africa, 2011). Specifically, the census showed that the average annual income is 365,000 rands, 251,500 rands, 251,000 rands, and 60,600 rands for whites, mixed race, Indians and Blacks households respectively. Commenting on these figures Jacob Zumah- the South African president retorted *"whiles greater strides have been made since racial segregation ended in 1994, much still needed to be done to end inequality".* Indeed, these figures cast doubt on the efficacy of the various legislations (such as the BBBEE, Employment equity Act, etc) in curbing the racial inequality menace. Among the various criticisms levelled against these legislations is that, it has only succeeded in creating a "creterie" of few black elites instead of benefitting the entire black population (Ntim , 2012).

Others have also criticised the BBBEE and classified it as an engine for corruption. The BBBEE has also *promoted "tenderpreneurs who were tender thieves because they got their tenders through (political) connections*" (*Business Report* 30 November 2010). Consequently, based on these allegations, the South African Institute of Race Relations made a submission to the Department of Trade and Industry calling for the BBBEE to be scrapped. Nevertheless, the South African Government still believes it can be amended to serve its purpose better especially if made to run hand in hand with other stakeholder policies. For example, with a black population of over 79%, policies aimed at making corporations socially responsible may better target a wider black community than only a few as is the case with BBBEE.

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