

3. The Anglo-American model of corporate governance in sub-Saharan Africa: explanatory and normative dimensions

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INTRODUCTION

In sub-Saharan Africa, the corporate governance¹ model that has been adopted is the so-called ‘Anglo-American’ (that is, British and US) model. Although there has been much discussion in both the literature and amongst business leaders of this model, there is no precise definition of what Sub-Saharan Africans understand this term to mean, nor is there any consensus other than that it is a unitary board model. While it cannot be doubted that good corporate governance adds value to a corporation, the authors of this paper believe that corporate governance needs to be deconstructed (Gustavson *et al.*, 2005).

We are aware that a substantial amount of work is being done in the area of establishing legal and institutional arrangements for corporate governance in Africa, especially by governments and regulatory agencies (Armstrong, 2003, 2006). We are also aware of the contributions of other sets of actors, such as the Kenya-based Centre for Corporate Governance (which operates throughout East Africa), or the Institute of Directors in Southern Africa under the auspices of which the King Committee on Corporate Governance was initiated. Corporate governance also plays an important role in the African Peer Review Mechanism, but although the purpose of corporate governance is given (NEPAD, 2004: 59),² there is no discussion of the model of corporate governance. While there has also been empirical research on how the model is being implemented within sub-Saharan African countries (see for example Goldsmith, 2003),

with the notable exception of work being done in South Africa (especially King, 2002; Rossouw, 2005a, b), there is little evidence that the normative dimensions have been addressed, for example in terms of analysing the appropriateness of the Anglo-American corporate governance model as it is being championed by governments and regulatory agencies.

There is, admittedly, little evidence as to why the model was chosen; anecdotal evidence, which needs research support, suggests that it was either unreflective choice or as a result of pressure from organizations such as the World Bank and IMF. While corporate governance standards and practices ostensibly aim to promote positive social change through increased transparency and accountability, economic development and greater integration of the corporations of each country into the global financial community, it is important to note that the Anglo-American model of corporate governance does not always work well even in Anglo-American cultures. Therefore the central argument of this chapter is that there is no reason to assume that the Anglo-American model (whatever this is perceived to be) must be adapted *in toto*. It may well be that some aspects may be beneficial to sub-Saharan African economic and social development and so should be taken over, but other aspects may be damaging to social development and so the society must then question whether or not the economic benefits are worth the social damage (on this, see Reed, 2002). The need therefore arises to consider which of the constituent parts of the corporate governance model are essential and which can be modified to make them more in keeping with local cultural values.

This chapter is the first step in a research project that aims to develop an understanding of what the 'Anglo-American' model of corporate governance actually means in sub-Saharan Africa and how it works; using these data it then attempts to modify the model to make it more effective.³ Here, we draw upon John Braithwaite's understandings of both 'explanatory theory' as a set of 'ordered propositions about the way the world is', and normative theory as 'a set of ordered propositions about the way the world ought to be' (Braithwaite, 2002: ix). The first part of this chapter outlines the theoretical frameworks used for analysing the empirical trends in corporate governance legislation: Donaldson and Dunfee's Integrative Social Contracts Theory (1999) and Hofstede and Hofstede's dimensions of national cultures (2005). This is followed by a comparison of principles of good corporate governance practices of listed companies as expressed in the relevant legislation or guidelines of three sub-Saharan African countries: Kenya, Botswana and Zambia.

THEORETICAL FRAMEWORKS

Social Contract Theory

One of the theoretical underpinnings of our work is Donaldson and Dunfee's Integrative Social Contracts Theory (1999; hereinafter ISCT), one of the most prominent theories in the field of business ethics. Social contract theory 'focuses on a community or group of rational, self-interested individuals who are presumed to consent to the terms of a hypothetical agreement because it is in their rational interest to do so' (Dunfee, 1997: 585). The idea of a contract is something with which businesspersons feel comfortable: they negotiate contracts and work with contracts throughout their business lives. ISCT differs from standard social contract theory. The standard theory produces a hypothetical contract: it is based purely on reasoned argument, and as such states what should be, ignoring what is. ISCT attempts to integrate a hypothetical contract with the actual ethical norms of a society. The part of the theory on which we would like to focus is the distinction between what ISCT calls hypernorms and what it calls microsocial contracts. Hypernorms 'are principles so fundamental that they constitute norms by which all other norms are to be judged. They are discernible in a convergence of religious, political, and philosophical thought' (Dunfee and Donaldson, 2005: 244). Microsocial contracts on the other hand are the ethical norms of particular communities; they are allowed to stand so long as they do not conflict with hypernorms, which invariably take precedence.

Our Variant of ISCT

In our research, we view hypernorms as being things that are fundamental to the system of corporate governance: things without which the system would at best not work very well, and at worst be undermined to, or beyond, the point of collapse. Unlike Donaldson and Dunfee, we view everything as a hypernorm unless we can argue that it should be a microsocial contract. We believe that this is essential as any divergence from commonly accepted standards of the international business community may have significant negative consequences for a society. The difficulties in deciding whether an issue is a hypernorm or a microsocial contract are clearly seen from the following argument by Elegido (1996: xv-xvi):⁴

one still has to consider in detail the consequences which are likely to follow from refusing or accepting a request for a certain questionable payment. At this

level of analysis it is suggested that the answer could be very different depending on whether one is, say, a clearing agent in the port of Lagos or an investment banker in New York. This is not to say that clearing agents in Lagos are justified in surrendering to every attempt to extort money from them, or that there are no conceivable circumstances in which it would be ethical for an American investment banker to give in to extortion requests. The point is rather that the specific circumstances in which issues arise are relevant to the ethical assessment of the alternatives facing the actor, and that, generally speaking, there are many issues in which some ethically relevant circumstances tend to differ systematically between developed and developing countries.

We view microsocial contracts as being parts of a corporate governance model that may be adapted to each community using that community's norms as their basis; so long as the benefit to the community of adopting a microsocial contract outweighs the disadvantages to the community of adopting a contract which is at variance with the dominant multinational contracts (hypernorms). Note that we refer to the community, not shareholders. It is the community, through the legislative arm of government, that allows business to operate, and surely any rational community would only allow business to exist for the community's overall benefit.

Social Contracts and Cultures

If we are going to identify any microsocial contracts in the area of corporate governance, we would suggest looking for large-scale cultural influences, and so turn to the famous work of Geert Hofstede (Hofstede and Hofstede, 2005), who scored cultures in 74 countries and regions on four dimensions. As his work is based on actual cultures, it is clearly in the domain of extant contracts, all of which are therefore microsocial contracts and some of which may also be hypernorms. An advantage of using this framework is that we can increase the certainty of attributing particular findings from our analysis of corporate governance practices to cultural differences, rather than to other factors. Hofstede's work in Africa was published as the results for one country, South Africa (the sample was exclusively Caucasian), and two regions, West Africa (Ghana, Nigeria, and Sierra Leone) and East Africa (Kenya, Ethiopia, Tanzania, and Zambia). It should be pointed out that we are proceeding on the assumption that Hofstede's work reflects a generalized national culture, and so we will be looking for a best fit between the generalized national culture and the generalized social contracts that underpin corporate governance.⁵

The data in Table 3.1 show that the two countries after which the Anglo-American model is named, the United Kingdom and the United States,

Table 3.1 Hofstede's cultural dimensions: scores for African and selected Anglo-American countries/regions

Dimension	Power distance	Individualism/collectivism	Masculinity/femininity	Uncertainty avoidance
West Africa	77	20	46	54
East Africa	64	27	41	52
South Africa	49	65	63	49
United States	40	91	62	46
Australia	36	90	61	51
United Kingdom	35	89	66	35

Source: Hofstede and Hofstede (2005): 43–4, 78–9, 120, 169.

have similar scorings on these criteria, as does another country with a similar cultural background, Australia. On the first three of the dimensions, West Africa and East Africa have scores which are similar to each other but which are very different to those of the Anglo-American countries: their scores are the highest two or lowest two on each of the scales. South Africa sits somewhere in between, but is more 'Anglo-American' than 'African'; it should be remembered that Hofstede's sample (Hofstede and Hofstede, 2005: 27) consisted of white South Africans only.

Power distance

The first of Hofstede's dimensions is power distance, that is, 'the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally', and it is noted that, in large power distance countries, 'subordinates are unlikely to approach and contradict their bosses directly' (Hofstede and Hofstede, 2005: 46). Anglo-American cultures score lower on this scale, indicating that there is lower acceptance of unequal power distribution: those at the top do not have unfettered power, and so are likely to be questioned. This would suggest that the board is aware that society will place restrictions on its power and that its decisions will be subject to justification and questioning. On the other hand, there is significant power distance in West and to a lesser extent East Africa suggesting, for example, that decision making will be concentrated at board level and that those decisions will not be directly queried even when they relate to management rather than governance, which may be to their organization's detriment; and that shareholders in West and East Africa may not be as activist as their British or American counterparts, which may also be to their society's detriment.

Individualism/collectivism

The second dimension is individualism/collectivism.

Individualism *pertains to* societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family. Collectivism *as its opposite pertains to* societies in which people from birth onward are integrated into strong, cohesive in-groups, which throughout people's lifetimes continue to protect them in exchange for unquestioning loyalty. (Hofstede and Hofstede, 2005: 76)

Hofstede found that the three most individualistic cultures were Anglo-American, namely, the USA (score of 91), Australia (90), and the UK (89); indeed, these were the only three countries to score more than 80. We therefore expect to find their corporate governance model, the so-called Anglo-American model, to be appropriate for individualistic cultures. East Africa scored 27 and West Africa 20, indicating that in these cultures collectivism was culturally predominant. This suggests, for example, that we may expect to find more emphasis on value for individuals, and in particular individual shareholders, in the Anglo-American countries, but more emphasis on value for society, and in particular local stakeholders, in West African and East African countries. If the Anglo-American individualistic shareholder approach is forced on to the collectivist African cultures, we would expect to find tension.

Masculinity/femininity

The third dimension is masculinity/femininity. In masculine cultures,

emotional gender roles are clearly distinct: men are supposed to be assertive, tough, and focused on material success, whereas women are supposed to be more modest, tender, and concerned with the quality of life. A society is called *feminine* when emotional gender roles overlap: both men and women are supposed to be modest, tender, and concerned with the quality of life. (Hofstede and Hofstede, 2005: 120)

Countries with a relatively high masculinity score include the UK (66), South Africa (63), the USA (62) and Australia (61). As such, we may expect to find their corporate governance model to be masculine (for example, focused on financial profit), which would appear to conflict with the more feminine culture in West Africa (46) and East Africa (41), where a more natural governance model may focus on the impact of the organization on the quality of people's lives. Interestingly, Hofstede also points out that 'unlike individualism, masculinity is unrelated to a country's degree of economic development' (Hofstede and Hofstede,

2005: 120), and so it cannot be assumed that the more feminine focus will naturally change to a more masculine one as these areas develop economically. This is important as it means that it cannot be argued that a 'masculine' model should be imposed in order to assist economic development.

Uncertainty avoidance

The fourth dimension is uncertainty avoidance, 'the extent to which the members of a culture feel threatened by ambiguous or unknown situations' (Hofstede and Hofstede, 2005:167). As the countries we are examining are clustered on this scale, we would not expect it to be significant for our study.

COMPARISON OF THE THREE COUNTRIES' LAWS

In comparing the expression of principles of good corporate governance practices of listed companies in the relevant legislation of sub-Saharan African countries, we consider three countries: Kenya, Botswana and Zambia. For Kenya, we chose its *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya* (Republic of Kenya, 2002; hereinafter Kenya's *Guidelines*)⁶ which were issued pursuant to the Capital Markets Authority Act.⁷ We use the respective Companies Acts (hereinafter CA) of Botswana⁸ and Zambia,⁹ as these countries do not presently possess guidelines on corporate governance practices similar to Kenya, where extent of disclosure (or non-disclosure) forms an essential part of disclosure obligations in corporate annual reports.

We used the Kenyan *Guidelines* as our framework for comparing the countries' legislation. We found some divergence, with some issues being explicitly stated in one country's legislation but not in others; on other issues, we found no significant differences. A qualitative assessment of reasons as to why this is the case may form the basis for determining which issues may be regarded as hypernorms and which may be regarded as microsocial contracts.

The Board and Board Committees

In Kenya, it is mandatory to establish an audit and nominating committee (s.2.1.1(ii)), and recommended that other committees be appointed as may be necessary (s.2.1.1(i)). Botswana's CA appears to be silent on this issue, but in Zambia directors 'may delegate any of their powers to a committee or committees of directors' (s.217(6)).

Directors' Remuneration

Kenya's *Guidelines* (s.2.1.2) states that 'remuneration should be sufficient to attract and retain directors'. For executive directors, remuneration should be 'competitively structured and linked to performance'; for non-executive directors, remuneration should be 'competitive in line with remuneration for other directors in competing sectors'. There should be a 'formal and transparent procedure for remuneration of directors, which should be approved by shareholders'. Botswanan and Zambian legislation is far less demanding. In Botswana, remuneration should be determined by the company in a general meeting (First schedule, table A, part I [hereinafter table A], art.75). In Zambia, the company must determine directors' remuneration by ordinary resolution (s.206(14)).

Supply and Disclosure of Information

Kenya's *Guidelines* attempts to bring together in one concise statement a number of ideas which are scattered in various sections of its CA. In Botswana and Zambia, the CA contains similar provisions regarding the supply and disclosure of information, but these are scattered in various sections of the legislation, making it difficult to draw them together in a concise manner. Kenya's *Guidelines* states that the board: 'should be supplied with relevant, accurate and timely information to enable the board [to] discharge its duties' (s.2.1.3(i)); should disclose in its annual report 'its policies for remuneration including incentives for the board and senior management' (s.2.3.1(ii)); and shall make public disclosure 'of any management or business agreements entered into between the Company and its related companies, which may result in a conflict of interest' (s.2.5.1). However, the meaning of 'public' in this context is not elaborated. Interestingly, neither Botswanan nor Zambian legislation makes such clear provision; at most, the requirement for disclosure is made in general terms.

Zambia's CA provides that 'directors may meet together for the despatch of business and adjourn and otherwise regulate their meetings as they think fit' (s.217(2)). However, it is silent if and how the board should be supplied with relevant accurate and timely information necessary to discharge its duties. It is, however, more explicit regarding remuneration including incentives for the board and senior management: it requires disclosure of payments for compensation for loss of office to members of the company and for such proposal to be 'approved by an ordinary resolution of the company' (s.222(1)); it imposes a prohibition on payments for 'transfer of the whole or any part of the undertaking or property of the company', unless disclosure of such particulars is first made to the members of the

company and for such proposal to be approved by an ordinary resolution of the company (s.222(2)); and where payments are made to directors in connection with takeover bids, the director is required to 'take all reasonable steps to ensure that particulars of the relevant payment are included in or sent with any notice of the offer made for their shares which is given to any shareholders' (s.223(1)(b)). The register of directors and secretaries must show for each director the 'number, description and amount' of any shares or debentures held in the company (s.225(1)). Finally, directors are required to make disclosure of loans and receipts (s.169(1)).

In Botswana, supply and disclosure of information is handled with similar attention to detail. There is a requirement for a statutory meeting to be held between one and three months from the date the company is entitled to commence business (s.96(1)). A statutory report must be sent to all members of the company at least two weeks before the meeting (s.96(2)), which must contain information relating to shares allotted, and cash received with respect to the shares (s.96(3)). There must be a register of directors and secretaries (s.157), and particulars of directors must be given in trade catalogues, circulars and business letters (s.158). Other mandatory provisions include an obligation on directors to disclose any payments made to them for loss of office as a result of a takeover (s.150(1)), a requirement for a register of all directors' share holdings (s.152), a prohibition of allotment of shares to directors except on the same terms as to all members, and a restriction on sale of undertakings by directors (s.153); disclosure in a general meeting of particulars of accounts of directors' emoluments, pensions, and payments of any compensation for loss of office (s.154) and of loans to directors or officers (s.155); and disclosure by directors of interests in contracts (s.156 and table A, art.83).

Board Balance

We noted with interest that Kenya's *Guidelines* recommends the establishment 'of a balance of executive directors and non-executive directors (including at least one-third independent and non-executive directors) of diverse skills or expertise in order to ensure that no individual or small group of individuals can dominate the boards' decision-making processes' (s.2.1.4). By contrast, this issue is not raised in the CA of either Botswana or Zambia.

Appointments to the Board

The three countries' legislation covered the same broad issues regarding appointments to the board. Kenya's *Guidelines* recommends that 'There

should be a formal and transparent procedure in the appointment of directors to the board and all persons offering themselves for appointment, as directors should disclose any potential area of conflict that may undermine their position or service as director' (s.2.1.5). Zambia's CA covers the same issues, although providing less clarity. In essence, it holds that companies should have at least two directors (s.204(1)), and that 'the number of directors of a company shall be the number of first directors named in the application for incorporation, or such other number as the company may decide by ordinary resolution' (s.206(1)). Botswana's CA requires the appointment of directors to be voted on individually (s.144). It came as a surprise to learn that conflicts of interest might arise: a director 'may act by himself or his firm in a professional capacity for the company, and he or his firm shall be entitled to remuneration for professional services as if he were not a director' (table A, art.83(5)).

Multiple Directorships

Kenya's *Guidelines* prohibits directors from holding directorships in more than five public listed companies, and alternate directorships are not permissible for more than three public listed companies (s.2.1.6). Zambia's CA is silent on this issue. In Botswana, there is no clear prohibition on multiple directorships: the CA permits a director to 'hold any other office or place of profit under the company (other than the office of auditor) in conjunction with his office of director for such period and on such terms as the directors may determine' (table A, art.83(3)).

Re-election of Directors

The legislation of the three countries appeared to broadly agree on the issue of re-election of directors. Kenya's *Guidelines* recommends that 'All directors except the managing director should be required to submit themselves for re-election at regular intervals or at least every three years' (s.2.1.7(a)); that 'Executive directors should have a fixed service contract not exceeding five years with a provision to renew subject to: (i) Regular performance appraisal; and (ii) Shareholders approval' (s.2.1.7(b)); and that 'Disclosure should be made to the shareholders at the annual general meeting and in the annual reports of all directors approaching their seventieth (70th) birthday that respective year' (s.2.1.7(c)).

Botswana and Zambia have a similar approach. In Botswana, directors are reappointed in general meetings (s.144). At the first annual general meeting, all directors are required to retire from office; in subsequent general meetings, the one-third of directors who have been longest in

office are required to retire. However, retiring directors are eligible for re-election (table A, art.88–90). Zambia's CA makes similar provision regarding the reappointment of directors (s.206).

Resignation of Directors

A point of divergence between the three countries concerns the resignation of directors. Zambia's CA allows for a director to resign office by notice in writing to the company (s.210(1)). There is no requirement to provide reasons for the resignation. Similar provisions occur in Botswana (table A, art.87(e)). By contrast, Kenya's *Guidelines* recommends that 'Resignation by a serving director should be disclosed in the annual report together with the details of the circumstances necessitating the resignation' (s.2.1.8). However, we note that a disjuncture exists in practice, as this recommendation is usually not followed through; the notice usually states when the director resigned, but does not necessarily provide reasons for doing so.

Role of Chairman and Chief Executive

Disparities arose among the three countries regarding the positions of chairman and chief executive. In Kenya, the *Guidelines* states that the 'Chairperson of a public listed company shall not hold such position in more than two public listed companies' (s.2.2.2), and recommends that 'There should be a clear separation of the role and responsibilities of the chairman and chief executive . . . Where such roles are combined a rationale for the same should be disclosed to the shareholders in the annual report of the company' (s.2.2.1). In Botswana, however, the CA simply provides that directors may 'appoint one or more of their body to the office of managing director for such period and on such terms as they think fit' (table A, art.106), and that 'a managing director shall receive such remuneration . . . as the directors may determine' (table A, art.107). Zambia's CA contains similar provisions (ss.214(2) and (4)).

Approval of Major Decisions by Shareholders in Meetings

Although the three countries all require shareholders to participate in meetings, there are distinct differences as to how shareholder approval of major company decisions should be obtained. Kenya's *Guidelines* recommends that 'There should be shareholders participation in major decisions of the company' (s.2.3.1), and proceeds to give examples of such decisions: 'major disposal of the Company's assets, restructuring, takeovers,

mergers, acquisitions or reorganization'. By contrast, Botswana's CA only lays out procedures for participation in general meetings (ss.96–110 and table A, arts 47–73), yet no clarification is given as regards the types of decision where shareholder participation is particularly recommended. A similar shortcoming is seen in Zambia's CA. Whilst procedures are given for shareholder participation in general meetings, no clarification is given as regards the types of decisions where shareholder participation is particularly recommended.

Annual General Meetings

There are differences between the three countries with regard to the actual conduct of annual general meetings. Kenya's *Guidelines* recommends that the board should 'provide to all its shareholders sufficient and timely information' pertaining to the AGM (s.2.3.2(i)), 'make shareholders' expenses and convenience primary criteria when selecting venue and location' of AGMs (s.2.3.2(ii)), and 'provide sufficient time for shareholders' questions on matters pertaining to the Company's performance' (s.2.3.2(iii)). In contrast, neither Botswana's nor Zambia's CA addresses these issues in similar detail.

Accountability and Audit

This is an issue on which the three countries are in full agreement. With regard to annual reports and accounts, Kenya's *Guidelines* recommends that 'The board should present an objective and understandable assessment of the Company's operating position and prospects' and 'ensure that accounts are presented in line with International Accounting Standards' (s.2.4.1). Similar requirements are seen in Botswana, where there is an obligation for the company to present to a general meeting a profit and loss account and a balance sheet which give a true and fair view of the company's state of affairs as at the end of its financial year (ss.111–13, 115–20 and table A, arts 122–6). Zambia's CA makes similar provision, requiring the company to keep such accounting records as will enable the preparation of true and fair accounts (s.162), and to present these before the company in general meeting (s.164).

Relationship with Auditors

The three countries appear broadly to agree upon the importance of having formal and transparent arrangements between the company and its auditors. However, whereas Botswana and Zambia provide the

procedures, only Kenya makes clear and unambiguous statements as to what is required of the board and its shareholders. For example, Kenya's *Guidelines* recommends the establishment of 'a formal and transparent arrangement for shareholders to effect the appointment of independent auditors at each annual general meeting' (s.2.4.3), and that 'The board should establish a formal and transparent arrangement for maintaining a professional interaction with the Company's auditors' (s.2.4.4). Botswana's CA provides for the appointment and fixing of remuneration of auditors through the AGM (s.121), for the disqualification of directors for appointment as auditor (s.123), and for their right of access to books and to attend general meetings (s.125). Similar provisions are found in Zambia's CA (ss.162(5) and 171).

Professional Qualification of Company Officers

Not all of the three countries appear to recognize the importance of professional qualifications of certain key company officials. Kenya's *Guidelines* states that the 'Chief Financial Officers and persons heading the accounting department of every issuer shall be members of the Institute of Certified Public Accountants' (s.2.5.2(i)), and that where such persons are not yet registered members, they must register within 12 months from the date of appointment to such position' (s.2.5.2(ii)). Similarly, company secretaries must be members of the Institute of Certified Public Secretaries (s.2.5.3). In Botswana and Zambia, membership by secretaries or chief accounting officers of a professional association does not appear to be mandated by law, but company auditors must be, in Botswana, 'a member of a body of accountants' established under law, or a person authorized by the Minister (s.123), or in Zambia, a member of the Zambia Institute of Certified Accountants (s.172).

ANALYSIS OF FINDINGS ARISING FROM CROSS-COUNTRY COMPARISONS

When analysing these data in terms of hypernorms and microsocial contracts, we must also be looking for more than cultural explanations. For example, in Kenya there are restrictions on multiple directorships, but such restrictions would have little practical effect in the other countries examined: Zambia in 1995 (the year after its CA) had only two companies listed on the Lusaka Stock Exchange, a figure that had risen by 2005 to 13 (ASEA [2006]: 73); and Botswana in 2005 had 28 listed companies (ASEA [2006]: 37).

Hypernorms

Some of these issues clearly seem to be hypernorms. For example, if we look at auditing practices, including the appointment of auditors and the preparation of financial statements, we can see no reasons, cultural or otherwise, why there should not be international standards. As stated on pp. 25–6, we believe that microsocial contracts should only come into play when the community benefits from the move away from a hypernorm, and we believe that strong arguments can be put that internationally accepted auditing practices are essential for the attraction of foreign and even domestic capital, which is important to aid the development of these economies.¹⁰ Another hypernorm, gender, is raised in the Kenyan *Guidelines* (s.3.1.3.viii). This concern for gender is probably driven by western values rather than the efficient functioning of Kenyan boardrooms. Is it what the authors of the *Guidelines* believe to be international best practice? Clearly, it is in a society's best interests to have the best possible pool of candidates for board positions, and to exclude women would be to exclude many potentially excellent candidates. Nevertheless, the global situation is that there are currently many more men than women who have the necessary qualifications and experience to be directors, and we must be careful lest positive discrimination results in less-than-ideal appointments. Here we think of the situation in Norway where legislation required that at least 40 per cent of the members of a board are women, and that 'if a company does not comply with this requirement by the end of 2008, the company may be dissolved'.¹¹ In some countries there would surely not be a large enough available pool of suitable women to be able to implement this policy within the given timeframe.

Microsocial Contracts

Director independence

Let us now turn to what may be microsocial contracts. Our first example is director independence. Increasingly, countries using the Anglo-American model state in their legislation or best practice guidelines that there should be a majority of independent directors. This is fine in individualistic cultures, but is it appropriate in collectivist cultures? Clearly, directors should be independent in that they are not involved with companies that are major suppliers or customers. But in determining the meaning of 'independent' within the context of non-executive directors, we identify two cultural issues which merit further empirical examination.

The first issue relates to tribalism or ethnicity. The 1989 Kenyan population census divided the population into 42 tribal or ethnic groupings

(Republic of Kenya, 1989); tribal data from the 1999 census was not released. Many people have a very strong bond with members of their own tribe, and a tribal identity which may be stronger than their identity as Kenyans. To what extent is it realistic for a director, under these circumstances, to be independent of her or his tribal affiliation (an issue raised in Gustavson *et al.*, 2005)? Kenya has a fairly collectivist culture (see 'East Africa' in Table 3.1), and it is reasonably conceivable that Kenya would take a more stakeholder-oriented view than, say, the United States.

The second issue relates to the role of family units and collective organizations among immigrant Indian capitalists, which has historical and cultural connotations. We suggest that these considerations might be relevant for directors of listed companies that were originally started by local Indian capitalists. These may feel a great bond to their community and family rather than remaining independent in the strict sense of the word. As David Himbara (1994: 35) points out:

Immigrants from the Indian sub-continent played a determining role in the development of commerce and industry in East Africa. Beginning with coastal-based merchant activities before the colonial period, the commercial prominence they attained enabled them to remain the predominant force during the colonial period and after. This, in turn, provided them with a foundation for playing a similar role in industry, from the 1940s to the present.

Some of the determining factors that distinguished the Indians from businessmen in other Kenyan communities were their commercial skills, as evidenced by an ability to survive in remote areas on modest resources and by sheer determination and hard work; their vision of the potential mass market and the patience to transform it into an actual market; their general efficiency and competitive edge; and the *role of family units and collective organizations in providing mechanisms to engender discipline and cohesion*. Not even the domination of politics and agriculture, through legislative means, of the white settlers, and later Kenya [*sic*] Africans, could offset or reduce the critical importance of local Indian capitalists in retail and wholesale trade, finance, and manufacturing. [emphasis added]

Among the prominent local Indian capitalists that he cites are the Chandaria family of Kenya and the Madhvani Group of Uganda who have extensive investments in commerce, manufacturing and the agricultural sectors of the respective countries. It is not clear how directors under these circumstances would be independent given, for example, the pressure on family members to join the family business as soon as they have completed their high school or university education, even if they are not the most highly skilled candidates. Anecdotal evidence made available to one of the Kenyan co-authors of this chapter clearly suggests that there is a strong expectation within elements of the Indian business class that family members should eventually contribute to the family business, notwithstanding their qualifications or other interests.

Given such circumstances, we question whether such non-independence is actually bad. For one thing, Himbara appears to suggest that the use of family units by Indian capitalists is deeply rooted in history, and it is how they have always operated in East Africa. Similarly, in instances where Indian businesses are set up to serve the needs of the Indian community, for example in banking and finance, it would seem that in giving that business a social licence to operate, the local community is entitled to say, 'you can set up among us but a member of our own has to be a director'. Presumably, this ensures that the voices of the community most directly affected by the business are heard.

For these two reasons, we would suggest that the jury is out on the question of whether director independence, in the context of tribe or family, should necessarily be interpreted in the same way as it would be interpreted in an individualist context.¹² Nevertheless, we appreciate that these cultural considerations in no way undermine the importance of conscientious attention to rules and details regarding directors' independence. But cultural considerations may require an attempt to modify the notion of director independence in a way that does not undermine the model of corporate governance.

Resignation of directors

A second example of a microsocial contract relates to resignation of directors. Kenya's *Guidelines* states that 'Resignation by a serving director should be disclosed in the annual report together with the details of the circumstances necessitating the resignation' (s.2.1.8). This implies that directors have broader obligations to society, as appropriate for a collectivist culture: resignation from a board of directors does not have purely personal implications. Such a requirement also makes good business sense. From annual reports, it appears that this provision is not strictly enforced in practice; this is an issue calling for empirical inquiry.

Annual general meetings

A third example relates to Kenya expecting that 'The board should make shareholders' expenses and convenience primary criteria when selecting venue and location of annual general meetings' (s.2.3.2(ii)). As the majority of Kenya's listed companies have a single dominant shareholder, this is essential if we are not to see expropriation of value from minority shareholders, treatment of whom is a major ethical issue for boards (Gustavson, 2007). As Reed has noted, one of the characteristics of corporate governance in developing countries is that the primary agency problem is often between majority and minority shareholders, rather than between owners and managers (Reed, 2002: 233).

CONCLUSION

The central argument of this chapter is that although essential corporate governance standards and practices should be global in order to ensure the integration of the corporations of each country into the global financial community, we need to consider which of the constituent parts of the corporate governance model are essential and which can be modified to make them more in keeping with local cultural values. This is important: the Anglo-American model of corporate governance does not always work well even in Anglo-American cultures. We should only make these changes, however, when we are confident that first, they will not undermine the entire system, and second, when the overall costs to society of doing so are less than the costs to society of not doing so. It is therefore submitted that a central component of a future research agenda should be a more comprehensive 'mapping' of both the empirical and normative dimensions of the Anglo-American corporate governance model, with the ultimate aims being twofold. First, there is the development of contemporary and comprehensive theory; and second, following on from this, the development of sound normative proposals in the form of new policies and practice.

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NOTES

1. In this chapter we adopt the same definition of corporate governance as is stated in Kenya's *Guidelines*, namely, 'the process and structure used to direct and manage business affairs of the company towards enhancing prosperity and corporate accounting with the ultimate objective of realizing shareholders' long-term value while taking into account the interest of other stakeholders' (Republic of Kenya, 2002, s. 1.2).
2. There is a very different definition, and one that would appear to be much closer to

African values, in NEPAD, 2003 (p. 20), an earlier document relating to the African Peer Review Mechanism: 'Corporate Governance is concerned with the ethical principles, values and practices that facilitate holding the balance between economic and social goals and between individual and communal goals. The aim is to align as nearly as possible the interests of individuals, corporations and society within a framework of sound governance and common good.'

3. The research project is planned to include all current and former Commonwealth countries in Africa. Through a comparison of countries all of which have a common law heritage, and which in many cases are geographically contiguous, it becomes easier to identify which of the constituent parts of the corporate governance model are essential and which can be modified to make them more in keeping with local cultural values. The countries selected for this chapter are all current members of the Commonwealth, namely, Botswana, Kenya, and Zambia.
4. Elegido expands on this on pp. 245–58.
5. Cultures cross national boundaries, and more importantly each nation-state may have many distinct cultures. Nevertheless, in many countries, including each of those studied, the system of legislative acts, regulations and guidelines under which business operates exist at the level of the nation-state. To examine whether or not there is a generalized national culture which is reflected in its system of legislative acts, regulations, and guidelines is clearly far beyond the scope of this chapter.
6. These are not to be confused with the *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance* issued in 1999 by the Private Sector Initiative for Corporate Governance and reprinted by the Private Sector Corporate Governance Trust (now the Centre for Corporate Governance).
7. Capital Markets Authority Act, Chapter 485A of the Laws of Kenya (online at <http://www.kenyalaw.org/eKLR/>). In the introduction, it is stated that Kenya's Capital Markets Authority 'has developed these guidelines for good corporate governance practices by public listed companies in Kenya in response to the growing importance of governance issues both in emerging and developing economies and for promoting growth in domestic and regional capital markets. It is also in recognition of the role of good governance in corporate performance, capital formation and maximization of shareholders' value as well as protection of investors' rights' (s.1.1). The *Guidelines* states that its purpose 'is to strengthen corporate governance practices by public listed companies in Kenya and to promote the standards of self-regulation so as to bring the level of governance in line with international trends' (s.1.4). Kenya's Capital Markets Authority, in developing the guidelines, 'adopted both a prescriptive and a non-prescriptive approach' (s.1.5) in that it requires that the extent of compliance (or non-compliance) with the *Guidelines* to form an essential part of disclosure obligations in corporate annual reports (s.1.7).
8. *Chapter 42.01 of the Laws of Botswana* is relatively old, having originally been enacted in 1959, but amendments have been made as recently as 1995. According to its short title, the Act 'consolidates and amends the laws relating to the constitution, incorporation, registration, [and] management [of companies] . . . and for other purposes incidental thereto'. (The Act was online from 4–14 May 2006 after which online access was withdrawn; see www.laws.gov.bw).
9. *Chapter 388 of the Laws of Zambia*, in its short title, indicates that its scope extends to far more than companies which are listed, as it provides, *inter alia*, for the formation, management, administration and winding-up of companies, and provides for matters connected with or incidental to the foregoing. It is a relatively new piece of legislation, having been enacted in 1994 (Republic of Zambia, 1994).
10. In a globalized environment, managers of capital (foreign or domestic) can use accounts prepared using international standards to allocate capital according to their risk return criteria, whether within the domestic economy or without.
11. See The Public Limited Companies Act section 6-11a, 20-6 and The Limited Liability Companies Act section 20-6 as cited in Noss, 2006: 6.

12. This is not the same as appointing someone to a board because they have strong links with senior government ministers; this is a practice found throughout the world. The nature of the link may be different (here tribal rather than 'old school tie') but the purpose and practice is global.

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