Corporate governance in Africa

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ABSTRACT

There is no doubt that Corporate Governance has taken a centre stage in the global debate on sustainable economic growth. That is so because companies who adhere do the concept, have reaped fruits of sustainability in terms of both returns and development.

The words Corporate Governance and the concept inherent are by and large becoming part of the every day language in the global business arena. The same applies in a number of African countries which in the near past have embarked on a crusade to promote Corporate Governance. Apart from the establishment and strengthening the network of Institutes of Directors whose main objective is the promotion of Corporate Governance, the New Partnership For Africa's Development- African Peer Review Mechanism, NEPAD-APRM, of which Corporate Governance is one of its four thematic areas of evaluation is playing a crucial role in the consolidation of Corporate Governance in Africa.

Nonetheless, the concept in Africa has often viewed in a lance of countries which have made a mark in this field, ignoring unique aspects which are inherent to countries which are still trying to find their footing in the concept. Besides, the concept has had a very strong advocacy in the Anglo-Saxon countries and others which their laws in one way or the other have links with Common Law based legal systems, hence creating a gap between countries which the roots of their legal system are different, such as Civil Law (corpus juris civilis) and the Islamic laws in Northern Africa. This paper then will look at corporate governance as a concept and its definition, later the hut model and and lastly an overview of the APRM and its impact on Corporate Governance.

Introduction

One of the long times debates since the concept caught the attention of boardroom players was whether Corporate Governance is the synonym of Company Governance and if so, why not simplify and use the word company instead of corporate? This debate to a certain extent caught the attention of delegates at the Annual General Meeting-AGM/Workshop of the Commonwealth Association for Corporate Governance in 2003 at Christchurch in New Zealand.

There seems to be a general consensus that corporate governance as simply words could mean company governance hence tending to limit the discussion to the governance of companies only. As a concept however Corporate Governance cuts across the governance of all institutions, from private to public and through to the public sector. The assertion of the King Report on Corporate Governance (2002) on the relevance of Corporate Governance in Municipal Councils can not be overemphasized.

As a concept Corporate Governance also transcend to the governance of Non Governmental Organizations-NGOs, which of late have been seen to contribute to social upliftment not only of their members but also the community. Lastly, the concept involves the discussions of core values and principles which are inherent to proper, effective and efficient running and control of an institution_, and structures intrinsic to each governance system. Corporate Governance would rather be seen to be good governance than company governance, but picking the company as the model.

Corporate Governance Defined

In an attempt to provoke some thoughts on the definition of Corporate Governance, Head of Global Corporate Governance Forum-GCGF and former Principal Convenor of the King Committee on Corporate Governance, Philip Armstrong said;

"Corporate *Governance deals with who directs what? For whose benefit?*"

And as if answering the above question Armstrong further defined corporate governance as:

" a mechanism through which boards and directors are able to direct, monitor and supervise the conduct and operation of the corporation and its management in a manner that ensures appropriate levels of authority, accountability, stewardship, leadership, direction and control".

On the other hand the Cadbury Report 1992, defined Corporate Governance as

"The system through which the organizations are directed and controlled".

But in a concise, simple and all-encompassing manner, Corporate Governance could be defined as

"Any act of a corporate governor, always conscious of his fiduciary duty to the company, accountability to the shareholders and responsibility to the environment".

Three words come to the spotlight on the last definition_ and these are; fiduciary, accountability and responsibility. To whom do directors owe fiduciary which is one of the gist of the corporate governance concept? Is it to the company or the shareholders? If to the company, why not the shareholders whose investment need to be protected by directors? What of accountability and responsibility, is it to the shareholders, trade unions or even consumer association? These have been questions which have boggled the minds of so many people who are interested in the governance of institutions. Various people may have had various opinions, but in the interest of sustainable advancement we will look at the discussion bellow.

Directors Fiduciary

Directors' fiduciary duty is often set in most companies' acts and it entails that the director should always deal in good faith. Some believe that directors owe their fiduciary to the shareholders or members. They argue that the company's interest is embodied in the interest of the shareholder. This could be true to an extent especially at the beginning but as time passes the situation could have changed. And a situation where directors are said to owe their fiduciary to the shareholders could result in a position that the company or an institution is sacrificed to save the shareholders' interest, culminating in undermining other stakeholders surrounding the company. This was the case in Parmalat where the company was sacrificed in order to save a family firm of the founder and CEO.

Directors should owe their fiduciary, to the company. That is, always dealing *bona fide* and in the best interest of the same. The director should not in any case put himself in a situation where his interest is in direct conflict with the interest of the company or institution. Any deal, should be at arms length and for the benefit of the company. Directors should declare their interest where there is a possible clash with that of the institution they act on behalf. As a matter of principle they should also excuse themselves from material decisions which directly affect them. Along side directors fiduciary, there is the duty of skill and care. The director should always endevour to do his best. He should direct all his knowledge and exercise the care that a reasonable man would when going about his directorship duties.

Directors Accountability

Accountability results from the trust the shareholder give to the directors to overseer their investment on their behalf. As trustworthy stewards, directors should be able to, at a point in time come back to the owners of the capital and give an account of how they have administered their investment. These should not only account but also be called to account by the shareholders. The stewardship report often takes form of the Annual Report which is tabled at an AGM of an institution. The report should comprise the Annual Financial Statements, the Cash Follow Statement, Statement of Change in Equity, Directors Report, Conformity with Corporate Governance and Environmental Report.

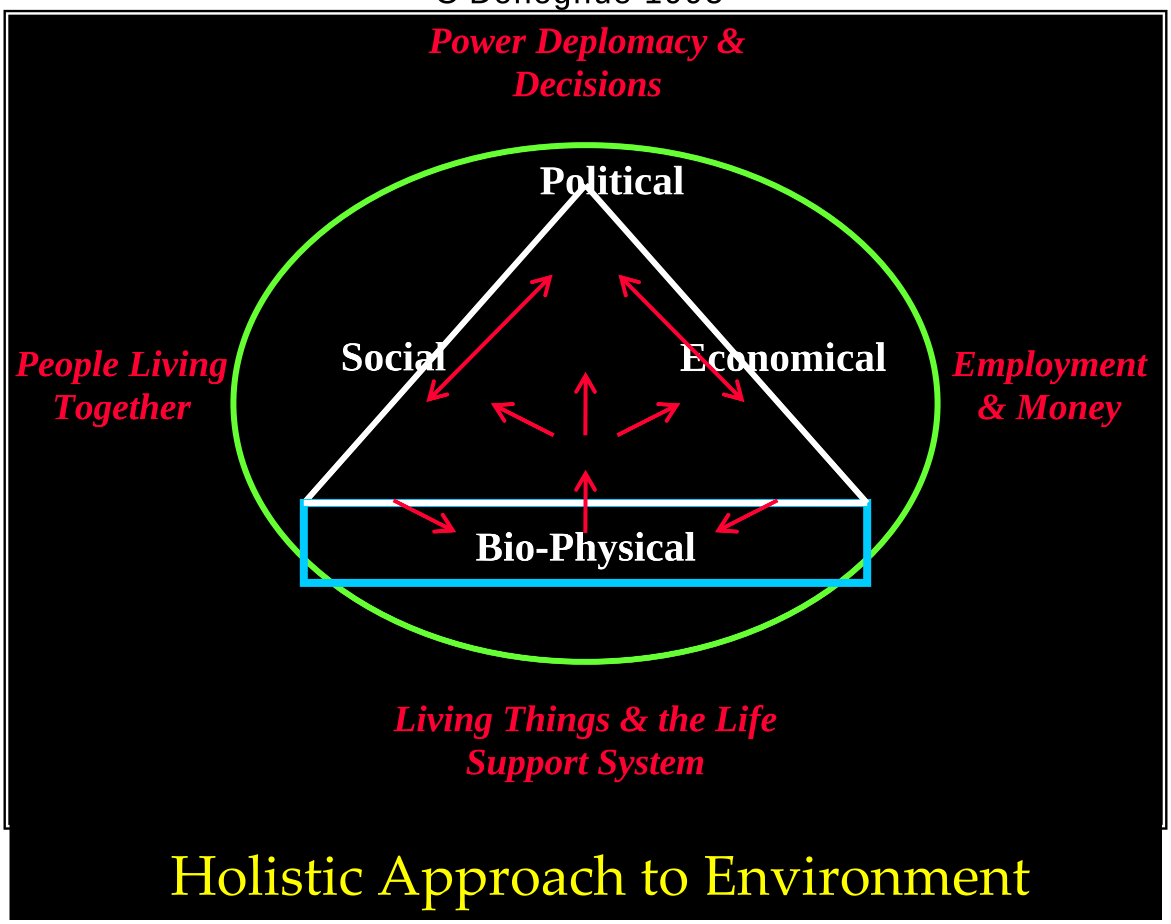
While there are other opinions that directors should also account to other stakeholders, the fact is that, if they are then called to account to anybody, they could end up accounting to no one. Therefore directors should account to the people who have mandated them do look after their wealth. Note that directors accountability is different to corporate accountability as defined by the Non Governmental Organization-NGO Forum and submitted to the Brundtland Commission in 1987. It is also important to note that accountability is one of the pillars of Corporate Governance as per the King Commission on Corporate Governance 2002.

Responsibility to the environment

Though directors owe fiduciary to directors and accountable to the shareholders, they should highly be responsible to the environment. The directors should always see environmental concerns to be part of boardroom matters rather than external issues, as a company is not an island in a sea. There is first of all the internal environment which a company should be concerned with. This comprises of the internal stakeholders such as the workers, and directors responsibility in this regard has to do with guaranteeing an environment conducive for work. Besides, directors are called to assure compliance with applicable laws.

On the other hand directors should show a sense of responsibility to the environment in which their company is planted. In his holistic approach to the environment Rhodes University Professor Rob O'Donoghue defined environment as a social construct with four dimensions which are biophysical, economical, political and social. The environmental dimensions are thinly divided and highly interact with each other. It is in these dimensions where most activities including corporate take place, resulting in the large amount of crises endangering our planet earth which inter alia, include water and air pollution, global worming, depletion of the ozone layer and land degradation. Social conflicts and other pandemics, selfish political decisions and other crisis are some of the wrongs inflicting the environment. See bellow O'Donoghue's model.

O'Donoghue 1995



Sustainability

The main objective of corporate governance is sustainability. That is in both returns and environmental balance. Companies exist in order to make profits so that they guarantee their continuity. Non profit making organizations also need to have a surplus so to assure their members of their life ahead. Hence institutions need to put in place, governing structures which will assure proper, effective and efficient delivery that will in turn result in good returns. A proper mix of factors of production plus the human element, and proper governing and management structures are crucial for this purpose.

The paradoxical role of wealth creation while depleting the environment seems to have been narrowing since environmental issues became the integral part of boardroom debates. In this regards, like Russell Lobser said, companies are willing to do good *"not because some is watching, but because it is the right thing to do so"*. The role of directors in this case is not only to assure sustainable development as defined by Brundtland Commission on the dawn of the Earth Summit on Sustainable Development (1992), but also to achieve sustainable living. Bellow is a sustainability table.

Corporate Governance vis a vis Management

The best way of understanding corporate governance is by contrasting it with management. Management on one hand involves the day to day running of the business. Most authors define it through its functions which are planning, controlling, leadership and organizing. Some see the human component to be key to the entire management process, hence the list is extended to include staffing. It is at the management level where strategies are developed and executed, and policies and board decisions are implemented. It is a common practice to entrust management to the hand of an executive figure called the Executive Director or Chief Executive Officer. The management performance should be limited to what is within its power of jurisdiction, that is, the door to the boardroom. Any attempt_ to go beyond this is frowned and labeled as *Ultra Vire*.

On the other hand corporate governance is making sure that the day to day business entrusted to the management is moving towards the right direction. In other words, corporate governance is about controlling and directing the management's activities. This involves evaluating strategies, formulating policies, appointment and dismissal of the management among other tasks. In the same way, the following functions of the board were recommended by the Cadbury Committee: review of corporate strategy, commitment of corporate resources, evaluation of corporate performance and establishment of standards of corporate conduct. Board members pocking their nose to what is supposed to be _ management duties are said to be interfering, and their act is condemned in the strongest terms.

In an attempt to give a vivid picture of separation of power and duties of the board and managers, Executive Director of Center for International Private Enterprise-CIPE, John D. Sullivan likened a board of directors with a legislative body, an objective group of individuals charged with setting long-term objectives and then holding accountable a corporation's managers as they pursue these objectives.

Corporate Governance Hut Model

The Corporate Governance hut model gives at a glance an almost complete picture of the Corporate Governance concept. Being in Africa, it is easy to understand and appreciate not only the important multi roles of an African traditional hut but also its ability to resist the violence of the different types of the weather conditions along the year. Through the model the corporate governors will be able to easily grasp the gist of the corporate governance concept.

The hut is held to the ground by seven pillars as identified by the King Committee on Corporate Governance 2002. Further the roof is supported by three beams representing ethics, strategies and compliance. Lastly the beams rest on a bar representing participatory learning which is in turn supported by the seven pillars. See bellow the model:

Transparency

This involves openness in many areas of the corporate activities including disclosures on board remuneration, declaration of interests and reporting on environmental issues.

Accountability

As mentioned earlier on, directors should every year face the shareholders and present a stewardship report of how they managed their investment. Accountability can not be delegated.

Responsibility

This has to do with directors' power of jurisdiction. Power is inherent to responsibility as it will ensure directors performance. Directors are expected to assume full control of the stewardship entrusted to them by the shareholders. This however can be delegated to the management who in turn perform on behalf of the board.

Fairness

This is another key component. While some argue that fairness is subjective, one could only take refugee to the golden rule ‘do to others as you will love it be done to you’. Naturally, a man has the sense of what is right and in Africa that is the base of ‘*Buntu or Wumunhu’* (humanity), embodied in the saying ‘*a mhunhu i mhunhu hi vanhu*’ literally translated ‘your are a human because of others’. In facts this is noted at the highest point of an African governance structure where King Mswati III at his coronation said “The King is a King because of his people”.

Independence

Directors should be independent when going about their business. That means they should be able to act without fetters. Possible fetters could be because of a major shareholder or an influential person or institution they represent. Former head of the Day Commission on Corporate Governance (Canada) Peter Day, observed that it does not suffice for a director to be independent but also to be independent minded.

Discipline

Directors are entrusted with a very high responsibility where for a reasonably long period will be expected to perform without having any one at their back to monitor. This needs a high level of self control and direction. Discipline also involves sacrificing short time personal gains for the long term benefits of the company.

Social Responsibility

This has become the talk of the day and involves the recognition by institutions of the fact that they are part of the environment in which they operate. Social Responsibility includes absorbing environmental damage expenses into the production process and further ploughing back to the community some of its profits. Corporate Social Responsibility is more than wielding a donation’s cheque.

Compliance

It is the duty of directors to make sure that the company complies with statutes. These include the law regulating the operation of the company and others such as tax, environmental and insider trading but to name a few. It is also the duty of directors to see to it that the organization complies with corporate governance standards and other international norms.

Strategy

A corporate strategy also known as the ‘grand’ plan is part of the brain of the organization. Jay W. Lorsch and James E. Sailer defined corporate strategy as “a pattern of corporate purposes and objectives which determines business and functional strategies of the company”. The main role of the board in this regard is making sure corporate strategies mark a difference. This is through proper evaluation and monitoring the implementation of the same.

Ethics

Ethics is about doing what is right, often within a just law. The law often sets the minimum requirement for compliance and an ethical person will even be willing to go an extra mile. Lord Atkins used the Bible neighborhood principle to emphasize the importance of a companies’ responsibility towards its customers. While the late Deputy Prime Minister of Swaziland Albert Heshana Shabangu described unethical behaviour as *´goal posts shifting´*

Participatory Learning

Like Harris Kamanga says ‘if you think education is expensive try ignorance’, continuous board training is key to board performance. The general view is that it is a must for a newly appointed board to have a corporate governance inception course as its first activity after appointment. It is also advisable to send board members to a refreshing corporate governance course at least once every year. But let it not be just learning but a participating one as advocated by Paulo Freire’s social constructivism.

Corporate Governance Historical Background

While corporations activities can be traced back to the industrial revolution about 150 years ago, contemporary corporate governance can only be traced to the early 1990s. Following the collapse of most financial institutions during this period the Cadbury Commission was constituted in UK to look into the financial aspect of Corporate Governance in that country. This resulted in the release of the Cadbury Report in 1992 which also came to be known as “The Code of Best Practices”.

Various commissions followed in different parts of the world. In South Africa for instance the King Commission on Corporate Governance was appointed and it issued its first report in 1994. This report was known as “The Code of Corporate Practice and Conduct". The ‘Code’ as it was also popularly known, also entailed some issues which were unique to South Africa as she had just come out from the apartheid system of government. Other commissions which followed were the Day, Hampel, Turnbull etc.

Various African countries also embarked on developing individual codes. It is therefore important to appreciate that today the world has a set of corporate governance codes which subject the directors and businesses to the highest standards of corporate behavour, and these include the Organization of Economic Coordination and Development-OECD Principles, the Commonwealth Association for Corporate Governance-CACG Guidelines, the Combined Code, the King Report on Corporate Governance and the Basel Committee Guidance among others.

Under the umbrella of the Institute of Directors in Southern Africa-IoDsa, the King Committee on Corporate Governance issued its second report, known as the King Report on Corporate Governance 2002, or simply King II. King II has been nicknamed ‘the world bible of corporate governance’. Different from other codes this as adequately handled issues of sustainability. King II recognizes that companies should endevour to meet the triple bottom line as advocated by the Global Reporting Initiative and the compliance with the Global Compact principles as advocated by the then United Nations Secretary General Kofi Annan.

The major corporate scandals in the dawn of the millennium have also challenged the world to raise corporate governance standards. That is true with the Sarbanes-Oxley Act in the United States of America which was a response to both the Enron and WorldCom Scandals. Today no one can argue against the fact that “corporate governance is inherent to a sustainable investment”.

As if to put a stamp on the importance of Corporate Governance in a modern Africa, the heads of states have endorsed the concept through the New Partnership for Africa's Development-African Peer Review Mechanism, NEPAD-APRM. Corporate Governance is one of the four thematic areas of evaluation in the APRM of which some of the countries have gone through its review, and others are yet to toe the line.

Grasping Corporate Governance in Africa

It is a general practice to assume that when we discuss corporate governance everyone understands it the same. That is why we often see statements like corporate governance in Africa as if the perception of the concept is linear at the various sectors and levels of every African country. Africa has fifty-three countries, each unique in its legal system, economic development and cultural practices. These differences, in one way or the other inform and influence corporate governance practices and understanding in the different countries.

The continent has nations who base their laws in religions like the countries in the north. Others have planted their legal systems on the frameworks left by the so called colonial masters. Within the later we have the Common and Civil law bases. More and above, countries' legal frameworks often suffer influence of other sources including customs and laws from other countries of influence

The main difference that is usually drawn between the common and civil law systems is that common law draws abstract rules from specific cases, whereas civil law starts with abstract rules, which judges must then apply to the various cases before them. Countries which use the Civil Law as a base for example depart from the point that once an issue is legislated then that is complete. Any gape will have to wait for an amendment at a later stage.
This then challenges governments based on such systems to be on toes on legislative matters. And what of our countries which have lived with laws as old as half a century or even more? Be that as it may, is it possible for the law to close all the gapes especially in a modern world where some crimes are committed at the touch of a button? And what of the challenges faced by our judiciary and the whole law enforcement mechanism in the continent?

In contrast, in a Common law based system courts are not only limited to what is 'written is written' but also to any other valid argument based in common sense. That's why court cases are often used to resolve new legal battles on the *stare decisis (abide by what has been decided)* principle. Besides, House of Lords justice Lord Atkins used Bible scriptures, quoting the neibourhood principle to pass verdict in the case on corporate responsibility.

According to Lord Atkins in the famous case of *Donoghue v. Stevenson* [1932] All ER Rep 1; [1932] AC 562: "*There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ... The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply.*

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as long as so affected when I am directing my mind to the acts or omissions that are called in question."

Another side of the coin is that Africa's economic and social development is not at the same level. While in some countries there are strong institutions to debate theories and concepts of emerging issues other countries lack behind. This results in some concept being viewed and judged at the lance of those countries with stronger advocating institutions. An analysis of Corporate Governance in Africa for example is usually limited to discussing South Africa and other English speaking Countries ignoring the rest of the larger Africa.

Looking at the above discussion, it is clear then that the way we think about corporate governance in Africa is not linear. The different blocks such as Arabic, lusophone and francophone also need to be looked at when debating Corporate Governance in the continent. Moreso, we need to bear in mind that Africa is vast and at different levels of economic, social and corporate governance advancement.

Corporate Governance and the NEPAD-APRM

One of talks of the day is about whether the New Partnership for Africa's Development_ a is achieving its objectives or not. This is because in recent fora, some of the Heads of member states of the African Union have burst out and labeled NEPAD as non functional. These Heads of States however, are being perceived at some quarters as not having understood the role of NEPAD from the beginning.

Following is a discussion of the African Peer Review Mechanism-APRM, one of the instruments for achieving NEPAD's main objectives.

- The African Peer Review Mechanism (APRM) is a mutually agreed instrument voluntarily acceded to by the Member States of the African Union (AU) as an African self-monitoring mechanism. The APRM is a bold, unique and innovative approach designed and implemented by Africans for Africa.

- The APRM aims to put in motion a strategic re-orientation towards the validation of universal as well as African values and accelerate the process of intra-African cooperation and integration.

- Without doubt, the APRM therefore will be a key driver of African renaissance and rebirth, and is a centre piece of the NEPAD process for the socio-economic development of Africa.

- Its mandate is to ensure that the policies and practices of participating countries conform to the agreed values in the following four focus areas: democracy and political governance; economic governance; corporate governance; and socio-economic development.

- The APR process entails periodic reviews of the policies and practices of participating countries to ascertain progress being made towards achieving the mutually agreed goals and compliance in the four focus areas, namely Democracy and Political Governance, Economic Governance and Management, Corporate Governance, and Socio-Economic Development. National ownership and leadership by the participating country are essential factors underpinning the effectiveness of the APRM. The APRM process is designed to be open and participatory.

- The APRM is also guided by the principles of transparency, accountability, technical competence, credibility and it should be free from manipulation.

- The APRM is not meant to exclude or punish countries. There is no conditionality attached to the mechanism.

Structures of the APRM

The Committee of Participating Heads of State and Government (APR Forum) is the highest decision making authority in the APRM;

1. The Panel of Eminent Persons (APR Panel) oversees the review process to ensure integrity, consider reports and make recommendations to the APR Forum;

2. The APRM Secretariat (APR Secretariat) provides secretarial, technical, coordinating and administrative support for the APRM; and

3. The Country Review Team (APR Team) visits the country to review progress with the Country's Programme of Action and produces the APRM Report on the country.

At country level there is:

- The focal point which in most cases is a government Ministry;

- The National Forum which is made of representative of various groups and prominent individuals;

- The APRM Secretariat and

- The research institutions on the four thematic areas.

While a good number of AU members' states have not yet adhered to the APRM and also majority of the countries which accented to the APRM not having been reviewed, the few which have gone through the evaluation have a story to tell. It might not yet be the time to wield policy papers which resulted from the exercise but to appreciate the value it brought to the populace.

The general view is that for the first time in the history of the AU or its predecessor the Organization of African Union-OAU, the heads of states have accorded the people at grassroots level an opportunity to openly discuss issues of governance that directly affect them without intimidation. So far the APRM has achieved more than it meets the eyes in the countries that have passed through the evaluation process. APRM campaigns, publicities and the entire review process have sparked debates even on those issues which never seemed important to most people. A good example is the corporate governance subject which most people seem to be taking interest thereafter, and if not, yet they still ask of this monster called corporate governance. Of course, this is the focus of my discussion.

The main challenge in the corporate governance thematic area is that the concept is new to most people and is not understood the same way and at the same level in different countries. As Africa is multi-lingual, some key issues seem to fall along the translation, as it is common knowledge that information changes as it moves from one medium to another. Above all there also seem to lack capacity on this field even within the APRM secretariat hence the subject finds itself being relegated behind in the campaigns. Having said that however, one has to recognize that just the presence of the review process on its on opens doors for discussing concepts like corporate governance even in other parallel fora.

Summary

In conclusion one needs to emphasize the need for renewed commitment by all Africans to corporate governance. Yet these need to appreciate the inbuilt difference across the continent. Likewise our international partners and the whole corporate governance network should, like a professional photographer move to different positions in order to value the diversity of Africa and its African people.

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