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Corporate Governance in South Africa: A Comparative Aspect

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1 Introduction

The Republic of South Africa (South Africa) is of particular interest for research through the prism of the Russian experience. The country is a member of BRICS (Brazil, Russia, India, China and South Africa)—the organization of the largest developing countries, leaders in their regions. South Africa, like Russia, in the early 1990s underwent a transit of the political system and during the 1990s significantly transformed its economic model towards greater inclusivity. The creative evolution of the Anglo-Saxon legal system and corporate governance model among BRICS members can be very well traced on the example of South Africa.

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2 Materials

The theoretical framework to solve the above problems has been provided by works of foreign (J.J. du Plessis, R. Croucher, L. Miles, V. Padayachee, C.W.J.C. Swart, etc.) and Russian (A.G. Dementyeva, A.V. Gabov, V.K. Verbicky, etc.) scholars who have studied the theory of corporate governance in South Africa and Russia, its organizational foundations, corporate governance best practices and their significance in the legal system from the standpoint of both economic and legal sciences.

The empirical framework has been provided by the legal acts of South Africa, the Russian Federation, and some other countries, as well as sources of best practices of corporate governance (in particular—King's Kommitee's reports, Russian Corporate Governance Code, and listing rules of Johannesburg Stock Exchange).

3 Methodology

The research is based on the universal dialectical-materialistic method, general scientific methods (analysis, synthesis, induction, deduction, modeling) and particular scientific methods (comparative-legal, historical-legal, legal forecasting), the combined use of which allows a comprehensive study of the most important aspects of corporate governance in South Africa.

4 Results

4.1 Legal Regulation

The basic act regulating the activities of South African corporations is Companies Act 2008, which came into force on 1 May 2011 (such a long period of implementation, in the authors' opinion, has to do with the fate of close corporations, which numbered more than 2 million; since the entry into force of Companies Act 2008, they are not registered). In this, regulation is similar to the British one: all types of companies are

considered under one law. In addition, the literature notes that the concept of the law was significantly influenced by the New Zealand Companies Act 1993 (du Plessis 2009, 274–275).

However, according to the authors, Companies Act 2008 has an original character: its institutions are generated by the specific historical and economic situation in South Africa.

The act itself contains cases of by-law regulation, which is the responsibility of the member of the Cabinet of South Africa (Minister of Finance), in charge of company oversight. Regulations can be adopted on a variety of topics: from the issue of shares to the internal structure of a Corporation.

In comparison, in the Russian Federation, regulation of financial markets is the responsibility of the Bank of Russia (in particular, it approved additional requirements for the preparation, convening and holding of general meetings of shareholders and standards for the issue of securities). However, a number of acts were adopted by the Government of the Russian Federation, a body of general competence.

The reform of corporate law has been discussed for a long time: in 1993, the Corporate Governance Committee was formed, headed by a retired judge of the Supreme Court of South Africa, Mervyn E. King. Gradually, at the state level, the need to design a new system of corporate governance began to be realized (South African Company Law for the Twenty-first Century). The King Committee issued four reports: before the adoption of Companies Act 2008 in 1994 and 2002, and after in 2010 and 2016 (similar national corporate governance reports have begun to appear in different countries: the best known is the report of the British Committee on the financial aspects of corporate governance (Cadbury Committee) in 1992). In fact, the King Committee's reports are collectively the national code of corporate governance.

The introduction of best corporate governance practices is a mandatory requirement for issuers on the Johannesburg Stock Exchange. Generally, these rules relate to the internal structure of the Corporation (the presence of a corporate secretary, committees of the board, financial director) and the adoption of a number of acts (remuneration policy, report on the implementation of corporate governance practices). The listing rules also reflect the national specificities of South Africa: the need to maintain gender and racial diversity on the board of directors is emphasized.

One of the main markers of the evolution of the corporate governance architecture in South Africa, which should be mentioned now, is a departure from the principle of "acting in the interests of the company as a whole and maximizing profits"—still common in Russian legislation and dominating in Russian judicial practice—to the principle of taking into account the interest of all stakeholders—including at the level of legislation (Croucher, Miles 2010, 369–370).

Thus, there is a typical Anglo-Saxon regulatory system: a single law and complementary best practices of corporate governance (reports of the King Committee and listing rules). In Russia, on the other hand, the basics of the legal status of joint-stock companies alone are regulated by two (the Civil Code of the Russian Federation and the law on a specific type of legal entity), and of state corporations and some other non-profit organizations—by three legislative acts (the Civil Code of the Russian Federation, the law on non-profit organizations and the law on a specific type of legal entity). The separate law is devoted to insolvency. Russian corporate governance practices are more formalized (the Bank of Russia adopted the Corporate Governance Code of 2014, approved by the Government of the Russian Federation). However, only public companies, which are forced to comply with the listing rules, attach importance to these practices, comparable to legislative norms.

Judicial practice plays a crucial role in the South African legal system. For example, the law does not resolve the issue of representation on behalf of the company's directors. The rule that an individual director must be specially authorized for representation by the decision of the board or the Memorandum of Incorporation of the company, was arrived in: One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd 2015 4 623 (WCC) (Swart, Lombard, 676).

For comparison, a number of provisions of the Russian legislation (introduction of the principle of business judgment rule) first developed within the framework of arbitration practice and were summarized by the Supreme Court. In fact, all decisions of the highest court—the Supreme Court (also the Supreme Arbitration Court in economic cases until 2014) are part of Russian legislation, since the lower courts follow the legal positions contained in them. Thus, in the Russian Federation, the country of the continental legal family, judicial practice plays a supporting role in relation to legislation, which is considered the pinnacle or endpoint of law of sorts.

4.2 The System of Legal Entities

South African companies are divided into commercial and non-commercial. Commercial companies can be classified as follows:

- Companies whose legal status is regulated by the General rules of Companies Act 2008 (private sector companies—private and public company) and companies whose status can be changed by the Executive authorities (public sector companies—state-owned company);
- Companies in which former and current directors are fully jointly and severally liable for all debts of the company during the performance of their duties (subspecies of private company—personal liability company) and companies in which liability is limited and should be due to unfair or unreasonable actions (all other companies);
- Companies that have the right to freely place their securities, including on the stock exchange (public company) and those whose Memorandum of incorporation limits the turnover of shares and prohibits their offer to other persons (private company) or such placement is not provided by law (state-owned company).

This system in its main division into public and private company is very similar to the Russian one, where after the reform of 2014, public and non-public corporations appeared in the Civil code of the Russian Federation.

Only stock corporations can be public in Russia. Shares of the latter are freely placed or traded (Article 66.3 of the Russian civil code). Non-public are both stock corporations and limited liability companies. In short, the difference between them is as follows: the authorized capital of a joint-stock company is divided into shares—securities. Shares in a limited liability company are not. The law on limited liability companies provides for a number of rules aimed at maintaining the personal composition of the business—the pre-emptive right to buy a share, the ability to establish a ban on the alienation of the share to third parties. The ban on the alienation of shares is void.

These forms of legal entities were replaced by open and closed joint-stock companies, divided on the basis of the composition of shareholders. Their re-registration as public or non-public companies is carried out when the company makes changes to its Charter for the first time.

4.3 The Internal Structure of the Company

The supreme governing body of the company in South Africa is the general meeting of shareholders. An annual meeting in public companies is to be held for the first time not later than 18 months after the date of company registration and subsequently every calendar year, but not later than 15 months from the date of the previous one (Companies Act 2008, 61 (7). At the annual general meeting, the report of the directors and the audit committee are presented, as well as the financial statements, the election of the directors (unless otherwise provided by Memorandum of Incorporation) is held, the auditor (to confirm the annual statements) and the audit committee are appointed.

As such, there is no limitation of competence: any issues that a shareholder deems necessary may be submitted to the general meeting of shareholders. In Russia, however, the general meeting is competent to resolve only those matters expressly mentioned by Federal Law №208-FZ of 26.12.1995 "On Stock Corporations" (hereinafter—208-FZ). Only in a non-public corporation, by a unanimous decision of all shareholders, may additional issues be referred to the competence of the general meeting (p. 3 and 4, art. 59 208-FZ).

The Anglo-Saxon model of corporate governance is a one-tier model. This means that in addition to the general meeting of shareholders, a single board is created in the company, which primarily performs managerial functions and resolves strategic issues.

Taking into account corporate governance practices—both in South Africa and in Russia, the board *(sovet directorov)* combines the functions of the classic Anglo-Saxon Board and the German supervisory Board *(Aufsichtsrat)*.

It is important to note that the Russian board of directors and executive bodies are different entities. The sole executive body (*generalniy director*—managing director) is mandatory and its competence includes all matters not related to the competence of other bodies. He cannot even be chairman of the board. The board of directors resolves issues within its competence by the law and the Charter. A collegial executive body *(pravlenie)* is created in only few Russian societies (unlike Germany, where *Vorstand* is mandatory).

In South Africa, in a private company—the board can be represented by one person. A public company board must consist of at least three persons.

South African law also provides for the following original features that can be established in the Memorandum of Incorporation:

- Direct appointment of a director or directors by a person named in the Memorandum of Incorporation;
- Status of director ex officio (for example, CFO of the parent company is the director of subsidiaries, which is specified in their charters). It seems that it is convenient for jurisdictions with an abundance of vertically integrated holding companies, including Russia, where there is no such rule;
- Appointment of alternate directors in the event of the inability of directors to perform their duties (Companies Act 2008, 66 (4)).

However, the use of such opportunities is limited: the general meeting of all types of companies (except state-owned companies) should directly elect at least 50% of directors and alternate directors.

Vacancies on the board can be filled either individually or together—if the next meeting of shareholders occurs or if the number of directors is less than the minimum established by the Memorandum of Incorporation (Companies Act 2008, 68). The powers of directors may be terminated separately—this requires a simple majority of votes at the general meeting (Companies Act 2008, 71).

In South Africa, a director may be a capable individual who meets the requirements of the Memorandum of Incorporation, and has not been disqualified. The board of directors of a Russian stock corporation is elected annually in full, unless otherwise provided by the Charter of a non-public corporation (Art. 66.3 of Civil Code, Art. 66 208-FZ). In a limited liability company, the procedure for electing the board of directors is provided for by the Charter (Art. 32 of Federal Law of 08.02.1998 №14-FZ "On Limited Liability Corporations").

Board committees in South Africa are not, unlike in Russia, advisory bodies. They may be delegated the competence of the board. Unless otherwise provided by the Charter, board committee membership may not be limited to directors.

For public and state-owned companies, it is mandatory to create an audit committee. For the members of the audit committee, the act establishes the requirement of independence (e.g., not to be a supplier or employee of the company) and separation from current management functions. The Minister may also prescribe the creation of a social and ethics committee, which keeps the social responsibility and business ethics.

In South African public and state-owned companies, a corporate secretary has to be appointed—at the incorporation or later, by the board of directors. The functions of the corporate secretary may be assigned to a legal entity. His responsibilities include informing the directors, including on issues of law, communication to the board on any violation, the keeping of protocols, the confirmation of his part of annual financial statements. Public and state-owned companies must also appoint an external auditor.

For comparison, Russian legislation pays little attention to the corporate secretary, whose status is almost entirely regulated by best corporate governance practices.

5 Some Comments and Conclusions

The national system of corporate governance is determined by a wide range of factors of economic and political nature.

As it seems to the authors, South Africa as a whole has passed a democratic transit. South Africa is a multinational country with strong political institutions (in particular, Congress of South African Trade Unions, part of the so-called "Alliance of three"—the government coalition—along with the African national Congress and the South African Communist Party).

Therefore, even at the level of the law, employee representation is allotted significant importance (unlike in Russia, rescue procedures involve not only a creditor committee but also an employees' committee (Companies Act 2008, 144, 148); trade unions have the right to file indirect claims (Companies Act 2008, 165 (2c)). Russian Federation of the Independent Trade Unions of Russia, successor of the Soviet

government-organized trade unions, on the other hand, does not articulate its interests on an equal basis with public authorities and employers.

Neither South Africa nor Russia is representative of the Anglo-Saxon (outsider) or continental (insider) model of corporate governance in its pure form. The history of South Africa and its economic ties led to the development of corporate governance on the Anglo-Saxon model. However, South Africa of the 1990s can be characterized as a country of "family capitalism", more typical of, for example, France. The evolution of the capital structure and the increase in the inclusiveness of the economy are very slow (Padayachee 2013, 260–262). In this regard, the strong position of the CEO is seen not so much as a consequence of the dispersion of capital, as it happens in the United States, but, on the contrary, as a consequence of the concentration of capital. Accordingly, South Africa can be attributed to the Anglo-Saxon model of corporate governance on the content of norms, but not on the structure of the economy.

The Russian legal system belongs to the Romano-German family. Russian corporate law has been influenced by both German traditions (supervisory functions of the board of directors, the possibility to provide for the executive board) and Anglo-American innovations (this mainly concerns the rules aimed at protecting the interests of minority shareholders—indirect claims, disclosure of information, etc.). Therefore, Russian researchers, speaking about legal models, distinguish Russian corporate governance with a special model ((Dementyeva 2017, 345–354) (Gabov 2017, 257–268) Frolova and others).

However, the capital structure in Russia is highly concentrated. According to a study by Deloitte in 2015, the average value of the largest stake in the sample of 120 public companies is 57.6%, the average free float—25%. The authors believe that this data, considering foreign policy trends, is at least relevant.

The attitude towards the public sector as the "driver of change" is characteristic of developing countries. According to a number of legislative provisions, the status of public and state-owned companies in South Africa is equivalent. The fourth report of the King Committee draws attention to the fact that corporate governance approaches "are equally applicable and equally valuable for all organizations: private and public, large and small, for-profit and not-for-profit" (King IV 2016).

In Russia at the end of the 2000s, there emerged a trend to improve corporate governance in the public sector: a number of regulations were issued, introducing the most applicable corporate governance practices, and the open selection of independent directors in companies with state participation began. As a result, according to the Russian expert community, corporate governance in the public sector has become only slightly inferior to the level of corporate governance in public companies. For example, the study of the Russian institute of directors notes that compared to the sample of companies with a listing, companies with state participation managed to minimize the lag in all respects, except for information disclosure. Positive dynamics has been observed since 2011 (The survey of corporate governance practice in Russia).

According to the authors, it is important not so much to choose as to consistently implement the best practices of corporate governance. Some Russian scholars note a downward trend associated with the sanctions pressure and the subsequent decline in the investment attractiveness of the country (Dementyeva, Milovidov 2018, 86–87) Inshakova, Goncharov).

In Russian the words "governance" and "management" are denoted by one word *"upravlenie"*. Therefore, for the Russian-speaking reader it is not difficult to understand that corporate governance is aimed not only to increase investment attractiveness, but also to establish the proper process of rational and effective functioning of management.

Corporate governance in South Africa is in a trend that can be described by the words "corporate governance is not an end in itself".

Let us consider this conclusion with the example of principle 7 of King IV Code on Corporate Governance, which states that "the governing body should comprise the most appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibility objectively and effectively".

All companies do not need to pedantically meet the standard on independent directors and introduce corporate governance practices point by point. There must be a proper balance between executive directors (who represent the board's management point of view), non-executive directors and independent directors (King IV 2016).

The board in Anglo-Saxon countries, including South Africa, is at the center of the corporate governance system. Therefore, in contrast to

Russia, the understanding of the board as a means of control in the broadest sense (as governance and management) is directly reflected in the practices of corporate governance: there should be as many directors as are needed for the board and its committees to worked effectively (Verbicky). We need those corporate governance practices that reflect the scale, industry and ownership specifics of the business.

It seems to the authors that both basic models of corporate governance have common foundations of management order, less subject to national specifics and more—as shown by the example of South Africa and Russia—to economic conditions.

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