

“Broad-based black economic empowerment (B-BBEE) in South Africa: a moral and ethical management perspective”

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SECTION 3. General issues in management

Louis P. Krüger (South Africa)

Broad-based black economic empowerment (B-BBEE) in South Africa: a moral and ethical management perspective

Abstract

Twenty years after South Africa became a democratic country, it still faces considerable challenges in striving for economic equality and social justice. The African National Congress (ANC) has passed several pieces of legislation in an attempt to achieve these objectives. The broad-based black economic empowerment Act (B-BBEE) (2003) provides the legislative framework for such programs. The purpose of this research was to benchmark B-BBEE (and its codes of good practice) against the provisions of the United Nations (UN) Declaration of Human Rights, the Constitution of the Republic of South Africa (RSA) and the B-BBEE Act. A “5 Star” research methodology and a moral and ethical management theoretical framework were developed to assist with the evaluation. It appears that in at least two areas, the Constitution of the Republic of South Africa and the B-BBEE Act passed in terms of the Constitution, may be in violation of the UN Declaration, both in its letter and spirit. It is recommended that the UN Committee on the Elimination of Racial Discrimination (CERD) be alerted to this possibility.

Keywords: broad-based black economic empowerment (B-BBEE), African National Congress (ANC), United Nations (UN), moral and ethical management framework, committee on the elimination of racial discrimination (CERD).

JEL Classification: M14

Introduction

“SA is ‘more unequal’ than 20 years ago, says Oxfam”, according to Sue Blaine in a *Business Day Live* headline on 22 January 2013. She posits that “SA is one of the world’s most unequal societies, with a Gini coefficient of 0.63 in 2011 – a coefficient of zero means a country has complete equality and all households earn exactly the same” (Blaine, 2013). Recently, the public protector in South Africa, Advocate Thuli Madonsela echoed these sentiments in a speech she delivered at the University of Stellenbosch where she noted that South Africa is one of the most unequal societies in the world despite the constitutional promises which include the substantive notion of equality and she added “Compounding the situation is that poverty and unemployment have worsened and also the fact that, that too follows the contours of racial, gender and other forms of structural inequality or discrimination” (SAPA, 2014a).

This year, 2014, South Africa celebrates 20 years of freedom and democracy since its first non-racial democratic elections held on 27 April 1994. On reflection, a whole range of factors in the country have changed, including “... socioeconomic and health policies; formation of new political parties; establishment of institutions such as the Independent Electoral Commission [IEC], Public Protectors Office, Labour Court, Equality Court and the Constitutional Court; and major [sport] events such as the [1995 Rugby World Cup that also was won by South Africa] [and hosting the] 2010 Fifa World Cup ...” (Anonymous, 2014a).

One such prominent socioeconomic policy change was the introduction of black economic empowerment (BEE) and its extended version, namely broad-based black economic empowerment (B-BBEE) in the State and private businesses or entities in South Africa. Essentially, BEE and B-BBEE are in some ways similar to affirmative action policies that are better known in the United States of America (USA), the United Kingdom (UK) and other countries, but in the Republic of South Africa they are legislated in accordance with Act 53 of 2003 as amended by Act 46 of 2013.

While the need and/or motivation for B-BBEE in South Africa (given the 40 or so years of apartheid rule under the former National Party (NP) government which the African National Congress (ANC) replaced, may appear self-explanatory, arguably it is not as clear or self-evident about what the moral justification for B-BBEE is in terms of the United Nations Declaration of Human Rights, the Constitution of South Africa and Chapter 2 of the Bill of Rights; nor whether the implementation of B-BBEE, in accordance with the above-mentioned Act as amended and the application of the Department of Trade and Industry (DTI) codes of good practice, is ethically defensible.

The research on which this article is based followed “5 Star” research methodology (as a qualitative research design) to consider the relevant proposition and assumptions in order to gather the evidence (in this case only secondary data sources), and argue the case in order to draw a final conclusion.

1. Background to the research

The researcher has been involved in research relating to transformational policies in South Africa since 2009 and also, specifically, BEE, and to date has published

four journal articles. The first article pertaining to transformational policies (Krüger, 2012), the researcher was the first person to attempt to determine the general feeling of people employed in South African companies towards concepts such as affirmative action, black economic empowerment, Ubuntu and so forth. This was followed by a research project focusing on the potential influence of such policies on the operational competitiveness of South African businesses (Krüger, 2013). With the third article (Krüger, 2011), the researcher was again the first to explore the impact of BEE on ten dimensions of South African business performance. The researcher then attempted to assess South African managers' perceptions of 20 popular conceptions (or misconceptions) relating to the origin, justification, impact on business competitiveness, practical implementation prescripts, compliance measures and so forth of BEE (Krüger, 2014).

All the above articles were based on empirical data collected from employees in South African businesses. However, BEE seeks compliance from all entities of the State, including government departments, provincial offices and local municipalities as well as private enterprises that do business with them. The focus of this research was a moral and ethical management perspective on the application of B-BBEE in all organs of the State and private entities (businesses) and only used secondary data resources.

It should be noted that a literature review was conducted of the library resources relating to B-BBEE, but the researcher concluded that no such specific research had yet been conducted (or at least published). Of particular interest, however, was an article by Smit (2013) in which an extended legal argument was presented on affirmative action, employment equity and so forth, in which she agrees "... certain challenges that remain in the area of labor equality laws with regard to conceptual and application issues ..." (mainly with reference to the SA Constitution, the Employment Equity Act [Act 56 of 1998], the Labor Relations Act [Act 66 of 1995] and others), but argues that "... labor law in itself cannot address the problems facing a highly unequal society such as South Africa".

In his article, Knight (2014) argues that "...it may seem that objectionable legal discrimination has reappeared in the guise of Black Economic Empowerment (BEE) policies ..." and that in terms of three contemporary theories of distributive justice (Rawlsian justice, utilitarianism, and luck egalitarianism) "... they all recommend a large-scale redistribution to the benefit of the (predominantly black) poor ..." but a "... more surprising result agreed by all three theories is that this redistribution should be conducted in non-racial fashion ...".

In possibly the most comprehensive review of BEE policies since 1994, a respected political analyst warns that there seems to be "... a lack of critical scrutiny of BEE in all its aspects ... partly because of its supposedly remedial aims, which tend to be taken at face value, so limiting proper evaluation" and "... the fact that BEE is based on racial identity makes the system still more difficult to criticize for fear of being labeled a racist or apartheid apologist" (Jeffery, 2014, p. 25). She further cautions that "... BEE's emphasis on racial identity reinforces racial stereotypes and fosters polarization around race" and "... also undermines the core values of non-racialism and equality before the law ..." which she claims the ANC are well aware of, should BEE be poorly implemented, could "... redistribute resentment ... and destroy social peace" (Jeffery, 2014, p. 26).

The term "morality" can either be used descriptively or normatively. Descriptively, it refers "... to some codes of conduct put forward by a society or, some other group, such as a religion, or accepted by an individual for her own behavior[u]r", and normatively it refers to "... a code of conduct that, given specified conditions, would be put forward by all rational persons ..." (Google, 2014). In this research, a simplistic interpretation of what morals and morality entail was adopted, basically referring to the intention, purpose and motivation of an action being either good or bad and/or whether the moral values and principles underlying the action are deemed right or wrong.

The term "ethics" refer to "... moral principles that govern a person's behavior or the conducting of an activity ...", which is linked to the definition of morality above. However, in the case of this research, again a simplistic interpretation of what ethical behavior entails was adopted, referring to the impact, results or outcome of an action in applying moral principles of honesty and integrity (Oxford dictionaries, 2014). See figures 1 and 2 in Appendix.

2. Research methodology

From an epistemological (knowledge) perspective, the objective of the research methodology employed in the current research was to provide propositional knowledge on the subject or issue under investigation. The methodology that was utilized is depicted in figure 3 and was termed "5 Star" research methodology, partly because it involves five definite steps. However, the name was also inspired by the 5 star grading system used in the SHEQ risk management industry in South Africa by NOSA[®] (Nosa, 2014). The outcome (knowledge) is considered *a priori* knowledge which

is non-experimental, and is thus known independently of experience but can be argued by reason (Wikipedia, 2014). The purpose was to use the research design, namely the “5 Star research methodology”, in a qualitative research effort using secondary data and thematic analysis guided by the control principles of credibility, trustworthiness and relevance.

3. Research propositions and assumptions

The basic proposition of this research was as follows: *black economic empowerment as it is currently applied in South Africa is in accordance with a moral and ethical management perspective as underpinned by the United Nations Universal Declaration of Human Rights.*



Fig. 3. “5 Star” research methodology

The assumptions underlying this research were as follows:

1. The United Nations Universal Declaration of Human Rights encompasses the 30 articles that were adopted by UN General Assembly in Resolution 217A (III) of 10 December 1948.
2. The Constitution of the Republic of South Africa 108 of 1996 was first promulgated on 18 December 1996, and was followed by 11 amendments between 1997 and 2003.
3. Broad-based black economic empowerment (B-BBEE) refers to the implementation of the provisions and regulations as contained in Act 53 of 2013 and as amended by Act 46 of 2013.
4. The B-BBEE codes of good practice that are currently applied are those issued by the Department of Trade and Industry (DTI) in accordance with section 9(1) of the B-BBEE Act (Government Gazette Vol. 500, No. 29617 on 9 February 2007, 96 pages). They are to be replaced with new codes of practice (Government Gazette Vol. 580, No. 36928 on

11 October 2013, 112 pages) and are expected to come into effect on 1 May 2015.

5. The evaluation or comparison between B-BBEE and the UN Universal Declaration of Human Rights is based on a moral and ethical management perspective as opposed to legal argument, which is by no means the focus of the research.
6. Qualitative research through the collection of secondary data sources was used and there was no empirical data generation either through questionnaires or interviews.
7. The guiding control measures include credibility (equivalent of validity in quantitative research) and trustworthiness (equivalent of reliability in quantitative research).

4. Research data

For this qualitative research, the three primary secondary data sources that were consulted were (1) text from the United Nations Universal Declaration of Human Rights (see Table 1); (2) text from the Constitution of the Republic of South Africa (see

Table 2); and (3) extracts from the BEE Act 53 of 2003 and its amendment Act 46 of 2013.

4.1. The United Nations Declaration of Human Rights. Table 1 presents abstracts from the Declaration, which are deemed relevant to this research. The declaration sets forth certain universal human rights which are regarded as an inherent part

of all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, color, religion, language or any other status. All people are equally entitled to these human rights without discrimination. The human rights are further all considered interrelated, interdependent and indivisible (OHCHR, 2014a).

Table 1. The United Nations Universal Declaration of Human Rights

 <p>Universal Declaration of Human Rights</p>
<p>Extract from the preamble:</p> <p>"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ... that human rights should be protected by the rule of law ... the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom ... Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms ... Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."</p> <p>Article 1</p> <p>"... humans are equal in dignity and rights ... and should act towards one another in a spirit of brotherhood ..."</p> <p>Article 2</p> <p>"Everyone is entitled to all the rights and freedoms ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ..."</p> <p>Articles 3 to 6 omitted.</p> <p>Article 7</p> <p>"All are equal before the law and are entitled without any discrimination to equal protection of the law ... All are entitled to equal protection against any discrimination in violation of this Declaration ..."</p> <p>Article 8</p> <p>"Everyone has the right to an effective remedy ... for acts violating the fundamental rights granted ... by the constitution or by law."</p> <p>Articles 9 to 20 omitted.</p> <p>Article 21</p> <p>"Everyone has the right to take part in the government ... the right of equal access to public service ..."</p> <p>Article 22</p> <p>"Everyone ... has the right to social security ... is entitled to realization ...of the economic, social and cultural rights ...indispensable for his dignity ..."</p> <p>Article 23</p> <p>"Everyone has the right to work ... to free choice of employment ... without any discrimination ... to just and favorable remuneration ... worthy of human dignity ... the right to form and to join trade unions for the protection ..."</p> <p>Articles 24 to 27 omitted.</p> <p>Article 28</p> <p>"Everyone is entitled to a social and international order in which the rights and freedoms ... in this Declaration can be fully realized."</p> <p>Article 29</p> <p>"Everyone has duties ... rights and freedoms ... subject only to such limitations ... determined by law ... purpose of securing ... respect ... of others ... in no case is exercised contrary to ... principles of the United Nations."</p> <p>Article 30</p> <p>"Nothing in this Declaration ... be interpreted as implying ... any State, group ... any right to engage in any activity ... aimed at the destruction of any of the rights and freedoms ..."</p>

Source: <http://www.un.org/en/documents/udhr/#atop> [Accessed 28 July 2014].

A fundamental “cross-cutting” principle in international human rights law is the principle on *non-discrimination*. This principle underscores all the major human rights treaties and conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. It should be noted that the principle of non-discrimination, which pertains to all human rights and freedoms, applies to everyone. It prohibits any form of discrimination on the basis of a list of non-exhaustive categories which include sex, race, color and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights.” (OHCHR, 2014b).

Human rights under the United Nations Charter are considered both universal and inalienable. The principle of universality of human rights became the cornerstone of international human rights law, whereby it is the duty of all signatory States to

promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

Human rights are also considered inalienable. In general, they cannot be taken away or restricted other than in some cases, where criminality is involved (OHCHR, 2014c).

Lastly, under international law, human rights come with obligations and duties to signatory States “to respect, to protect and to fulfill human rights”. “The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.” (OHCHR, 2014d).

4.2. The Constitution of the Republic of South Africa. Table 2 indicates certain abstracts of the Constitution that are deemed relevant to this research.

Table 2. The Constitution of the Republic of South Africa

 <p>Bill of Rights</p>
<p>Extract from preamble</p> <p>“We, the people ... believe that South Africa belongs to all who live in it, united in our diversity ... adopt this Constitution as the supreme law of the Republic so as to ... heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights ... improve the quality of life of all citizens ... build a united and democratic South Africa ...”.</p> <p>FOUNDING PROVISIONS</p> <p>Section 1: Republic of South Africa</p> <p>“The Republic of South Africa ... is ... founded on the following values ... human dignity, the achievement of equality... non-racialism and non-sexism ... supremacy of the constitution and the rule of law ... a system of democratic government ...”.</p> <p>Section 2: Supremacy of Constitution</p> <p>“ ... Constitution is the supreme law ... law or conduct inconsistent with it is invalid ... the obligations imposed ... must be fulfilled.”</p> <p>Section 3: Citizenship</p> <p>“... is a common South African citizenship ...all citizens are ... equally entitled to the rights, privileges and benefits equally subject to the duties and responsibilities ...”.</p> <p>Sections 4 to 6 omitted.</p> <p>CHAPTER 2</p> <p>Section 7: Rights</p> <p>“ ... Bill of Rights is a cornerstone of democracy ... the rights of all people ... values of human dignity, equality ... state must respect, protect, promote and fulfil the rights ... subject to the limitations ... in section 36 ... or elsewhere ...”.</p> <p>Section 8: Application</p> <p>“The Bill of Rights applies to all law ... binds a natural or a juristic person ... when applying a provision ... a court ... must apply... develop rules of the common law to limit the right ... the limitation is in accordance with section 36(1).”</p> <p>Section 9: Equality</p> <p>“Everyone is equal before the law ... full and equal enjoyment of all rights ... promote the achievement of equality ... to protect or advance persons ... disadvantaged by unfair discrimination ... state may not unfairly discriminate directly or indirectly against anyone ... legislation must be enacted to prevent or prohibit unfair discrimination ... discrimination on ... the grounds listed ...is unfair unless it is established that the discrimination is fair.”</p>

Table 2 (cont.). The Constitution of the Republic of South Africa

<p>Section 10: Human dignity</p> <p>"Everyone has ... the right to have their dignity respected ...".</p> <p>Sections 11 to 15 omitted.</p> <p>Section 16: Freedom of expression</p> <p>"Everyone has the right to freedom of expression ...does not extend to ... advocacy of hatred that is based on race ... that constitutes incitement to cause harm."</p> <p>Sections 17 to 32 omitted.</p> <p>Section 33: Just administrative action</p> <p>"Everyone has the right to administrative action ... lawful, reasonable and procedurally fair ... whose rights have been adversely affected ... the right to be given written reasons."</p> <p>Section 34: Access to courts</p> <p>"Everyone has the right to have any dispute by the application of law decided ... before a court ...".</p> <p>Section 35 omitted.</p> <p>Section 36: Limitation of rights</p> <p>"The rights in the Bill of Rights may be limited only ... to the extent that the limitation is reasonable and justifiable ... based on human dignity, equality ... taking into account all relevant factors ... no law may limit any right entrenched in the Bill of Rights."</p> <p>Section 37 omitted.</p> <p>Section 38: Enforcement of rights</p> <p>"Anyone ... has the right to approach ... court alleging ... a right ... has been infringed or threatened ... the court may grant appropriate relief, including a declaration of rights."</p> <p>Section 39: Interpretation of Bill of Rights</p> <p>"When interpreting the Bill of Rights ... must promote the values that underlie ... society based on human dignity, equality ... must consider international law ... must promote the spirit, purport and objects ... does not deny the existence of any other rights ... to the extent that they are consistent with the Bill."</p> <p>All sections hereafter from Chapter 3 to 14 omitted.</p>

Source: <http://www.gov.za/documents/constitution/1996/a108-96.pdf> [Accessed 29 July 2014].

The Constitution of the Republic of South Africa, "...is widely regarded as the most progressive constitution in the world, with a Bill of Rights second to none ... and all are taken extremely seriously by the citizens of the country ... there has been no hesitation in testing the provisions and implications of the Bill of Rights in the Constitutional Court ... any limitation of rights must be "reasonable and justifiable in an open and democratic society" and must take several factors into consideration." (Anonymous, 2014b, par 4, 5).

In the Constitution of the Republic of South Africa "... human rights are given clear prominence ... they feature in the preamble with its stated intention of establishing a society based on democratic values, social justice and fundamental human rights." (Anonymous, 2014c, par 1).

4.3. B-BBEE in South Africa. B-BBEE in South Africa is legislated under Act 53 of 2003 and was introduced during the first term of the second non-racial, democratically elected president, post-1994, former president Thabo Mbeki. The B-BBEE Act provides the legislative framework for the promotion of B-BBEE and empowers the Minister of and the Department of Trade and Industry to administer all the provisions of the Act in order to advance

economic transformation and enhance the economic participation of black people in the South African economy (DTI, 2014a).

The objectives of the B-BBEE, according to the Act, are to "... promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services ...".

Officially, according to the B-BBEE Amendment Act 46 of 2013, 'black people' is a generic term which means Africans, Coloreds and Indians – (a) who are citizens of the Republic of South Africa by birth or descent; (b) who became citizens of the Republic of South Africa by naturalization – (1) before 27 April 1994; or (2) after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date; and 'broad-based black economic empowerment' means the viable economic empowerment of all black people [including], in particular women, workers, youth, people with

disabilities and people living in rural areas through diverse but integrated socioeconomic strategies that include but not limited to – (a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the workforce; (e) preferential procurement from enterprises that are owned or managed by black people; and (f) investment in enterprises that are owned or managed by black people”.

Four notable new points in the legislation observed in the amended B-BBEE Act 46 of 2013 send a certain “message” to those entities that need to comply with the Act, in particular businesses that deal with the State or other public entity. They are as follows: (1) section 1 (e), which defines “fronting practice” in terms of a B-BBEE initiative; (2) section 13A, which allows for the cancellation of any contract or authorization awarded that is based knowingly on false information provided by an organ of the State or public entity; (3) section 13O, which identifies four types of offences in terms of B-BBEE and the penalties in the case of a conviction in terms of the B-BBEE Act; (4) section 13P, which deals with the prohibition on business with organs of State following conviction under the B-BBEE Act.

In 2007, the DTI published the first set of B-BBEE codes of good practice in accordance with section 9(1) of the B-BBEE Act (Government Gazette Vol. 500, No. 29617 on 9 February 2007, 96 pages) (DTI, 2014b). These codes of practice are set to be replaced by the DTI with new codes of practice (Government Gazette Vol. 580, No. 36928 on 11 October 2013 of 112 pages), which are expected to become effective as from 1 May 2015 (a statement on the clarification of the transitional period to this effect was issued by the DTI on 8 July 2014) (DTI, 2014c). The new codes (DTI, 2014d, par 1, p. 5) contain the details of the interpretative principles of B-BBEE; they specify the application of the codes and basis for measurement; they indicate the qualifying thresholds for measured entities to qualify as exempted micro enterprises (EMEs) or qualifying small enterprises (QSEs); they specify the method for measuring start-up enterprises; they specify the measurable elements of B-BBEE under the generic scorecard and qualifying small enterprises; they determine the basis for compliance for entities with the code; and they provide for the transitional period before compulsory use of the generic and QSE scorecard starts.

The following “entities” (the word used in the code) are deemed measurable under the new codes of practice (DTI, 2014c, par 3, p. 5):

1. all organs of State and public entities;
2. all measured entities that undertake any economic activity with all organs of the State and public entities;
3. any other measured entity that undertakes any economic activity, whether direct or indirect, with any other measured entity that is subject to measurement of (1) and (2) above and which seeks to establish its own B-BBEE compliance.

It should be noted that only two B-BBEE research reports lie in the public domain (both dating back to 2007) and are listed on the DTI’s (2014e) website, namely the B-BBEE Progress Baseline Report, June 2007, and the Progress of B-BBEE in South Africa: Executive Report, August 2007.

5. Discussion

In presenting the case for either accepting or rejecting the proposition, it is argued that a so-called “top-down” approach (see Figure 4) indicating the preceding importance or supremacy of the declaration, legislature or Act that comes before it, would be most appropriate in this research. Hence the UN Declaration of Human Rights at the top is first and the ultimate measure against which the protection of a human right should be considered. This is followed by the Constitution of the Republic of South Africa and its Chapter 2, Bill of Rights, which must conform in all respects to its precedent, the UN Declaration of Human Rights. This should be followed by the B-BBEE Act and its amendment which must conform to all the provisions of the Constitution of the Republic of South Africa and its Bill of Rights. Next on this list is the DTI’s B-BBEE Codes of Good Practice, which are issued in accordance with section 9(1) of the B-BBEE Act, which in turn must conform to the Act itself. It is against the last level that an argument will be presented on the basis of the Moral/ Ethical Pathway Indicator (MEPI – Figure 1) and the Moral/Ethical Position Matrix (MEPM – Figure 2) whether B-BBEE can or could be seen as morally justified or justifiable, and whether the way B-BBEE is currently being applied in South Africa by the State and in business, can or could be seen as ethically defensible on the basis of honesty and integrity.

5.1. The UN Declaration of Human Rights versus the Constitution of the Republic of South Africa.

Article 1 of the UN declaration is patently clear that “... humans are equal in dignity and rights ...” and further “ ... should act towards one another in a spirit of brotherhood ...”. Article 2 goes on to entitle

everyone to all the rights “... without distinction of any kind, such as race, color ...”.

Article 7 emphasizes the fact that all “... are equal before the law and are entitled without any discrimination to equal protection of the law ...” and further that all “... are entitled to equal

protection against any discrimination in violation ...” of the UN Declaration. In support of this article, article 8 declares that “... everyone has the right to an effective remedy ... for acts violating the fundamental rights granted ... by the constitution or by law”.

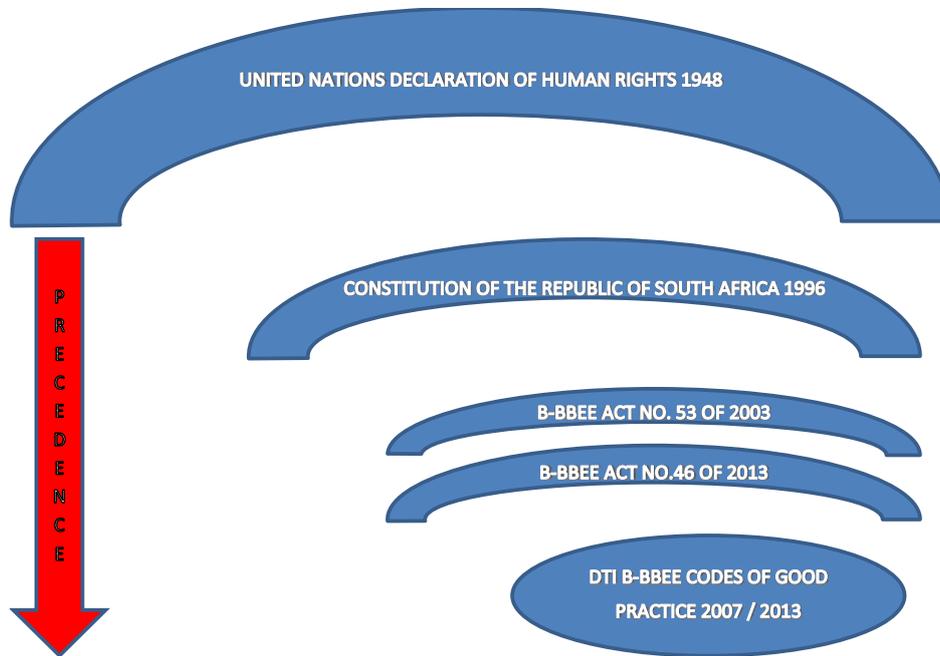


Fig. 4. “Top-down” approach for precedence supremacy

Articles 28, 29 and 30 may all be considered together in as much that they, firstly, entitle everyone “... to a social and international order in which the rights ...” in the UN Declaration can be realized; secondly, they are “... subject only to such limitations ... determined by law ...” which in “... no case be exercised contrary to ...” the principles of the UN; and thirdly caution that nothing in the UN Declaration may “... be interpreted as implying ...” that any State or group of people have “... any right to engage in any activity ...” that appears to or actually aims at the “... destruction of any of the rights and freedoms ...” of the UN Declaration itself.

Following the preamble to the Constitution of the Republic of South Africa, sections 1 to 3 set forth the founding values of “... human dignity, the achievement of equality... non-racialism ...”, the supremacy of the Constitution and declares that any “...law or conduct inconsistent with it is invalid ...” and that all South Africans are “... equally entitled to the rights, privileges and benefits ...” of the Constitution. The Bill of Rights contained in Chapter 2 of the Constitution thereafter closely “mirrors” the UN Declaration of Human Rights.

It should be noted that in sections 7 (the bill of rights), 8 (the application of the bill of rights) and 9 (the concept of equality and fair discrimination) of

the Constitution, firstly, certain provisions are made for “... subject to the limitations” in accordance with section 36 (which follows); secondly, it provides for the development of “... rules of the common law to limit the right ... in accordance with section 36(1) (which again follows); and lastly, while all have “... full and equal enjoyment of all rights ...”, the grounds for discrimination are listed and are considered only to be unfair “... unless it is established that the discrimination is fair.”

The Constitution of the Republic of South Africa has a specific section that describes the limitation of rights as indicated in the paragraph above – section 36. In this regard “... the rights in the Bill of Rights may be limited only ... to the extent that the limitation is reasonable and justifiable ... based on human dignity, equality ... taking into account all relevant factors ... no law may limit any right entrenched in the Bill of Rights”.

Lastly, section 38 provides for the enforcement of the rights by a declaration of a court should a right be infringed or threatened, and section 39 makes provision for the interpretation of the bill of rights based on human dignity and equality as well as in the context of international law, but “... does not deny the existence of any other rights ...” to the “... extent that they are consistent with the Bill”.

Categorically, the UN Declaration considers all humans as being equal in dignity and rights, and does not allow for any distinction by race or color (*all people are equal and no classification based on race or color is possible*)¹. Unconditionally, people are further considered equal before the law without any discrimination, which is a direct violation of the declaration (*no law may discriminate against people*). The UN Declaration entitles everyone to an international order with all the rights and only such imitations determined by law which may not be in contrary to any of the principles declaration itself (*everybody has all the international rights which may only be limited by law, given that this is not in conflict with any of the rights*) and no State or group of people may engage in any activity aimed at the destruction of any of the rights and freedoms (*no government may limit any of the rights*).

Following a preamble, the Constitution of the Republic of South Africa contains some 39 sections (versus the 30 articles of the UN Declaration) which, as stated earlier, closely resemble it. However, unarguably it points out in section 7 that certain limitations of rights are stipulated in the Constitution under section 36 which may be developed by rule of common law (section 8), but then inexplicably introduces a concept in the Bill of Rights (*fair or unfair discrimination*) which, in essence, means that on certain grounds (these are listed), discrimination may be considered fair unless it is found to be unfair (section 9). Unquestionably such a provision is not found in the UN Declaration where, firstly, discrimination of any kind is seemingly permitted on certain grounds (see section 7 of the RSA Constitution); and secondly, section 9 of the RSA Constitution allows for laws to be passed that may diminish or eliminate certain international rights from certain groups of people which, in essence, is in conflict with the UN Declaration (see articles 28, 29 and 30).

5.2. The Constitution of the Republic of South Africa versus the B-BBEE Act and its amendment. Following the discussion above regarding the Constitution of the Republic of South Africa, sections 7, 8, 9 and 36, arguably provided the platform for the legislation which was passed in the case of the above-mentioned two B-BBEE Acts (corroborated by Smit, 2013). Hence given the history of South Africa and the legacy of apartheid, it seems that, at least morally, a case for equality through the improvement of the economic and social welfare of persons previously discriminated upon, may justifiably be made. Such legislation relating to

programs or actions must be implemented within a moral framework, which provides for the ethical principles of honesty and integrity.

5.3. The B-BBEE Act and its amendment versus the DTI B-BBEE Codes of Good Practice. The B-BBEE Codes of Good Practice are published by the Department of Trade and Industry (DTI) in accordance with section 9 (1) of the above-mentioned B-BBEE Acts. One can undoubtedly accept that the Codes would be in compliance with the Act. The implementation amended codes have been postponed to 1 May 2015. It is then that four new (or even somewhat controversial) points in the B-BBEE Amendment Act 46 of 2013 will come into operation, notably those dealing with the practice referred to as “fronting”, and ironically, in the context of a free-market economy, the criminalization of organs of the State, other entities, businesses or other individuals for noncompliance in terms of the B-BBEE Act and the Codes of Good Practice, with hefty fines (up to 10% of total turnover) and/or prison sentences of up to ten years (see the B-BBEE Act 46 of 2013, clause 3O (3)).

In order to consider B-BBEE in terms of a moral and ethical management perspective, it is suggested that it be judged in terms of both the MEPI (Figure 1) and MEPM (Figure 2). Regarding MEPI, the end result of four likely pathways is indicated. While the Government would probably argue that B-BBEE is on pathway A, namely that this practice is both morally justified and applied ethically, those opposed to the concept and its application would probably select pathway B. Noting the Government’s attempt to become more forceful in its attempt to seek compliance (stamping out the practice of “fronting” and imposing fines and even prison sentences), the ethical implication is disconcerting, thus suggesting we look at the possibility of pathway C. Pathway D (a position implied that B-BBEE is morally unjustified, but ethically correctly applied) is unlikely to garner much support. Moving on to MEPM, and based on the same arguments as above, B-BBEE would probably fall into quadrant 2 (the Government would again argue it should rather be quadrant 3), while those in total opposition would argue that quadrants 1 and 4 would probably have few supporters. On the basis of this somewhat simplistic analysis, B-BBEE appears to have the general support of South Africans when it comes to its moral justification as an imperative. However, the way it is being applied in the country is likely to evoke a number of questions because of corrupt practices such as fronting, the so-called “tenderpreneurs”, high-profile businesspersons

¹ The practical implication in terms of the UN Declaration is indicated in italics in brackets.

receiving multimillion rand kickbacks from B-BBEE deals and so forth. With time, and noting some of the sentiments expressed by, inter alia, President Obama at the recent US–Africa Leaders summit held in Washington DC, from 28 to 30 July 2014 (Fin24, 2014a) that “Africa must stop making excuses”, it is only logical that the moral justification for B-BBEE will tend to change if not disappear, especially if the ethical application continues to draw criticisms such as nepotism, favoritism, corruption, maladministration and widespread abuse of public funds for individual gain resulting in unseen before anger by citizens and opposition parties which could even lead to the possibility of anarchy. This suggestion is underscored, if some of the recent media headlines in South Africa for the month of August 2014 alone are indicative of what is currently taking place in the country and the resultant pleas by top ANC government officials to end such practices:

- ◆ “Protector assessing complaint on Zuma’s [the current President of South Africa] daughter” (SAPA, 2014b);
- ◆ “Govt [Government] official fired over R60 m fraud” (SAPA, 2014c);
- ◆ “ANC canvasses civil servants for donations” (News24, 2014a);
- ◆ “Beleaguered Jordan [claimed he was Doctor Jordan] quits as ANC MP” (News24, 2014b);
- ◆ “Systems in place to guard against dishonesty – Zuma” (SAPA, 2014d);
- ◆ “Fake qualifications undermine education” (SAPA, 2014e);
- ◆ “Zuma avoiding accountability – DA [Democratic Alliance, which is the official opposition in Parliament]” (SAPA, 2014f);
- ◆ “Man convicted of selling state land” (SAPA, 2014g);
- ◆ “Govt must get rid of procurement fraud – body [SA Council for the Quantity Surveying Profession]” (Fin24, 2014b);
- ◆ “‘F***’ the poor says ex-African Bank boss” (Fin24, 2014c) [African Bank was placed under curatorship by South African Reserve Bank on 10 August 2014 after reckless lending to those labelled as “poor and desperate” during the time he was the bank’s chief risk officer];
- ◆ “Tlakula’s [Chairperson of the Independent Electoral Commission] ConCourt [Constitutional Court which is the highest court in the country] application dismissed [guilty of procurement misconduct and removed from office]” (SAPA, 2014h);
- ◆ “Ramaphosa [the current Deputy President of South Africa] tells SA not to take bribes, steal” (Fin24, 2014d);
- ◆ “Madonsela [Public Protector] challenges Zuma over Nkandla [President Zuma’s own private homestead where the state spent R246 million on upgrades] debt” (News24, 2014c);
- ◆ “MEC’s [Member of the Executive Council of a local provincial government] husband linked to R33 m deal – report” (SAPA, 2014i);
- ◆ “Lonmin enters into BEE agreement” (Fin24, 2014e)”, and less than a month later, “Lonmin to cut up to 5 700 jobs – sources” (Fin24, 2014f);
- ◆ “Casac: [Council for the Advancement of the SA Constitution] Zuma showing contempt for Parliament” (SAPA, 2014j);
- ◆ “Gauteng health CFO [Chief Financial Officer] suspended over tender irregularities” (SAPA, 2014k);
- ◆ “SANDF [South African Defence Force] chief under fire over R100k first class flight” [a contravention of National Treasury regulation] (News24, 2014d);
- ◆ “Executive overstepping the mark – DA” (SAPA, 2014i);
- ◆ “Madonsela must do her job, behave – ANC” (SAPA, 2014m) [the Public Protector is not answerable to any political party but only to Parliament];
- ◆ “Arms deal [into a multi-billion arms deal in 1999] inquiry failed – R2K [Right to Know Campaign]” (SAPA, 2014n);
- ◆ “Let Madonsela do her work – Tutu [Archbishop Emeritus Desmond Tutu is also a South African Nobel Peace Prize laureate along with former presidents Nelson Rolihlahla Mandela and FW de Klerk]” (SAPA, 2014o);
- ◆ “Malema: [former ANC youth league chairperson and now elected leader of the far left Economic Freedom Front in Parliament] We will shut down Parliament” (SAPA, 2014p).

Arguably many of the above “maladies” may direct or indirectly be linked to some of the negative manifestations or side-effects of B-BBEE. If this continues, B-BBEE could soon then move into quadrant 1 (MEPM) or on to pathway B, where it would be regarded as morally unjustified and ethically indefensible.

Conclusion

The purpose of the research was to investigate and analyze whether B-BBEE and the way it is currently being applied in South Africa is morally justified and ethically defensible.

A “5 Star” research methodology was developed to guide the research in the utilization of a qualitative research methodology in which only secondary data

was consulted. The primary literature sources were the United Nations Declaration of Human Rights (1948), the Constitution of the Republic of South Africa with the Bill of Rights in Chapter 2 (1996), the Broad-based black economic empowerment Act of 2003 and its Amendment Act of 2013), the Department of Trade and Industry's B-BBEE Codes of Good Practice issued in terms of section 9(1) of the aforementioned Act (2007 and the amendment codes of 2013 which are expected to become effective on 1 May 2015), selected accredited journal articles, newspaper articles and various sources accessed and downloaded from the internet. Two conceptual frameworks, namely a moral/ethics pathway indicator (MEPI) and a moral/ethics position matrix (MEPM), were developed in order to judge whether B-BBEE could be seen as morally justifiable and whether the way it is currently being applied, could be considered ethically defensible.

It appears that in at least two respects, the Constitution of the Republic may be in violation or at least then in spirit, against the UN Declaration of Human Rights. The first relates to the prohibition not to discriminate against anybody based on race or color, and the second, the most controversial introduction of a concept in the Constitution of fair or unfair discrimination against a group of people based on certain grounds. It may be argued that these two factors probably paved the way for legislation such as B-BBEE, which clearly discriminates against a group of people in South Africa, to be passed based on racial grounds. It is further interesting to note that while the word "black" is used in the Act and a definition is provided of who that includes, no basis for determining whether a particular South African is considered black or not is provided and probably would not be allowed because it would be regarded and experienced as offensive (e.g. physical observation, DNA testing, surname and/or language spoken, etc.) similar to practices in the unfortunate days of apartheid. However, the point is if one cannot determine or measure who is black – how can one actually apply the B-BBEE legislation in practice. The proposition of the research that B-BBEE as it is currently being applied in South Africa, is in accordance with a moral and ethical management perspective as underpinned by the United Nations Universal Declaration of Human Rights, and should thus be rejected.

The United Nations Committee against all forms of discrimination should be alerted to the fact that the Constitution of the Republic of South Africa seemingly allows for discrimination based on race and color, and that certain pieces of legislation (such as B-BBEE) may already have been passed in

violation of the UN Declaration of Human Rights (South Africa is a UN member state). Should there be agreement in this regard, the whole B-BBEE Act could be declared invalid and in violation of the UN Declaration of Human Rights, and then scrapped.

The research on which this article is based may contribute to a better understanding of the moral and ethical management perspective of B-BBEE itself and how it is currently being applied in South Africa. The "5 Star" research methodology may also provide a workable example that could be used in other qualitative research (or quantitative research). Although it is acknowledged that the two theoretical moral/ethical frameworks against which B-BBEE was evaluated, may be considered exceedingly simplistic, they do offer a basis for judging actions and events, and could perhaps be perfected in future research.

Given the findings of the research and noting that there seems to be little evidence that black economic empowerment actually leads to an increase in economic activity and realizing fair equality of opportunity (Knight, 2014), the justification for and application of B-BBEE needs to be reassessed. Moeletsi Mbeki (2009, p. 83) previously argued that B-BBEE is merely a wealth redistributive program ("more slices from the same cake" so to speak). However, what South Africa really needs is an economic expansive strategy, which would involve enlarging the cake with more equal slices – hence the scrapping of B-BBEE seems to be the only imperative.

Andrea Jeffery draws the same conclusion in her call for a move from BEE to "EED" (Economic Empowerment for the Disadvantaged). EED differs from BEE in two significant ways. Firstly, it is not race-based, which will "... reduce racial awareness and potential racial polarization" thereby "helping South Africa to attain and uphold the principle of 'non-racialism' embedded in the constitution"; and secondly, it does not focus on outputs in the form of numerical quotas" (Jeffery, 2014, p. 409). She also insists that "[a]ll other aspects of BEE [prior reference is made to education, public hospitals and clinics, state-owned enterprises, municipal functions, mining and agriculture, land reform and race-based BEE equity deals that largely benefit a small black elite with close ANC ties] should be scrapped" (Jeffery, 2014, p. 412).

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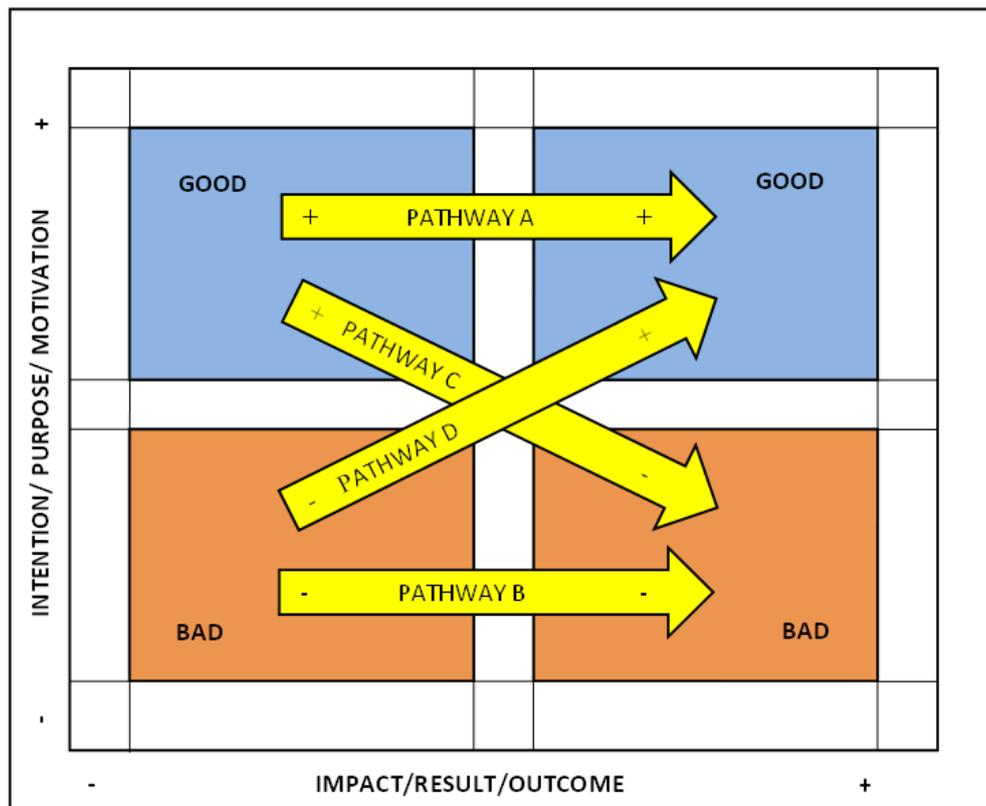
This article is dedicated to the late Ms Marion Leurs, former publishing editor of the South African Journal of Business Management of the University of Stellenbosch Business School. She greatly assisted in "transforming" my manuscripts into a publishable material. I thank and honor her!

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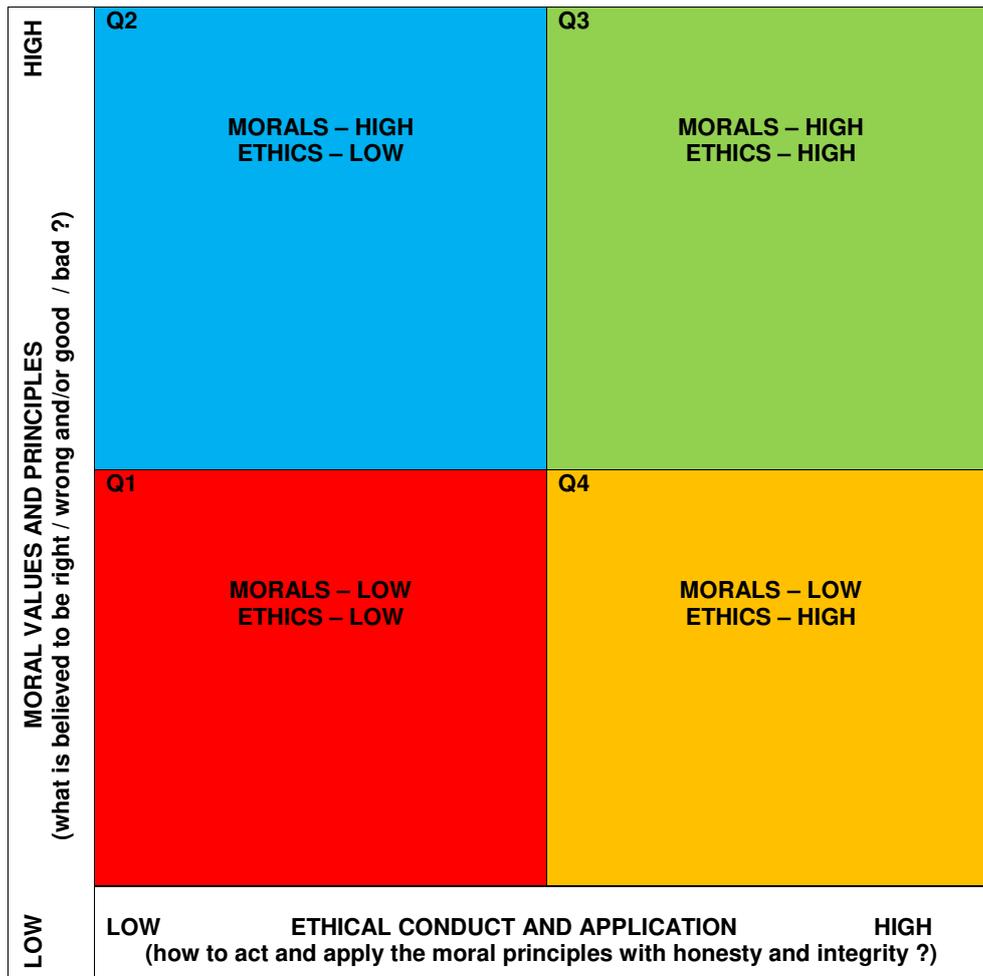
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Appendix



Note: ++ - PATHWAY A: A morally justified position or decision which in its application is ethically defensible (e.g. the assistance and treatment of the Ebola virus outbreak in Western Africa – Guinea, Sierra Leone and Liberia). It is also possible to relate the application of the framework to well-known people or world leaders. A case in point would be the late Nelson Mandela. - - PATHWAY B: A morally unjustified position or decision, which is unethical in its application (e.g. the recent suspected shooting down of the Air Malaysian civilian airliner MH 17 by the pro-Russian separatist in East Ukraine). Many would identify a person such as Adolf Hitler with such a “profile”. +- PATHWAY C: A morally justified position or decision, which is unethically applied (e.g. most debatable – but possibly the current Israeli and Palestinian conflict in Gaza where hundreds of civilians, women and children are being killed every day in Israel’s attempt to destroy the tunnels running into its territory). Again debatable – but the prime minister of Israel Benjamin Netanyahu could fit this “profile”. - + PATHWAY D: A morally unjustified position or decision which is ethically defensible (e.g. the application of euthanasia certain religious groups reject as immoral).

Fig. 1. Moral/ethics pathway indicator (MEPI)



Note: Q1: Quadrant 1: Worst position equivalent to a minus: minus position (Pathway B) (see Figure 1). Q2: Quadrant 2: Equivalent to a plus: minus position pathway (Pathway C) (see Figure 1). Q3: Quadrant 3: Best position equivalent to a plus: plus position (Pathway A) (see Figure 1). Q4: Quadrant 4: Equivalent to a minus: plus position (Pathway D) (see Figure 1)

Fig. 2. Moral/ethical position matrix (MEPM)