"A CRITICAL STUDY OF CORPORATE GOVERNANCE WITH REFERENCE TO THE STAKEHOLDER PROTECTION UNDER COMPANY LAW"

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

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I wish her success in life.

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ABBREVIATION

1:- SECURITIES AND EXCHANGE COMMISSION (SEC)

2:- NEW YORK STOCK EXCHANGE (NYSE)

3:- AMERICAN LAW INSTITUTE (ALI)

4:- ORGANIZATIONS FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)

5:- CORPORATE SOCIAL RESPONSIBILITY (CSR)

6:- INSTITUTE OF COMPANY SECRETARY OF INDIA (ICSI)

7:- DELAWARE GENERAL CORPORATION LAW (DGCL)

8:- FINANCIAL CONDUCT AUTHORITY (FCA)

9:- FINANCIAL REPORTING COUNCIL (FRC)

10:- ECONOMIC, SOCIAL AND GOVERNANCE (ESG).

11:- DEPARTMENT OF CORPORATE AFFAIRS (DCA)

12:- NATIONAL DEFENSE UNIVERSITY (NDU)

13:- FINANCIAL REPORTING COUNCIL (FRC)

14:- SINGAPORE MONETARY EXCHANGE (SIMEX)

15:- GROSS DOMESTIC PRODUCT (GDP)

16:- CHIEF EXECUTIVE OFFICER (CEO)

17:- SECURITIES EXCHANGE BOARD OF INDIA (SEBI).

18:- CORPORATE CODE OF CONDUCT (CCC)

19:- NON-GOVERNMENTAL ORGANISATION (NGO).

20:- NATIONAL VOLUNTARY GUIDELINES (NVG).

21:- MINISTRY OF CORPORATE AFFAIRS (MCA).

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CHAPTER-I

INTRODUCTION

For good governance all administrators including King are considered as servants of the people. **- Archarya Chanakya**

Good corporate governance means govern the corporation in such a way that the interests of the shareholders is protected while ensuring other stakeholders' requirements going to be fulfilled as far as possible. In short, the directors should ensure that the company obeys the law of the land while carrying out its business. Corporate governance is effective, which provides managers to hold board and manager accountable in their management of corporate assets. Such accountability combined the efficient use of resources; it improves to lower-cost capital and increased responsiveness to societal needs and expectations which it leads to corporate performance.

In Covid-19, the Boards are facing a complex type of new reality in a company. Such type of new environment characterized by pressures and demands from various stakeholder groups, heightened expectations for societal engagement and corporate citizenship, and radical uncertainty about the future. Such factors are complicating by board decision-making and challenging the shareholder-centric model of governance that has guided boards and business leaders for the past several decades.

In the face of Covid-19, some companies struggled because their customers disappeared. Others saw their workforce reduced to a skeleton crew of essential employees. Still others grappled with supply chain disruptions, unsustainable debt, or insufficient capital to fund their operations. Since the onset of the crisis, it has become common practice for management to update the board on the situation regarding each stakeholder group, and many boards and senior leaders have declared the health and safety of employees and customers to be their top priority. Some investor groups as well have weighed in on behalf of putting employees first during this perilous time.[1] Covid-19 has complicated board decision-making and made it less amenable to general rules and simple formulas. The injunction to "maximize shareholder value" just does not have much purchase when it comes to deciding how much to invest in personal protection equipment to safeguard employees' health or whether to convert an auto manufacturing line to the production of ventilators for a nation in need. This analysis

[1] Covid-19 Is Rewriting the rules of Corporate Governance : Harward Business School

suggests that a board's ability to deliberate in a thorough and thoughtful, but efficient, manner and come to a considered conclusion will be a critical aspect of its effectiveness in the post-Covid era.

As of today, directors and boards vary widely in their appetite and capacity for this sort of discussion. Board chairs, as well, differ in their ability to facilitate it. This is another area in which forward-thinking boards will want to assess themselves and, if needed, take steps to raise their game. A balance of the economic damage with the possible health damage is difficult to achieve even at the level of the single company.[2] As already mentioned, company profit is not theoretically incompatible with health measures (given the utilitarian interests of the company in the safety of its stakeholders), but the maximization of these two interests seem to me in conflict, given that generally the full stakeholders' safety is incompatible with the total un-restrictiveness of the economic activity, namely the absence of any precautionary measure that has a cost. [3]

In an ideal world, incisive and draconian public measures that annihilated the spread of the virus would have re-established, at an immediate cost, market conditions favorable to profitability. The reality has instead shown that the virus coexists with the economies that it continues to affect. In addition to localized measures to avoid the contagion, and widespread measures to protect stakeholders, it cannot be excluded, in my opinion, that to some degree (perhaps in some sectors that will remain profitable) the attention to stakeholders will be eventually internalized at the individual company level through stakeholder-oriented corporate governance.

ABSTRACT

The role of stakeholders in corporate governance is an emphasis in contributions from the accounting literature. It focus on the following stakeholder employee ,the general public, the media, related firms, the government, private regulators, gatekeepers, and foreigners. The concept of stakeholders in an organization is just to understand the task of board of directors. A volunteer approach of corporate governance it focus on the effective director is preferable to structural change to legislation. The most appropriate protection of stakeholders' interests

[2] Is COVID-19 Killing Shareholder Primacy?, : Forbes (Apr. 9, 2020),
[3] The Economics of Safety, Health, and Well-Being at Work: An Overview : (ILO Infocus Safework Working Paper May 1, 2000),

can be provided by the institutions and practice of corporate governance, other specific kinds of legal provisions may be more suitable.

In many cases rather than substitution complementary prevails between different legal provision protecting the interests of stakeholders and the stakeholders protection afforded through the shaping of institutions of capital governance. The governance framework for insurers should ensure an appropriate protection of the interests and rights of stakeholders (including policyholders, employees, creditors, supervisors and consumers) through proper disclosure and market conduct, effective governance and redress mechanisms, and respect for the rights and expectations of shareholders (or member– policyholders) and participating policyholders.

In corporate sector, corporate governance is a big issue in scams and scandals which is taken place to maintain equilibrium between economic and public goals as well as individually and collective goals. It focus on accountability and transparency in the system like Investment decisions for some common people like shareholders (who invest in the company), creditors (who bring funds for the company through loans), financial analysts (who analyze the company's position in the market) and security consultants (who offer consultancy on purchasing shares and securities) of the company which based upon the disclosure made through corporate governance only. Such corporate activity on all the stakeholders of corporation is opposed to focus on the corporate effect on shareholders. Hence, the poor governances will emphasis on homogeneity of company boards and decision-making by entities by funding them. Here, both the securities and corporation law have to realize that how much laws work to protect investors and other stakeholders.

HYPOTHESIS

A research on an issue of corporate governance and bank profitability. Such study supports the hypothesis that corporate governance positively affects not only stakeholders but also efficient bank management. Corporate governance could be thought of as the combined statutory and non-statutory framework within which boards of directors exercise their fiduciary duties to the organizations that appoint them. The key issue is that 'directors owe to

shareholders, or perhaps to the corporation, two basic fiduciary duties: the duty of loyalty and the duty of care'.

The primary goal of corporate governance is to enhance the value of a company through ethical behavior, espousing a policy of openness and fairness and ensuring informed decision making throughout the company. Unfortunately, the center of corporate ethics—the board of directors—in certain cases became a magnet for unethical practices.

Blinded by the glare of a rapidly growing stock market, pressured by stockholders for ever-increasing returns, and led by executives seeking to maximize bonuses based on stock performance, certain boards of directors and audit committees failed to constrain "creative" accounting to keep up their earnings numbers. It must have seemed to some directors that the investing public really did not care about issues such as executive compensation, as long as they made their double-digit returns.

RESEARCH PROBLEM

The Corporate Governance position depicted by higher rank shows the better Corporate Governance compliance of the organization. There is not any unified formal code of Corporate Governance except NRB provisions of Good Governance concerned to Banking and Financial Institutions in Nepal. Company Act, Security Act, BAFIA are some major sources of Governance along with regulatory bodies Gnawali (2018). In these regards, the study aims to study the major issues that are associated with corporate governance in Nepal. The disciplining role of stakeholders on managerial behavior requires going beyond the agency problem generated by the separation of ownership and control by including situations where the aggrieved parties are stakeholders other than capital providers. Pollution, price-fixing, consumer fraud, or unfair competition are some examples while these actions could be beneficial for shareholders, they impose costs on stakeholders and thus can hardly be considered socially desirable.

RESEARCH METHODOLOGY

The new field of corporate governance and development aim is to discover how the business activities, corporate relations with the society and environment and different stakeholders are perceived in a rapidly developing former post-socialist. It was the stakeholder interests and corporate relations with the society and environment in business which have not yet been

consideration important issues in business organizations. Hence the results of the stakeholders thinking and stakeholder concepts have became recognized and understood among business leader. The inability of the company to apply laws, rules, regulations and instructions related to the application of the principles of corporate governance and obligation of company to apply in weakness so that it is easy to protect the equity in the market and to protect to ensure the rights of shareholders. The research community consists of investors and shareholders in all listed companies for securities. The sample size study was determined by random sample stratified sample of the research community which is going to be evaluated to a number of arbitrators who are specialized professors to ensure the validity of the tool to problems.

CHAPTER-II

HISTORY AND EVOLUTION OF CORPORATE GOVERNANCE IN CORPORATE WORLD

HISTORICAL ANALYSIS

The term corporate governance is a vast subject which contains a long and rich history. It incorporates managerial accountability, board structure and shareholder rights. During 16 and 17 century, the issue of governance was started with the dating back to the East India Company, the Hudson's Bay Company, the Levant Company and other major chartered company.

For the next 200 years, corporations in general were small institutions with specific purposes such as transportation. In those days, corporations were not allowed to make political contributions, and could not own any stock in other companies.[4]

In 1970s, such name didn't come into vogue. This is the only term which is used in United States. After this within 25 years of corporate governance such topic becomes a hot topic for the academics, regulators, executives and investors. In mid-1970s and the end of 1990s, the term corporate governance was well-entrenched as academic and regulatory shorthand. After such development in this governance it analysis the inter-relationship between directors, executives and shareholders of publicly traded companies is to be conducted through the conceptual prism of corporate governance for the foreseeable future.

Corporate Growth Places Emphasis on Developing Corporate Governance

After World War II, the United States experienced strong economic growth, which had a strong impact on the history of corporate governance. Corporations were thriving and growing rapidly. Managers primarily called the shots and board directors and shareholders were expected to follow. In some cases, it was an interesting dichotomy; managers highly influenced the selection of board directors. Unless it came to the matters of dividends and stock prices, investors tended to steer clear from governance of matters.

[4]The History And Development Of Corporate Governance Finance Essay : Borja Gómez Tejera

In the 1970s, things start changing as the Securities and Exchange Commission (SEC) brought the issue of corporate governance to the forefront when it brings to an official corporate governance reforms. In 1976, the term "corporate governance" firstly it appeared in the Federal Register, the official journal of the federal government.

In the 1960s, the Penn Central Railway had diversified by starting pipelines, hotels, industrial parks and commercial real estate. Penn Central filed for bankruptcy in 1970 and the board came under public fire. In 1974, the SEC brought proceedings against three outside directors for misrepresenting the company's financial condition and a wide range of misconduct by Penn Central executives.

Around the same time, the SEC caught on to widespread payments by corporations to foreign officials over falsifying corporate records. During this era, corporations started to form audit committees and appoint more outside directors. In 1976, the SEC prompted the New York Stock Exchange (NYSE) to require each listed corporation to have an audit committee composed of all independent board directors, and they complied. Advocates pushed to get governance right by requiring audit committees, nomination committees, compensation committees and only one managerial appointee.

In 1980s, Corporate Governance brings a Counter- Reaction

In 1980s, the 1970s movement comes to an end for corporate governance reform due to a political shift to the right and a more conservative Congress. This era brought much opposition to deregulation, which was another major change in the history of corporate governance. Lawmakers put forth The Protection of Shareholders' Rights Act of 1980, but it was stalled in Congress.

Debates on corporate governance focused on a new project called the Principles of Corporate Governance by the American Law Institute (ALI) in 1981. The NYSE had previously supported this project, but changed their stance after they reviewed the first draft. The Business Round table also opposed ALI's attempts at reform. Advocates for corporations felt they were strong enough to oppose regulatory reform outright, without the restrictive ALI-led reforms. Businesses had concerns about some of the issues in Tentative Draft No. 1 of the Principles of Corporative Governance.

The draft recommended that boards appoint a majority of independent directors and establish audit and nominating committees. Corporate advocates were concerned that if companies implemented these measures, it would increase liability risks for board directors.[5]

Law and economic scholars also heavily criticized the initial ALI proposals. They expressed concerns that the proposals didn't account for the pressures of the market forces and didn't consider empirical evidence. In addition, they didn't believe that fomenting litigation would serve a purpose in improving board director decision-making.

In the end, the final version of ALI's Principles of Corporate Governance was so watered down that it had little impact by the time it was approved and published in 1994. Scholars maintained that market mechanisms would keep managers and shareholders aligned.

The "Deal Decade" Leads to Shareholder Activism

The 1980s was also referred to as the "Deal Decade." Institutional shareholders grabbed more shares, which gave them more control. They stopped selling out when times got tough. Executives went on the defensive and struck deals to prevent hostile takeovers.

State legislators countered takeovers with anti-takeover statutes at the state level. That, combined with an increased debt market and an economic downturn, discouraged merger activity. The Institutional Shareholder Services (ISS) was formed to help with voting rights. Shareholders struck back with legal defenses, but judges often favored corporate decisions when outside directors supported board decisions. Investors started to advocate for more independent directors and to base executive pay on performance, rather than corporate size.[6]

CONCEPTUAL ANALYSIS

A holistic view on Corporate Governance and protection of the stakeholder's right and interests. Here, the boards of directors address the shareholders rights for proving the effective guaranteeing of the remaining firm's stakeholders. The corporate governance and the concept of principles contained in the Organizations for Economic Cooperation and Development (OECD). Some countries like Nigeria, United States and United Kingdom have developed corporate governance principles with corporate social responsibility (CSR) by

[5]What Is the History of Corporate Governance and How Has It Changed? : Nicholas J. Price

[6]What Is the History of Corporate Governance and How Has It Changed? : **Nicholas J. Price.**

using the guidelines of the OECD principles and other sources of rules and principles of corporate governance which includes the Companies and Allied Materials Act, Investment and Securities Act and others. As per this corporate governance, it has spread a corporate business across the globe by highlighting the importance to specify the distribution of rights and responsibilities among various corporate stakeholders such as board members, managers, shareholders and outlining the rules and procedures for making decisions.[7]

In recent years, the separation of ownership and control in corporations, the shareholder model of corporate governance increasingly became associated with agency theory. Such theory holds managers are the agents of shareholders and capacity as agents are obliged to act the best financial interests of the shareholders of the corporations. Its main purpose is to promote their shareholders' economic interests. Many a times the stakeholder' views were present in corporate legislation. Such facts of the creditor's protection scheme are one of the fundamental principles. Such stakeholder vision articulated more expansive and proactive. It covers a whole host of non-shareholders' groups – employees, suppliers and so on which seeks to promote active corporate engagement in protecting the interests of these groups and promoting welfare.[8]

To check, weather the corporate governance intention and protections of stakeholders with corporate social responsibility in corporate organizations. To highlight the importance and distributions of rights and responsibilities among various members of the corporations such as board members, managers, shareholders and other stakeholders and outlining rules and procedures for making decisions. Its aim is to examine the structure by which the company's objectives are ways of doing these and monitoring performance.[9]

The structure of a company's board helps to protect shareholders by having checks and balances in place and ensuring there aren't any conflicts of interest between the board members and management of the company.

It is therefore important that organizations be acquainted with the rights of stakeholders as established by law. The organization should also engage in active co-operation with its stakeholders in creation of wealth, jobs and a financially sound enterprise.

[7] G20/OECD Principles of Corporate Governance : Angel Gurría OECD Secretary-General
[8] Semester VI Corporate Governance : MD College
[9] Corporate Governance and Protection of Stakeholders Rights and Interests : Kingsley O. Mrabure1, Alfred Abhulimhen-Iyoha2

The corporate governance is as old as the corporate sector itself; it has assumed centre stage only in the new age economy. In the global economy today, companies are built to last. The primary objective—of the management of any publicly-traded enterprise—is to enhance its values. An enterprise is expected to honor and protect the rights of other stakeholders including the local community. Increased competitiveness is all the more reason for board level management to institute corporate governance—on highly ethical grounds—across the spectrum of the organization. [10]

Corporate governance includes the sets of mechanisms and processes that help ensure that companies are redirected and managed to create value for their owners while concurrently fulfilling responsibilities to other stakeholders. It is the combination of processes, structures and relationships through which corporations are directed and controlled.[11]

The view of corporate governance often emphasizes the role of contracting [e.g., Armstrong, 2010] view corporate governance as "the subset of a firm's contracts that help align the actions and choices of managers with the interests of shareholders". Other definitions include other stakeholders.

For example, Shleifer and Vishny [1997] also include creditors among the parties protected by the corporate governance system, a system that they define as "the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment." Other authors avoid focusing on any specific party and define corporate governance more broadly as a set of (monitoring) mechanisms that influence managerial decisions [Larcker, 2007] or as the system to direct and/or control operations at a company Gillan and Starks, 1998.

EVOLUTION OF COMPANIES

In recent last some years, when sole proprietorship and partnership were the most preferable form of the business wherein the persons use to invest and earn profits out of the business for themselves. Though these form of businesses still exist but are not the most common form of business today as now the taste of the consumers has changed, technology has advanced manifold, etc., which require funds, huge funds and because of involvement of few persons in sole proprietorship or partnership this need of huge investment, production at large scale, etc,

[10]Corporate Governance- A conceptual Guideline : Arabinda Bhandari

[11] CORPORATE GOVERNANCE: THE STAKEHOLDERS PERSPECTIVE : Onyekachi .E. Wogu

was not possible. So to fulfill these needs company form of business came into existence, as also with the time demand shifted from traditional goods to the capital goods and technological products, which require huge amount of labor and capital, supply of which was not the possible for a handful of persons in an industries.[12]

An evolutionary understanding, grounded in evolutionary systems theory, can open possibilities for leadership and innovation towards sustainability. Complex systems, such as organizations, need to learn in harmony with the dynamics of their miles in order to co-evolve and create value. The paper concludes with a reflection on the implications of the evolutionary paradigm for business education.[13]

In the commercial sphere the principal medieval associations were the guilds of merchants, organizations which had few resemblances to modern companies but corresponded roughly to our trade protection associations, with the ceremonial and mutual fellowship of which we can see relics in the modern Freemasons and Livery Companies. Many of these guilds in due course obtained charters from the Crown, mainly because this was the only effective method of obtaining for their members a monopoly of any particular commodity or branch of trade. Incorporation as a convenient method of distinguishing the rights and liabilities of the association from those of its members was hardly needed since each member traded on his own account subject only to obedience to the regulations of the guild.

Hence, it was recognized, it appears at first to have been valued mainly because it avoided the risk of the company's property being seized in payment of the members' separate debts, rather than as a method of enabling the members to escape liability for the company's, and this was the reason that mainly contributed towards such a fast growth and evolution of the companies.

Background of English Company Law

Evolution of English Company Law incorporation seems to have been used only in connection with ecclesiastical and public bodies, such as chapters, monasteries, and boroughs, which had corporate personality conferred upon them by a charter from the crown or were deemed by prescription to have received such a grant. At the same time in the commercial sphere the principal medieval associations were the guilds of merchants,

6 Origin and Evolution of Companies : Rahul Kumar Singh

[13]THE EVOLUTION OF BUSINESS: LEARNING, INNOVATION AND SUSTAINABILITY IN THE 21ST CENTURY :Kathia Castro Laszlo, Ph.D.

organizations that had few resemblances to modern companies but corresponded roughly to the trade protection associations. Incorporation as a convenient method of distinguishing the rights and liabilities of the association from those of its members was hardly needed since each member traded on his own account subject only to obedience to the regulations of the guild. Trading on joint account, as opposed to individual trading subject to the rules of the guild, was carried on through partnerships, of which two types were known to the medieval law merchant the commend and the societal.[14]

The first type of English organization to which the name company was applied was merchant adventures for trading overseas. Royal charters conferring privileges on such companies are found as early as the fourteenth century, but it was not until the expansion of foreign trade and settlement in the sixteenth century that they become common. The earliest types were the so called regulated companies which were virtually extensions of the guild principles into the foreign sphere and which retained much of the ceremonial and freemasonry of the domestic guilds. Each member traded with his own stock and on his own account, subject to obeying the rules of the company, and incorporation was not essential since the trading liability of each member would be entirely separate from that of the company and the other members.[15]

The concept was separate trading by each member with his own stock but later instead of it, they started to operate on joint account and with a joint stock. This process can be traced in the development of the famous East India Company, which received its first charter in 1600, granting it a monopoly of trade with the Indies.

But even after that until the second half of the seventeenth century differentiation between the two types of company (unincorporated partnerships and incorporated companies) was not firmly established. At this time there was no limit to the number of partners, but in fact they were generally small in number and additional capital was raised by invitations or calls on the existing members rather than by invitations to the public.

The South Sea Bubble

[14]Inc: A Guide for Incorporated Associations in Western Australia

[15]East India Company; English trading company **:** The Editors of Encyclopedia Britannica

The concept of corporate form was brought in for the first time in United Kingdom wherein the body corporate could be brought into existence either by a Royal Charter or by a special Act of Parliament. Both methods were very expensive and dilatory.[16] Consequently, to meet the growing commercial needs of the nation, large unincorporated partnerships came into existence, trading, however, in corporate form. The memberships of each such concern being very large, the management of business was left to a few trustees resulting into separation of ownership from management. Rules of law were not being developed by that time which gave a chance to fraudulent promoters to exploit the public money. As a result, many spurious companies were created which were formed only to disappear resulting in loss to the investing public. The English parliament, therefore, passed an act known as the Bubbles Act of 1720, which, instead of prohibiting the formation of fraudulent companies, made the very business of companies illegal. This Act made no attempt to put joint stock companies on a proper basis so as to promote the interest of the industry and trade and also to protect the investors. An almost frenetic boom in company flotation's, which led to the famous South Sea Bubble, marked the first and second decades of the eighteenth century. Most company promoters were not particularly fussy about whether they obtained charters (an expensive and dilatory process), and those who felt it desirable to give their projects this hallmark of respectability found it simpler and cheaper to acquire charters from moribund companies, which were able to do a brisk trade therein.

HISTORY OF MODERN COMPANY LAW

The history of modern company law in England began in 1844 when the Joint Stock Companies Act was passed. The Act provided for the first time that a company could be incorporated by registration without obtaining a Royal Charter or sanction by a special Act of Parliament. The office of the Registrar of Joint Stock Companies was also created. But the Act denied to the members the facility of limited liability. The English Parliament in 1855 passed the Limited Liability Act providing for limited liability to the members of a registered company. The act of 1844 was superseded by a comprehensive Act of 1856, which marked the beginning of a new era in company law in England. This Act introduced the modern mode of creating companies by means of memorandum and articles of associations.

[16] Origin and evolution of Company Law : legalservices

The first enactment to bear the title of Companies Act was the companies Act, 1862. By these acts some of the modern provisions of the company were clearly laid down. First of all, two documents, namely, (a) the memorandum of association, and (b) articles of association formed the integral part for the formation of a limited liability company. Secondly, a company could be formed with liability limited by guarantee. Thirdly, any alteration in the object clause of the memorandum of association was prohibited. Provision for winding up was also introduced. Thus, the basic structure of the company as we know had taken shape. Sir Francis Palmer described this Act as the Magna Carta of co-operative enterprises. But the companies (Memorandum of Association) Act, 1890 made relaxation with regard to change in the object clause under the leave of the court obtained on the basis of special resolution passed by the members in general meeting. Then the liability of the directors of a company was introduced by the Directors' liability Act, 1890 and the compulsory audit of the company's accounts was enforced under the Companies Act, 1990.

The concept of private company was introduced for the first time in the companies Act, 1908 (the earlier ones were called public companies). Two subsequent acts were passed in 1908 and 1929 to consolidate the earlier Acts. The companies Act 1948, which was the Principal Act in force in England was based on the report of a committee under Lord Cohen. This Act introduced inter alia another new form of company known as exempt private company. Another outstanding feature of 1948 Act was the emphasis on the public accountability of the company. Generally recognized principles of accountancy were given statutory force and had to be applied in the preparation of the balance sheet and profit and loss account.

Further, the 1948 legislation extended the protection of the minority (Section 210) and the powers of the Board of Trade to order an investigation of the company's affairs (Section 164-175); and for the first time the shareholders in general meeting were given power to remove a director before the expiration of his period of office. The independence of auditor's vis-a-vis the directors were strengthened.

Charter Company

The type of corporations which was involve in the early modern era in Europe. They enjoy certain rights and privileges and were bound by certain obligations, under a special charter granted to them by the sovereign authority of the state, such charter defining and limiting those rights, privileges, and obligations and the localities in which they were to be exercised.

The charter usually conferred a trading monopoly upon the company in a specific geographic area or for a specific type of trade item.

The earliest English chartered companies were the Merchant Adventurers and the Merchant Staplers. Such early companies were regulated companies, deriving the principles of their organization from the medieval merchant guilds. The regulated company was a corporation of merchants, each of whom traded on his own account but was subjected to a rigid set of common rules that regulated his operations within narrow limits.

A great increase in the number and activities of the chartered companies took place during the second half of the 16th century, when the English, French, and Dutch governments were ready to assist trade and encourage overseas exploration. Changes also occurred in the organization of chartered companies. The regulated company, which had been very convenient for trading with countries where conditions were stable, was not so suitable for ventures to remoter lands, where the risks, commercial and political, were greater. To meet the requirements of the new trading conditions, the joint-stock organization, in which the capital was provided by shareholders who then participated in the profits from the joint enterprise, was evolved. In some cases, the companies alternated between one form and the other. In all charters, provisions were inserted to secure the "good government" of the company.

In England two of the earliest and most important of overseas trading companies were the Muscovy Company (1555) and the Turkey Company (1583). They had important effects on international relations, for they maintained English influence and paid the expenses of ambassadors sent to those countries. Other English companies were established in this period for similar trading ventures: the Spanish Company (1577, regulated); the East land Company, for trade with the Baltic (1579, regulated); and the French Company (1611, regulated).

The first company for African trade was founded in 1585, and others were granted charters in 1588, 1618, and 1631. But it was the chartered companies that were formed during this period for trade with the Indies and the New World which had the most wide-reaching influence. The East India Company was established in 1600 as a joint-stock company with a monopoly of the trade to and from the East Indies. Its political achievements form a large part of the history of the British Empire, and its economic power was enormous, contributing substantially to the national wealth and causing the company to be the centre of most of the economic controversies of the 17th century.

In North America the English chartered companies had a colonizing as well as a trading purpose. Although the Hudson's Bay Company was almost wholly devoted to trade, most companies--such as the London Company, the Plymouth Company, and the Massachusetts Bay Company--were directly involved in the settlement of colonists. Elsewhere, chartered English companies continued to be formed for the development of new trade--for instance, the short-lived Canary Company in 1665, the Royal African Company in 1672, and the South Sea Company in 1711. There was frantic speculation in the shares of the South Sea Company, resulting in a severe setback to joint-stock enterprise. The Bubble Act of 1720 was designed to make it much more difficult to obtain a charter.

In France and the Netherlands, chartered companies had also been used for similar purposes by the governments. In France, from 1599 to 1789, more than 70 such companies came into existence. Under J.B. Colbert the French East India Company was founded (1664), and the colonial and Indian trade was placed in the hands of chartered companies in which the king himself had large financial interests. The French companies, however, were largely destroyed by the "Mississippi scheme" of John Law, in which trading companies like the Senegal and French East India companies were incorporated in a plan to take over the public debt. The financial crash in 1720 destroyed public confidence, and although a new Company of the Indies existed until 1769, the chartered company was virtually dead. In the Netherlands the Dutch East India and West India companies were the basis of the commercial and maritime supremacy of the Dutch in the 17th century.

The success of the East India companies caused the foundation of the Ostend Company, whereby the Holy Roman emperor Charles VI sought unsuccessfully to acquire the trade of England and the Netherlands.

The development of the modern limited-liability company or corporation under successive company acts led to a decline in the importance of chartered companies. Some of the older ones still exist, however, including the Hudson's Bay Company.

Merchant Adventures and the growth of Domestic Companies

The first type of English organization to which the name company was generally applied was that adopted by merchant adventurers for trading overseas. Royal Charters conferring privileges on such companies are found as early as the fourteenth century, but it was not until the expansion of foreign trade and settlement in the sixteenth century that they became

common. The earliest types were the so-called regulated companies which were virtually extensions of the guild principle into the foreign sphere and which retained much of the ceremonial and freemasonry of the domestic guilds. Each member traded with his own stock and on his own account, subject to obeying the rules of the company, and incorporation was not essential since the trading liability of each member would be entirely separate from that of the company and the other members. Charters were nevertheless obtained largely because of the need to acquire a monopoly of trade for members of the company and governmental power over the territory for the company itself.

After that, the partnership principle of trading on joint account was adopted by the regulated companies which became joint commercial enterprises instead of trade protection associations. At first, in addition to the separate trading by each member with his own stock, and later instead of it, they started to operate on joint account and with a joint stock.

Such process can be traced in the development of the famous East India Company, which received its first charter in 1600, granting it a monopoly of trade with the Indies. Originally any member could carry on that trade privately, although there also a joint stocks to which members could, if they wished, subscribe varying amounts. At first this joint stock and the profits made from it were re-divided among the subscribers after each voyage.

From 1614 onwards, however, the joint stock was subscribed for a period of years, and this practice subsisted until 1653 when a permanent joint stock was introduced. It was not until 1692 that private trading was finally forbidden to members. Until this date, therefore, the constitution of the East India Co. represents a compromise between a regulated company, formed primarily for the government of a particular trade, and the more modern type of company, designed to trade for the profits of its members. This new type was called a joint stock company, a name which persists until the present day, although few of those who use it realize that it was adopted to distinguish the companies to which it relates from a once normal, but now obsolete, form.

Growth of Domestic Companies

In 17th century, the powerful monopolistic companies were already coming to be regarded as anachronisms; it was realized that their governmental powers were properly the functions of the State itself and that their monopolies were an undue restraint on the freedom of trade. Most of them atrophied; but some survived for a time by converting, as did the Levant and

Russia companies, from the joint stock to the regulated form (a strange reversal of the normal trend designed to allow greater freedom to their members) and others, like the Royal Africa Company, by completely relinquishing their monopolies. After the Revolution of 1688, it seems to have been tacitly assumed that the Crown's prerogative was limited to the right to grant a charter of incorporation, and that any monopolistic or other special powers should be conferred by statute.[17]

The decline in the foreign-trading companies was, however, accompanied by an immense growth in those for domestic trade. Some of these were powerful corporations chartered under statutory powers (such as the Bank o England) the objects of which resembled those of the public corporations of the present day, but most were public companies in the sense that they invited the participation of the investing public. As regards these, the close relation between incorporation and monopoly was still maintained, for most companies were incorporated in order to work a patent of monopoly granted to an inventor. Till the end of 17th century some idea had been gleaned of one of the primary functions of the company concept- the possibility of enabling the capitalist to combine with the entrepreneur. The share dealing is common and stock-broking was a recognized profession, which abuses the legislature sought to regulate as early as 1696.

But it would be entirely misleading to suggest that there was in any sense a company law; at the most there was embryonic law of partnership which applied to those companies which had not become incorporated and, with modifications required by the terms of the charter and the nature of incorporation, to those which had. From the end of the 17th century the term directors began to supersede assistant governors.

After that, the East India Company in the later part of 18th century. From then onwards, there was no going back and as times went by, numerous companies with huge capital investments came to be registered.

Business life, as a legitimate money making practice, it is not the "universal human activity it is sometimes thought to be. It is, instead a remarkably modern and culturally peculiar phenomenon" (Solomon & Hanson, 1983) whose infancy was triggered by the industrial revolution during the 18th century and supported by individualism and the Calvinist

[17] Shubodh : Karnataka University

Protestant ethic. From an evolutionary perspective, it is not inconceivable to consider the transformation of the ends and means of business.

"For thousands of years, business existed only at the fringes of society. Society thought little of people in business, and people in business expected little of society. Profit was their only reward because power, social status, and even social acceptability were closed to them. In this context, the idea making a profit was the only goal of business might have some sense" **(Solomon & Hanson, 1983).** But in a time when the values of the business world largely influence the values of society as a whole and the possibilities of future generations, the purposes and goals of business need to be questioned and expanded.

Merchant (1996) makes a useful distinction between different ethical approaches. She explains the paradigmatic assumptions of three kinds of ethics—egocentric, homocentric, and eccentric ethics. Her framework helps to identify the dominant ethical stance of modern business: the egocentric ethic. In this approach, the well being and happiness of the individual is sought. It encourages the individual to act in ways that brings about the personal good, assuming that a society constituted of fulfilled individuals equals the collective good. However, there are some pitfalls to this ethical position. "Because egocentric ethics is based on the assumption that the individual good is the highest good, the collective behavior of human groups or business corporations is not a legitimate subject of investigation" (Merchant, 1996). Also, "it includes the assumption that humans are 'by nature' competitive and capitalism is the 'natural' form of economics" and as a result "ecological effects are external to human economics and cannot be adjudicated".

The point is that the trickle down economic theory does not work in reality. Rich people become richer while poor people become poorer. That is, the egocentric ethic does not bring about social good. Another possibility is the homocentric ethic, which goes beyond individualistic self-interest in order to promote the collective good. However, it assumes that humans have a special place in the universe and this entitles them to exploit the rest of the world for their own purposes. So the homocentric ethic is good but not good enough as a new business ethic. The eccentric ethical approach is the one that can bring a balance between human progress and preservation of the natural world. The eccentric ethic embraces a systems view of the world – in contrast to the ego and homocentric ethics which are rooted in a reductionist and mechanistic paradigm.

Koestenbaum (in Labarre, 2000) points out that "an evolutionary transformation of who we are, how we behave, how we think, and what we value" is necessary to resolve the paradox between business as usual and the contemporary global challenges that call for social and environmental responsibility. He connects this evolutionary transformation to the basic human quest for meaning, purpose, and fulfillment which have been left behind in the hectic life style of industrial societies. Unless such issues of purpose and meaning are addressed, humans cannot make intelligent decisions come Monday morning – much less develop a long term strategy toward sustainability. Human depth makes business sense, he argues, and it is precisely the depth required to move from the egocentric business ethic to a broader perspective that advances the well being of individuals, societies, ecosystems and future generations. "The more you understand the human condition, the more effective you are as a business person" and the more we understand the interconnected nature of the universe, the more competent we are as shapers of sustainable and evolutionary organizations. To focus beyond the bottom line does not implies forgetting about the "profit motive" but transcending it toward a mode of wealth creation that pursues personal, social and ecological gains in addition to financial results. "The gift of working for sustainability is it means fullness" **(Paul Hawken in Nattrass & Altomare, 1999).**

The business world is heavily influenced by images and metaphors that shape the strategies, structures and processes of organizations. Solomon (1999) analyzes common metaphors that he considers ways not to think about business. "How a person thinks about business – as a ruthless competition for profits or as a cooperative enterprise whose aim is the prosperity of the community – perhaps much of his / her behavior and attitudes toward fellow employees or executives, competitors, customers, and the surrounding community"

Introduction of Corporate Governance

"Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society."

- Sir Adrian Cadbury

Here, the researcher is saying that the corporate governance holds the balance of corporate environment of an economic, legal and institutional environment between individual and communal goals. Such limited resources to make the productions in a form of large quantities.

"When a man says he approves of something in principle, it means he hasn't the slightest intention of carrying it out in practice." **- Otto von Bismarck**

A set of process, customs, policies, laws and institutions which affects the way to corporate and directs the administrative or controlled. It also includes the relationships among many stakeholders which involved in governing and achieves the goal of corporations. The stakeholders are the shareholders/members, management and the board of directors and other stakeholders include labor (employees), customers, creditors, suppliers, regulators and the community at large. It ensures the certain accountability of individuals in organizations through mechanisms which try to reduce or eliminate the principal-agent problem.

Corporate governance is a system to operate, control and structure a company with a view to achieve a long term strategic goals to satisfy shareholders, creditors, employees, customers and suppliers to comply with the legal and regulatory requirements, apart from meeting environmental and local community needs. It protects the long term interests to enhance the values of shareholders and other stakeholders. It harmonizes the rights and interests of shareholders and stakeholders by continuous exercise of striking balance.

The primary objective—of the management of any publicly-traded enterprise—is to enhance its values. An enterprise is expected to honor and protect the rights of other stakeholders including the local community. Increased competitiveness is all the more reason for board level management to institute corporate governance—on highly ethical grounds—across the spectrum of the organization. Worldwide economic crisis and corporate debacles have proven the adequacy of regulatory frame work to bring the best out of corporate management.

DEFINITIONS BY SCHOLARS

Robert Ian (Bob) Tricker (who introduced the word corporate governance for the first time in his book in 1984):- "Corporate Governance is concerned with the way corporate entities are governed, as distinct from the way businesses within those companies are managed. Corporate Governance addresses the issues facing Board of Directors, such as the interaction

with top management and relationships with the owners and others interested in the affairs of the company".

James D. Wolfensohn (Ninth President World Bank):- "Corporate Governance is about promoting corporate fairness, transparency and accountability.

Cadbury Committee, 1992:- "The definition of corporate governance most widely used is "the system by which companies are directed and controlled".

Organization for Economic Co-operation and Development (OECD):- "Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined."

Report of SEBI committee (India):- "Corporate Governance as the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders".

Institute of Company Secretary of India (ICSI) :- " Corporate Governance is an application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility, for sustainable development of all stakeholders".

The word Governance is derived from "gubernatorial" it means to steer. Corporate or a Corporation is derived from Latin term "corpus" which means a body. Corporate Governance would mean to steer an organization in the desired direction. The responsibility to steer lies with the board of directors/governing board. Corporate Governance refers to the way a corporation is governed. It is the technique by which companies are directed and managed. It means carrying the business as per the stakeholders' desire. It is actually conducted by the Board of Directors and the committees concerned for the benefit of individual and societal goals, as well as, economic and social goals.[18]

The corporate governance lays down the framework for creating a long term trust between companies and the external providers of capital, it would be wrong to think that the importance of corporate governance lies solely in better access of finance.

[18] Corporate Governance under the provision of the Companies Act, 2013 : CS S Raja Babu

Corporate Governance in India has undergone a paradigm shift by gradually becoming more conscience-driven to interests of customers, employees, vendors and regulators. With the recent spate of corporate scandals and the subsequent interests in corporate governance, a plethora of corporate governance norms and standards have sprouted around the globe. The Sarbanes Oxley Legislation in the USA, the Cadbury Committee recommendations for European companies and the OECD principles of corporate governance are perhaps the best known among these. Corporate Governance Practices are just a little over a decade old and mostly focused on listed public companies.

The Companies Act, 2013 was passed by the Rajya Sabha on 8th August, 2013 paving way for a new Company Law and received the assent of the president on 29th August, 2013. The Act, 2013 replaces the existing Companies Act, 1956 which was enacted 57 years ago. The new Act seeks to usher in more transparency and governance in the corporate bodies besides creating the necessary environment for growth in the present global structure. It has the potential to be a historic milestone, as it aims to improve corporate governance, simply regulate the interests of minority investors and for the first time states the role of whistle-blowers. It encourages good governance practice by placing the onus on independent directors to bring oversight in the functioning of the Board and protect the interest of minority shareholders.

Corporate Governance deals with the way the investors make sure they get a fair return on their investment. In Corporate Governance, there is a clear distinction between the role of the owners of a company (the shareholders) and the managers (the executive board of directors) when it comes to making effective strategic decisions.

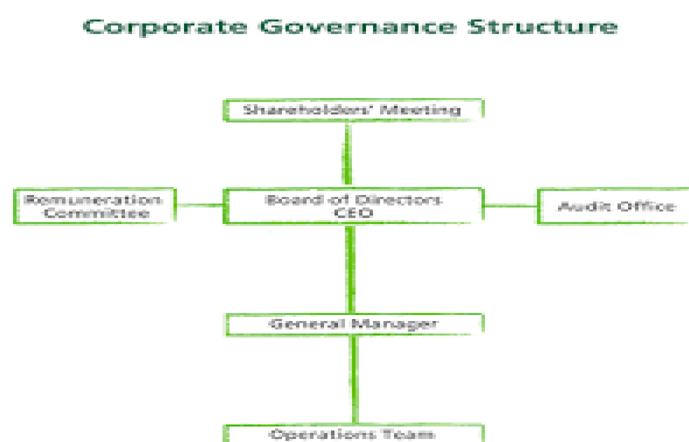
In today's market-oriented economy, with the help globalization the importance of corporate governance is growing. This is due to the fact of governance being an important way of ensuring transparency that makes sure the interests of all shareholders (big or small) are safeguarded.

Nature and Scope

Corporate Governance created for deciding a company's performance and direction. Its rules and regulations for the executive of an incorporated firm who agree to take responsibility towards the shareholders. It is a board term in today's business environment. It has become a widely discussed subject and very important consideration for investors around the world.

Investors and governments have start demanding better governance practices from all particular companies after over corporate scandals such as Enron, Parmalat, Xerox, World Com, Satyam and many others during early century. The legal outfits of corporate governance can be customized to fit the meticulous choice of each wearer.

The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies.



Corporate governance is a framework of systems, policies, procedures and controls through which an entity:-

[1] It promotes the sound and prudent management of its business;

[2] Protects the interests of its Customers and stakeholders; and

[3] Places clear responsibility for achieving Rule 3.3.41(2)(a) and (3) on the Governing Body and its members and the senior management of the Authorized Person[19].

[19] Scope of Corporate Governance : ADGM Legal Framework

2. Many requirements designed to ensure sound corporate governance of companies, such as those relating to shareholder and minority protection and responsibilities of the Board of Directors of companies, are found in the company laws and apply to Authorized Persons. Additional disclosure requirements also apply if they are listed companies. The requirements in this Rule book are tailored to Authorized Persons and are designed to augment and not to exclude the application of those requirements.

3. Whilst Rule 3.3.41 deals with two aspects of corporate governance, the requirements included in other provisions under Rules 3.2 and 3.3 also go to the heart of sound corporate governance by promoting prudent and sound management of the Authorized Person's business in the interest of its Customers and stakeholders.

These requirements together are designed to promote sound corporate governance practices in Authorized Persons whilst also providing a greater degree of flexibility for Authorized Persons in establishing and implementing a corporate governance framework that are both appropriate and practicable to suit their operations.

4. Stakeholder groups of an Authorized Person, who would benefit from the sound and prudent management of Authorized Persons, can be varied but generally encompass its owners (e.g. its shareholders), Customers, creditors, Counter parties and Employees, whose interests may not necessarily be mutually coextensive. A key objective in enhancing corporate governance standards applicable to Authorized Persons is to ensure that they are soundly and prudently managed, with the primary regard being had to its Customers.

5:- Accountability means a situation in which any person is responsible and needs to give a satisfactory reason for anything wrong in work. Corporate governance makes accountability.

(a) Accountability ensures that working management i.e. Managers, Employees are responsible to the Board of Directors (BOD).

(b) Further, Accountability Ensure that the BOD is accountable to shareholders if anything bad happens.

6:-Fairness it protects the rights of Shareholders.

(a) CG treats all shareholders equally including minorities

(b) Provide effective redress for any violations i.e. Customer care

7:- Transparency, i.e. right to information, timelines, integrity of the information produced. Here, the Corporate Governance makes ensure timely, accurate disclosure on all material matters of the company including the financial situation, performance, ownership

8:- Clarity in responsibility to enhance accountability.

9:- Quality and competence of Directors and their track record.

10:- Checks and balance in the process of governance.

11:- Adherence to the rules, laws and spirit of codes.

12:- In Independence of the Corporate Governance it makes procedures, rules, and structures in place to minimize or avoid conflicts of interests as well as it appoints Independent Directors and Advisers i.e. to take the free decision from the influence of others.

Importance of Corporate Governance

1:- Corporate governance ensures that a properly structured Board, capable of taking independent and objective decisions is at the helm of affairs of the company. it lays sown the framework for creating a long term trust between the company and external providers of capital.

2:- It improves strategic thinking at the top by inducing independent directors who bring a wealth of experience and a host of new ideas.

3:- It rationalizes the management and monitoring of risk that a corporation faces globally.

4:- Corporate governance emphasizes the adoption of transparent procedures and practices by the Board, thereby ensuring integrity in financial reports.

5:- Corporate governance is important to promote the honest and transparent monitoring of each and every activity of the company. It helps the company to maintain the rules and standards of the company. Corporate governance also assists the training and development of directors so that they can perform well in the decision-making process[20].

6:- Foreign capital means getting capital investment from foreign countries. Foreign capital markets want high standards for efficiency & transparency of the company. Good corporate governance is important to bring efficiency & transparency to the company which helps the global market players to gains credibility and trust.

7:- Financial reporting is the financial results of a company that are published to its stakeholders and the public. Corporate governance ensures sound, transparent, and credible financial reporting. Corporate governance also makes accountability (Responsibility) of employees & managers for their work to increase their effectiveness.

8:- Shareholder communication refers to the right to vote in the decision-making process. It is the way in which investors can communicate with the companies. Corporate governance is important to set up the right for shareholder communication. Nowadays more importance is giving to corporate governance.

9:- The next importance of corporate governance is to protect the rights of investors. Every investor wants their rights to be protected by companies. Bringing corporate governance in a company can protect investors' interests by improving the efficiency of corporate enterprises.

COMPANIES AND INCORPORATION

A company comes into existence is generally by a process referred to as incorporation. Once a company has been legally incorporated, it becomes a distinct entity from those who invest on capital and labor to run such company.

Generally, to form a new company the first step is known as "promotion". In this, a person persuades others to contribute capital to a proposed company before it is incorporated. Such type of person is known as promoter of a company. Such type of promoters can enter into a

[20] Meaning, scope and importance of corporate Governance : GK

company on a contract basis, before or after it has been granted a certificate of incorporation and arrange share issues in the name of the company.

As per section 3 to 22 of the companies act, 2013, as read with the Companies (Incorporation) Rules, 2014 make under Chapter II of the Act which covers the provisions with regard to incorporation of companies and matters incidental thereto.

Though there was no distinction between unincorporated partnership and incorporated companies yet the incorporation had certain legal advantages. Incorporation enabled the company to sue outsiders and its own members; possession of a common seal facilitated the distinction between the act of the company and its members. This incorporation process led to the separation of management from ownership i.e. fund subscribes. Company, a legal entity distinct from its members cannot act or run business by itself. Legal fiction created an imaginary personality, but that it was not a sufficient to carry on the business. Due to factual necessity it was compelled to depend upon same human agencies, which in the evolution of company law called as Board of Directors or Managers or Governors of the Company. The most important advantage of incorporation is limited liability, surprisingly at this stage it was not recognized by trading companies, but subsequently applied to trading companies.[21]

The object of limited liability, when it was introduced was to avoid the risk of the company's property being seized in payment of member's debt5 rather than as method of enabling the members to escape liability for the company's debt. Principle of limited liability 'was' as well as 'is' an attraction for investor's. By investing or agreeing to invest a fixed sum he can take part and become factually part owner of the company.61 However, to get this benefit, as long as the company is going institution they cannot exercise the ownership rights. The property and money of the company is managed and dealt by the company itself but in fact managed by the Board of Directors. This absence of control over the property and money enabled the managers to misuse or abuse it to the detriment of the interest of the investors

C.A.Cook, regarding the origin of corporation said that, the corporation is first of all an origin of government, ecclesiastical and municipal, which controls the activities of its members, exercise jurisdiction over them and negotiates on their behalf with other corporations. It is an institution applied to a pubic purpose and although it owns property and tends towards great wealth by reason of its immortality, it is not a property in itself. The

[21] By Limited Liability Act, 1855 (U.K.)

members are members of it rather than part owners, they submit much of their daily lives to its jurisdiction and its property is held for the limited interest of their benefited. The joint stock company has become the principle organ of private economic enterprise, which retains fragment of the character of its 16th century ancestors. The nature of corporate control has also changed. Member's function is to appoint representatives to control the management of their living enterprise".

The observation of C.A.Cook is that there was change in the management of the corporation i.e. company. The role of members is limited to appointment of their representatives and these representatives are managing the company's business. In case of any mismanagement by managers, that has to be regulated by law[22].

A company, which owes its incorporation to statutory, any authority cannot effectively do anything beyond the powers expressly or impliedly conferred upon it. The purpose of the restriction is to protect investors in the company so that they may know the objects in which their money is to be employed. This enabled the investors to make decision as to investment and secondly to protect creditors by ensuring that the company's fund are not dissipated. [23]

Prior to the principle of limited liability there was no much scope to speak of good Corporate Governance, as the liability of members was unlimited, though the Act of 1844 permitted for the incorporation of joint stock companies, but once the principle of limited liability was recognized there was great need to protect the interest of investors and creditors. To ensure safe zone to investors and creditors the court and legislature have devised several principles and regulations by enacting various laws. At the same time by the companies Act, in India and as well as in England, investors are invested with certain powers and conferred certain rights. The aim of all these exercise is to ensure good Corporate Governance.

[22] C.A. Cooke., Corporation Trusted Company, An Essay in Legal History,(Manchester : Manchester University Press 1950), at pp 17-18.
[23] Super note pg53

CHAPTER III

UNDERSTANDING ON NATIONAL (INDIA) and INTERNATIONAL (U.S.A. & U.K.) CORPORATE GOVERNANCE

National Corporate Governance

Antiquity of Corporate Governance in India

Corporate Governance is a vast concept and its relevance today in business can be seen as development of welfare concept. Welfare of business means not only the growth and development of business in terms of profit and market share, but also to see the way overall growth is attained in the society. In this process, it requires lot of accountability and commitment among the various authorities within the organization. Corporate Governance is not a new concept and this existed long back. The history of effective Corporate Governance can be traced back to Ancient period. Today the approach of Corporate Governance is talked more from the point of business but in Ancient India, it was about over all administration of state. It talked about how the king used to manage his subjects through effective Governance.

The ancient period of India is studied in three heads are:-

[1] Vedic Period

[2] Mauryan Period

[3] Gupta Period

Such study of an Ancient Corporate Governance shed some light on the evolution of the present Corporate Governance which is more specific to business approach. Many ideas practiced and the system in usage to governing business entity. Today, every business entity is trying to follow ancient system and its reflections are seen in today's business world. [24]

Five elements of Governance

As we know, our universe is governed with 5 elements in nature. Such type of governance is every where without these elements we cannot aspect any life in this earth. The elements of such nature bring existence in different types of nature. It ensures countries limitation is

[24] The Antiquity of Corporate Governance of India

going to be overcome through partnership and collaboration. Such type of governance which bring imbalances are:-

The major context of Corporate Governance which tells that how business should govern elements of nature are:-

Land - Being Grounded

- Corporate need to be grounded and look at things as others sees them
- Fundamentals of Corporate Governance are about dealing with the ground realities from all the stakeholders' perspectives including the employees

Water - Being Flexible

- Corporate should be Adaptive and Flexible
- Understanding matters deeply than looking at its surface employees

Air - Invisible Presence

- Governance needs to be invisible yet exist everywhere like air.
- It should transmit the sounds of governance to the right levels as to the true attribute of air which transmits sound and It will show its color if something is mixed up.

Fire - Destroying Evil

- Corporations should have the fire to clear the evil forces that hinders the growth of the Organization.
- The governance should be structured in a way that it is clearly seen as a lethal weapon to all the destructive forces.

Sky - Endless possibilities

- Even in utmost turmoil, one thing that holds us together is Hope and the endless possibilities
- Corporate should strive to achieve its goals. The rule is very simple - The possibilities are endless. Sky is the limit.

Ways of Good Corporate Governance which helps to give growth to an organization

[1] While developing appropriate strategies it would absolutely help the organization to achieve best result in the achievement of stakeholder objectives.

[2] To attract, motivate and retain the talent in the organization.

[3] To create a secure and prosperous environment and improves an operational performance.

[4] To manage and mitigate risk and protect and enhance the company's reputation.

IMPACT OF KAUTILYA'S ARTHASHASTRA IN TODAYS GOVERNANCE

Kautilya's Arthashastra it states that for good governance, all administrators, including the king were considered servants of the people. Kautilya's opinion regarding Corporate Governance is:- "King has no individuality of his own. He is for the people and of the people." In short CSR was differently but articulately explained by Kautilya's. Thus, CSR is not a recent Western phenomenon. It is certainly not new to India – it has been a part of our culture for thousands of years.

Kautilya's fourfold duty of a king:- The substitution of the word

State = Corporation

King = CEO or the board of a corporation.

Raksha	Raksha = protection = **Risk Management**
Vriddhi	Vriddhi = growth = **Stakeholder Value Enhancement**
Palana	Palana = maintenance/compliance = **compliance to the law in letter and spirit.**
Yogakshema	Yogakshema = wellbeing of society through the King = **Corporate Social Responsibility.**

Ancient to Today's Corporate Governance

In today's competitive world of business, the question of survival depends totally on the effective Corporate Governance. Such concept is slowly and slowly shifting towards welfare objectives, it can be welfare of stakeholders, investors, environment, society, nation etc which the business should try to achieve. This is exactly same as what it was told in ancient period.

As per ancient Corporate Governance:- Fear plays a key role in an organization, harness it wisely - In the Bhagavata, Kansa kills babies. Krishna kills Kansa. In the Ramayana, Ravana abducts wives of other men, and seduces them. Ram kills Ravana. In the Devi Purana, the asuras trouble for devas. Durga kills the asuras. As in the aforesaid scenarios the expression of Krishna and Ram and Durga is an artwork. There all are at peace. They are simply aware of fears of humanity. As per, the responsibility towards all the stakeholders - The Arthashastra affirms that an organization can profit as well as sustain long-term advantage if its leader conducts business in an ethical and socially responsible manner, with responsibility towards all stakeholders. Always keep the employees first - Chanakya stresses that the satisfaction of a leader lies in the welfare of his people, and needs to be observed as a fundamental principle in a leader's decisions. As today's leaders struggle with the right way forward in adopting new technologies, this principle could offer a simple but powerful guide. In the Mauryan and Gupta period, the major decisions relating to welfare of the kingdom was taken on collective basis. One important thing about good governance in Mauryan empires was the appointment of spy's to monitor and control illegal activities and corruption in the administration.[25]

As per today's Corporate Governance:-At the work place, everyone is in fear that if investor gets afraid the company will lose his investment. The director is worried if his directives are not taken seriously. Managers are afraid if they are not managing the crisis well. Executives are frightened into submission by their bosses, etc. But when these fear get a great fuel for the leader, he/she is unable to focus on the job at hand. Appreciating the fear within enables us to appreciate the fear without. We will be able to empathize, comfort, inspire, lead, challenge. If a leader were agile and responsive to change without keeping in mind the responsibility for all stakeholders, the benefit to business would be short-lived. In turn, if a leader would be aware of this responsibility but be heavy-footed in response to change, it might result in loss of profits and therefore a lack of resources necessary to undertake responsibility. If a leader were agile and responsive to change without keeping in mind the responsibility for all stakeholders, the benefit to business would be short-lived.

In turn, if a leader would be aware of this responsibility but be heavy-footed in response to change, it might result in loss of profits and therefore a lack of resources necessary to undertake responsibility. One of the most important areas in corporate governance is

[25] The Antiquity of Corporate Governance in India

decision making. While making the decision the corporate affairs should be taken keep in mind that not only the promoters and owners but also who rely and depend on corporate affairs i.e. customers, suppliers, etc. This can be related to appointment of internal auditors today in business. Internal Auditors almost perform the same duties, they check the areas where there is chances of embezzlement and corrupt practices and warns management to take appropriate decisions.

Corporate Governance:

Regulatory Framework

We all are aware of Satyam scam which is the India's biggest corporate scam. The scam is all about corporate governance and it is regarded as the 'Debacle of the Indian Financial System'. Ever since this scam the concern for good corporate governance has increased phenomenally. The Cadbury Committee defined Corporate Governance as "the system by which companies are directed and controlled" in its report called Financial Aspect of Corporate Governance published in the year 1992. In general words Corporate Governance means set of rules and regulations by which an organization is governed, controlled and directed. It is conducted by the Board of Directors or the concerned committee for the benefit of the company's stakeholders.[26]

Corporate Governance extends beyond corporate law. Its fundamental objective is not mere fulfillment of the requirements of the law but to ensure the commitment of the Board in managing the company in transparent manner to involves ethics for maximizing long-term shareholder value. It has enough laws to exist to take care of many of these investor grievances, the implement and adequacy of penal provisions have left lot to be desired. The real onus to achieve the desired level of Corporate Governance thus lies in the proactive initiatives taken by the companies themselves and not in the external measures.

In India, the legal and regulatory framework of Corporate Governance is broadly introduced in the Companies Act, 2013 as well as Clause49 (Revised) of the Listing Agreement of Stock Exchanges.

26 Regulatory framework for Corporate Governance in India: Anubhav Pandey

Key changes introduced by the Companies Act, 2013:-

[1] Board Composition:-

[i] Number of Directors

[ii] Companies need to have following class of directors: Resident Directors, Independent Director and Woman Director.

[2] Committees of the Board:-

[i] Audit Committee (177)

[ii] Nomination & Remuneration committee (178)

[iii] Stakeholders Relationship Committee

[iv] CSR Committee

[v] Risk Management

[vi] Internal Financial Committee & its adequacy

[vii] Board Meeting and Processes.

As the Companies Act,2013 has introduced significant changes regarding the board composition and focus on board processes, as certain of these changes may overly prescriptive, a closer analysis leads to a compelling conclusion that emphasis on board processes, which is over a period of time it would institutionalize good corporate governance and not-make governance over-dependent on the presence of certain individuals on board.

Clause49: Listing Agreements:-

Clause 49 of the Listing Agreement with the stock exchanges, which is derived from the Sarbanes & Oxley Act, is applicable only to the listed companies. Its motive is to improve the quality of corporate governance by insuring appointment of independent directors; strengthening the role of Audit Committee; disclosure and transparency in financial reporting. It makes the CEO and CFO responsible for putting in place risk management and internal control system in critical areas of operations of their companies. Some provisions which come under Clause49 are as follows:-

[i] The Board of Directors [II] Audit Committee

[iii] Subsidiary Companies [iv] Disclosures

[v] CEO/CFO Certificates

[vi] Report on Corporate Governance [vii] Compliance[27]

Corporate Governance : Reforms

Corporate Governance Reforms (CGRs) is a deliberate intervention in a country's corporate governance tradition by the state, security and exchange commission, or stock exchanges. It is usually undertaken through publication for a set of codified corporate governance norms or amendments to countries' corporate and securities laws pertaining to the role and composition of the board of directors and board committees; the appointment and rules of operation applying to external auditors; the distribution of rights.

As the Securities and Exchange Board of India (SEBI) has issued revised clause 49 of the listing agreement for all listed companies in India. As they include protecting rights of shareholders, timely disclosures, preventing of insider trading and equitable treatment of shareholders. It further states that rights of all the stakeholders must be recognized and respected. There should be transparency in financial and non financial disclosures. The duties of the board should be clearly published and aligned with the interest of the stakeholders.

Improvement of Corporate Governance acquired global attention; India cannot be a silent spectator. To cope with the global demand, to attract foreign investment as well as to protect domestic investors, it has taken in right spirit and adopted good corporate practices of other countries. This is evident from the various legislative changes being brought in, in the last couple of years in corporate legislation and law relating to capital market.

All these changes were made on the recommendations of various committees, such as:-

[1] CI.I. Committee on Code of desirable Corporate Governance, 1998

[2] UTI Committee on Code of Governance 1999

[3] Kumar Mangalama Birla Committees on Corporate Governance, 2000.

[4] Naresh Chandra Committee on Corporate Audit and Governance, 2002

[27] Corporate Governance – All you want to know: taxguru.in

[5] N.R.Narayan Murthy Committee (SEBI) 2003.

As per Union Budget, 2021-22, the Indian Corporate law has regime certain reforms in this pandemic year are:- [28]

[1] This budget directly affects to the Start-ups and Innovators, such budget proposes to incentivize the incorporation of **One Person Companies (OPCs).** The Companies (Incorporation) Second Amendment Rules, 2021 have been notified and same shall come into force and effect from April 01, 2021. Here, are some special or beneficial amendments of start-ups are as follows:-

[1] the conversion of private companies into OPCs have been made easier by removing the restrictions on turnover and paid-up share capital. Earlier, private companies having paid up share capital of "INR 50lakhs" or less and average annual turnover of "INR 2 crores" or less could have been converted themselves into OPC.

[2] The conversion of OPCs into a public or private company has been simplified. OPCs shall now be required to pass a resolution to alter their memorandum and articles to give effect to the conversion. OPC is to increase their number of members and directors and paid-up share capital as per the provision of Companies Act, 2013.[29]

[3] The residency limit for an Indian citizen to set up an OPC has been reduced to 120 days from the existing 182 days to further ease the compliance.

[4] Non-Resident of India (NRIs) has been allowed to corporate OPC in India. The amendment have been substituted the term *"whether the resident in India or otherwise*" in place of resident in India.

The Corporate Affairs Ministry enters 2021 make plans to recover business and kick off reforms such as direct foreign, listing, especially for start-ups and e-commerce companies. Some interventions of the government were triggered by the Covid-19 crisis, which is based on the greater use of technology while holding shareholders' meeting via video conferencing. The pandemic has made us realize that physical presence is not essential for meetings, voting, etc.

28 India: Union Budget 2021 by Richa Bhagat and Disha Dubey

[29] How to convert OPC into a Private Company : cleartax

Objectives of Corporate Governance under Companies Act,2013

As per the primary analysis of any study was to investigate the development of the provision related to corporate governance with reference to the protection of investors and analysis the investors of the adequacy. In this regard we have to follow some provision for providing protection from company to investors are as follow:-

[1] Firstly, an analysis of disclosure provision relating to prospectus is undertaken. A comparative study of the provisions in the Companies Act and the SEBI Act of India and provisions in other countries is undertaken.

[2] Secondly, the objective of the study was to analyze the provisions relating to Directors powers, responsibilities and positions with reference to the Corporate Governance.

[3] Thirdly, the objective of the investigation to assess the role of investors in Corporate Governance. The role of investors, long-term as well as short-term, and need of investor's education is examined.

[4] Fourth objective of the study was to analyses the recommendation of various committees in India and abroad and to arrive at a working formula to ensure proper Corporate Governance.

[5] Fifth, the objective was to investigate the adequacy of disclosure provision in the Companies Act and the SEBI Act and provisions relating to the role and importance of Audit Committee and suggest suitable amendments to ensure proper governance and protect investor's interest.

[6] Sixth, for making an appropriate suggestion to make corporate governance effective in protecting the rights of investors.

Confederation of Indian Industry (C.I.I.) Desirable Corporate Governance in India,1998

The Confederation of Indian Industries (CII), the Associated Chambers of Commerce and Industry and the Securities and Exchange Board of India constituted committees to recommend initiatives in corporate governance. The CII, in 1996, took a special initiative on corporate governance. It was the first institutional initiative in Indian industry in which it works to create an environment conducive to the growth of industry in the country. CII is a

non-government, not-for-profit, industry-led and industry managed organization for playing a proactive role in India's development process.[30]

In 1895, CII has over 7200 members, from the private as well as public sectors, including SMEs and MNCs, and an indirect membership of over 1,00,000 CII works closely with Government on policy issues, interfacing with thought leaders, and en hancing efficiency, competitiveness and business opportunities for industry through a ra nge of specialized services and strategic global linkages.

It has 64 offices, including 9 Centers of Excellence, in India, and 7 overseas offices in Australia, China, Egypt, France, Singapore, UK, and USA, as well as institutional partnerships with 224 counterpart organizations in 90 countries, CII serves as a reference poi nt for Indian industry and the international business community. The CII Theme for 2014-15 is Accelerating Economic Growth, to strengthen a growth process that meets the aspirations of today's India.

"Corporate Governance is a phrase which implies transparency of management systems in business and industry, be it private sector, public sector or the financial institutions all of which are corporate entities. Just as industry seeks transparency in Government policies and procedures, so also, the debate on Corporate Governance seeks transparency in the corporate sector".

-Mr.Shekhar Datt[31]

The objective being to develop a code for corporate governance to be adopted by the Indian companies (private sector, the public sector, banks and financial institutions which are corporate entities), a code by CII carrying the title "Desirable Corporate Governance" was released.

DESIRABLECORPORATE GOVERNANCE: A CODE

In1996,CII took a special initiative on Corporate Governance the first institutional initiative i n Indian industry. The objective was to develop and promote a code for Corporate Governance which is to be adopted and followed by Indian companies, as well as Private Sector, the Public Sector, Banks or Financial Institutions which are corporate entities. This initiative by CII flowed from public concerns regarding the following:-

[30] International Journal of Law and Legal Jurisprudence Studies :ISSN:2348-8212: Volume 2 Issue 4
[31] Business Today, 7th May 1997

[1] Protection of investor interest, especially the small investor;

[2] The promotion of transparency within business and industry;

[3] The need of international standard is a disclosure of information for a corporate sector and to develop a high level of public confidence in business and industry.

Role of CII

Our primary goal is to develop Indian industry and to ensure that government and society as a whole, to understand both the needs of industry and its contribution to the nation's well being. For this, we have to work to identify and strengthen the industry's role in the economic development of the country. To act as a catalyst which bring out the growth and development of Indian Industries? It reinforces industry's commitment of the society, to provide up-to-date information and data to industry and government. The way to creating an awareness and support for industries effort on quality, environmental, energy management, and consumer protections. To identify and address the special needs of the small sector to make it more competitive as well as to promote cooperation with counterpart organizations and work towards the globalization of Indian industry and integration into the world economy.

Recently, in March 2021, Confederation of Indian Industry has specified the need to limit and streamline the independent director liability which provides safe-harbors to independent directors. "CII sincerely appreciates the government for undertaking this as a part of its continuing endeavor for improving business environment, which in turn not only has the potential of attracting investment but also improving the quality of corporate boards and reducing concerns of criminal prosecution for non-material matters."

Early last year, CII drew the attention of the Regulators to certain aspects of the regulatory framework for review for ease of doing business in India. CII explained that in certain cases, commercial and civil disputes under business and economic legislation are treated as criminal offence, thereby raising concerns among directors, young entrepreneurs, and domestic and foreign investors.

Attention was drawn on the issue of decriminalization of offences under business and economic legislation that affect the Industry and Trade with respect to technical offenses,

unless the offences include an element of fraud / wrongdoing.[32] It was submitted that offences which are of a technical nature or which do not affect public interest prejudicial or which are not serious offences may be considered to be decriminalized. For such business and economic legislation which fall within the domain of arbitration or civil courts, government needs to consider decriminalizing the laws, unless there is an intent of fraud or misdoings. The punishment ought to be limited to penalties instead of fines / imprisonment. Periodic or habitual offenders may be punished with higher penalties as may be decided by the adjudicating authority.

Recently, the government of India has concluded the exercise of decriminalizing of the Companies Act, 2013. In this connection, CII recently submitted a Paper to the Ministry of Corporate Affairs highlighting matters with respect to framework for settlement of offence; liability of independent directors; vicarious liability, impact of Covid-19 pandemic; and D&O liability insurance. The Paper enumerates the following:

[1] Government has enhanced in-house adjudication of penalties in respect of certain offence. The mechanism is extended to additional provisions which involve technical lapses. It is further recommended that the government considers the decriminalization of other compoundable offence under the Companies Act.

[2] As a general principle, given the onerous responsibilities and liabilities on directors, including independent directors and company secretaries, penalties ought to be limited to fines instead of imprisonment. According to CSR, the penalty can be imposed for non-compliance which should not be exceeding the unspent CSR amount.

[3] According to financial statements and books of accounts, there is a distinguish between fraudulent maintenance and mere faulty maintenance which should be brought out.

There is a need to create legal and procedural safeguards relating to personal liability of independent directors, and initiation of prosecution itself should be an exception rather than the rule, to keep risk and rewards of being an independent director proportionate. The whole idea of decriminalizing civil duties is essential to conserve faith in the institution of independent directors.

[32] Confederation of Indian Industry

As there were several case laws which set out the legal principles to interpret on vicarious liability under various statutes, initiation of proceedings itself can involve significant personal hardship and costs for the concerned individuals. While wrong doers must be prosecuted, there need to be procedural guidelines/safeguards across laws to restrict and minimize proceedings against individuals who are not actually and demonstrably in charge of the management. Against the backdrop of COVID-19, bona-fide decisions taken during such exceptional times (even if they do not turn out as anticipated) may not be unduly challenged with the benefit of hindsight.[33]

The Supreme Court has said in ***KK Ahuja v. V.K Arora*, 2009** analyzed the two terms often used in vicarious liability provisions, i.e., 'in charge of' and 'responsible to'. It acknowledged that there was little guidance on what made an officer 'in charge' and 'responsible to' so that they can be held liable under the vicarious liability provisions. It was held that the 'in-charge' principle presents a factual test and the 'responsible to' principle presents a legal test.

In the case, ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, 2005** the SC held that liability arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.

In the case, ,**Sunil Bharti Mittal v. Central Bureau of Investigation,2015** had clarified that the principle of *alter ego* can only be applied to make a company liable for acts of a person or a group of persons who exercise significant and pervasive control over the affairs of the company and could not be applied in the reverse. It was further noted that directors of the company can be held responsible for the wrong done by the company only where there is sufficient evidence to prove that such persons played an active role and they had a criminal intent or otherwise, the relevant statute has specifically imposed liability on them, such as labour and environmental law statutes. Vicarious liability cannot be imposed on any director in the absence of legislative mandate.

The SC in the case of ***Shiv Kumar Jatia v. State of NCT of Delhi*, 2019** reaffirmed its views set forth in the Sunil Mittal case, and held that an individual either as a director or a managing director or chairman of the company can be made an accused, along with the

[33]Exempt independent directors from any criminal liability, says CII : Ruchika Chitravanshi

company, only if there is sufficient material to prove his active role, coupled with criminal intent. It is essential that the criminal intent alleged must have direct nexus with the accused.

Recommendations of Task Force

[1]There is no need to adopt the German system of two-tier boards to ensure desirable corporate governance. A single board, if it performs well, can maximize long term shareholder value just as well as a two- or multi-tiered board. Equally, there is nothing to suggest that a two-tier board, per se, is the panacea to all corporate problems.

[2] Any listed companies with a turnover of Rs.100 cores and above should have professionally competent, independent, non- executive directors, which constitute by many process are:-

[a] At least 30 percent of the board if the Chairman of the company is a non-executive director

[b] At least 50 percent of the board if the Chairman and Managing Director is the same person.

[3] No single person should hold directorships in more than 10 listed companies.

[4] For non-executive directors, they have to play a material role in corporate decision for making and maximizing the long term shareholder value, it requires to:-

[a] It becomes active participants in boards, not passive advisors;

[b] It has clearly defined responsibilities within the board such as the Audit Committee;

[c] It knows how to read a balance sheet, profit and loss account, cash flow statements and financial ratios and have some knowledge of various company laws.

[5] To secure better effort from non-executive directors, companies should- (a) pay a commission over and above the sitting fees for the use of the professional inputs. The present commission of 1 percent of the net profits (if the company has a managing directors) or 3 percent (if the is no managing director) is sufficient, (b) Consider offering stock option, so as to relate rewards to performance. Commission are rewards on current profits... stock options are rewards contingent upon future appreciation of corporate value. An appropriate mix of the two can align a non-executive director towards keeping an eye on short-term profits as well as long-term shareholder value.

[6] Key information that must be reported to, and place before, the board must contain:-

a) Annual operating plans and budgets, together with updated long-term plans.

b) Capital budgets, manpower and overhead charges.

c) Quarterly results for the company as a whole and its operating divisions or business segments.

d) Internal audit reports, including case of theft and dishonestly of a material nature.

e) Show cause, demand and prosecution notices received from revenue authorities, which are considered to be materially important (material nature is any exposure that exceeds 1 percent of the company's net worth).

f) Fatal or serious accidents, dangerous occurrences and any effluent or pollution problems.

g) Default in payment of interest or non-payment of the principal on any public deposit, and or to any secured creditor or financial institutions.

h) Defaults such as non-payment of inter-corporate deposits by or to the company, or materially substantial non-payment of goods sold by the company.

i) Any issue which involves possible public or product liability claims of a substantial nature, including any judgment or order which may have either passed strictures on the conduct of the company, or taken an adverse view regarding another enterprise that can have negative implications of the company.[34]

j) Details of any joint venture or collaboration agreement.

k) Transactions that involve substantial payment towards good will brand equity, or intellectual property.

l) Recruitment and remuneration of senior officers just below the board level, including appointment and reappointment or removal of the chief financial officer and the company secretary.

m) Labor problems and their proposed solutions.

[34]CLII-Confederation of Indian Industry-corporate governance code: Pallav Tyagi

n) Quarterly details of foreign exchange exposure and the steps taken by management to limit the risks of adverse rate movement, if material.

[6] (a) Listed companies with either a turnover of Rs.100 crore or a paid up capital of Rs.20 crore whichever in less should set up audit committees within two years.

(b) Audit committees should consist of at least three members all drawn from a company's non-executive directors who should have adequate knowledge of finance, accounts and basic elements of company law.

(c) To be effective, members of audit committees must be willing to spend more time on the company's work vis-a-vis other non-executive directors.

(d) Audit committees should assist the board in fulfilling its functions relating to corporate accounting and reporting practices, financial and accounting controls and financial statements and proposal that accompany the public issue of any security and thus provide effective supervision of the financial reporting process.

(e) Audit committees should periodically interact with the statutory auditors and the internal auditors to ascertain the quality and veracity of the company's accounts as well as the capability of the auditors themselves.

(f) For audit committees to discharge their fiduciary responsibilities with due diligence, it must be incumbent upon management to ensure that members of the committee have full access to financial data of the company, its subsidiary and associated companies, including data on contingent liabilities, debt exposure, current liabilities, loans and investments. [35]

(g) By the fiscal year 1998-99, listed companies satisfying criterion (l) should have in place a strong internal audit department, or an external auditor to do internal audit; without this, any audit committee will be toothless.

[7] Under 'Additional shareholders' Information' listed public companies should give data on:-

(a) High and low monthly averages of shares prices in all the stock exchanges where the company is listed for the reporting year.

[35]CII - Confederation of Indian Industry-corporate governance code: Pallav Tyagi

(b) Statement on value added, which is total income minus the cost of all inputs and administrative expenses.

(c) Greater detail on business segments or divisions, up to 5% of turnover, giving share in sales revenue, share in contribution, review of operations, analysis of markets and future prospectus.

[8] (a) Consolidation of groups account should be optional and subject to (i) the FIS20 allowing companies to leverage on the basis of the groups assets, and (ii) the Income-Tax Department using the group concept in assessing corporate income tax.

(b) If a company choose to voluntarily consolidate, it should not be necessary for 20 Financial Institutions. 100 of annex the accounts of the subsidiary companies under Section 212 of the Companies Act.

(c) However, if a company consolidates, than the minimal definition of 'group' should include the parent company and its subsidiaries (where the reporting company owns over 50% of voting stake).

[10] Major Indian stock exchanges should gradually insist upon a compliance certificate, signed by the CEO and the CFO, which clearly states are:-

(a) The managements responsible for the preparation, integrity and fair presentation of the financial statements and other information in the annual report, and which also suggest that the company will continue in business in the course of the following year.

(b) The accounting policies and principles conform to standard practice, and where they do not, full disclosure has been made of any material departures.

(c) The board has overseen the company's system of internal accounting and administrative controls system, either through its audit committee (for companies with a turnover of Rs.100 crores or paid up capital of Rs.200 crores (whichever is less) or directly.

[11] For all companies with paid up capital of Rs.20 crore or more, the quality and quantity of disclosure that accompanies a GDR issue should be the norm for any domestic issue.

[12] The Government must allow for greater funding to the corporate sector against the security of shares and other paper.

Hence, the Committee is to conclude remarks aptly stated that 'A code of Corporate Governance cannot be static' Corporate Governance is a changing concept. It changes with the time and here the time means growth along with the growth of the nation as well as the corporate governance also grows. Hence it is reviewed 105 timely. But one has to remember that, Corporate Governance is an inter-play between companies, shareholders, creditors, capital markets, financial institutions and company law. Hence, a code of Corporate Governance must attempt to address all these issues. Hence the company should fix the default on fixed deposits and it should not be permitted to accept further deposits and make inter-corporate loans or investments until the default is made good and it should declare dividends until the default is made good.[36]

Kumar Mangalam Birla Committee Report in Corporate Governance, 2000
Background of Constitution of the Committee

After publication of 'desirable code of Corporate Governance some of the forward looking companies have already revived or are in the process of reviewing their board structures and have also reported. In their 1998-99 annual reports the extent to which they have complied with the code. The SEBI, however, felt that under Indian condition a statutory rather than a voluntary code would be far more purposive and meaningful, at least in respect of essential features of Corporate Governance. The report submitted by the committee is the first formal and comprehensive attempt to evolve a 'Code of Corporate Governance', in the context of prevailing conditions of governance in Indian companies, as well as the state of capital markets. In early 1999, Securities and Exchange Board of India (SEBI) had set up a committee under Shri Kumar Mangalam Birla, member SEBI Board, to promote and raise the standards of good corporate governance. But there were many companies, whose practices are a matter of concern. There is also increasing concern about standards of financial reporting and accountability especially, after losses[37] suffered by investors and lenders in the recent past, which could have been avoided with better and more transparent reporting practices.

Another reason was there were also companies, which were not paying adequate attention to the basic procedures for shareholders services, such as delay in transfer of shares, delay in

[36] Capital Market Analysis & Corporate Laws : ICMAI
[37] Investors have suffered on account of unscrupulous management of the companies, which have raised capital from the market at high valuations and have performed much worse than the part reported figures; leave alone the future protections at the time of raising money.

dispatch of share certificates and dividend warrants and non-receipt of dividend warrants; companies also did not pay sufficient attention to timely dissemination of information to investors, these investors grievance did not receive adequate attention.

Corporate Governance is considered as an important instrument of investor protection, and it is therefore a priority of SEBFs agenda. To further improve the level of Corporate Governance, need was felt for a comprehensive approach. Hence SEBI, constituted a committee under the chairmanship of Shri Kumara Mangalam Birla on 7 may 1999.[38]

Members of the committee:-

(1) Shri. Kumar Mangalam Birla - Chairman, Aditya Birla Group.

(2) Shri. Rohit Bhagat-Country head, Boston Consulting Group.

(3) Dr.J.Bhagwath -Jt. Secretary, Ministry of Finance.

(4) Shri.Samir Biswas Raj Director, Western Region, DCA GOI.

(5) Shri S.P.Chhayed - President of Institute of Chartered Accountants of India.

(6) Shrill Virender Ganda- President of Institute of Company Secrecy India.

(7) Dr.Sumnatra Ghoshal- Prof, of Strategic Management, London Business School

(8) Shri.Vijaya Kalantri -President, all India Association of Industries.

(9) Shri Pratip Kar- Executive Director SEBI Member Secretary.

(10) Shri. Y.H. Malegam -Managing Partner, S.B. Billimona and Co.

(11) Shri.Narayana Murthy -Chairman and managing Director, Infosys Technologies Ltd.

(12) Shri A.K. Narayana - President of Tamil Nadu Investors Association

(13) Shri Kamal Prakash -Ex-President Calcutta stock Exchange.

(14) Dr. R.H. Patil- Managing Director, National Stock Exchange Ltd.

(15) Shri Anand Rathi- President of the Mumbai stock Exchange

(16) M.S. D.N.Raval- Executive Director, SEBI

[38] Shobdh : Karnataka university

(17) Shri Rajesh Shab- Former President of the Confederation of India Industries.

(18) Shri L.K. Singhvi- Sr-Executive Director, SEBI.

(19) Shri. S.S. Sodhi- Executive Director, Delhi Stock Exchange

Term Committee:- The term Committee refers to suggest suitable amendments to the listing agreement executed by the stock exchanges with the companies and any other measures to improve the standards of corporate governance in the listed companies, in areas such as continuous disclosure of material information, both financial and non- financial, manner and frequency of such disclosures, responsibilities of independent and outside directors; draft a code of corporate best practices; and suggest safeguards to be instituted within the companies to deal with insider information and insider trading.[39]

The Committee terms refers to:-

(a) To suggest suitable amendments to the listing agreements executed by the stock exchanges with the companies and any other measures to improve the standards of Corporate Governance in the listed companies in areas such as continuous disclosure of material information both financial and non-financial, manner and frequency of such disclosures, responsibilities of independent and outside directors;

(b) To draft a code of corporate best practices and

(c) To suggest safeguards to be instituted within the companies to deal with insider information and insider trading.

The committee, before submitting its report took note of the recommendations of various committees abroad and desirable Code of Corporate Governance in India. Some of them are as following:-[40]

(1) Strengthening of disclosure norms for initial public offers following the recommendations of the committee set up by SEBI under the chairmanship of Shri Y.H. Malagam

(2) Providing information in director's reports for utilization of funds and variation between projected and actual use of funds according to the requirements of the Companies Act.

[39] Kumara Mangalam Birla Committee: Suraj; slideshare
[40]Shodh: Karnataka University; Malagi, S.C.

(3) Inclusion of cash flow and funds flow statement in annual report and declaration of quarterly results

(4) Mandatory appointment of compliance officer for monitoring share transfer process and ensuring compliance with various rules and regulations.

(5) Timely disclose of material and price sensitive information etc

Recommendation of Task Force

Such report is the first formal report and comprehensive attempt to evolve a Code of Corporate Governance, in the context of prevailing conditions of governance in Indian companies, as well as the state of capital markets. While making the recommendations the Committee has been mindful that any code of Corporate Governance must be dynamic, evolving and should change with changing context and times. It would therefore be necessary that this code also is reviewed from time to time, keeping pace with the changing expectations of the investors, shareholders, and other stakeholders and with increasing sophistication achieved in capital markets.[41]

Applicability of the recommendation

Mandatory and Non-Mandatory recommendation

Mandatory Recommendation:-

[1]Applies to listed companies with paid-up capital of Rs.3 Crore and above.

[2] Composition of Board of Directors – Optimum combination of executive

[3] Audit Committee – with 3 Independent Directors with one having financial and accounting knowledge

[4] Non-Executive Directors.

[5] Board Procedures – atleast 4 meetings of the board In a year with maximum gap of 4 Months between 2 meetings.

[41] Kumar Mangalam Birla Committee : Suaj; Slideshare

[6] To review operational plans, Capital Budgets, Quarterly results, minutes of committee's meeting. Director shall not be a member of more than 10 committees and it shall not act as chairman of more than 5 committees across all companies.

[7] Management discussion and analysis report covering industry structure, opportunities, threats, risks, outlook, and internal control system.

[8] Information should be shared with shareholders.

The committee further recommended the SEBI, to write to the department of company affairs for suitable amendments to the Companies Act.[42] The committee provided for the separate section on Corporate Governance in the annual reports of companies, with a detailed compliance report. This is a mandatory one. Finally the committee also recommended that the company should arrange to obtain a certificate from the company's auditor's regarding compliance of mandatory recommendations and annexes the certificate with the director's report which is sent annually to all the shareholders of the company. The same certificate should also be sent to the stock exchanges along with the annual return filed by the company. This is a mandatory recommendation.

Non-Mandatory Recommendation:-

[1] Role of Chairman

[2] Remuneration Committee Of Board

[3] Shareholders' Right for Receiving Half Yearly Financial Performance Postal Ballot Covering critical matters like alteration in memorandum etc

[4] Sale of Whole or Substantial part of the undertaking.

[5] Corporate Restructuring

[6] Further issue of capital.

[7] Venturing into new business.

Naresh Chandra Committee on Corporate Audit and Governance,2002

[42] On the recommendation of the Companies Act,2000

On August 21, 2002, the Department of Company Affairs (DCA) under the Ministry of Financial and company affairs appointed a high level committee to examine various Corporate Governance issues under the chairmanship of Mr. Naresh Chandra. Among others, important issues before the committee are: -

1) The statutory auditor- company relationship so as to further strengthen the professional nature of this interface.

2) The need, if any, for rotation of statutory audit firms or partners.

3) The procedure for appointment of auditors and determination of audit fees

4) Restrictions, if necessary, on non-audit fees.

5) Independence of auditing functions.

6) Measures required ensuring that the management and Companies Actually present 'true and fair' statement of the financial affairs of companies.

7) The need to consider measures such as certification of accounts and financial statements by the management and directors.

8) The necessity of having a transparent system of random scrutiny of audited accounts.[43]

9) Adequacy of regulations of chartered accountants, company secretaries and other similar statutory oversight functionaries.

10) Advantages, if any, of setting up of an independent regulator similar to the public company accounting oversight board as in the S.O.Act and if so, its constitution; and

11) The role of independent directors, and how their independence and effectiveness can be ensured.80 By looking to the terms reference, the committee is entrusted to look into the two key aspects of Corporate Governance: -

a) Financial and non-financial discloses, and

b) By independent auditing and board oversight management. Related aspects are, the need for independent oversight of auditors, and efficacious disciplinary procedure for professionals.

[43] Report of the Committee (Naresh Chandra) on Corporate Audit and Governance SEBI, Dec 23, 2002.

The members of the committee are:-

(l) Mr.Naresh Chandra - Chairman

(ii) Mr.Ashok Chandak - Member

(iii) Mr.Aditya Vikram Lodha -Member

(iv) Mr.R.Krishna - Member

(v) Mr.M.K. Sharma - Member

(vi) Ms.Kaipana Morparia - Member

(vii) Mr. Mahesh Vyas - Member

(viii) Dr.Omkar Goswami - Member

(ix) Mr. Rajiv Mehrishi - Member

(x) S.B. Mathur.- Member.

The Committee's recommendation related to:-

[1] Disqualifications for Audit assignment.

[2] List of prohibited non-audit services.

[3] Independent standards for consulting , other entities that are affiliated to audit firms.

[4] Compulsory audit partner rotation.

[5] Auditor's disclosure of contingent liabilities.

[6] Auditor's disclosure of qualifications and consequent action.

[7] Management's certification in the event of auditor's performance.

[8] Auditor's annual certification of independence.

[9] Appointment of auditor's.

[10] Setting up of Independent Quality Review Board.

[11] Proposed disciplinary mechanism of auditors.

[12] Defining of independent directors.

[13] Percentage of Independent directors.

[14] Minimum board size of listed companies.

[15] Disclosure on duration of board meeting/committee meetings.

[16] Additional disclosure of directors.

[17] Independent directors of Audit committee of listed companies.

[18] Audit committee charter.

[19] Remuneration of non-executive director.

[20] Exempting non-executive directors from certain liabilities.

[21] Training of independent directors.

[22] SEBI and Subordinate legislation.

[23] Corporate serious Fraud Office, etc.44

Naresh Chandra Committee, as the terms of reference confined it to the accounting audit of the companies, committee in clear terms recommended for the two types of auditors, internal auditors and external auditors. The functions and purposes of these auditors are, though different, but aimed at protecting the interest of the investors by ensuring proper Corporate Governance. But the major role has to be played by the institutional investors.

In these financial institutions, there are shareholders or investor either as shareholders or fixed depositors or unit holders. These investors directly do not have any control on these financial institutions. If at all something goes wrong with the invested company, it is not the financial institutions but ultimately suffer are investors in financial institutions.

From this view, the investigator is of the opinion that the responsibility imposed on the financial investor is not adequate. They must be made more stringent to cover every lapse on the part of these institutions. Hence it seems proper for these financial institutions to discharge the role of internal auditors.

Although the committee is not in favor of two tier boards, which is practiced in German, but it recommended for executive directors and non-executive directors. This recommendation is timely one and by this proper governance may be ensured.

The committee recommendations are on par with the practice prevailing in other parts of the world. Disclosure provisions and provisions relating to certification are navel one. The responsibility of the executive directors is enhanced beyond the scope of Companies Act.

National Foundation for Corporate Governance (NFCG)

Ministry of Corporate Affairs (MCA) has set up a National Foundations for Corporate Governance (NFCG) in associate with CII, ICAI, AND ICSI, as a not-for-profit trust. It provides a platform to deliberate on issues relating to good corporate governance

Ministry of Corporate Affairs has set up a National Foundation for Corporate Governance (NFCG) in association with CII, ICAI and ICSI, as a not-for-profit trust. It provides a platform to deliberate on issues relating to good corporate

[44]Corporate Governance M.Com2: Bhavik Umakant Swadia, GLS University

governance, to sensitize corporate leaders on importance of good corporate governance practices as well as facilitate exchange of experiences and ideas amongst corporate leaders, policy makers, regulators, law enforcing agencies and non- government organizations.[45]

The NFCG has a three-tier structure for its management, viz, the Governing Council under the Chairmanship of Minister of Corporate Affairs, the Board of Trustees and the Executive Directorate. NFCG had framed an action plan, which includes development of good corporate governance principles on identified themes i.e.

[a] Corporate governance norms for institutional investors,

[b] Corporate governance norms for independent directors, and

[c] Corporate governance norms for audit.

NJR Narayana Murthy Committee Report on Corporate Governance, 2003

The constitution of the new Committee by the SEBI is that it believes that efforts to improve Corporate Governance standards must continue as the market dynamics goes on changing. To review the existing Code on Corporate Governance from two perspectives, (a) to evaluate (b) to further improve the existing practices.

Hence the SEBI committee on Corporate Governance was constituted under the chairmanship of Shri N.R.Narayan Murthy, Chairman Infosys Technologies Ltd. The terms of reference are as follows:

a) To review the performance of Corporate Governance; and

b) To determine the role of companies in responding to rumor and other price sensitive information circulating in the market in order to enhance the transparency and integrity of the market.

The Committee mainly discussed the issues relating to audit committees, audit report, independent directors, related parties, risk management directorship and director compensation, codes of conduct and financial disclosures.

Apart from discussing the main issues, the Committee also discussed some of the recommendations already made by the Naresh Chandra Committee on corporate Audit and

[45] National Foundation Of Corporate Governance : MCA

Governance, and the Committee accepted them. Like Naresh Chandra Committee, this Committee also made mandatory and non-mandatory recommendations. The following is the gist of the recommendation on key issues: Audit Committee:

Audit committees of publicly listed companies should review the following information:-

a) Financial statements;

b) Management discussion and analysis of financial condition and results of operations;

c) Reports relating to compliance with laws and to risk management;

d) Management letter/letters of internal control weakness issued by statutory/internal auditors; and

e) Records of related party transactions.

The above recommendation was already contained in the Kumar Mangalam Birla Committee's Report on Corporate Governance. But in addition to the K.M. Birla Committee's Report, it imposed additional responsibility on the Audit Committee vis-a-vis their duties and role.

1.1 Financial literacy of members of the audit committee:

It is common practice in India that usually audit committee, apart from other professional, it consisted representatives or nominees of promoters or controlling director. Some of them are financially illiterate. Hence they were not in a position to protect the investor and ensure good Corporate Governance. Hence the committee made the following mandatory recommendation "All audit committee members should be financially literate" and at least one member should have accounting or related financial management expertise.

Explanation-1: The term "financial literate means the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account and statements of cash flows.

Explanation-2: A member will be considered to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting, or any other comparable experience or background, which results in the individuals financial sophistication, including being or having been a

chief executive officer, chief financial officer, or other senior officer with financial oversight responsibilities.[46]

In this recommendation the Committee insisted for at least one member should be financial literate. The investigator has strong reservation against this recommendation. As the audit committee plays vital role in ensuring proper Corporate Governance in financial matters, if majority of the members of audit committee are financial illiterates, how one can expect proper auditing of financial matter and ensure investor protection? Hence, the investigator is of the opinion that if not all at least majority of them should be financial literates.

1.2 Audit Report and Audit Qualifications

This recommendation[47] deals with a case where the company has followed different form of accounting standards. Then independent/statutory auditors should justify why they are supporting differential form of accounting standards. The committee made the following mandatory recommendation.

"In case of a company has followed a treatment different from the prescribed in an accounting standard, management should justify why they believe such alternative treatment is more representative of the underlying business transaction. Management should also clearly explain the alternative accounting treatment in the footnotes to the financial statements."[48]

In this recommendation the committee provided for different form of accounting standards in lieu of standardized form of accounting. If the company has adopted differential form then it only required justifying its stand. But this option to the company may dilute investor's protection and efficacy of effective Corporate Governance. Hence the investigator is of the opinion that there shall be only one that to international standard of accounting this may attract foreign investors.

1.3 Audit Qualifications

This committee makes a non-mandatory recommendation as follows:

[46] Recommendation: 3.2.2
[47] Recommendation 3.3
[48] Recommendation 3.3

"Companies should be encouraged to move towards a regime of unqualified financial statements. This recommendation should be reviewed at an appropriate juncture to determine whether the financial reporting climate is conducive towards a statement of filing only unqualified financial statements".[49]

For making non-mandatory recommendation reasons put forward by the committee is that already there are adequate safeguards[50] and to avoid undue hardship to some of the companies. The stand taken by the committee seems to be not appropriate. The very purpose of constituting the committee is to improve Corporate Governance and investor's protection. Even before the recommendation of this committee there were and there are number of provisions, regulations to protect investors and regulate Corporate Governance.

But the SEBI, in the light of developments that have taken in and around the country, it felt the exiting safeguards are not adequate hence constituted this committee but the committee has not made any recommendation on this issue.

1.4 Related Party Transactions:-

Insider transactions are very detrimental to the investor's protection and also transaction with the relatives of the directors and mangers. Generally these transactions are called 'interested transaction'. To ensure proper governance the committee made the following mandatory recommendations.[51]

"A statement of all transactions with related parties including their basis should be placed before the independent audit committee for formal approval /ratification. If any transaction is not on an arm's length basis, management should provide an explanation to the audit committee justifying the same.

Further the committee defined 'related party' as follows; "The term related party shall have the same meaning as contained in Accounting Standard 18, related party transactions, and issued by the Institute of chartered accounts of India.

[49] Recommendation 3.3.2
[50] Recommendation 3.3.2.3
[51] Insider Trading definition : Investopedia

1.5 Risk Management:-

Business risks management is one of the important issues from the point of investors. In every business there is a certain kind of risk. Proper assessment of risk in advance may minimize the loss. Hence there is need to review risk management periodically. Here the risk would include global risks, general, economic and political risks; industry risks; and company specific risk. Placing of the report on risk before the board is essential. Hence the committee made the following mandatory recommendation.[52]

"Procedures should be in place to inform board members about the risk assessment and minimization procedures. These procedures should be periodically reviewed to ensure that executive management controls risk through means of a properly defined framework.

Management should place a report before the entire board of directors every quarter documenting the business risks faced by the company, measures to address and minimize such risks, and any limitations to the risk taking capacity of the corporation. The board should formally approve this document.[53]

In addition to this the Committee felt the need of training of Board members,[54] hence the committee is after training in the business model as well as the risk profile of the business of the company. However the committee made a non-mandatory recommendation on this issue.

"Companies should be encouraged to train their board members in the business model of the company as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them.[55] With regard to training of Board members, the investigator is of the view that the committee would have made mandatory recommendation instead of non-mandatory one. As the proper Corporate Governance and enhancing the investor value depends upon the risk assessment and forecast and now trained and qualified executives manage many companies in other parts of the world.

Hence in India there is a greater need for training not only from the point of protecting investors but also to attract outside investors. Hence mandatory recommendation is justice able.

[52] Risk Management Planning : Project Management
[53] Recommendation 3.5.1
[54] Naresh Chandra Committee also recommends
[55] Recommendation 3.5.2

1.6 Proceeds from Initial Public Offerings:-

Capital of the company comes from the public. It is raised through prospectus. But once the money is collected, although at the time of issuing certain disclosure is made regarding the object of raising funds, but thereafter what happens to the fund collected from public, only directors know it.[56] Hence there is need to disclose the use of proceeds hence the committee has made the following mandatory recommendation. "Companies raising money through an initial public offering (IPO) should disclose to the audit committee, the uses/applications of funds by major category (capital expenditure, sales and marketing, working capital, etc) on a quarterly basis. On an annual basis, the company shall prepare a statement of funds utilized for purposes other than those stated in the offer document/ prospectus.

The independent auditors of the company should certify this statement. The audit committee should make appropriate recommendations to the board to take up steps in this matter.97 Among all other recommendation, the investigator feels that this is the best way to protect the investor's interest. Timely receipt of information will make the investor to decide whether their agents i.e. fund managers are using their money properly or not. The committee has made most welcoming recommendations.

1.7 Code of Conduct

Directors of the companies are enjoying vast powers and subjected to various duties and liabilities. Apart from this onerous obligation the Indian Companies Act also imposes the fiduciary obligation on them. Though the Companies Act made provision for directors' power but no provision is made in respect of code of conduct i.e. statutory provision regarding their liabilities.[57]

Hence the committee felt the need of written code of conduct for board members i.e. all categories of directors' executive directors, independent directors, nominee directors and promoter directors and also for senior financial personnel including Chief Financial Officer, Treasurer and Financial Controller. While making recommendation the committee noted the recommendation made by the Kumar Mangalam Birla Committee on the board roles and responsibilities of management.

[56] Top 2 ways Corporation raise capital : Investopdia
[57] Directors and legal service India : Legal services India

By considering the need of written code of conduct, the committee made the following mandatory recommendation; “It should be obligatory for the Board of a company to lay down the code of conduct for all board members and senior management of a company. This code of conduct shall be posted on the website of the company. All board members and senior management personnel shall affirm compliance with the code on an annual basis. The annual report of the company shall contain a declaration to this effect signed off by the CEO and COO. Explanation- for this purpose, the term senior management shall mean personnel of the company who are member of its management /operating council (i.e. core management team excluding board of directors). Normally, this would comprise all[58] members of management one level below the executive directors.

On this recommendation, the investigator is of the opinion that the Indian Companies Act 1956 has to be amended on par with the Nigerian Companies Act," which deals with the duties of directors.[59] The Act made statutory provision, which is not found in the Indian Companies Act. Hence this recommendation is a step forward in protecting the interest of investors as well good Corporate Governance.

1.8 Nominee Director:-

Section.255 (2) provides for appointment of nominee directors by the financial institutions100 to guard its interest. But the issue is whether nominee director is to be included in the list of independent director or not, some of the companies included nominee director within the number of independent directors.[60]

As nominee director is representing a particular group of investors’ i.e. financial institution, hence strictly speaking he cannot be considered as an independent director. Hence the committee aptly recommended that the nominee director should be excluded from the definition of independent director. The mandatory recommendation made by the committee is as follows. “There shall be no nominee directors where an institution wishes to appoint a director on the board; such appointment should be made by the shareholders. An institutional

[58] Recommendation 3.7
[59] Singh Avtar Company Law ed.264
[60] Naresh Chandra Committee recommend ½ of Independent Directors

director, so appointed, shall have the same responsibilities and shall be subject to the same liabilities as any other director.

Nominee of the Government on public sector companies shall be similarly elected and shall be subject to the same responsibilities and liabilities as other directors. In this recommendation, the committee enlarged the scope of liability and responsibilities of a nominee director. Earlier he was liable only to the financial institution, of which he represented, without incurring any liability to the other investor. But the present recommendation holds him liable to other investor. This is also a good sign in process of investor's protection.

1.9 Non-Executive Director Compensation:-

Non-Executive Director or Independent Director plays a significant role in Corporate Governance. Heavy responsibility is imposed on him to protect the interest of the investor. Naresh Chandra Committee makes heavy reliance on non-executive director as well this committee. Like executive directors non-executive directors are also be remunerated.

The Companies Act 1956 made express provision relating to the maximum limit of remuneration payable to executive directors.[61] The Companies Act in fact prescribed 1% of net profit on the maximum limit of remuneration payable to other than executive Directors .By looking to the nature of duties discharged by the independent director non-executive director is getting a very meager sum. Hence there is need to re-look into this aspect. So the committee made the following mandatory recommendation on this issue.

"All compensation paid to non-executive directors may be fixed by the board of directors and should be approved by shareholders in general meeting. Limits should be set for the maximum of stock options that can be granted to non-executive directors in any financial year and in aggregate. The stock options granted to the non-executive directors shall vest after a period of at least one year from the date such non-executive directors have relived from the board of the company".

Companies should publish their compensation philosophy and statement of entitled compensation in respect of non-executive directors in their annual report. Alternatively, this

[61] Section 198 lays down that the over all remuneration payable to executive director shall not exceed 5% if more than on 10% of the total net profits of the company in that financial year and for all directors 11% of the net profit.

may be put up on the company's website and reference drawn thereto in the annual report. Companies should disclose on an annual basis, details of shares held by non-executive directors, including the as 'if-converted' basis. Non-executive directors should be required to disclose their stock holding (both own or held by /for other persons on a beneficial basis) in the listed company in which there is proposal to them as director, prior to their appointment. These details should accompany their notice of appointment.

In this recommendation the committee rightly provided for payment of remuneration of non-executive directors by stock options. By this method, the investigator feels that the investors are properly protected. Because, if the independent non-executive directors do not properly discharge their duties, the share price i.e. stock holding will come down and results in loss of remuneration to independent directors. If price goes up means more remuneration to them. So while laying down the policies and supervision, because it acts like a supervisory board on behalf of shareholders, of the executive directors they will take appropriate care. But only threat to the interest of other shareholder is over a time the shareholding of independent director may increase and it may result in the concentration of controlling powers in the independent directors.

By looking to the mode of fixing the remuneration of non-executive directors, [i.e. it is fixed by the board of directors and approved by the general body,] the investigator feels that, independent directors will not be independent in stricto senso, because of their remuneration they have to look to the board of director.

Hence, the suggestion of the investigator is that the remuneration is to be fixed directly in the Annual General Body meeting and it need not either be recommended or approved by the board of directors.

1.10 Independent Directors:-

Regarding the definition of the 'independent director' the committee noted the recommendation of the Naresh Chandra Committee. It also looked into the definition given in the code of the International Corporate Governance Network. The definition on independent director become material from several points viz for the payments of benefits like sitting fees, remuneration, travel and stay arrangements; stock options and performance bonus that executive directors may be entitled. The committee defined the term 'independent directors' as follows: -

"[The Independent Director is one] who apart from receiving director remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters its senior management or its holding company, its subsidiaries and associated companies.

Is not related to promoters or management at the board level or at one level below the board:-

[1] Has not been an executive of the company in the immediately preceding three financial years.

[2] Is not a partner or an executive of the statutory audit firm or the internal audit firm that is associated with the company, and has not been a partner or an executive of any such firm for the last three years? This will also apply to the legal firms (and consulting firms) that have a material association with the entity.

[3] Is not a supplier, service provider or customer of the company. This should include lessor-lessee type relationship also.

[4] And is not substantial shareholder of the company i.e. owning 2% or more of the block of voting shares.

1.11 Analyst Reports:-

To avoid conflict of interests between stock analysts and their employing brokerage /investment banking firms on the one hand and listed companies on the other hand, that the stock analysts must submit proper and accurate report. It depends upon the integrity and credibility of the reporters.

Hence the committee made the following mandatory recommendation.

" SEBI should make rules for the following:-

[a] Disclosure in the report issued by security analyst whether the company that is being written about is a client of the analysts employer or an associate of the analysts employer, and the nature of services rendered to such company.

[b] Disclosure in the report issued by a security analyst whether the analyst or the analysts employer or an associate of the analysts employer hold or held (in the 12 months immediately preceding the date of the reporter) or intend to hold any debt of equity instrument in the issuer company that is the subject matter of the report of the analysts."

1.12 Recommendation of the Naresh Chandra Committee:-

Apart from making independent recommendation, the committee endorsed the, recommendations of Naresh Chandra Committee and made the following mandatory recommendations:-

[1] Disclosure of contingent liabilities:- "Management should provide a clear description in plain English of each material and contingent liability and its risks, which should be accompanied by the auditors clearly worded comments on the managements view. This is important because investors and shareholders should obtain a clear view of a company's contingent liability as there may be significant risks factors that could adversely affect the company's future financial condition and results operations".[62]

[2] The committee, CEO/CFO certification of Naresh Chandra Committee[63] made the following mandatory recommendations.

[a] For all listed companies, there should be a certification by the CEO (either the Executive Chairman or the Management Directors) and the CFO (whole time Finance Director or other person discharging this function), which should state that to the best of their knowledge and belief.

[b] They have reviewed the balance sheet and profit and loss account and all its schedules and notes and accounts, as well as the cash flow statements and the director's reports.

[c] These statements do not contain any material untrue statement or omit any material fact nor do they contain statements that might be misleading.

[d] These statements together present a true and fair view of the company, and are in compliance with the existing accounting standards and /or applicable laws regulations.

[e] They are responsible for establishing and maintaining internal controls and have evaluated the effectiveness and internal control system of the company; and they have also disclosed to the auditors and the audit committee, deficiencies in the designer operation of internal controls, if any, and what they have done or propose to do to rectify these.

[62] Recommendation 4.2

[63] Section 2.10 of Naresh Chandra Committee Report

[f] They have also disclosed to the auditors as well as the audit committee, instances of significant fraud, if any, that involves management or employees having a significant role in the company internal control systems; and

[g] They have indicated to the auditors, the audit committee and in the notes on accounts, whether or not there were significant changes in internal control and or of accounting policies during the year".

[3] On definition of independent director[64] the committee incorporates in the report without making or suggesting any changes.

[4] On independence of audit committee[65], the committee has made the following mandatory recommendation: "All audit committee members shall be non-executive members.

Naresh Chandra Committee has made provisions for exemption of independent directors. But this committee made, in addition to that, the following recommendation:

"Legal provisions must specifically exempt non-executive and independent directors from criminal and civil liabilities under certain circumstances. SEBI should recommend that such exemptions are need to specifically spell out for the relevant laws by the relevant departments of the Government and independent regulators.

However, independent directors should periodically review legal compliance reports prepared by the company as well as steps taken by the company to cure any fault. In the event of any proceedings against independent director in connection with the affairs of the company, defense should not be permitted on the ground that the independent director was unaware of this responsibility.

1.13 Other Suggestions:-

The committee received certain other suggestions relating to the Corporate Governance. They are:

Harmonization: On these aspects the committee suggested SEBI should work harmonizing the provisions of clause 49 of the listing agreement and those of Companies Act, 1956. Because there are some difference between the listing agreement clause 49 and the

[64] Section 4.1 of Naresh Chandra Committee Report
[65] Section 4.2 of Naresh Chandra Committee Report

Companies Act. This should be identified by the SEBI and should make appropriation provision[66].

On the suggestion of removal of independent director and informing the SEBI/ Stock Exchange within 5 business days, the committee disapproved this suggestion on the ground that there are enough safeguards to protect investors.

Term of office of non-executive directors:

It was suggested that there must be a cap on the term of office of a non-executive director. On this issue the committee recommended that as long as the term of office did not exceed nine years (in three terms of three years each, running continuously) that shall be a cap on the term of office. Further the committee opined that it would be a good practice for directors to retire after a particular age and recommended the companies to fix it at either 65 or 70 years.

1.14 Corporate Governance Ratings:-

Regarding the rating of Corporate Governance of companies, that the criteria recommended, parameters of wealth generation, maintenance and sharing as well as Corporate Governance. But at the same time the committee left it to the company whether it is to be rated or not. But the investigator feels that whether company likes it or not the SEBI shall give its own rating based on the parameters suggested by the committee.

1.15 Implementation of Recommendation:- The committee has made several recommendations to protect investor, internal as well external, and to ensure proper governance of the company. The committee believes that the recommendations should be implemented for all companies to which clause 49 apply. This would also continue to apply to companies that have been registered with BIFR, subject to any direction that BIFR may provide as per this regard.

The committee in concluding remarks aptly opined that there are several Corporate Governance structures in the developed world. Hence there is no one 'the structure'. There is no "*one size fits air* "structure for Corporate Governance. Different conditions prevailing in different parts of the world require different models. Important factors which influence Corporate Governance are stock market literacy and financial literary of the shareholders (investors).

[66] Shbodh : Karnataka University

Other categories of stakeholders are creditors, employees and public who are influencing the structure of Corporate Governance. "*Corporate Governance extends beyond corporate Law*", The fundamental objective is not mere fulfillment of the requirement of law, but in insuring commitment of the board in managing the company in a transparent manner for maximizing long-term shareholder value. Effectiveness of a system of Corporate Governance cannot be legislated by law, nor can any system of Corporate Governance be static. In a dynamic environment the systems of Corporate Governance need to continually evolve.[67]

Naresh Chandra Committee Report, 2009

The Naresh Chandra committee was appointed in August 2002 by the Department of Company Affairs (DCA) under the Ministry of Finance and Company Affairs to examine various corporate governance issues. The Committee submitted its report in December 2002. It made recommendations in two key aspects are: financial and non-financial disclosures: and independent auditing and board oversight of management.[68] The committee submitted its report on various aspects concerning corporate governance such as role, remuneration, and training etc. of independent directors, audit committee, the auditors and then relationship with the company and how their roles can be regulated as improved.

The salient recommendations are as follows:

1. Creation of a new post of Intelligence Advisor to assist the NSA and the National Intelligence Board on matters relating to coordination in the functioning of intelligence committee. Corporate Governance codes and their role in improving corporate governance practice: Mojca Duh

2. Amendment to Prevention of Corruption Act to reassure honest officers, who take important decisions about defense equipment acquisition, so that they are not harassed for errors of judgment or decision taken in good faith.

3. A permanent Chairman of the Chiefs of Staff Committee.[69]

[68]Corporate Governance codes and their role in improving corporate governance practice : Mojca Duh
[69] Corporate Governance M.Com : Bhavik Umakant Swadla, GLS University

4.Expediting the creation of new instruments for counter-terrorism, such as the National Intelligence Grid and National Counter Terrorism Centre.

5. Measures to augment the flow of foreign language experts into the intelligence and security agencies, which face a severe shortage of trained linguists

6. Promotion of synergy in civil-military functioning to ensure integration. To begin with, the deputation of armed services officers up to director level in the Ministry of Defense should be considered. Early establishment of a National Defense University (NDU) and the creati on of a separate think-tank on internal security.

International Corporate Governance (U.S.A. & U.K.)

Corporate Governance of U.S.A.

Governance is necessary whether the body of people is a nation state, a town community, a professional society or a business corporation. Corporate Governance is concerned with the process by which corporate entities, particularly limited liability companies, are governed; that is with the exercise of power over the direction of the enterprise, the supervision and control of executive actions etc.

"Good Corporate Governance is not just a matter of prescribing particular corporate structure and complying with a number of hard and fast rules". **– Hampel Committee**

Investor's protection turns out to be crucial because expropriation of minority shareholders and creditors by the controlling shareholders is extensive. When outside investors finance firms, they face a risk that the returns on their investments will never materialize because the controlling shareholders or managers expropriate them.

Corporate Governance is to a large extent a set of mechanism through which outside investors protects themselves against expropriation by the managers. If extensive expropriation undermines the functioning of a financial system, how can it be limited? The legal approach to Corporate Governance holds that the key mechanism is the protection of shareholders through the legal system.

For the first time in U.S.A., Berle and Means used the word 'Corporate Governance' in mid 1930. At that time much attention was not given to the good Corporate Governance. Subsequently, when major companies in U.S. and England collapsed due to accounting

frauds "Corporate Governance" become the buzzword. The appropriate Corporate Governance model, to understand it, one must look into the different theories of the existence of companies.[70]These theories will affect the degree of state interference and that is deemed appropriate in the conduct of company affairs, as well as the range of interest that compose the interest of the company.

TYPES OF U.S.A.

State Corporate Laws:-State corporate law - both statutory and judicial - governs the formation of privately held and publicly traded corporations and the fiduciary duties of directors. Delaware is the most common state of incorporation. Because Delaware law and interpretation are influential in other states, the Delaware General Corporation Law (DGCL) is used in this article as the reference point for all state law discussion. Shareholder suits are the primary enforcement mechanism of state corporate law.

Federal Corporate Law:-On the federal level, the primary sources are the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (the Exchange Act), each as amended. The Securities Act regulates all offerings and sales of securities, whether by public or private companies. The Exchange Act addresses many issues, including the organization of the financial marketplace generally, the activities of brokers, dealers and other financial market participants and, as to corporate governance, specific requirements relating to the periodic disclosure of information by publicly held, or 'reporting', companies.

A company becomes a reporting company under the Exchange Act when its securities are listed on a national securities exchange or when it has total assets exceeding US$10 million and a class of securities held of record by more than 2,000 persons or a maximum of 500 persons who are not sophisticated ('accredited') (with some exclusions). Both the Securities

[70]Dine Janet., The Governance of Corporate Groups, (Cambridge: Cambridge University Press)

Act and the Exchange Act have addressed questions of corporate governance primarily by mandating disclosure, rather than through normative regulation[71].

Cooper v. Aaron, 358 U.S. 1 (1958), was a landmark decision of the Supreme Court of the United States, which denied the Arkansas School Board the right to delay desegregation for 30 months. On September 12, 1958, the Warren Court handed down a per curium decision which held that the states are bound by the Court's decisions and must enforce them even if the states disagree with them, which asserted judicial supremacy established in **Marbury v. Madison, 1803** (a landmark U.S. Supreme Court case it established the principle of judicial review of United States, it means that American courts have power to strike laws, statutes, and some government actions down which they need to find and violate Constitution of United States. In 1803, it was decided that Marbury remains single and it was most important decision in American constitutional law. The Court's landmark decision established that the U.S. Constitution is actual law, not just a statement of political principles and ideals, and helped define the boundary between the constitutionally separate executive and judicial branches of the federal government). The decision of this case upheld the rulings in Brown v. Board of Education and Brown II which held that the doctrine of separate but equal is unconstitutional.

DEVELOPMENT OF CORPORATE GOVERNANCE IN U.S.A.

71 Corporate Governance in the USA: Sidley Austin LLP

In United States their use “Anglo-American model”. It relies on single-tired Board of Directors. The CEO usually serves as Chairman of the Board. After this, the United States have adopted the “Model Business Corporation Act”. Dominant state laws were publically traded corporations in Delware. Individual rules for corporations are based upon the corporate character and less on the corporate laws. Shareholders cannot initiate changes in the corporate charter although they can initiate changes to the corporate laws.

Enron Scandal:- Enron Corporation was formed by Ken Lay in 1985 as result of a merger two natural gas pipelines company. The stock price of Enron rose steadily through 1990s, but began to fall on December 2, 2001 and the company filed for bankruptcy protection. From the seller’s point of view, revenue is normally is recorded when the energy is delivered to the customer. Executives defend their own power. The ideology on the 'shareholder value’. Investor’s power maintained. In US their use “Anglo-American model” Relies on single-tiered Board of Directors. The CEO usually serves as Chairman of the Board.

Corporations:- Anglo-American model act as a 'good' benchmark. Boards are increasingly independent. Due to collapsing of Enron, it revealed that the elements in the model are cannot function well together. The scandal of Enron has force US to re-examine their corporate governance as well as the worldwide. According to both internal and external investigation, the failure of Enron was attributed in large part, to the failure of board director to provide oversight and governance. The board of director also failed to ensure the independence of Enron’s auditor, Author Andersen. It also appears that it chose to ignore the complaint from various whistle-blowers and instead placed its faith in the company’s senior executives.

Managerial Capitalism:-Executive Defense and the Ideology of Shareholder Value. It describes as the strong manager and weak owners. 'Agency problem’: manager has more power.

The failure of the Enron Corporation has thrown up a lot of questions about the effectiveness of contemporary accounting, auditing and corporate governance practices.

Conclusion:- Therefore, the US government has set a new and enhanced standards for all US public company boards, management and public accounting firms. Known as Sarbanes – Oxley Act named after US Senator (Paul Sarbanes) and US Representative (Michael G. Oxley).As consequences of Enron’s failure, 10 000 employees loss their jobs million of

investors (directly or indirectly) loss million dollars. 10 key employees were indicted and sent to prison.

Corporate Governance of U.K.

The Indian corporate structure is mainly based on U.K. model. The eye opening events which have taken place in England, repeated in India in similar ways or with little variation. The factors compelling for the good Corporate Governance are same corporate scandal.

The UK system of corporate governance is generally seen as an effective model that has influenced many other jurisdictions in Europe and Asia. This helps to attract international companies wishing to gain access to a wide pool of investors, who are reassured by the governance obligations placed on issuers regardless of where their key business operations are located. In this chapter we focus on UK-incorporated companies with a premium listing on the Main Market of the London Stock Exchange. Requirements are relaxed to a degree for companies that are only able (or only choose) to obtain a standard listing or those are not UK-incorporated companies.[72]

The United Kingdom's corporate governance system comprises laws, codes of practice and market guidance. Mandatory and default rules and legal standards derive from common law, from statute (notably the Companies Act 2006 (the Companies Act)) and from regulation (notably the Listing Rules and the Disclosure and Transparency Rules published by the Financial Conduct Authority (FCA), which is a statutory body).

Some of these laws and regulations derive from European law, but some are specific to the United Kingdom. The City Code on Takeovers and Mergers (the Takeover Code) also has an important role to play in control transactions, and has statutory force. Each company's

[72] Corporate Governance in United Kingdom: ecgi

constitution, which will also impose governance requirements, has legal effect as a statutory contract.

The most important code of practice is the UK Corporate Governance Code (the Code), which is published and updated periodically by the Financial Reporting Council (FRC), which is also a statutory body. The current edition of the Code was published in 2014. The FRC has recently indicated that no substantial changes are expected until the next scheduled review in 2019. In 2010, the FRC also published the UK Stewardship Code (the Stewardship Code), which applies to the institutional investor community and not to companies directly.

Nevertheless, in its January 2016 report on recent developments in corporate governance, the FRC (Financial Reporting Council) noted that over 90 per cent of all FTSE 350 companies (the 350 largest UK-listed companies, by market capitalization) reported full compliance with the Code, or full compliance with all but one or two provisions. In many cases, non-compliance is due to circumstances rather than deliberate choice. This confirms that the provisions of the Code are widely adopted by companies despite to comply or explain philosophy.

Barings Bank was founded in 1762 by Francis Baring, a British-born member of the famed German family of merchants and bankers. Barings was England's oldest merchant bank; it financed the Napoleonic Wars and the Louisiana Purchase, and helped finance the United States government during the War of 1812. At its peak, it was a global financial institution with a powerful influence on the world's economy.

Lesson, who grew up in the middle-class London suburb of Watford, began his career in the mid-1980s as a clerk with Coutts, the royal bank, followed by a succession of jobs at other banks, before landing at Barings. Ambitious and aggressive, he was quickly promoted to the trading floor, and in 1992 he was appointed manager of a new operation in futures markets on the Singapore Monetary Exchange (SIMEX). He was placed in charge of both the trading floor and transaction settlement operations, which allowed unusual autonomy and an ability to hide troubling news from the home office.

Early on, he made millions for Barings with bets on the Nikkei Index in Japan, and his profits delighted his bosses back in London. He was earning a salary of £50,000 with a £150,000 bonus, bought a yacht, and lived in an expensive apartment with his young wife, Lisa, a colleague at Barings.

Separation of ownership and control: Berle and Means of Hypothesis

The Modern Corporation and Private Property is a book written by Adolf Berle and Gardiner Means published in 1932 regarding the foundation of United States corporate law. It explores the evolution of big business through a legal and economic lens, and argues that in the modern world those who legally have ownership over companies have been separated from their control. The second, revised edition was released in 1967. It serves as a foundational text in corporate governance, corporate law (company law), and institutional economics.

Berle and Means argued that the structure of corporate law in the United States in the 1930s enforced the separation of ownership and control because the corporate person formally owns a corporate entity even while shareholders own shares in the corporate entity and elect corporate directors who control the company's activities. The Modern Corporation and Private Property, first brought forward issues associated with the widely dispersed ownership of publicly traded companies. Berle and Means showed that the means of production in the US economy were highly concentrated in the hands of the largest 200 corporations, and within the large corporations, managers controlled firms despite shareholders' formal ownership.[73]

Berle and Means espoused a stakeholder theory of corporate governance which challenges the idea on the sole purpose of a corporation to create value for the shareholders. Whereas shareholder value ideology was dominant in the United States in the 1920s, the nation's corporate governance system moved towards a stakeholder model during the New Deal. It is argued that the influential text by Berle and Means contributed to this shift. Stakeholder theory remained dominant in the US corporate governance theory until the late 1970s, when it was challenged by the re-emergence of shareholder value ideology.

The Public Interests: Good Corporate Governance

In today's economic market, the desirability of 'good governance' is often advocated or given lip service which governs and interest of central to economic development. However, It's typically not appreciated is that governance in the public interest requires a form of market economy which is not found in the 'free market'. Whereas the free market implies interest groups pursuing their own objectives, despite the resistance of others, governance in the

[73] Berle and Means: Wikipedia

public interest requires participation by those affected by the economic process and a constant search for effective democracy.

This is the argument that we advance and explore in this paper, which culminates in a discussion of requisite public policy. Today our focus is on the modern corporation and this paper is therefore a contribution to the long-running debate first raised by Berle and Means (1932). In 70years has not dimmed the controversy and topicality of this subject for economies throughout the world.

The focus on strategy points to the modern corporation being viewed as a centre of strategic decision-making. Although, a corporation is not determined solely by strategic decisions, these are especially important because, by definition, they determine a corporation's broad direction. Such importance of this argument is that the strategy approach to the theory of the firm is not associated with a market-centered analysis of impact and policy. Rather, it leads to an understanding of impact and policy based on strategic decision-making, and it includes corporate governance as a central policy issue.

Cadbury Committee report of financial aspects of Corporate Governance

The Cadbury Report, titled Financial Aspects of Corporate Governance, is a report issued by "The Committee on the Financial Aspects of Corporate Governance" chaired by Adrian Cadbury that sets out recommendations on the arrangement of company boards and accounting systems to mitigate corporate governance risks and failures. The report was published in draft version in May 1992. Its revised and final version was issued in December of the same year. The report's recommendations have been used to varying degrees to establish other codes such as those of the OECD, the European Union, the United States, the World Bank etc.

The Cadbury Committee was set up in May, 1991 by the Financial Reporting Council of the London Stock Exchange. Such committee published its report in December, 1992. The Chairman of such committee is Adrian Cadbury. The code of such practices is divided into four sections are:-

[1] Role and duties of Board of Directors and its compositions.

[2] Role of Non-Executive Directors.

[3] Deals related to remunerations.

[4] Addressing questions on financial reporting and control.

[1] Roles and duties of Board of Directors

The roles and duties of Board of Directors discuss that how the directors take control and monitor the company to take them towards success are:-

[i] The board should meet regularly, retain full and effective control over the company and monitor the executive management.

[ii] The board should include non-executive directors of sufficient caliber and number for their views to carry significant weight in the board's decision.

[iii] All directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are followed and that applicable rules and regulations are complied with. Any question of the removal of the company secretary should be a matter for the board as a whole.

[2] Role of Non-Executive Directors

[i] Non-executive directors should bring an independent judgment to bear on issues of strategy, performance, resources, including by appointment and standards of conduct.

[ii] Non-Executive directors should be appointed for specified terms and reappointment should not be automatic.

[iii] Non-Executive directors should be selected through a formal process and both the process and their appointment should be a matter for the board as a whole.

[3] Deals related to remunerations

[i] We recommend that future service contracts should not exceed 3years without shareholders' approval and that the Companies Act should be amended inline with these recommendations.

[ii] Shareholders demands that the remuneration of directors should be fair and competition.

[iii] The Annual General Meetings gives opportunity to shareholders to give their views on matters as director's benefit known to their boards

[4] Asking question financial report and control

[1] It's board's duty to present a balanced and understanding assessment of the company's position.

[2] The board ensures that an objective and professional relationship is maintained with the auditors.

[3] The board should establish that an audit committee of at least three non-executive directors with written terms of reference which deal clearly with its authority and duties.

[4] The directors should explain their responsibility for preparing the accounts next to a statement by the auditors about their reporting responsibilities.

[5] The directors should report about the effectiveness to the company's system on internal control.

[6] The directors should report to the business is a going concern, with support of assumptions and qualifications as necessary.

The major recommendations related to the committee are as follows:-

[1] Every single person should never be vested with the decision making power i.e., the role of chairman and chief executive should be separated clearly.

[2] The Non-executive directors act like an independently while giving their judgment on issue of strategy, performance, allocation of resources and designing the code of conduct.

[3] A majority of directors should be independent non-executive directors, i.e., they should not have any financial interests in the company.

[4] The term of the Directors can be extended beyond three years only after the prior approval of the shareholders.

[5] A remuneration committee with majority of non-executive directors should decide on the pay of the executive directors.

[6] The interim company report should give the balance sheet information and reviewed by the auditors.

[7] The information regarding the audit fee should be made public and there should be regular rotation of the auditors.

[8] An objection and professional relationship with the auditors must be ensured.

[9] It must be reported that a business is a growing concern.

CHAPTER – IV

INTRODUCTION OF STAKEHOLDERS

Meaning of Stakeholders

In a corporation, a stakeholder is a member of "groups without whose support the organization would cease to exist",[74] as defined in the first usage of the word in a 1963 internal memorandum at the Stanford Research Institute. The theory was later developed and championed by R. Edward Freeman in the 1980s. Since then it has gained wide acceptance in business practice and in theorizing relating to strategic management, corporate governance, business purpose and corporate social responsibility (CSR). The definition of corporate responsibilities through a classification of stakeholders which is to consider has been criticized as creating a false dichotomy between the "shareholder model" and the "stakeholders' model" or a false analogy of the obligations towards shareholders and other interested parties.[75]

A stakeholder is a party that has an interest in a company and can either affect or be affected by the business. The primary stakeholders in a typical corporation are its investors, employees, customers, and suppliers. However, with the increasing attention on corporate social responsibility, the concept has been extended to include communities, governments, and trade associations.[76]

A stakeholder is any individual, group, or party that has an interest in an organization and the outcomes of its actions. Common examples of stakeholders include employees,

[74]Freeman, R. Edward; Moutchnik, Alexander (2013). "Stakeholder management and CSR: questions and answers". UmweltWirtschaftsForum

[75] Stakeholders (Corporate) : Wikipedia

[76] Stakeholders : Jason Fernando

customers, shareholders, suppliers, communities, and governments. Different stakeholders have different interests, and companies often face trade-offs in trying to please all of them.

Accepting this view, we seek to provide some benefit to mankind and science in general and both project and general management in particular by removing ambiguity from the meaning of the term stakeholder. The need to do this was pointed out by McGrath and Whitty (2015).[77]

Stakeholders provide resources that are more or less critical to a firm's long-term success. These resources may be both tangible and intangible. Shareholders, for example, supply capital; suppliers offer material resources or intangible knowledge; employees and managers grant expertise, leadership, and commitment; customers generate revenue and provide infrastructure; and the society builds its positive corporate images.

A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interest of the company, its employees, the community and the environment. Stakeholder engagement leads to increased transparency, responsiveness, compliance, organizational learning, quality management, accountability and sustainability. Stakeholder engagement is a central feature of sustainability performance. Stakeholder engagement leads to increased transparency, responsiveness, compliance, organizational learning, quality management, accountability and sustainability. Stakeholder engagement is a central feature of sustainability performance.

Stakeholder engagement leads to increased transparency, responsiveness, compliance, organizational learning, quality management, accountability and sustainability. Stakeholder engagement is a central feature of sustainability performance. Customers are considered as the king to drive the market and they can sometimes exercise influence by consolidating their bargaining power in order to get lower prices. he lenders put a check and balance on the governance practices of an organization to ensure safety of their fund and as a societal responsibility. The organization which builds a mutually strong relationship with its vendors improves its overall performance in the marketplace. The society provides the desired climate for successful operation of a company business. If society turns against the company, then business lose its faith in the eyes of other stakeholders be it government or customer. "Stakeholders" mentioned in the media from time to time.

[77] Stakeholders defined : Jonathan Witty, Stephen Keith Mcgrath

The Role of Stakeholders in Corporate Governance **Preston, Sachs (2002),**"A person, group or organization that has interest or concern in an organization. Stakeholders can affect or be affected by the organization's actions, objectives and policies. Some examples of key stakeholders are creditors, directors, employees, government (and its agencies), owners (shareholders), suppliers, unions, and the community from which the business draws its resources.

Not all stakeholders are equal. A company's customers are entitled to fair trading practices but they are not entitled to the same consideration as the company's employees. The stakeholders in a corporation are the individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and that are therefore its potential beneficiaries and/or risk bearers." This definition differs from the older definition of the term stakeholder in Stakeholder theory (Freeman, 1983) that also includes competitors as stakeholders of a corporation. [78]

Fassin (2009) noted that "Stakeholder management has become an important tool to transfer ethics to management practice and strategy" and Huemann (2016) point out the need to consider management "for" rather than "of" stakeholders. The stakeholder area has also been elevated in importance in the Guide to the Project Management Body of Knowledge (PMBOK Guide) (Project Management Institute, 2013), having been added as a new knowledge area, whereas it had previously been covered under communications.[79]

Miles (2012) concluded that stakeholder is an essentially contested concept as defined by Gallie (1956), nothing. The concept of the "stakeholder" has become central to business, yet there is no common consensus as to what the concept of a stakeholder means, with hundreds of different published definitions suggested.

The roles of play by a stakeholder in corporate governance are as follows:-

[1] A stakeholder has a vested interest in a company and can either affect or be affected by a business' operations and performance.

[2] Typical stakeholders are investors, employees, customers, suppliers, communities, governments, or trade associations.

[78] Stakeholders : Wikipedia
[79] Stakeholder : Stephen Keith McGrath, Researcher gate

[3] An entity's stakeholders can be both internal and external to the organization.

Stakeholders can be internal or external to an organization. Internal stakeholders are people whose interest in a company comes through a direct relationship, such as employment, ownership, or investment. External stakeholders are those who do not directly work with a company but are affected somehow by the actions and outcomes of the business. Suppliers, creditors, and public groups are all considered external stakeholders.

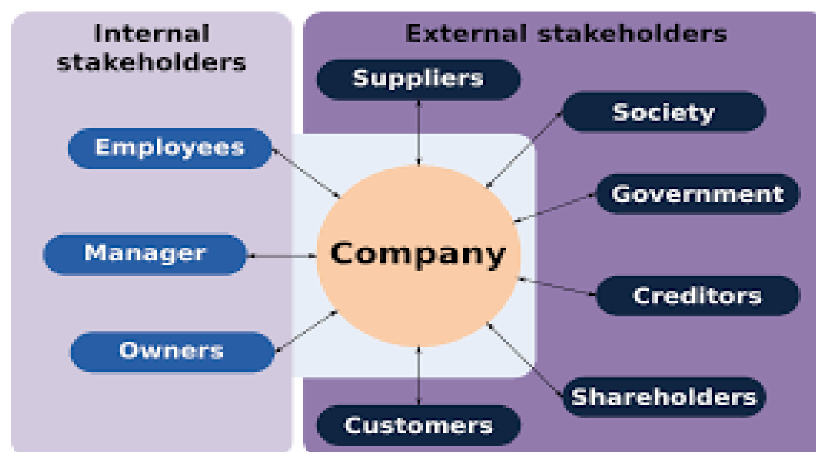
Example of Internal Stakeholder:-

Investors are internal stakeholders who are significantly impacted by the associated concern and its performance. If, for example, a venture capital firm decides to invest $5 million in a technology startup in return for 10% equity and significant influence, the firm becomes an internal stakeholder of the startup. The return on the venture capitalist firm's investment hinges on the startup's success or failure, meaning that the firm has a vested interest.[80]

Example of an External Stakeholder:-

External stakeholders, unlike internal stakeholders, do not have a direct relationship with the company. Instead, an external stakeholder is normally a person or organization affected by the operations of the business. When a company goes over the allowable limit of carbon emissions, for example, the town in which the company is located is considered an external stakeholder because it is affected by the increased pollution.

Types of Stakeholders in Corporate Governance



As per the corporate governance there are two types of stakeholders are as follow:- .

[80] Stakeholder : Jason Fernando

[1] Internal Stakeholders [2] External Stakeholders

[1] Internal Stakeholders:- Internal stakeholders are entities within a business (e.g., employees, managers, the board of directors, investors). Employees want to earn money and stay employed. Owners are interested in maximizing the profit the business makes. Investors are concerned about earning income from their investment.

Responsibility towards owners/Holders:-

[1] Proper use of capital

[2] To manage business effectively.

[3] To provide accurate and timely information

[4] Ensure growth and appreciation of owner's capital.

[5] Provide regular and fair return on owners capital.[81]

Responsibility towards Employees:-

[1] Fair compensation for service provided.

[2] Timely and regular payments.

[3] Provision of proper working and welfare conditions.

[4] Job security.

[5] Provision of security benefits and better living conditions.

[6] Training and development opportunities.

[7] To recognize and honor individual worker's rights.

[8] Fair and unbiased treatment to all

Responsibility towards Management:-

[1] Management decisions have impact.

[81] Stakeholders theory : Jagruti Godambe

[2] Shareholder's expects higher returns •Management has a fine balance

[2] External Stakeholders:- External stakeholders are entities not within a business itself but who care about or are affected by its performance (e.g., consumers, regulators, investors, suppliers). The government wants the business to pay taxes, employ more people, follow laws, and truthfully report its financial conditions. Customers want the business to provide high-quality goods or services at low cost. Suppliers want the business to continue to purchase from them. Creditors want to be repaid on time and in full. The community wants the business to contribute positively to its local environment and population. The types of stakeholders are as follows:-

Any action taken by any organization or any group might affect those people who are linked with them in the private sector. The goal is to put you in the shoes of each type of stakeholder and see things from their point of view. Hence the types of stakeholders are as follows:-

[1] Customers:- Many would argue that businesses exist to serve their customers. Customers are actually stakeholders of a business, in that they are impacted by the quality of service/products and their value. For example, passengers traveling on an airplane literally have their lives in the company's hands when flying with the airline. Mainly, customers think about their product, quality and their services.

[2] Employees:- Employees have a direct stake in the company in that they earn an income to support themselves, along with other benefits (both monetary and non-monetary). Depending

on the nature of the business, employees may also have a health and safety interest (for example, in the industries of transportation, mining, oil and gas, construction, etc.).

[3] Investors:- Investors include both shareholders and debt holders. Shareholders invest capital in the business and expect to earn a certain rate of return on that invested capital. Investors are commonly concerned with the concept of shareholder value. Lumped in with this group are all other providers of capital, such as lenders and potential acquirers.

[4] Suppliers and Vendors:- Suppliers and vendors sell goods and/or services to a business and rely on it for revenue generation and on-going income. In many industries, suppliers also have their health and safety on the line, as they may be directly involved in the company's operations.

[5] Communities:- Communities are major stakeholders in large businesses located in them. They are impacted by a wide range of things, including job creation, economic development, health, and safety. When a big company enters or exits a small community, there is an immediate and significant impact on employment, incomes, and spending in the area. With some industries, there is a potential health impact, too, as companies may alter the environment.

[6] Governments:- Governments can also be considered a major stakeholder in a business, as they collect taxes from the company (corporate income taxes), as well as from all the people it employs (payroll taxes) and from other spending the company incurs (sales taxes). Governments benefit from the overall Gross Domestic Product (GDP) that companies contribute to.

Difference between Internal Stakeholder and External Stakeholders

The following are the major differences between internal and external stakeholders:

[1] The individual or group that works for the organization and they actively participate in the management of the company are known as Internal Stakeholders. External Stakeholders, on the other hand, are the individual or group that is not employed by the organization but they get affected by its activities.

[2] Internal Stakeholders serves the organization, but External Stakeholders deals with the company externally.

[3] Internal Stakeholders are directly influenced by the company's activities because they are the part of the organization which is just opposite in the case of External Stakeholders.

[4] Internal Stakeholders are employed by the company, but external stakeholders are not.

[5] Internal matters of the company are known to internal stakeholders. However, external stakeholders are not known about such matters.

[6] Internal Stakeholders are the primary stakeholders whereas External stakeholders are the secondary stakeholders.

Stakeholders Conflicts and Resolution

Beggars do not envy millionaires, through of course they will envy other beggars are more successful. **–Bertrand Russell**

Russell's observation on the resentment that can attend those sharing the same condition remind us of a point all but forgotten in the management stakeholder literature, that stakeholders who seemingly share a common fate are frequently in conflict with one another. Rather than united in common cause against a more powerful other, like brothers in arms, they can be more like Cain and Abel, jealously divided against one another. Contemporary corporate governance is primarily concerned with conflicts between stakeholder groups, such as owners, workers and managers or what Wolfe and Putker (2002) which describe as role-based stakeholder groups. Conversely, in the paper that the corporate governance literature identifies numerous conflicts within stakeholder groups or intra-stakeholder conflicts, such as those who are the owners (Bergloff & von Thadden, 1994; Hoskisson, Hitt, Johnson & Grossman 2002) or creditors. However, there are several compelling explanations of inter-stakeholder conflicts, such as agency theory (Eisenhardt 1989) or class politics (Roe 1994), there is no comparable account of intra-stakeholder conflict.

It propose that intra-stakeholder conflicts are inherent in the functioning of a firm and because stakeholder primacy varies with the governance system, so it does the governance issues – whether as a means of resolving conflicts, or being the very cause of the conflict. The fundamental issue of corporate governance is not simply one of the protecting shareholders from manager, rather the issue is one of determining stakeholder distribution rights, describing inter-stakeholder tensions and identifying the means through which the

primary stakeholder seek to preserve their privilege and externalize the costs of those privileges onto less powerful secondary stakeholders.

A stakeholder is someone who has an interest in the success of the business. All stakeholders want the business to succeed and are dependent on each other to make this happen. For example:-

[1] A mangers need suppliers to provide them with high quality stock when required and suppliers need managers to buy supplies from them to keep them in business.

[2] The owners need employees to work hard for them to help satisfy customers and increase sales and employees need owners to provide them with fair wages and good working conditions.

[3] The customers need owners to provide them wit the goods and services they require, and owners need customers to buy their products.

Conflict interests of stakeholders

Different stakeholders have different objectives. The interests of different stakeholder groups can conflict. For Example:-

[1] The owners generally seek high profits and so may be reluctant to see the business pay high wages to staff.

[2] A business decision to move production overseas may reduce staff costs. It will therefore benefit owners but works against the interests of existing staff who will lose receive a poorer service.

[3] The managers may want to pay for goods later to improve cash flow whereas the suppliers will want their payment as soon as possible.

[4] The managers want the highest profit possible on sales whereas customers want low prices for high quality goods.

Whenever you face strong differences in opinions, determine how you will manage the conflict. The five common conflict management techniques are :-

[1] **Withdrawing.** Some project managers hate conflict and avoid it as much as possible. Withdrawing from the conflict does not make it go away. The issues will surely surface later in the project and will likely cause more damage than if addressed early.

[2] **Smoothing.** Other project managers are as smooth as silk. These project managers emphasize the areas of agreement and fail to address the differences of opinion, thus, kicking the can down the road.

[3] **Compromising.** Another method of dealing with conflict is to search for solutions where the stakeholders will compromise.

[4] **Forcing.** Project managers may be given authority and power. These individuals are prone to "lay down the law." Team members may comply, but typically these same members find a way to undermine the decisions later.

[5] **Problem-Solving.** Turn the difference in opinions into a problem to be solved by the stakeholders through careful examination of the alternatives.

Such techniques, withdrawing and smoothing are easiest and least effective. Sooner or later the stakeholders will make their opinions known. Compromising is certainly better and can bring about positive results. Forcing may move things forward quickly, but it can be risky.

Turn Conflict into a Problem-Solving Exercise

As by helping, the stakeholders it can resolve the conflict by reframing the conflict as a problem-solving exercise. It seeks to understand the differences of opinions and makes them transparent, carefully leading individuals and groups to find common ground. This is more than consensus. Problem-solving leads to a mutual commitment by the stakeholders with greater buy-in and support. Make no mistake about it; problem-solving takes time and effort. Project managers have to use their leadership skills to influence the stakeholders.

CHAPTER – V

COMPANY PROSPECTUS AND ROLE OF POWERS

Meaning and definitions of Prospectus

Prospectus means any document described or issued as prospectus and includes any notice, circular, advertisement or any other communication, inviting offers from the public for the subscription or purchase of any shares in or debentures of, body corporate, inviting deposits from the public other than deposits invited by a banking company or a financial institution approved by the Federal Government whether described as prospectus or otherwise.

- PROSPECTUS COMPANIES ORDINANCE, 1984

Clause (70) of Section 2 of the Act define "prospectus" means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate. Section 26 deals with matters to be stated in prospectus.

- Companies Act 2013

Company prospectus is released by company to inform the public and investors of the various securities that are available. These documents describe about mutual funds, bonds, stocks and other forms of investments offered by the company.

Prospectus is a formal legal document, which is required by and filed with the SECP that provides details about an investment offering for sale to the public, it should contain the facts that an investor needs to make an informed investment decision.

In a document there are many ingredients to constitute a prospectus are:-

[1] There must be an invitation to the public.

[2] The invitation must be made "by or on behalf of the company or in relation to an intended company.

[3] The invitation must be "to subscribe or purchase".

[4] The invitation must relate to any securities of the company.

Provisions of Company Prospectus under Companies Act,2013

The modem corporation since its inception was purely commercial association but it has grown into a social and economic institution that exerts tremendous influence on every aspects of nation's economy and as well as on many stakeholders such as shareholders, creditors employees and public. Now it has moved from the periphery to the very centre of our social and economic existence.

The corporation being separate and distinct from its members,[82] it can posses and disposes property in his name.[83]The Madras High Court in R.T. Perumal v. H.John Deaviv, 1960 observed that "no member can claim himself to be the owner of the company's property during its existence, or in its winding up". But the company is an association of persons who contribute money or monies worth to a common stock.[84] It means that the property of the company is nothing but a contribution by the members or shareholders or investors. If the corporate personality is removed, property of the company means property of members who constitute a company. But as long as corporation or company is a going concern no one can claim ownership or rights over that property. During the life of the company investors became dormant or passive owners, i.e. they do not have any direct control on the property. The control and ownership is vested and exercised by the legal person. But in fact some natural persons exercise this power of company, as the company does not have any physical existence except in the registry of company and in the eye of law.

Because of this handicap the company has to depend upon some natural persons, they are, under the company law are termed as Board of Directors. S.291 of the Companies Act, 1956 provides that, "subject to the provision of the Act, the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do". This provision extends protection to investors through the memorandum and Articles of Association of the company.. These two documents are binding on members (investors) as well as the company. The issue here is what protection is given to the public at the time of contribution to the company's joint stock.

At that time prospective investor is a stranger to the company and its affairs. Further, if there is any misrepresentation by the promoters and directors at the time of collection of joint stock

[82]Solomon v. Solomon & Co. Ltd.,1895-99
[83]Gramophone & Typewriter Co. v Stanley,1906
[84]Lord Justice Lindley's, Definition in Taxman's Company Law and Practice, 19,h ed., (New Delhi: Taxmann Publication, 2003),

of the company, what protection is provided to the investor by the company law? The good corporate governance requires protection to investors not only after subscription to joint stocks but also at the time of pr-subscription. In this chapter, the investigator is critically analyzing the provisions of company law relating to prospectus.

Public Offer and Private Placement

Chapter III (Section 23 to Section 42) of the Companies Act,2013 which deals with prospectus and allotment of securities. It is divided into two parts are:-

[1] Part I deals with public offer and

[2] Part II deals with private placement.

[1]Public Offer/ Public Company:-As per section 23(f), a public company may issue securities:-

[1] To public through prospectus (herein referred to as "public offer") by complying with the provisions of this Part (i.e. Part I)

[2] To the through private placement by complying with the provisions of Part II of this Chapter; or

[3] The right issue or a bonus issue in accordance with the provisions of this Act and in case of a listed company or a company which intends to get its securities listed also with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made.

[**2] Private Placement/ Private Company**:- As per Section 23(2), it lays down that a private company may issue securities:-

[1] The way to issue rights or bonus issue in accordance with the provisions of this Act; or

[2] It through private placement by complying with the provisions of Part II as per this chapter.

As per section23 of the Companies Act, 2013, the purpose of Chapter III, "public offer" includes initial public offer or further public offer of securities to the public by a company, and an offe for sale of securities to the public by an existing shareholder.

Protection in case of misrepresentation in prospectus

The Companies Act in various sections requires fair complete and true disclosure of information about the company and business prosecutes. In the event of failure to comply with this requirement apart from prescribing penalty certain remedies are provided to the aggrieved investor.

The Right of Recession

The contractual right of rescission appears to be very fragile in the hands of the investor. If he wishes to recover money or property transferred by him under the contract he will have to initiate proceedings for rescission very quickly.(**All card v. Skinner, (1887**). Delay even due to facts beyond his control will defeat his claim for rescission.

The right of rescission is lost to him if the company is wound up, or has been ordered to wound up before he started legal proceedings.(**First National Reinsurance Co. Ltd v. Greenfield, (1921).** Further only an allotter is entitled to rescind the contract.(**Peek V. Gurney, (1873).** The right of rescission operates in a wider space, as the allottee is entitled to avoid the allotment if it was caused by misrepresentation whether innocent or fraudulent. It is a general rule that a contract induced by material misrepresentation is voidable and may at the option of the aggrieved party be rescinded**.(Smith 's case, (1867).**The reasons for the rule, that the allottee has to act quickly to enforce the right of rescission is, "his name in the register of members and as such he is being held out as a contributory to the assets of the company".**(Palmer's Company Law).** The right of rescission may also be lost by an implied ratification, i.e. after discovering his right to rescind; he tries to sell his shares, attends meetings of the company, **Sharpley v. Louth etc Co., (1876)** receives dividends or pays calls etc. .**Scholey v. CentralRly, (1868).**

To claim the relief of rescission the allottee is required to establish the following;

a) The misrepresentation was one of fact;

b) It was material and;

(c) He acted upon it.

The investor need not be shown that misrepresentation was the sole fact relied upon, but it must have been one of the facts relied upon. By avoiding the contract investor can get rid of

his shares and claim the money he paid for them.[85]Further under section 75 of the Indian Contract Act, a person who law fully rescinds a contract is entitled to compensation for any damage, which he has sustained through the non fulfillment of the contract. On principle the right of recessions is an appropriate remedy, provided the party misrepresented himself has made a contract. But in case of a company, the directors are acting not as a principal but as an agent of the company as well as employee of the company. Under law of agency, company is liable as principal. If the act of directors is ultra- virus than the law of agency is of no use to investor. Further, this right looses its force, if the company is wound up or in the processes of winding up. Hence the investigator is of the opinion that the right of rescission provides an appropriate remedy if the act of a director is within his power and the company is a going concern otherwise, it is fragile protection.

Investors Right In Section 56

The prospectus issued by the company shall contain the particulars mentioned in section 56(1) of the Companies Act. Section 56(1) reads: '(1) Every prospectus issued (a) by or on behalf of company or (b) or on behalf of any persona who is or has been engaged or interested in the formation of the company, shall state the matters specified in part I of Schedule II and set out the reports specified in part II of that schedule and the said parts I & II shall have effect subject to the provisions contained in part III of that schedule'. Violation of provision of Section 56(1) will be followed by a penalty provided in section 56(3). But section 56 does not say anything about the subscriber's remedy on violation.

The section in terms gives no remedy or cause of action, but it is a remedial section for the protection of applicants for shares against wiles of promoters and others. **Lord Lindlay in Macclay v. Jait, (1906).** But there is no reference in the Companies Act which stipulates that the directors and other officials incur liability to the investor for violation of section 56(1) and (III).

Their liability has to be inferred from indirect language in sub-section (4). It reads: "All directors or other persons responsible of the prospectus shall not incur any liability by reason of any non compliance with, or contravention of, any of the requirements of this section, if:-

a) As regards any matter not disclosed, he proves that he had no knowledge thereof; or

[85]Section 64, Indian Contract Act, 1872

b) He proves that the non-compliance or contravention arose from on honest mistake of fact on his part; or

c) The non-compliance or contravention was in respect of matters, which in the opinion of the court dealing with the case were immaterial, or otherwise such as ought, in the opinion of that court, having regard to all circumstances of the case, reasonable to be excused.

Provided that no director of other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of schedule II, unless it is proved that he had knowledge of the matters not disclosed" On a careful reading of section 56(4) it becomes evident that the onus is very heavy on the investor. He cannot succeed for an omission of matters required to be specified under clause 18 of schedule II 45 unless he proves that directors or other officials who have issued the prospectus has knowledge of the matters not disclosed. It non-compliance or contravention was in respect of matters which in the opinion of the court dealing with the case were immaterial or otherwise such as ought in the opinion of the court reasonably to be excused, the officials and other person, responsible for the issue of prospectus will not incur liability. Officials responsible for the issue of prospectus are exonerated from liability for violation of section 56 if they can prove certain matters, **Desai j in Shiromani Sugar Mills Ltd v. Deviprasad, AIR (1950)**. But the mere fact that the prospectus has not complied with the requirements of section 56(1) and (3) does not confer on an allottee any right against the company. He can neither sue for rescission nor for damages against the company under section 56(4). It contemplates only right against a director or other officials. Like right of rescission, right under section 56 is also subjected to number of limitations. Good governance of a company requires enhancement of shareholders value. Hence this section has to be suitably modified and a specific right is to be conferred on shareholders against directors and company.[86]

Criminal Liability for Mis-statement in Prospectus

As per section 34 of the Companies Act, 2013, where a prospectus, issued, circulated or distributed includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorize the issue of such prospectus shall be liable under section 447. Section

[86] Shodh : Karnataka University

447 provides that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to 10years and shall also liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

However, when the fraud involves in public interests, the term of imprisonment shall not be less than 3years.

However, where a person who has authorized the issue of prospectus it proves, either that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary may be relieved from the criminal liability.

Penalty for Fraudulently Inducing to Invest Money

As per section 36 of the Companies Act,2013, it provides that any person who, either knowingly or recklessly makes any statement, promises or forecast which is false, deceptive or misleading or deliberately conceals any material facts, to induce another person to enter into or to offer to enter into:-

[a] Any agreement for or with a view to, acquiring, disposing of, subscribing for, or underwriting securities

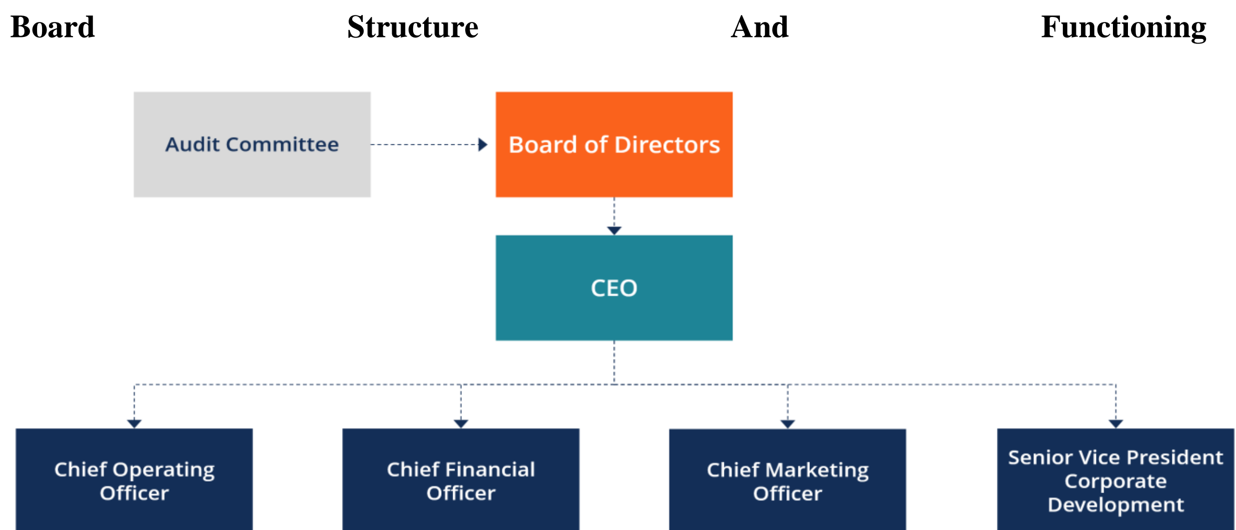
[b] Any agreement the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuate the value of securities

[c] Any agreement for or with a view to obtain credit facilities from any bank or financial institutions, shall be liable for action under section 447.

CHAPTER – VI

ROLES AND POWERS OF A DIRECTORS UNDER CODE OF GOVERNANCE

Board Structure And Functioning



The major proper role of outside directors in determining the strategy of a company and in evaluating capital investments in its future. **William Wommack** recommends that corporate objectives or a strategy committee should become the usual structural means for reviewing management's recommendation for investments. The author argues that management must organize well to relate to such a committee and that someone should be clearly designated the chief strategic officer (if not the CEO, then not the chief operating officer). He outlines the processes leading to management-board involvement in funding strategies (not projects) and in determining direction.

Boards – and directors – are not all the same. In fact, they face different challenges and their structure is shaped by different factors. A KMPG report synthesized some of the variables that can affect the foundations of a board:

[1] The legal and regulatory obligations of the relevant geography – which may range from a highly regulated environment that dictates board composition and responsibilities to no applicable laws at all, depending on the country in which the business is based.

[2]The company's ownership structure – which may range from a business closely held by a few family members who see each other on a daily basis, to one with numerous, geographically

dispersed distant family members, to the inclusion of other investors, either through private equity investment or publicly traded stock.[87]

[3] The expectations and interests of key stakeholders including owners, other interested family members (such as the owners' likely heirs), customers, and insurers.

4:- The company's attributes – size, resources, maturity, culture, and level of complexity.

In the end, companies with a good corporate governance system, together with an experienced board that has a growth-mindset and sustainability concerns, will be better positioned to prosper both in the short term and on the long run.

Basic Structure of a Board of Directors

The structure, responsibilities, and powers given to a board of directors are determined by the bylaws of a company or organization. The bylaws generally determine how many board members there are, how the members are elected, and how frequently the board members meet. There's not a set number or structuring for a board of directors; it depends largely on the company or organization, the industry in which the company or organization operates, and the shareholders.[88]

It widely agrees with the board needs to represent shareholder and owner/management interests and that it's usually a good idea for the board to include both internal and external members. Accordingly, there is usually an internal director – a member of the board invest in the daily workings of the company and manage the interests of shareholders, officers, and employees – and an external director, who represents the opinion and interests of those who function outside of the company. The Chief Executive Officer (CEO) often also serves as chairman of the company's board of directors.

Duties of Directors

As per the section 166 of the Companies Act, 2013 duties of directors have been defined. Such Act considerably enhances the roles and responsibilities of the Board of Directors and makes them more accountable. The Act 2013 has set the following duties of directors are:-

[1] To act in accordance with company's articles.

[87] Corporate Governance : youmatter
[88] What is a Board of Directors : Corporate Finance Institute

[2] To act in good faith to promote the objects of the company for the benefit of the members as a whole and the best interest of the company, its employees, shareholders, community and for protection of the environment.

[3] To exercise duties with reasonable care, skill and diligence and exercise of independent judgment.

[2] Achieve or attempt to achieve any undue gain or advantage, either to himself or his relatives, partners or associates.

[3] Assign his office and any assignment so made shall be void.

Swine-Ready J. held in the case of the Percival v Wright (1902) regarding the directors' duties towards the shareholders. "The directors of a company are not trustees for individual shareholders and may purchase their shares without disclosing pending negotiations for the sale of the company's undertaking".

The decision in the case of the Percival v Wright has been criticized a lot that it should not be deduce that the directors can never be placed in a fiduciary relationship to the members. If the shareholders authorize the directors to negotiate for them, then the directors owe a duty in the case of a takeover bidder. The establishment of an agency relationship may be sufficient in the case of a family company, which depends on the whole surrounding circumstances and the character of the responsibility which the directors have assumed in a real and practical sense.

According to Mr. Flanagan the decision in the case of the **Coleman v Myers (1977)** by the court of appeal of the New Zealand is based on the wrong analysis. The shareholders complaint was that the director had failed in disclosing about their financial plans to get all the share of the company, through non disclosure and misrepresentation. According to the court, failure was the breach of the fiduciary duty which arose on the basis of the facts.

Set Strategy and Structure to Management

Organizing Management for Relating to the Board

If a board sets up a strategy committee, management quickly feels the need to organize itself to relate to it. The following two steps seem very important to me:

1. A company must have a set of objectives:- What I am referring to here are the broad objectives of the company that really relate to compounding cash at a satisfactory rate.

2. A company needs to develop a strategic philosophy:-The philosophical belief, in short, reflects a set of theories which a company believes will result, if applied correctly, in meeting the objectives. One such general guide could be: "Businesses that generate neither cash today nor credible promise of more cash tomorrow are worthless." Another could be: "All our businesses will be the cost-effective leaders in their market segment; otherwise they will be managed for cash today."

In a multiple product company, a philosophical belief has to be set forth so all the individual strategic business units have a common basis to which they can relate. For instance, if all the businesses become the cost-effective leaders, the sum of the results of the individual units will satisfy the corporate objective of 17%. Whereas the CEO without exception, as noted, always does the first step, a chief strategic officer should be identified, even if it is the CEO, to do the second step.

Board of Directors and Policy Making

A new era of board stewardship begins. When we published the first edition of our director interviews in December 2020, we saw a world in flux: the pandemic was raging around the world and many markets were just entering a winter spike in cases, occasioning more lockdown and reduced economic activity. At the same time, other economies were recovering, and several of the directors we interviewed, particularly those in China and Southeast Asia, were beginning to draw conclusions about what the pandemic has meant for their businesses, and about the critical decisions their boards have taken that make the difference between success and failure. More than three months on, things remain unclear for many countries. While vaccines have arrived for some, the pandemic has not abated, and it has become clear that the vaccination process and the road to recovery will both be long.

For boards of directors, the rhythm of virtual board and committee meetings continues. New directors are being recruited, interviewed, and on boarded in a completely virtual environment, and the traditional board dinner the night before a meeting has fallen away to, at best, a few minutes of banter into a webcam at the beginning of a video conference as directors assemble around the virtual boardroom table. And this is just the surface logistics of

serving on a board in 2021. Looming much larger are the changes in business models, ways of doing business, and ways of thinking that are being challenged by the extended pandemic.

Companies have had to confront increased demands from their employees and from the communities where they operate, and they've had to show goodwill, particularly where they may have received government support. And since last summer, many companies have taken public stands in the fight for racial justice, to an extent that would have been difficult to imagine a year or two ago. The degree to which an organization pivots along this axis to meet all of its stakeholders' needs is a real and recurring agenda item in many boardrooms today. Boards have to understand the importance of setting a clear and strong purpose for the organization that senior leaders and employees can stand behind and that brings value to society in the long term will be increasingly vital. [89]

Trusteeship of Directors

Corporate Governance is regulated by placing directors in the position of a trustee.[90]This idea of trustee arose in the early stage of evolution of Company Law. Prior to 1844, most joint stock companies were unincorporated and depended for their validity on a deed of settlement vesting the property of the company in trustees.[91] Many times the directors were themselves trustees. A distinction was drawn between the passive trustees and the managing board of directors. The court of equity regarded board of directors as trustees so far as they dealt with the trust property.[92]

The description of 'trustee' was not apt, yet it was not unnatural that the courts should extend it to them by analogy. The corporation, whether incorporated or not, the duties of Governors i.e. Directors remained the same.[93] The courts of equity always tend to apply the label 'trustee' to anyone in a fiduciary position.[94]

As **Romer J., in Re city equitable fire Insurance Co}, 1925** has express his words on the trusteeship of Directors:-

[89] 2021 Director's alert : Sharon Thorne; Dan Konigsburg
[90] . Duties are fiduciary in nature
[91] Gower LCB., The Principles of Modem Company Law, 3rd ed., (London: Steven & Sons Publication), p.515.
[92] CfGrimes v. Harrison (1859)
[93] Property of the Corporation was held in trust by the corporation for its members.
[94] ReGeman Mining Co., Ex p. Chippendale (1853)

"It has sometimes been said that directors are trustees. If this means no more than that the directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement".

To protect the interest of the investors, the directors are placed in the place of 'trustee', which was a well-thought and designed noble idea. In truth, directors are agents of the company, rather than trustees of it or its property. So far as the duty of good faith is concerned, the description of 'trustee' still has validity. But this analogy breaks down in relation to duties of care and skill. In the governance of business of a corporation the managers are required to take risk but that must be in good faith keeping in mind the interest of corporation and investors.

Code of Conduct

Corporate code of conduct (**CCC**), codified set of ethicalstandards to which a corporation aims to adhere. Commonly generated by corporations themselves, corporate codes of conduct vary extensively in design and objective. Crucially, they are not directly subject to legal enforcement. In an era acutely aware of the dramatic social and environmental effects of corporate activity across the world, such codes of conduct have become the focus of considerable attention.

It is not fixed that the CCC should cover stated objectives which are generally related to the particular concerns of the corporation, and authors are likely internal managers and serving consultants, although sometimes in consultation with nongovernmental organizations (NGOs) and the United Nations Global Compact. Accordingly, the codes are produced in numerous formats, ranging from detailed best-practice guidelines on social and environmental issues to broad proclamations by the corporation to uphold a range of values (such as the recognition of human rights).

By giving the power of corporations and the profit motives that shape their priorities, questions remain as to the degree to which they will genuinely prioritize socially responsible behavior facilitated the stakeholder input in corporate governance. The corporate sector's most prominent response to these issues is CCCs.

Codes of conduct that prescribe ethical behavior are deemed to positively influence purchasing decisions and thus boost shareholder profit and secure new investors. They are seen as a way to mainstream ethical concerns into the core of business procedures. However, the efficacy of such codes depends upon their reliability as a gauge for actual corporate behavior and whether stakeholders (such as consumers, governments, advocacy groups, and unions), as well as investing shareholders, can rely on their accuracy. Central credibility for CCCs it explained, monitored, enforced, and transparency of conduct. The corporate sector has long resisted the call for tighter centralized regulation of its activities, claiming that this would unacceptably reduce competitive capacity and depress financial growth. Instead, there has been a trend to produce publicly available CCCs and related CSR reports for the inspection of the public and shareholders alike, and a number of major corporations adopted this strategy, including McDonald's, Gap, Mattel, Hewlett-Packard, Dell, and IBM.[95]

Board's Report

Whenever a group of people comes together to work on something, there are bound to be disagreements and conflicts of interest. The notion of corporate governance became necessary because of conflicts of interest between stakeholders in corporations. Conflicts primarily occur between upper management and shareholders, but they can exist between other parties and individuals. Corporate governance reports provide the structures that ensure to stakeholders that corporations are committed to good corporate governance and that they're complying with all applicable laws and regulations.

A corporate governance report is also called the annual corporate report. It includes a statement of corporate governance procedures and compliance, information on board composition, statements on the company's performance, and information about compliance and conformance with best practices for good corporate governance.

The corporate report should include a statement of disclosure of the company's governance procedures and compliance. It should also disclose the principles and codes that guide the company's procedures. Disclosure statements usually detail the distribution of powers between the board chair and the CEO. Best practices in today's marketplace discourage the same individual from serving as CEO and board chair.

[95] Corporate code of conduct : Jude Browne

The corporate governance report should contain a section that lists the powers, functions, roles and responsibilities of board directors. The report includes information about committees and sub-committees and any delegated powers and duties. This section of the report should include conformance and trans-formative functions.

Shareholders may be particularly interested in reading information about board directors in the corporate governance report. Such information may include the company's procedures for appointing directors, board development, succession planning and remuneration by shareholding members.[96]

Throughout 2021, boards should continue to enhance their own effectiveness. Board competencies, practices and committee structure and responsibilities can be continually improved to meet ongoing and emerging challenges, including the impacts of COVID-19.[97]

Increased focus on long-term value creation, operational resiliency and ongoing governance trends related to ESG (Economic, social and Governance) and strategic workforce issues may also influence board agendas and how the board provides oversight.

In view of continued remote working and meetings, which will continue well into 2021, board meeting and information communication and security practices will need to be agile and effective. Charters, committee structure, agendas and time commitments may all need to be reassessed to drive board effectiveness and increase accountability.[98]

Access to the right information and people at the right time, always a critical board issue, is even more important in view of unprecedented uncertainty and rapid changes in business environments globally. Board members should assess the quality and timeliness of information from management and seek outside expertise and input from key stakeholders who can provide perspectives and highlight trends that could impact the business.

As boards navigate an ongoing global crisis, address the changing expectations of stakeholders and demonstrate leadership on issues of diversity, equity and inclusion, they may need to challenge how their composition reflects the stakeholder base and reassess the appropriate competencies needed to oversee strategic opportunities and risks now and in the

[96] What is a Corporate governance Board report : Nicholas J.Price
[97] Six priorities for boards in 2021 : EY
[98] CORPORATE GOVERNANCE GUIDELINES

future. Regular board refreshment, coupled with ongoing education for all board members, must be embraced as table stakes for meeting changing oversight needs.[99]

Doctrine of Ultra Virus

Corporate Governance in wider sense denotes directions and control of the affairs of a company. According to **Salim Sheikh and William Ress**, "The role of Corporate Governance is to ensure that the directors of a company are subject to their duties, obligations and responsibilities, to act in the best interest of their company, to give direction and to remain accountable to their shareholders and other beneficiaries for their actions".[100]

An effective Corporate Governance system should provide mechanisms for regulating director's duties in order to restrain them from abusing their powers and to ensure that they act in the best interest of the investors. To ensure good Corporate Governance the system of laws, regulations and judicial decisions have played a significant role. In this topic the investigator is attempted to discuss the role of court to control the powers of directors for the purpose of protecting the interest of the investors. The courts evolve many doctrines. Among them the earliest and important one is 'doctrine of Ultra virus'[i]

. 'Ultra-virus' literally means beyond the powers with reference to the company beyond the powers of Board of Directors. Memorandum of Association of the company defines the scope of powers of directors. To obtain the registration of a company an application is to be made along with it Memorandum of Association and Articles of Association, if necessary.

According to section 12 of the Indian Companies Act 1956, any seven or more persons in the case public company and in the case of private company any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and by complying with other requirements of this Act form a company with or without limited liability. Memorandum of association determines the nature of the company. The purpose of memorandum is to enable shareholders, creditors and those who deal with the company to know what the permitted range of business of the company. It also regulates the power of directors and ensures protection to investors. In **Asbury Railway Carriage Co. v. Riche, (1875)**:-

[99] EY centre for board matters : Stephen Klemash
[100] Dr.Chandrate K.R., "Role of Board of Directors in Emerging Dimensions,... ", Chartered Secretary, May 1997, p. A 109-505.

Lord Caims has said that: ".... The memorandum of association of a company is its charter and defines the limitation of the powers of the company established under the Act". The Companies Act 1956 has not imposed any restriction as to the number of the clauses to be included in the memorandum of association. Members of the company are free to include any number of clauses. The best judges to decide the number of clauses in memo are the members but not the legislator or the judiciary. But it does not mean that the Act and courts are silent spectators. Section 13 prescribes some obligatory clauses. In the matter of **Bhutora Brothers (Pvt.) Ltd,1957** while stating importance of the objects clause in the memorandum of association, Capoor, J., made the following observation:-

"The statement of the objects in its memorandum is not a mere legal technicality but is a necessity of great practical importance because the public who are called upon to subscribe to the capital of the company by purchase of its shares must know clearly what are the objects for which on they are paying and which they want to encourage. The object clause gives a caution to the investors.

By looking to the object they may decide either to invest or not to invest If they decide to invest the Act completely guards investors' interest. In this regards, in early days the judiciary has played important role. Further Lord Cairns in **Asbury Railway Carriage Co. v. Riche**, observed:-

"[Memorandum of Association] states affirmatively the ambit and extent of vitality and powers which by law are given to the corporation, and it states, if it is necessary to state, negatively that nothing shall be done beyond the ambit and that no attempt shall be made to use corporate life for any other purpose than that which is so specified".

Confining the activities of directors is very essential to protect investor. As directors are dealing with the investor's money, ultimately they should spend it for the set purposes. Memorandum of Association has achieved this object in general, objective clause in particular. In the early stage this has been recognized by the courts and very jealous to regulate the Corporate Governance.[101]

The Companies Act also in order to channelize the activities of the corporation and ensure protection of investor interest conferred statutory privileges on them with the means to create a statutory corporation, and secondly by making it obligatory to state the objects, in this

[101] Cotman v. Brougham, 1913

regard the Companies Act gives full freedom to the subscribers to set any object, but subject to certain restrictions. Many investors are corporate illiterate, spread on different parts of the country and having divergent views, or of the opinion.[102]

The Board of directors are enjoying the vast power and discretion and dictating their terms. This is more so in the case of a new company, as the promoters are deciding the objects. So the investigator is of the opinion that in case of a new company, there must be some independent agency to scrutiny and determines the objects.[103]

[102]Investor and Education Protection : MCA
[103] Management Concepts and Organizational Behaviour : Dr. Karam Pal

CHAPTER – VII

CORPORATE SOCIAL RESPONSIBILITY

Meaning and Definitions of Corporate Social Responsibility

We live a dynamic life in a world that is growing more and more complex. Global scale environmental, social, cultural and economic issues have now become part of our every day life. Boosting profits is no longer the sole business performance indicator for the corporate and they have to play the role of responsible corporate citizens as they owe a duty towards the society, where they operate and draw resources from it and as such they are part of society.

Corporate Social Responsibility [CSR] is underpinned by public policy and therefore, it has undeniable links with law. CSR is not something new to India and the concept of trusteeship advocated by Mahatma Gandhi, the Father of the Nation was embraced by many companies, in various forms over the years. The government perceives CSR as the business contribution to the nation's sustainable development goals. Essentially, it is about how business takes into account the economic, social and environmental impact of the way in which it operates. Perception of the government about CSR gained shape and form in the Companies Act, 2013, which mandates Companies to undertake Corporate Social Responsibility, as one of the Board Agenda.[104]

The importance of inclusive growth is widely recognized as an essential part of India's quest for development. It reiterates our firm commitment to include those sections of the society in the growth process, which had hitherto remained excluded from the mainstream of development. In line with this national endeavor, Corporate Social Responsibility (CSR) was conceived as an instrument for integrating social, environmental and human development concerns in the entire value chain of corporate business. Ministry of Corporate Affairs had issued 'Voluntary Guidelines on Corporate Social Responsibility, 2009' as a first step towards mainstreaming the concept of Business Responsibilities. This was further refined subsequently, as 'National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011.'

[104] Capital Laws and Security Laws : ICSI

The National Voluntary Guidelines (NVGs) on Social, Environmental and Economic Responsibilities of Business released by the Ministry of Corporate Affairs (MCA) in July 2011, is essentially a set of nine principles that offer Indian businesses an understanding and approach to inculcate responsible business conduct.

Corporate Social Responsibility is the way companies manage their businesses to produce an overall positive impact on society through economic, environmental and social actions. Corporate social responsibility (CSR), also called corporate conscience, corporate citizenship, social performance, or sustainable responsible business/ businesses. Business depends for its survival on long term prosperity of the society.[105]

"Corporate Social Responsibility is concerned with treating the stakeholders of a company or institution ethically or in a responsible manner. 'Ethically or in a responsible manner' refers to treating key stakeholders in a manner deemed acceptable according to international norms." **- Michel Hopkins**

Carroll (2004) argues that "the social responsibility of businesses encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time."

Buhmann (2006) simply defines CSR as "doing more than what is required by law"

Johnson, Scholes and Whittington define CSR as "the ways in which an organization exceeds its minimum obligations to stakeholders specified through regulation"

Corporate social responsibility is basically a new business strategy to reduce investment risks and maximize profits by taking all the key stakeholders into confidence. The proponents of this perspective often include corporate social responsibility in their advertising and social marketing initiatives. It is a tool to increase the reputation of the company in the eyes of society.[106]

As per section 135(1) of the Companies Act 2013, the CSR provision is applicable to companies which fulfills any of the following criteria during the immediately preceding financial year:-

[1] Companies having net worth of rupees five hundred crore or more, or

[105] Corporate social responsibility : Wikipedia
[106] Corporate Social responsibility : Investopedia

[2] Companies having turnover of rupees one thousand crore or more,

[3] Companies having a net profit of rupees five crore or more.

Role of CSR in Corporate Governance

Companies that trigger any of the aforesaid conditions must constitute a Corporate Social Responsibility Committee of the Board to formulate and monitor the CSR policy of a company.

Section 135(1) of the Act requires the CSR Committee to consist of three directors or more, including atleast one independent director. Where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.

Further, where a private company has only two directors on the Board, the CSR Committee can be constituted with these two directors. The CSR Committee of a foreign company shall comprise of at least two persons of which one person should be resident in India and the other person nominated by the foreign company.

The Board’s report shall disclose the composition of the Corporate Social Responsibility Committee. Rule 3 of the Companies (Corporate Social Responsibility Policy) Rules, 2014 specify that every company which ceases to be a company covered under section 135 as per the limits specified there under for three consecutive financial years shall not be required to constitute a CSR Committee and comply with the provision of section 135, till such time that it meets the criteria specified.

Corporate social responsibility is basically a new business strategy to reduce investment risks and maximize profits by taking all the key stakeholders into confidence. The proponents of this perspective often include corporate social responsibility in their advertising and social marketing initiatives. It is a tool to increase the reputation of the company in the eyes of society.

It is certainly a business approach that creates a long term consumer and employee value by not only creating a ‘green strategy’ on natural environment but also considering every dimension of how a business operates in social, cultural and environment. The company should meet the needs of its all stakeholders (consumer, employees, shareholder, clients and

other related persons) without sacrificing the ability to meet the needs of the future stakeholders.

Objectives of CSR

[1] To formulate and recommend to the Board, a CSR Policy which would indicate the activities to be undertaken in areas or subject, specified in Schedule VII of the Act.

[2] To recommend the amount of the expenditure to be incurred on the activities undertaken in pursuance of the CSR policy.

[3] To institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

[4] To monitor the CSR policy of the company time to time.[107]

Duties of CSR in Corporate World

[1] The CSR activities shall be undertaken by the company, as per its stated CSR Policy, as projects or programs or activities (either new or ongoing)1 *[Excluding activity undertaken in pursuance of its normal course of business (Omitted by the Companies (Corporate Social Responsibility) Amendment Rules, 2020, dated 24th August 2020].

[2] The CSR Committee of the company may decide to undertake its CSR activities approved by the Board, through:-

(a) A company established under section 8 of the Act or a registered trust or a registered society, established by the company, either singly or along with any other company, or

(b) A company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government or any entity established under an Act of Parliament or a State legislature.

[3] Further, if the Board of a company decides to undertake its CSR activities approved by the CSR Committee through a company established under section 8 of the Act or a registered trust or a registered society, other than those specified above, such company or trust or society shall have an established track record of three years in undertaking similar programs or projects; and the company has specified the projects or programs to be undertaken, the

[107] Executive Programme "Company Law" : ICSI

modalities of utilization of funds of such projects and programs and the monitoring and reporting mechanism.

[4] A company may also collaborate with other companies for undertaking projects or programs or CSR activities in such a manner that the CSR Committees of respective companies are in a positions to report separately on such projects or programs in accordance with these rules.

[5] The CSR projects or programs or activities undertaken in India only shall amount to CSR Expenditure.

[6] The CSR projects or programs or activities that benefit only the employees of the company and their families shall not be considered as CSR activities in accordance with section 135 of the Act.

[7] Companies may build CSR capacities of their own personnel as well as those of their implementing agencies through institutions with established track records of at least three financial years but such expenditure, including expenditure on administrative overheads, shall not exceed five percent of total CSR expenditure of the company in one financial year.[108]

[8]Contribution of any amount directly or indirectly to any political party under section 182 of the Act, shall not be considered as CSR activity.

Stakeholders Approach in CSR

The stakeholders are a key factor for the success of the CSR practices. Without their engagement, knowledge, skills, talent, loyalty, the organization could not achieve its objectives. A characteristic of CSR is the idea that the business is accountable to the various stakeholders who can be identified and have a claim, either legally mentioned or morally expected, on the business activities that affect them.[109]

Nowadays, more and more authors put the stakeholder approach in the core of the CSR theories [110]. Homes and Watts (2000) see the engagement of the stakeholders as "the essence

[108]CSR : ICMAI
[109] Mitnick, B.M. (1995). Systematics and CSR: the theory and processes of normative referencing. Business and Society
[110] Cohen, E. (2010). CSR for HR: A necessary partnership for advancing responsible business practices. Greenleaf Publishing Limited.

of CSR" [111]. More recently, CSR has become recognized as a growing area of strategic value creation for companies. Yet stakeholder engagement is often seen as secondary, even non-essential, to the CSR agenda.

Stakeholder theory emphasizes that beyond shareholders there are several agents that are interested in firms' actions and decisions. The theory highlights the need for managers to be accountable to stakeholders. Stakeholders are individuals or groups which were either harmed by or benefits from the corporation; or whose rights have been violated or have to be respected by the corporation. Firms have several stakeholders which compete for organizational resources; hence, the need for firms to identify strategies for managing stakeholders.[112]

The obligation to serve all stakeholders' interests is often referred to as stakeholder management. Since corporations deal with several stakeholders over time and simultaneously; it is unlikely that organizations would fulfill all their responsibilities towards each primary stakeholder or groups [113].

Hence, firms' should identify strategies for managing stakeholders as there are several stakeholders competing for organizational resources [114]. Furthermore, the type of stakeholders engages, and resources control strategy adopted impact organization's corporate strategy.[115] Stakeholder management facilitates consideration of individuals or groups within and outside the firm when allocating organizational resources. Stakeholder management promotes an effective allocation of resources among stakeholders to achieve a "win-win" outcome.

[111] Holmes, L., Watts, R. (2000). Corporate Social Responsibility: Making Good Business Sense. World Business Council for Sustainable Development.
[112] Bryson, J. (2005). What to do when stakeholders matter. Public Management Review, 6(1), 21-53
[113] Freeman, R.E. (1984). Strategic Management: A Stakeholder Approach", 1984, Boston, MA: Pitman Publishing.
[114] Branco, M.C., Rodrigues, L.L. (2007). Positioning stakeholder theory within the debate on corporate social responsibility. Electronic Journal of Business Ethics and Organization Studies,
[115] Kolk, A., Pinkse, J. (2007). Towards strategic stakeholder management? Integrating perspectives on sustainability challenges such as corporate responses to climate change. Corporate Governance.

CHAPTER VIII

SECURITIES AND EXCHANGEBOARD OF INDIA (SEBI) ACT,1992 AND INVESTORS WELFARE

SEBI's Organization

The Government is the major regulatory agency. It controlled the capital market through its various agencies such as "controller of capital issues"; 'Securities, and Exchange Board of India (SEBI)', 'Company Law Board' 'Reserve Bank of India'; 'Stock Exchanges' etc.

The SEBI Act, 1992 was enacted to empower SEBI with statutory powers for:-

[a] Protecting the interests of investors in securities,

[b] Promoting the development of the securities market, and

[c] Regulating the securities market.

Its regulatory jurisdiction extends over corporate in the issuance of capital and transfer of securities, in addition to all intermediaries and persons associated with securities market. The SEBI – can specify the matters to be disclosed and the standards of disclosure required for the protection of investors in respect of issues; – can issue directions to all intermediaries and other persons associated with the securities market in the interest of investors or of orderly development for securities market; and – can conduct enquire, audits and inspection of all concerned and adjudicate offence under the Act. In short, it has been given necessary autonomy and authority to regulate and develop an orderly securities market. As per Section 1 of the Act, this Act may be called the Securities and Exchange Board of India Act, 1992. It extends to the whole of India. It shall be deemed to have come into force on the **30th day of January, 1992.**

SEBI's Constitution

The SEBI Act 1992 provides for establishment of a Statutory Board with 6 members; they are:-

[1] Chairman;

[2] Two members appointed by the Central Government;

[3] Two members having experience of securities market appointed by the Central Government; and

[4] One member by the Reserve bank of India.

SEBI is a body corporate and enjoys autonomous status.

SEBI's Organization

Activities of SEBI are organized under five-departments namely-

[1] Primary Market Department - policy, in intermediaries, investor's grievance and guidance;

[2] Issue Management and Intermediaries Department vetting of prospectus and letter of offers, Co-ordination of primary market etc;

[3] Secondary Market Department:- Policy, Operations and Exchange Administration, Insider Trading, New Investment Product, etc;

[4] Secondary Market Department:- Exchange Administration, Inspection of Stock Exchanges, Non-Member Intermediaries, Share Shops etc; and

[5] Institutional Investment Department :- Mutual Funds, Foreign Institutional Investment, Mergers and Acquisitions Research, Publications and International Regulations.

Apart from these departments, SEBI has regional offices at New Delhi, Calcutta and Chennai, Mumbai being the headquarters.

Main Objectives of SEBI

The main objectives related to SEBI are as follows:-

[1] To protect the interests of investors in securities; and

[2] To promote the development of; and

[3] To regulate, the securities market and for matters connected therewith or incidental thereto.[116]

[116] Securities Market and capital Laws : ICSI

Powers and Functions of SEBI

The SEBI has three main powers are as follows:-

[1] Quasi-Judicial: SEBI has the authority to deliver judgments related to fraud and other unethical practices in terms of the securities market. This helps to ensure fairness, transparency, and accountability in the securities market.

[2] Quasi-Executive: SEBI is empowered to implement the regulations and judgments made and to take legal action against the violators. It is also authorized to inspect Books of accounts and other documents if it comes across any violation of the regulations.

[3] Quasi-Legislative: SEBI reserves the right to frame rules and regulations to protect the interests of the investors. Some of its regulations consist of insider trading regulations, listing obligations, and disclosure requirements. These have been formulated to keep malpractices at bay. Despite the powers, the results of SEBI's functions still have to go through the Securities Appellate Tribunal and the Supreme Court of India.[117]

Functions

Some of the functions of SEBI are as follows:-

[1] SEBI is primarily set up to protect the interests of investors in the securities market.

[2] It promotes the development of the securities market and regulates the business.

[3] SEBI provides a platform for stockbrokers, sub-brokers, portfolio managers, investment advisers, share transfer agents, bankers, merchant bankers, trustees of trust deeds, registrars, underwriters, and other associated people to register and regulate work.

[4] It regulates the operations of depositories, participants, custodians of securities, foreign portfolio investors, and credit rating agencies.

[5] It prohibits insider trading, i.e. fraudulent and unfair trade practices related to the securities market.

[6] It ensures that investors are educated on the intermediaries of securities markets.

[7] It monitors substantial acquisitions of shares and take-over of companies.

[117]SEBI : cleartax

[8] SEBI takes care of research and development to ensure the securities market is efficient at all times.[118]

In **Bhoruka Financial Services Ltd. v SEBI**, SAT has interpreted the words 'inquiry' or 'investigation' and it was held that the word 'investigation' as per this provision speaks about the investigation as referred to under Section 11C though this provision was introduced in 2002 with the help of SEBI (Amendment) Act, 2002 in addition to section 11(4).

Karnavati Fincap Ltd. and Alka Spinners Ltd v SEBI, [1996]

The domain of the expression 'such measures' is considered to be very wide in nature due to the words 'without prejudice to the generality of the foregoing provisions' with which subsection 2 of sec 11 begins. It has also been stated that the 'measures' can also be in relation to the matters provided for under subsection (2) and may also extend beyond those.[119]

Investors Protection Measures and Disclosure Requirement for Primary Market

[1] Minimum subscription: If the minimum subscription of 90% of the issued capital is not received within 120 days the entire subscription amount has to be refunded to the applicant within 128 days.

[2] Disclosure in the prospectus: regarding the disclosure in the prospectus, The Wall Street Journal had once published the following couplet.

"Before you invest, always read the prospectus. It is required by law, designed to protect us [investor]. Behind somewhere therein, under mountains of phrases are all of the risks, to which you [investors] are exposed. Do not you know where to start? Let me give you a hint. The greater the hazard the smaller the print."

This couplet aptly summarized the danger of not reading the prospectus. In order to protecting the investors in this regard the SEBI has issued guidelines in 1992 requiring in the disclosure of number of information[120].

[118] SEBI : cleartax
[119] Powers and function of SEBI :Akriti Gupta
[120] Guidelines for disclosure and investor protection : SEBIgov.in

[3] Investors Protection vis-a-vis secondary market: A person may invest in company's securities either through as the primary-market or secondary market. Primary market investors are protected by disclosure in the prospectus and other SEBI's regulation. To protect investor of secondary market the following steps have been taken by the SEBI:-

[a] Regulation on insider trading with the object to curb it completely and punish the guilty;

[b] Uniform trading hours for all the stock exchanges;

[c] Registration of market players- brokers sub-brokers, bank etc;

[d] Compulsory audit of accounts of all member brokers at registered intermediaries;

[e] Inspection of stock exchange operations;

[f] Gradual automation to reduce paper work and ensure transparency in transactions; g) Brokers should notify all transaction to the stock exchanges including off the floor trades;

[h] Uniform good/bad delivery norms;

[i] Brokers to keep client's money in separate account;

[j] Banning of forward dating;

[k] Stress upon shorter period of settlement;

[l] Dematerialization of securities;

[m] Regulations of Fraudulent trade practices;

[n] Effective margin system for smooth settlements;

[o] Introduction of Internet trading;

[p] Practicing prudent governance norm.

The measures maintained above will definitely help to minimize the investors' grievances.

[4] Recent Developments in Investor Protection

[a] Appointment of Administrator to check bad-deliveries;

[b] Streaming investor's protection fund;

[c] Service centre for investors;

[d] Compliance officer- each company is required to appoint compliance officer;

[e] Corporate Governance, SEBI has prescribed prudent corporate governance norms for all listed companies to ensue transparency and better disclosure.

D.R.Dhanuka Committee Recommendation

SEBI constituted a committee in 1997, under the chairmanship of justice D.R.Dhanuka to suggest amendments to the provisions of SEBI Act 1992, Securities Contract (Regulation) Act 1956 and Depositors Act 1996, with a view to enable SEBI to regulate and develop the securities market and protect the interest of investors

The committee made the following suggestions:-

a) Transfer of shares - The shares of public limited companies must be freely transferable. Instead of management's interest, transfer should be stopped only if provisions of any of the existing law are violated.

b) Blank transfer to be stopped- shares should allow to be sold only by the person whose name is registered in the register of members of the company.

c) Abolishing stamp duty on transfers.

d) Postal ballots- to improve corporate governance and make public listed company more shareholders oriented, it has suggested the introduction of postal ballot system under which every company will have to send to all its shareholders by registered post, notice of meeting along with draft resolution and also explain the reasons why the resolution is required. The company will be required to enclose a prepaid envelope/postcard to help shareholders to reply. This would lead to greater participation by shareholders in decision-making.

e) Delisting -It has been suggested to stop companies from getting delisted for nonpayment of listing fees.

f) Securities Audit- securities audit to be made compulsory. In this, transaction such as inter corporate deposits, payments by parent company to its subsidiary, deployment of public or right issue proceeds, correct use of application or allotment monies, etc, will be audited and

the results be disclosed in the annual report. This will ensure proper usage of funds and in case there is a division, a shareholder will be aware of it.

SEBI has issued directions for the establishment of Investors grievance Cells and Investors Welfare Funds.

Investor Welfare Fund

Investors' welfare is a novel idea to protect the interest of investors. This idea was moved and implemented by the Gujarat Oil and Industries Limited, Baroda in the name 'Oil and Investor welfare scheme'. This scheme provides personal accident insurance coverage for each and every shareholder/deposit holder.

In this scheme all the registered members are covered. This scheme even covers the investors who purchase shares in the secondary market from the time their name is entered in the register of members. Under this scheme even non-resident Indian members are also eligible for the benefit but subject to R.B.I. permission. Insurance covers many risks, like accidents failure of the company is an unexpected and unwanted event, which exposes the investor to pecuniary loss.[121]

Under law of insurance 'pecuniary interest' is insurable. Hence the company insures the interest of the all the investors against the corporate frauds committed by the directors, and the interest of members is well protected. Hence the investigator suggests for the "insurance of investors interest against the risk of winding up of a company for corporate frauds and scandals". In the initial stage premium may be paid from the profits of the company. But the moment the company collapses for the reason of bad governance of the directors, whatever premium is paid by the company may be recovered from the boards of directors and if they are unable to pay it, it may be recovered from surplus assets belonging or falling to the share of Board of directors. That must be applied in payment to members excluding the board of directors.

Protection against Insider Trading

Many committees in India and abroad made recommendations for protecting investor's against insider trading. Insider trading doesn't major damage to investor. Insider trading became more important in case of secondary market. Transparent, efficient and liquid

[121]Master Circular on Foreign Investment in India : RBI

secondary markets are vital for ensuring investor confidence. The improvement and strengthening of the market infrastructure, improvement in the quality of inter-mediation and intermediaries and structural framework within which the stock exchanges and their members function have been the focus of SEBI's efforts for regulation and development of secondary market. Insider trading regulation of SEBI provides a legal framework to protect the investors against insider trading and so-called price rigging.

In developed markets, insider trading is considered a serious crime and heavy penalty and punishment has been imposed. Indian stock market, in the last decade, witnesses a phenomenal growth in all spheres including insider trading. Insider trading means "an act of buying or selling of securities by a person with access to privileged information (to which none else in the market has access to) unusually done with the motive of making profits or avoiding losses". This is most common offence. Because of the sensitive information[122] insiders either makes profits or shifts loss to another. It is nothing but unjust enrichment.

Insider trading may be either direct or indirect. It is direct when the insider directly uses information i.e., who ahs access to information and it is indirect if some other person acts at the instance of insider. Effect of both type of trading is one and the same.

Sachar Committee Recommendation on Insider Trading:-

The Government of India, to regulate the insider trading, appointed a committee in 1987, called as the Sachar Committee and before that in 1985 appointed a high powered Patel Committee. The Sachar Committee's recommendations on insider trading are as follows:-

1) Any director, statutory auditor, cost auditor, financial accountant or financial controller, cost accountant, tax and management consultant or solicitor of the company and any private company partnership firm/joint venture or trust in which 'these persons have any pecuniary interest should, prior to actual purchase or sale, notify in writing to the Board of Directors of the company his or their intention to buy or sell the shares of the company. Full disclosure as to the number of shares, price at which they were bought or sold should be made by them to shareholders of the company by annexing a suitable statement to the published accounts.

[122] 1 Price sensitive information is unpublished news about bonus, right issue, dividend; good export orders, other corporate achievements, takeover, merger, acquisition etc.

2) These persons should be prohibited from either purchasing or selling the shares of the company two months prior to the closing of the accounting year of the company and for a period of two months thereafter. Such prohibition should extend for a period of two months prior to any rights issue also. In case, such person desire to buy or sell the shares of the company within the prohibited period, they may do so only after giving prior intimation in writing of the proposal to the board and if the Board does not refuse permission, the spouse and dependent children of such persons should also be subject to similar control.

3) In addition to the existing provisions of disclosure, the company should be required to main a register disclosing dealings in shares of the company by all of them as also by certain employees. Such information should also be published in a summarized form as a part of the published annual report of the company.

4) Notice under section 308 should be required to be given by all such persons. Such notice should also contain the details relating to the price that was actually paid or received for the shares.

5) Suitable provision should be made for assuring a civil remedy to persons who can establish that by reason of the misuse of significant information by any of the aforesaid persons they have suffered on identifiable loss the remedy should be by way of an application to the company law Board. Accountability should also be ensured by adequate provision.[123]

Regulation of Insider Trading

SEBI regulates insiders trading directly and indirectly. The appropriate regulations are:-

1) SEBI (Insider Trading) Regulation 1992.

2) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 and

3) SEBI (Prohibition of Fraudulent and Unfair Trade Practice relating to Securities Market) Regulations, 1995.

Insider - Concept of

According to SEBI (Insider Trading) Regulation 1992, an insider means- any persons:-

[a] Who is or was connected with the company.

[123] Corporate Governance of the Companies Act,2013 : Anita JOHNSON

[b] Who is deemed to have been connected with the company and is reasonably expected to have access, by virtue of such connection to unpublished price sensitive information, or

[c] Who has received or has had access to unpublished price sensitive information.

On this definition, **Justice P.N.Bhagwati** opined that this definition lacks clarity and it ultimately depends on the interpretation of law.

CONCLUSION AND SUGGESTION

CONCLUSION

In India, as compared to other countries in world, the theory of Corporate Governance has gain a momentum during the last decade of 20th Century, which became a buzzword. India has adopt a good governance practice and international accounting standards and disclosure for the purpose to ensure protection to investors.

It is believed that corporate governance is a new idea and which effects to corporate scandals and scams. Basically, it is not a new and naval ideas, it's a 'sin quo non' ol legal personality. In Salmon V. Salmon& Co. (1895 – 99), tells about the principle of separate and distinct entity.

As Lord Cairns L.C. has said that "The subscribers are to state the objects for which the proposed company is to be established and then the company comes into existence for those object and those objects only".

He describes that the good corporate governance is for the purpose of protection of an interests was very low. In the form of business element of agency and unlimited liability of members were appreciated. As per the trading privileges, especially for overseas trading, Royal Charter conferred privileges on 'Company'. At this point of time, the company was nothing but 'extension of merchant guilds'. Hence, in this period of business ethics i.e. trust, was up to the expectation of the investors.

Corporate Governance originates as a consequence of corporate scandals. The need of good corporate governance is important to maintain trust and confidence of investors. The main aim of corporate governance is to maintain the rights of shareholders along with other stakeholders in which it includes a commitment to the application of standards for disclosure and transparency.

The loyalty of a typical Indian investor is far greater then his counterparts in the USA or Britain. Our companies must not make the mistake of taking such loyalty to nurture and strengthen this loyalty, but our companies need to give a clear-cut signal that the word "your company" has real meaning. It requires well functioning boards, greater disclosure, better

management practices and a more open, interactive and a dynamic corporate governance environment.

Such environment refers to an economic, legal and institutional environment which allows companies diversify, growth, restructure and exit, and do everything necessary for maximizing the long term shareholder value. Thus, non-executive directors and disclosure are parts and not the whole of corporate governance. Hence, it ensure the proper and adequate protection to investors.

So some changes in the corporate world which indeed in the sake of a long-lasting world. It shows such sustainability is the really growing in the companies' agendas which is through the mindset of its leaders. At last, the main aim is to thrive in the economic market and the world needs it to consider sustainability.

For long-term profits, the CSR need to make type of policies and live a sustainable culture to make it aware about the sustainability practices and sustainable culture to thieve and succeed. In this way, such type of development make it clear to take part in the corporate governance in an organization.

SUGGESTIONS

[1] The corporate objective and strategy of the board committee is to be first to move and involve the board in the strategy of the company.

[2] The success effects strategic changes which occur probably in inverse proportion to the number of other duties which is handled by the same person.

[3] It is an important for a direct contact with each organizational level where strategic choices are being considered. Hence, the idea of organization will present strategic choices for selection is fiction. Such ideas of an organization are consciously or unconsciously eliminated from an organization.

[4] The changes in governance of emerging market for the next 12 years will be significant, albeit not earth shattering.

[5] The principal-agent problem is less pronounced; hence governance risk is less acute and as private finance becomes more and more ubiquitous in both core OECD and Emerging Market (EM), the delivery of challenges in the private company board room will grow.

[6] The corporate governance code, which is more specifically structure and implement the mechanism of codes in emerging markets.

[7] Corporate Social Responsibility plays an important role in an organizational initiatives and strategy from companies and their leadership teams which is essential for corporate social responsibility success.

[8] In 2021, many of the companies has taken many decisions that what happens after 30March which is till now unclear. All the meetings are held via Zoom, behind closed doors or webinars or as hybrid with shareholders as well as business preferences which need to be considered with shareholder.

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