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"BUSINESS LAW TRENDS – BASED ON TREATIES AND AGREEMENTS"

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"It is clear that good corporate governance makes good sense. The name of the game for a company in the 21st Century will be conform while it performs."

- Mervyn King

ABSTRACT:

Corporate governance has existed for as long as companies existed. Corporate governance broadly refers to the mechanisms, relations, and processes by which a corporation is controlled and is directed; involves balancing the many interests of the stakeholders of a corporation. It is intended to increase the accountability of your company and to avoid massive disasters before they occur. The term Governance has been implemented in each country and in corporate is shaped by various factors like political, economic and social history, legal framework, values and ethics of the promoters, managerial practices etc. Good Corporate Governance system would help the corporate to develop a credible opinion on its management in terms of quality and it would promote the development of strong financial systems whether they are largely bank based or market based which in turn might have a positive effect on economic growth and poverty reduction. In recent years the word governance has become a very fashionable term and is being used in a variety of ways and covers a large number of organizations both in the public and private domain. There has been a renewed interest in the Corporate Governance practices of modern corporations. The paper investigates the recent failures of Corporate Governance in India and the emerging issues to overcome and it shall be addressed during the course of the seminar and it shall be attempted to introduce solution seeking towards Good Corporate Governance.

KEY WORDS: Corporate Governance; Current Trends; Recent Failures; Good Corporate Governance; International Developments.

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INTRODUCTION:

Corporate governance is concerned with set of principles, ethics, values, morals, rules regulations, & procedures etc. Corporate governance establishes a system whereby directors are entrusted with duties and responsibilities in relation to the direction of the company's affairs. As we know that corporate Governance came into existence as long as company came into existence. The Indian corporate scenario was more or less stagnant till the early 90's. The position and scenario of the Indian corporate sector has changed a lot after the liberalization of 90's. In 1996, Confederation of Indian Industry (CII) took a special initiative on Corporate Governance. The objective was to develop and promote a code for Corporate Governance to be adopted and followed by Indian companies, be these in the private sector, the public sector banks or financial institutions, all of which are corporate entities. This initiative by CII flowed from public concerns regarding the protection of investor interest, especially the small investor, the promotion of transparency within the business and industry. The concept of 'corporate governance' is not an end; it's just a beginning towards growth of company for long term prosperity. There has been a renewed interest in the corporate Governance practices of modern corporations. In India ever since corporate fraud and governance failure unearthed. No singular model of CG is being adopted allover world. Different countries have different models of Corporate Governance and rightly so as cultures, traditions, legal structures and ownership structure vary from court to country.

CORPORATE GOVERNANCE – MEANING AND DEFINITIONS:

Corporate Governance is a multi-faceted subject and difficult to comprehend in a concise definition. The main theme of corporate governance is to integrate sound management policies in the corporate framework in such a manner to bring economic efficiency in the organization in order to achieve twin goals of profit maximization and shareholder welfare. It is about managing top management, building in checks and balances to ensure that the senior management pursue strategies that are in accordance with the corporate mission. It is generally understood to mean the system that defines the distribution of rights and responsibilities among different participants in the corporation, such as the boards, managers, shareholders and other stakeholders. The term can refer to internal factors defined by the officers, stockholders or constitution of a corporation, as well as to external forces such as customer group's clients and government regulations. It safeguards against corruption and mismanagement, while promoting fundamental values of a market economy in democratic society. It is a set of system and processes to ensure that a company is managed to suit the best interests of all stakeholders.

Few comprehensive definitions on Corporate Governance are discussed below.

1. *Cadbury Committee (U.K.), 1992* has defined corporate governance as such: "Corporate governance is the system by which companies are directed and controlled. It encompasses the entire mechanics of the functioning of a company and attempts to put in place a system of checks and balances between the shareholders, directors, employees, auditor and the management."

2. Definition of corporate governance by the Institute of Company Secretaries of India is as under: "Corporate Governance is the 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".

NATURE AND CONCEPT OF CORPORATE GOVERNANCE:

Corporate governance instills ethical standards in the company. It creates space for open dialogue by incorporating transparency and fair play in strategic operations of the corporate management. There is no definite definition of Corporate Governance rather it might be viewed from different stages. Yet the four core principles have been influential in setting of the Code of Governance across the global. These fundamental cornerstones are: fairness, transparency, accountability and responsibility. Ethics are essential as they extend beyond corporate law.

Quality of Corporate Governance is determined by the financial market, legislation and other external market forces plus how policies and processes are implemented and how people are led. To date, too much of corporate governance debate has centered on legislative policy, to deter fraudulent activates and transparency policy which mislead executives to treat the symptoms and not the causes.

Today, even law has a great role to play in successful and growing economy. Government and judiciary have enacted several laws and regulations like SEBI, FEMA, Cyber laws, Competition laws etc. and have brought several amendments and repeal the laws in order that they don't act as barrier for these corporate bodies and developing India. Judiciary has also helped in great way by solving the corporate disputes in speedy way.

NEED OF CORPORATE GOVERNANCE:

Need for corporate governance arises due to separation of management from the ownership. For a firm success, it needs to concentrate on both economic and social aspect. It needs to be fair with producers, shareholders, customers etc. It has various responsibilities towards employees, customers, communities and at last towards governance and it needs to serve its responsibilities at the best at all aspects. The collapse of international giants like Eronf, Worlcom, Tyco, AOL and financial scams like Satyam have been big eye-openers in the corporate arena to make realize the company's management, ownership and stakeholders the emergent need to comply with Corporate Governance principles in order to prevent themselves from paying huge corporate criminal liabilities in the future. These huge corporate giants paid the cost for lack of good corporate governance practices and corrupt policies adopted by management of these companies and their financial consulting firms. The significance of good corporate governance solutions has widened because of the increasing conflict between ownership and management disciplines, the non-compliance of financial reporting by auditors which inflicts heavy losses on investors and lack of fair and transparent culture in the company which shook's investor trust in the financial viability of the company and its ethical standards.

CORPORATE GOVERNANCE IN INDIA:

The growing economic growth that corporate India witnessed since the 1990s brought to the forefront the need for Indian Companies to adopt corporate governance practices and standards, which are consistent with international principles. The recommendations of various committees form the bedrock of the legal regime for Corporate Governance in India. The model of CG found in Anglo-American and German model. This is because in India, there are three types of Corporations viz. private companies, public companies and public sector undertakings. CG is one of the important criteria for foreign institutional investors to decide on which company to invest in. The quality of governance is important to protect the interest of Indian Shareholders.

LEGAL FRAMEWORK OF CG:

It has outlined a series of voluntary recommendations to integrate best-in-class practices of corporate governance in listed companies which touches the four cornerstones of fairness, transparency, accountability and responsibility in managing the affairs of the company. The second major initiative was taken by Security Exchange of India (SEBI) as Clause 49 of the Listing Agreement. The third key initiative to effectively introduce Corporate Governance was taken by Naresh Chandra Committee and Narayana Murthy Committee who previewed Corporate Governance model working in companies from the viewpoint of shareholders, investors and other stakeholders of the company. Corporate governance guidelines both mandated and voluntary have evolved since 1998, due to the sincere efforts of several committees appointed by the Ministry of Corporate Affairs (MCA) and the SEBI. The real change in the corporate sector could be felt with the introduction of 2009 Mandatory Corporate Governance Voluntary Guidelines which has to be comply by companies listed on stock exchange by Clause 49 of Listing Agreement including mandatory codes to be followed by companies pertaining to board of directors, audit committees and various disclosures with respect to related party transactions, whistleblower policies etc. The final assent to Corporate Governance practices in the effective management of the company can be seen as introduction to new significant provisions introduced in the Companies Act, 2013 in form of independent directors, women directors on the board, corporate social responsibility and mandatory compliance of Secretarial Standards issued by Institute of Company Secretaries of India as per Section 118 of Companies Act, 2013.

The Ministry of Corporate Affairs (MCA) is the executive arm which regulates the functioning of the corporate sectors. It primarily administers the Companies Act and other allied acts. MCA has taken a number of steps in establishing the standard for corporate governance in the country. Some of the key initiatives are: Voluntary guidelines on corporate governance, Green initiatives, Serious Fraud Investigation Office (SFIO), etc.

STANDARD OF CORPORATE GOVERNANCE – REPORT (SEBI's Kotak Panel)

A 21- member panel headed by banker UDAY KOTAK was set up in June 2017 with the view of enhancing the standard of corporate governance of listed entities in India. After three years gap after the enactment of Companies Act, 2013 and recent market events let the SEBI to constitute a committee on corporate governance. In result of which the above committee was set up and certain recommendation was put forth by committee. Some of the Major recommendations of the committee were as follow:

- Board of directors (BOD) shall comprise not less than six directors.
- BOD shall have an optimum combination of the executive and non-executive directors with at least one woman as an independent director and not less than 50% of the board of directors shall comprise non-executive directors.
- Listed entity, at least once in a year, undertakes a formed interaction between non-executive directors and the senior management.
- With effect from April 1, 2018, if a director does not attend at least half of the total meetings, held over the Relevant Period, he/s continuance is subject to ratification by the shareholders at the next general meetings.
- While from April 1, 2020, listed companies with 40% or more public shareholdings shall ensure that the chairperson is a non-executive director.

THE EMERGING ISSUES IN CORPORATE GOVERNANCE:

The Companies Act, 2013 has raised the bar for the Boards in India. 2015 has shaped up to be a year where Boards, once again, are under intense pressure and scrutiny to get it right. The Board is not only accountable to the company and its shareholders but also has a duty to act in their best interests. In addition, Boards are expected to take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities. Following are the key issues which the Boards will have to address themselves to, in the year ahead.

1. **Greater attention towards director independence*:*** A director can be formally independent, and yet feel caught inside the boardroom. This can be because of his or her social relationships, donations, jobs or contracts for friends, perks, vacations, office use, director interlocks, supplier or customer relations, and excessive tenure and compensation.
2. **Shareholder democracy vs. stakeholder democracy*:*** The appeal of “shareholder democracy” has dominated most changes in corporate governance over the past few years and has helped strengthen the shareholder franchise. However, maximizing enterprise value and a move from shareholder democracy to stakeholder view of governance is a tendency towards which academic literature is veering to.
3. **Better Boards and diversity*:*** Regulators are moving towards prescribed competency matrices. Production of detailed selection criteria, job descriptions, curriculum vitae and

interviews with directors and oversight functions to determine whether these individuals are fit for purpose can be challenging in this changing landscape.

4. **Risk governance and risk management*:*** Directors are at risk for oversight failure. Regulators are imposing onerous risk coverage requirements on directors that require oversight of internal controls and risk management.
5. **Compensation governance:**Media and public consciousness about the quantum and alignment of executive pay have resulted in regulation over: compensation committee, adviser independence, and pay ratios.
6. **Increased focus on strategy and value creation:** Good Board focus is on the value creation plan, monitoring, and hold management responsible for its achievement. Complacent or inexperienced Boards incapable of directing an under-performing, ineffective, or inefficient management team are being questioned. Excessive or non-performance based compensation is a red flag for governance intervention.
7. **Information Technology governance*:*** Rapid technology advancement has created opportunity and risk. There is profound technological ignorance by many or most Boards that is creating an inability to direct and oversee management. Cyber security, BYOD (Bring Your Own Device), and social media are just three IT risks that have deficient or non-existent internal controls, which in turn can cause privacy breaches, reputational damage, and significant investor loss.
8. **Tone at the top, now in the middle*:*** Boards vicariously responsible in acts of fraud, bribery, and other forms of corruption are being held by regulators at profound degrees within and outside their organization. "Tone in the middle" culture and injudicious risk-taking are the new warning signs on which prudent boards are seeking substantial assurance, to ensure that the directors do not remain the last link in the information chain.
9. **Boardroom:**Board should work as one team with a common goal. Any behavior gap, undue influence, reliance, dislike, dysfunction, or even contempt — by one or more directors or managers, introduces information and oversight asymmetry that can lead to governance failure.

CORPORATE GOVERNANCE IN INDIA PAST, PRESENT & FUTURE:

Good corporate governance in the changing business environment has emerged as powerful tool of competitiveness and sustainability. It is very important at this point and it needs corporation for one and all i.e. from CEO of company to the ordinary staff for the maximization of the stakeholders' value and also for maximization of pleasure and minimization of pain for the long-term business. Global competitions in the market need best planning, management, innovative ideas, compliance with laws, good relation between directors, shareholders, employees and customers of companies, value based corporate governance in order to grow, prosper and compete in international markets by strengthen their strength overcoming their weaknesses and running them effectively and efficiently in an efficient and transparent manner by adopting the best practices. Corporate India must commit itself as reliable, innovative and prompt service provider to their customers and should also become reliable business partners in order to prosper and to have all round growth. Corporate Governance is nothing more than a set of ideas, innovation, creativity, thinking having certain ethics, values, principles etc which gives direction and shape to its people, employees and owners of companies and help them to flourish in global market.

Corporate governance from the futuristic point of view has great role to play. The corporate bodies in their corporate have much futuristic approach. They have vision for their company, on which they work for the future success. They take risk and adopt innovative ideas, have futuristic goals, motto, and future objectives to achieve. With increase in independence and free trade among countries and citizens across the globe, internationally accepted corporate governance standards are of paramount importance for Indian Companies seeking to distinguish themselves in global footprint. The companies should always keep improving, enhancing and upgrading themselves by bringing more reliable integrated product and service quality. They should be more transparent in their conduct.

Corporate governance should also have approach of holistic view, value-based governance, should be committed towards corporate social upliftment and social responsibility and environment protection. It also involves creative, generative and positive things that add value to the various stakeholders that are served as customers. Be it finance, taxation, banking or legal framework each and every place requires good corporate governance. Hence corporate governance is a means and not an end, corporate excellence should be end.

CORPORATE GOVERNANCE FAILURE IN INDIA:

The failure of corporate governance and of misleading accounts is a failure of both the management and of the auditors. In the event, the company has a huge hole in its balance sheet, consisting of non-existent assets and cash reserves that have been recorded and liabilities that are unrecorded. The Satyam Scandal was the largest accounting fraud in the history of corporate India and dubbed India’s Enron, a reference to the American energy company that collapsed due to a mammoth accounting scandal. It is one such great opportunity to reassess some of the existing framework on corporate governance, systems for better enforcements of regulations; effective roles and duties of directors, executives, regulators; ethics in businesses and empowerment of minority shareholders. The government reacted the fraud by overhauling the regulatory framework, with the new Companies Act 2013 which fixed liabilities of auditor and independent directors, among other changes. In 2014, market regulatory SEBI amended clause 49 of listing guidelines to improve corporate governance.But time and time again, failures of corporate governance suggest that they do not. The infractions of law have arisen despite independent directors which were stopped by external forces. n contrast, the problem in the Indian corporate sector is disciplining the dominant shareholder and protecting the minority shareholders, vindicated in the recent Satyam case. After successfully working over the decades separating ownership and management, owners, realized that they have lost control over the management or the board.

THE RECENT EPISODE OF TATA'S AND INFOSYS:

India's two icons of good corporate governance- the TATA and INFOSYS- have been shaken. There is a fundamental contradiction in the way India governs its corporations and it had to surface. Unfortunately, it surfaced in two of India's best-known groups. The TATA groups present the paradoxical case of a large professionally managed India business group, not being led by a direct descendant of Jamsetji Tata- the founder of the Tata group. The TATA succession plan symptomizes most family businesses which concentrate largely on the business aspects, to the exclusion of the dynamics between family and family business interface. The tata-mistry imbroglio clearly demonstrates the lace of 'shared vision' between the incumbent and the successor. INFOSYS has recently come under fire from founder like N.R. Narayana Murthy who have publicly raised concerns on alleged corporate governance lapses at the company. He questioned certain decisions of BOD and Chief executive, alleging lapses in governance.

In India, concentration of ownership is a norm rather than an exception. Public sector enterprises, family businesses and Group Company's dominant the corporate sector. Too much focus on strengthening the institution of independent directors would not radically change the quality of corporate governance. One has to search for innovative solutions. We don't live in a perfect world; contradictions are bound to surface. That species is in the imagination of people who want to create a sort of system that apparently serves a purpose, but in reality, it is very different.

WEAKNESSES OF CORPORATE GOVERNANCE:

1. ***No Proper Structure:*** It is true that the 'corporate governance' has no unique structure or design and is largely considered ambiguous. There is still lack of awareness about its various issues, like, quality and frequency of financial and managerial disclosure, compliance with the code of best practice, roles and responsibilities of Board of Directories, shareholders rights, etc. There have been many instances of failure and scams in the corporate sector, like collusion between companies and their accounting firms, presence of weak or ineffective internal audits, lack of required skills by managers, lack of proper disclosures, non-compliance with standards, etc. As a result, both management and auditors have come under greater scrutiny.

2. ***No Government Support:*** Strong governance standards focusing on fairness, transparency, accountability and responsibility are vital not only for the healthy and vibrant corporate sector growth, as well as inclusive growth of the economy. Recent corporate scandals have led to public pressure to reform business practices and increase regulation. The public outcry over the recent scandals has made it clear that the status quo is no longer acceptable: the public is demanding accountability and responsibility in corporate behavior. It is widely believed that it will take more than just leadership by the corporate sector to restore public confidence in our capital markets and ensure their ongoing vitality. It will also take effective government action, in the form of reformed regulatory systems, improved auditing, and stepped up law enforcement. These responses make clear that the governance of corporations has become a central item on the public policy agenda. The recent scandals themselves demonstrate that lax regulatory institutions, standards, and enforcement can have huge implications for the economy and for the public. Of course, government responses to scandals should be well considered and effective.

3. ***Insider Trading:*** Corporate insiders like officers, directors and employees by the virtue of their position have access to confidential information about the corporation and may misappropriate that information to reap profits. In most countries, trading by corporate insiders such as officers, key employees, directors, and large shareholders may be legal, if this trading is done in a way that does not take advantage of non-public information.

However, the term is frequently used to refer to a practice in which an insider or a related party trades based on material non-public information obtained during the performance of the insider's duties at the corporation, or otherwise in breach of a fiduciary or other relationship of trust and confidence or where the non-public information was misappropriated from the company. Such corporate insiders use this information in such a way to reap profits or avoid losses on the stock market, to the detriment of the source of the information and to the typical investors who buy or sell their stock without the advantage of "inside" information.

4. ***Basis of Indian Model:*** The problem in the Indian corporate sector is that of disciplining the dominant shareholder and protecting the minority shareholders. Clearly, the problem of corporate governance abuses by the dominant shareholder can be solved only by forces outside the company itself. In an environment in which ownership and management have become widely separated, the owners are unable to exercise effective control over the management or the Board.

SUGGESTIONS:

1. Preventing insider trading by devising an internal procedure for adequate and timely disclosures andspecific rules for the conduct of insiders and the power to punish offenders. SEBI should show seriousness about checking insider trading and there should be a separate code by itself.

2. Organization for Economic Co-operation and Development (OECD) lays down certain principles for reforming corporate governance. They are-

- ✓ The right of shareholders- These include a set of rights including secure ownership of their shares, the right to full disclosure of information, voting rights, participation in decisions.

- ✓ The Equitable Treatment of Shareholders- Here the OECD is concerned with protecting minority shareholders rights by setting up systems that keep insiders, including managers and directors, from taking advantage of their positions.

- ✓ The Role of Stakeholders in Corporate Governance- the OECD recognizes that there are other stakeholders in companies in addition to shareholders whose rights needs to be protected on being associated with the company. For instance, if we take the example of an employee who invests their human capital in the firm as compared to share holders who invest their financial capital, shareholders can diversify their investment, whereas employees can make limited investment of their capital. For this purpose employees risk their entire investment in one field so their rights need to be protected.

3. Strengthening the responsibilities of audit committees.
4. Improving the quality of financial disclosures.
5. Requiring corporate executive boards to assess and disclose business risks in the annual reports of companies.
6. Introducing responsibilities on boards to adopt formal codes of conduct.
7. Striving to ensure that the code of conduct is understood and adhered to by all members of the organization.
8. The performance management system should recognize and reward ethical behavior.
9. There should be stringent control measures to prevent corporate frauds and an ambit for quick procedure to deal with such cases. The whistleblowers must be given more autonomy and security.

CONCLUSION

"Corporate governance is not a matter or right or wrong -'it is more nuanced than that."- Advocate Johan Myburgh. The concept of corporate governance hinges on total transparency, integrity and accountability of the management and the board of directors. The importance of Corporate Governance lies in its contribution both to business prosperity and to accountability. In the age of globalization, global competition, good corporate governance helps as a great tool for corporate bodies. It existed from Vedic times as the Highest standards in ArthaShastra to today's set of ethics, principles, rules, regulations, values, morals, thinking, laws etc. as good corporate governance. Corporate Governance is a means not an end, Corporate Excellence should be the end. A transparent and timely communication between those who are involved in decision making process must be the first tool that can prevent cases of failure. The link between information and fraud prevention must go beyond the particular mode of corporate governance chosen, organizational structure and control mechanisms applied. People are more important than processes, so one of the main goals is to encourage the diffusion of advanced practices, which lead not only to defend the interests of investors but also to ensure social stability, improving the quality of human capital and promoting authentic values. The Companies Act, 2013 empowers independent directors with proper checks and balances so that such extensive powers are not exercised in an unauthorized manner but in a rational and accountable way. The changes are a step forward in the right direction to smoothly run the management and affairs of the companies in the interest of stakeholders. These are all welcome changes in the globalized corporate world of today and they will strengthen the core corporate machinery by instilling strong corporate governance norms in a company leading to economic efficiency and higher ethical standards which will always inspire the company's management to work in the direction to uphold its goals of maximization of wealth of stakeholders backed with good corporate repute.

SUGGESTIONS:

As possible ways to avoid future cases of collapse may be the following:

- ✓ Separation of powers of the Chairman and CEO. Each has to activate on its own pathway, otherwise we could reach a situation of excessive concentration of power and control capabilities of the supervisory board to be diluted.
- ✓ Integrity and missing of conflict of interest between managers, that should not target capital gains from the position they occupy, rather than wage remuneration they deserve.
- ✓ The existence of a strict flow of information so that decision-makers, have to receive timely and adequate information to perform their duties.
- ✓ Drawing concrete tasks and functions, especially in management teams, where decisions require a sustained effort and a great responsibility.

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