

UNTANGLING THE SCEPTICISM OF CORPORATE GOVERNAN

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"The real mechanism for corporate governance is the active involvement of the owners"

-LOU. GERSTNER

ABSTRACT:

Corporate governance is the system of rules, practices and processes by which a company is directed and controlled. It essentially involves balancing the interests of a company's stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community. Since corporate governance also provides the framework for attaining a company's objectives, it encompasses practically every sphere of management, from action plans and internal controls to performance measurement and corporate disclosure. Good corporate governance creates a transparent set of rules and controls in which stakeholders have aligned incentives. Most companies strive to have a high level of corporate governance. For many shareholders, it is not enough for a company to merely be profitable; it also needs to demonstrate good corporate citizenship through environmental awareness, ethical behaviour and sound corporate governance practices. Bad corporate governance can cast doubt on a company's reliability, integrity or obligation to shareholders. Corporate governance became a pressing issue following the 2002 introduction of the Sarbanes-Oxley Act in the United States, which was ushered in to restore public confidence in companies and markets after accounting fraud bankrupted high-profile companies such as Envon and World Com. The 2013 Indian Company Law has been enforced with effect from 1 April 2014 with an attempt to change the very pattern of conventional company legislation. Quickly after providing for formation and financing of companies, it jumps to administration and management of companies. The main concern of 2013 Company Law is, as it seems to be , to strengthen corporate governance, which means a better and more responsible management and administration. The purpose of this write up is

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to understand the puddles regarding logical application of good governance practices and its flaws and cons in Indian scenario. This paper also attempts to draw out comparisons on corporate governance laws in India, US and UK, The sub theme of this compilation is "Corporate Governance Impact and Implication in India ".

KEYWORDS: Company Law 2013, Good Governance Practices, Shareholders, Corporate Governance, Management and Administration.

INTRODUCTION:

"Global Market Forces Will Sort Out Those Companies That Do Not Have Sound Corporate Governance"- MERVYN KING

Corporate governance in India gained prominence in the wake of liberalization during the 1990s and was introduced, by the industry association Confederation of Indian Industry (CII), as a voluntary measure to be adopted by Indian companies. It soon acquired a mandatory status in early 2000s through the introduction of Clause 49 of the Listing Agreement, as all companies (of a certain size) listed on stock exchanges were required to comply with these norms. In late 2009, the Ministry of Corporate Affairs has released a set of voluntary guidelines for corporate governance, which address a myriad corporate governance issues.

The Anglo-Saxon model of governance, on which the corporate governance framework introduced in India is primarily based on, has certain limitations in terms of its applicability in the Indian environment. For instance, the central governance issue in the US or UK is essentially that of disciplining management that has ceased to be effectively accountable to the owners who are dispersed shareholders.

Furthermore, given that corporate governance is essentially a soft issue, whose essence cannot be captured by quantitative and structural factors alone, one of the challenges of making corporate governance norms mandatory is the need to differentiate between form and content; for instance, how do we determine whether companies actually internalize the desired governance norms or whether they look at governance as a check-the-box exercise to be observed more in letter than in spirit.

Recent high-profile corporate governance failures scams like the Harshad Mehta stock market scam, Ketan Parikh scam, UTI scam and of late the mammoth Satyam scam, have received severe criticism from several stakeholders. This called for the need to establish an

improved and more transparent corporate governance system as the issue affects the financial and economic development of the country.

Currently, corporate governance reforms in India are at a crossroads; while corporate governance codes have been drafted with a deep understanding of the governance standards around the world, there is still a need to focus on developing more appropriate solutions that would evolve from within and therefore address the India-specific challenges more efficiently.

DEFINITIONS OF CORPORATE GOVERNANCE

1. **Cadbury Committee³ (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. **The Organisation for Economic Cooperation and Development (OECD)**, which, in 1999, published its Principles of Corporate Governance gives a very comprehensive definition of corporate governance, as under: “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. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders, and should facilitate effective monitoring; thereby encouraging firms to use resources more efficiently.”
3. 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”.⁴

HISTORY & SIGNIFICANCE OF CORPORATE GOVERNANCE

³Cadbury committee(UK) 1992

⁴ OECD principles of corporate governance (1999)

Corporate governance concept emerged in India after the second half of 1996 due to economic liberalization and deregulation of industry and business. With the changing times, there was also need for greater accountability of companies to their shareholders and customers. The report of Cadbury Committee on the financial aspects of corporate Governance in the U.K. has given rise to the debate of Corporate Governance in India.

Need for corporate governance arises due to separation of management from the ownership. For a firm success, it needs to concentrate on both economical 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 “corporate governance concept” dwells in India from the Arthshastra time instead of CEO at that time there were kings and subjects. Today, corporate and shareholders replace them but the principles still remain same, unchanged i.e. good governance.

20th century witnessed the glossy of Indian Economy due to liberalization, globalization, and privatization. Indian economy for the 1st time here was together with world economy for product, capital and lab our market and which resulted into world of capitalization, corporate culture, business ethics which was found important for the existence of corporation in the world market place.

NEED FOR CORPORATE GOVERNANCE:

The need for corporate governance has arisen because of the increasing concern about the non-compliance of standards of financial reporting and accountability by boards of directors and management of corporate inflicting heavy losses on investors.

The collapse of international giants likes Enron, World Com of the US and Xerox of Japan are said to be due to the absence of good corporate governance and corrupt practices adopted by management of these companies and their financial consulting firms.

The failures of these multinational giants bring out the importance of good corporate governance structure making clear the distinction of power between the Board of Directors and the management which can lead to appropriate governance processes and procedures

under which management is free to manage and board of directors is free to monitor and give policy directions.

In India, SEBI realised the need for good corporate governance and for this purpose appointed several committees such as Kumar Manglam Birla Committee, Naresh Chandra Committee and Narayana Murthy Committee.

ROLE OF LAW IN CORPORATE GOVERNANCE

Law can only provide a minimum code of conduct for proper regulation of human being or company.⁵ Thus, in the same manner, role of law in corporate governance is to supplement and not to supplant. It cannot be only way to govern corporate governance but instead it provides a minimum code of conduct for good corporate governance. Law provides certain ethics to govern one and all so as to have maximum satisfaction and minimum friction. It plays a complementary role. Role of law in corporate governance is in Companies Act which imposes certain restrictions on Directors so that there is no misrepresentation of documents, there is no excessive of power, so that it imposes duty not to make secret profit and make good losses due to breach of duty, negligence, etc, duty to act in the best interest of the company etc.

IMPORTANCE OF CORPORATE GOVERNANCE:

"Companies can always regulate their directors/officers beyond what is prohibited by the law".

A good system of corporate governance is important on account of the following:

1. Investors and shareholders of a corporate company need protection for their investment due to lack of adequate standards of financial reporting and accountability. It has been noticed in India that companies raised capital from the market at high valuation of their shares by projecting wrong picture of the company's performance and profitability.
2. Corporate governance is considered as an important means for paying heed to investors' grievances. Kumar Manglam Birla Committee on corporate governance found that companies were not paying adequate attention to the timely dissemination of required information to investors in by India.

⁵ Report of the Company Affairs Committee of the Confederation of the British Industry, Page 71.

Though some measures have been taken by SEBI and RBI but much more required to be taken by the companies themselves to pay heed to the investors grievances and protection of their investment by adopting good standards of corporate governance.

3. The importance of good corporate governance lies in the fact that it will enable the corporate firms to (1) attract capital and (2) perform efficiently. This will help in winning investors confidence. Investors will be willing to invest in the companies with a good record of corporate governance.

4. Global Perspective. The extent to which corporate enterprises observe the basic principles of good corporate governance has now become an important factor for attracting foreign investment. In this age of globalisation when quantitative restrictions have been removed and trade barriers dismantled, the relationship between corporate governance and flows of foreign investment has become increasingly important.

Thus, “International flows of capital enable companies to access financing from a large pool of investors. If countries are to reap the full benefits of the global capital markets, and if they are to attract long-term capital, corporate governance arrangements must be credible and well understood across borders”. The large inflows of foreign investment will contribute immensely to economic growth.

5. Indispensable for healthy and vibrant stock market. An important advantage of strong corporate governance is that it is indispensable for a vibrant stock market. A healthy stock market is an important instrument for investors’ protection.

IMPORTANT ISSUES IN CORPORATE GOVERNANCE

There are several important issues in corporate governance and they play a great role, all the issues are inter related, interdependent to deal with each other.

1. **Value based corporate culture:** For any organization to run in effective way, it needs to have certain ethics, values. Long run business needs to have based corporate culture. Value based corporate culture is good practice for corporate governance. It is a set of beliefs, ethics, principles which are inviolable. It can be a motto i.e. A short phrase which is unique and helps in running organization, there can be vision i.e. dream to be fulfilled, mission and purpose, objective, goal, target.

2. **Holistic view:** This holistic view is more or less godly, religious attitude which helps in running organization. It is not easier to adopt it, it needs special efforts and once adopted it leads to developing qualities of nobility, tolerance and empathy.

3. **Compliance with laws:** Those companies which really need progress, have high ethical values and need to run long run business they abide and comply with laws of Securities Exchange Board of India (SEBI), Foreign Exchange Regulation Act, Competition Act 2002, Cyber Laws, Banking Laws etc.

4. **Disclosure, transparency, and accountability:** Disclosure, transparency and accountability are important aspect for good governance. Timely and accurate information should be disclosed on the matters like the financial position, performance etc. Transparency is needed in order that government has faith in corporate bodies and consequently it has reduced corporate tax rates from 30% today as against 97% during the late 1970s. Transparency is needed towards corporate bodies so that due to tremendous competition in the market place the customers having choices don't shift to other corporate bodies.

5. **Corporate Governance and Human Resource Management:** For any corporate body, the employees and staff are just like family. For a company to be perfect the role of Human Resource Management becomes very vital, they both are directly linked. Every individual should be treated with individual respect, his achievements should be recognized. Each individual staff and employee should be given best opportunities to prove their worth and these can be done by Human Resource Department. Thus in Corporate Governance, Human Resource has a great role.

6. **Innovation:** Every Corporate body needs to take risk of innovation i.e. innovation in products, in services and it plays a pivotal role in corporate governance.

7. **Necessity of Judicial Reform**⁶: There is necessity of judicial reform for a good economy and also in today's changing time of globalization and liberalization. Our judicial system though having performed salutary role all these years, certainly are becoming obsolete and outdated over the years. The delay in judiciary is due to several interests involved in it. But then with changing scenario and fast growing competition, the judiciary needs to bring reforms accordingly. It needs to speedily resolve disputes in cost effective manner.

⁶Report of the Company Affairs Committee of the Confederation of the British Industry, Page 71

8. Globalization helping Indian Companies to become global giants based on good governance: In today's age of competition and due to globalization our several Indian Corporate bodies are becoming global giants which are possible only due to good corporate governance.

9. Lessons from Corporate Failure⁷: Every story has a moral to learn from, every failure has success to learn from, in the same way, corporate body have certain policies which if goes as a failure they need to learn from it. Failure can be both internal as well as external whatever it may be, in good governance, corporate bodies need to learn from their failures and need to move to the path of success.

The major challenges to corporate governance reforms in India are:

- Power of the dominant shareholder(s)
- Lack of incentives for companies to implement corporate governance
- Reform measures (no direct correlation between putting expensive governance systems and corresponding returns)
- Underdeveloped external monitoring systems
- Shortage of real independent directors
- Weak regulatory oversight including multiplicity of regulators.

CORPORATE GOVERNANCE IN INDIA PAST, PRESENT & FUTURE:

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.

1. VEDIC PERIOD

⁷ Report of the Company Affairs Committee of the Confederation of the British Industry, Page 71

Corporate governance has existed since past but it was in different form. During Vedic times kings used to have their ministers and used to have ethics, values, principles and laws to run their state but today it is in the form corporate governance having same rules, laws, ethics, values, and morals etc which helps in running corporate bodies in the more effective ways so that they in the age of globalization become global giants.

Several Indian Companies like PepsiCo, Infosys, Tata, Wipro, TCS, and Reliance are some of the global giants which have their flag of success flying high in the sky due to good corporate governance.

2. 21ST CENTURY

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.

Corporate bodies have their aim, values, motto, ethics and principles etc which guide them to the ladder of success. Big and small organizations have their magazines annual reports which reflect their achievements, failure, their profit and loss, their current position in the market. A few companies have also shown awareness of environment protection, social responsibilities and the cause of uplifting and social development and they have deeply committed themselves to it. The big example of such a company can be of Deepak Fertilizers and Petrochemicals Corporation Limited which also bagged 2nd runner up award for the corporate social responsibility by business world in 2005.

Under the present scenario, stakeholders are given more importance as to shareholders, they even get chance to attend, vote at general meetings, make observations and comments on the performance of the company.

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 interdependence 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 uplifting 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.

CORPORATE GOVERNANCE FRAMEWORK IN INDIA

Ever since India's biggest-ever corporate fraud and governance failure unearthed at Satyam Computer Services Limited, the concerns about good Corporate Governance have increased phenomenally. Broadly speaking, the corporate governance mechanism for companies in India is enumerated in the following enactments and listing agreement:

- 1) **The Companies Act, 2013**: it contains provisions relating to board constitution, board meetings, board processes, independent directors, general meetings, audit committees, related party transactions, disclosure requirements in financial statements, etc.
- 2) **Securities and Exchange Board of India (SEBI) Guidelines**: SEBI is a regulatory authority having jurisdiction over listed companies and which issues regulations, rules and guidelines to companies to ensure protection of investors.
- 3) **Standard Listing Agreement of Stock Exchanges**: For companies whose shares are listed on the stock exchanges.
- 4) **Accounting Standards issued by the Institute of Chartered Accountants of India (ICAI)**: ICAI is an autonomous body, which issues accounting standards providing guidelines for disclosures of financial information. Section 129 of the New Companies Act inter alia provides that the financial statements shall give a true and fair view of the state of affairs of the company or companies, comply with the accounting standards notified under s 133 of the New Companies Act. It is further provided that items

contained in such financial statements shall be in accordance with the accounting standards.

- 5) **Secretarial Standards issued by the Institute of Company Secretaries of India (ICSI):** ICSI is an autonomous body, which issues secretarial standards in terms of the provisions of the New Companies Act. So far, the ICSI has issued Secretarial Standard on “Meetings of the Board of Directors” (SS-1) and Secretarial Standards on “General Meetings” (SS-2). These Secretarial Standards have come into force w.e.f. July 1, 2015. Section 118(10) of the New Companies Act provide that every company (other than one person company) shall observe Secretarial Standards specified as such by the ICSI with respect to general and board meetings.

KEY LEGAL FRAMEWORK FOR CORPORATE GOVERNANCE IN INDIA

The Companies Act, 2013: The Government of India has recently notified Companies Act, 2013 (“New Companies Act”), which replaces the erstwhile Companies Act, 1956. The New Act has greater emphasis on corporate governance through the board and board processes.

a. Sec 299	Requires every director of a company to make disclosure, at the Board meeting, of the nature of his concern or interest in a contract or arrangement (present or proposed) entered by or on behalf of the company.
b. Sec 292A	Requires every public having paid up capital of Rs 5 Crores or more to constitute a committee of the board called the Audit Committee.
c. Sec 309(1)	Requires that the remuneration payable both to the executive as well as non-executive directors is required to be determined by the board in accordance with and subject to the provisions of Sec 198 either by the articles of the company or by resolution or if the articles so require, by a special resolution, passed by the company in a general meeting
d. Schedule VI	Requires disclosure of Director’s remuneration and computation of net profits for that purpose.

The New Act covers corporate governance through its following provisions:

New Companies Act introduces significant changes to the composition of the boards of directors:

- ❖ Every company is required to appoint 1 (one) resident director on its board.
- ❖ Nominee directors shall no longer be treated as independent directors.
- ❖ Listed companies and specified classes of public companies are required to appoint independent directors and women directors on their boards.
- ❖ New Companies Act for the first time codifies the duties of directors.
- ❖ Listed companies and certain other public companies shall be required to appoint at least 1 (one) woman director on its board.
- ❖ New Companies Act mandates following committees to be constituted by the board for prescribed class of companies: Audit committee, Nomination and remuneration committee, Stakeholders relationship committee and Corporate social responsibility committee.

RECENT CASES AND INCIDENTS INVOLVING CORPORATE GOVERNANCE ISSUES:

In 2012, the *Reebok India Scam*, where it was alleged that there was a INR870 crore (INR8.7 billion) fraud by the top management of Reebok, was one of the more recent corporate scandals to have rocked India. The managers were accused of criminal conspiracy and fraudulent practices including stealing products by setting up secret warehouses. There was a grave failure of corporate governance involved as well since it was also alleged that the former officials fudged accounts and indulged in fictitious sales causing a multi-crore dent to the company. Agencies such as the Serious Fraud Investigation Office (SFIO) which were probing the corporate fraud, detected a systemic mismanagement in the business planning and running of the company. Probing agencies also found that some of the top officials had indulged in inflation of bills and over valuation of goods.

Another recent scam involved investments made by *Bain Capital and Tpg In Lilliput Kids Wear* (primary and secondary acquisition from Everstone Capital) amounting to approximately USD86 million collectively. Less than two weeks after an IPO plan was approved, the investors received information alleging inflation of revenue figures and

falsification of the company's accounts. Prior to investment, investor due diligence of the company failed to find the irregularities. With this backdrop, accounting firm E&Y was sued by Bain Capital in the US (Massachusetts) over the inability of its INDIA 175 INDIA INTERNATIONAL SERIES Indian member firm SR Batliboi & Co (appointed as the statutory auditor of the company) to identify discrepancies in the financial statements which it had audited and certified as true and correct on the basis of which the investment by Bain Capital had been made.

INDIA, US AND UK CORPORATE GOVERNANCE NORMS - A COMPARATIVE

APPROACH:

A comparative analysis was done between the US, UK and India to gain insights into the Corporate governance system in these countries.

Feature	UK	US	India
Corporate governance approach	Principles based	Rules based	Rules based
Substantial shareholder	Can be an independent director	Cannot be an independent director	Cannot be an independent director
Audit Committee composition	Only independent directors	Minimum of 3 independent directors	2/3 rd independent directors
Remuneration committee	Discourages all forms of performance related remuneration, even share options	Allows stock options	Allows stock options
Whistle blower protection	Strong protection laws in place	Strong protection laws in place	No protection laws in place

- A substantial shareholder still retains his independence status according to the UK combined code, whereas India and the US exclude substantial shareholders from becoming independent directors.
- The Audit committee comprises of only Independent directors in case of UK, while India and the US have a more relaxed composition of 2/3rd and a minimum of 3 independent directors respectively.

- Supportive whistle-blowers protection laws are in place in both the US and the UK, whereas India doesn't have a law for the same.

CONCLUSION:

"Like All Fades, Corporate Governance Has Its Zealots"

- CONRAD BLACK

It is evident from above that it is essential that good governance practices must be effectively implemented and enforced preferably by self-regulation and voluntary adoption of ethical code of business conduct and if necessary through relevant regulatory laws and rules framed by Government or its agencies such as SEBI, RBI. The effective implementation of good governance practices would ensure investors confidence in the corporate companies which will lead to greater investment in them ensuring their sustained growth. Thus good corporate governance would greatly benefit the companies enabling them to thrive and prosper.

Further, in the context of liberalization and globalisation there is growing realization in the emerging economies including India that a country's business environment must be maintained and operated in a manner that is conducive to investors' confidence so that both domestic and foreign investors are induced to make adequate investment in corporate companies. This will be conducive to rapid capital formation and sustained growth of the economy.

Some persons regard certain good corporate practices as 'irritants' to the growth of their businesses since they require the implementation of minimum standards of corporate governance. However, fact of the matter is that the observance of practices of good corporate governance will ensure investors' confidence in the companies which have record of good corporate governance.

Further, it needs to be emphasized that practices and principles of good corporate governance have been evolved which stimulate business rather than stifle it. In fact in good corporate governance structure what is ensured is that companies must preferably follow voluntarily ethical code of business conduct which are conducive to the expansion of investment in them and ensure good outcome in terms of rates of return.

SUGGESTIONS

"Shareholders Value Gets Lost When Things Are Done Illegally, When Corporate Governance Is Not Adhered To, When Cohesive Action Is Not Taken."

- CYRUS PALLONIJI MISTRY

After analysing the various concepts of corporate governance, its implications and impacts in India and also after the comparative analysis we would like to submit the following suggestions as for good governance practice in India:

- **Better Defined Rules** The Chair of the Board should be an Independent Director with the roles segregated from that of the CEO
- **Guidelines for legal liability of Independent Directors** As long as the Independent directors show due diligence, the law should exempt them from all types of liabilities for the actions of the board or the managing director they may not be aware of.
- **Improved transparency** Remuneration of CEOs should be decided by a regulatory body like SEBI based on size of the company or decided by institutional investors holding significant stake in the company.
- **Remove One-Size-fits-all approach** Clause 49, which lays down role of the audit committee and role of board disclosure risk management, mentions compliance norms to be independent of the size of the company. This may not necessary yield the desired levels of compliance in India.
- **Training Program for new Directors** In order to have a better clarity on the issues facing the business and the upcoming challenges in the industry, many companies could do more in terms of a formal and tailored induction program(which is a recommendation of the Narayana Murthy Report) for their new directors.

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