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CORPORATE GOVERNANCE: A SOJOURN TO FIND A YARDSTICK

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Abstract

Corporate governance is a self-correctional effort of public companies in capitalism to face the challenges of public policy. In the last hundred years, corporate governance has attracted the notice of public policy and law makers in the times of financial crises. Corporate governance, yes or no, is not the question. How effective can corporate governance be made is the challenge. In India there are family business groups who play pivotal role in the management of the companies. These integrated groups use innovative control-mechanisms to keep firm control on the corporate empire through systems of pyramiding corporate establishments and interweaving trust system into it. The repercussions of absence of effective corporate governance in India can be ascertained from the increasing fraud in the corporate sector. The new Companies Act, 2013 aims to bring the regulation of companies by corporate governance mechanism. Nonetheless, the appointment of independent directors and auditors by the company in its AGM as prescribed in the company law does not in reality strengthen corporate governance but is often used to camouflage managerial mismanagement and adventurism. Therefore, the concept of corporate governance needs to be relooked in the light of changing trends of the corporate sector.

I Introduction

GOVERNANCE IS essentially a politically loaded word of public law. The term 'corporate governance' is a contradiction in itself. There is lack of unanimity in intellectual circle on the meaning of 'corporate governance' in the corporate and consumers' world. In broader terms corporate governance includes the relationship between shareholders, creditors, and corporations, between financial markets, institutions, and corporations and between employees and corporations.[1] Its line of demarcation with 'corporate management' is very thin. More confusion is added when some of these terms are explained with the analogy of democratic political

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1 Ozden Deniz, "The importance of Corporate Governance for a well functioning financial system: Reforming Corporate Governance in developing countries" 14 *Duq. Bus. L. J.* 219 (2012).

institutions. 'Corporate democracy' with 'liberal democracy' and 'corporate governance' with 'democratic governance' in a liberal democracy. Surely, no analogy can be drawn between shareholders' general meetings (GM) and the Parliament, or between the cabinet of ministers of a country and the board of a company! The only possible analogy may be drawn between a strong Prime Minister of a liberal democratic country and the CEO/CMD of a mighty corporation. Both govern; one governs the country and the other governs the company, hence their office is central to governance. The former of course has the public policy concern; the question is does the latter have the same too? Public policy is politically driven for one, is the other also concerned with such political or social compulsion? Or, should the analogy begin and end there? Is corporate governance an exercise for balancing the economic interest of the multiple stakeholders of a company including the consumers and also of the society at large to bring a system of fair-play in business organization running with public money or is it simply a witch-hunting devise in the event of financial collapse of a company?

The real connotation of 'corporate governance' can only be understood contextually from the historical development of company form of business enterprise. It is the vehicle for the growth and development of capitalism in different historical moments, sometimes to make large scale production and industrialization possible, sometimes to generate incentives to pool savings and investment to create employment, sometimes to produce at the cheapest cost, or emphasising the quality of goods to be produced and supplied or meeting all concerns of everybody! In modern times taking care of environmental protection is one of the primary social obligations.[2] Based on the growth of capitalism and its tenets, corporate governance is defined differently at different times. The concept has grown historically by way of self-correcting capitalism from the challenge of socialism. Its meaning and content did also vary according to historical needs. As such, it would be worthwhile to review the history of corporate entity and also the company law to deal with such enterprises in order to appreciate the meaning and content of corporate governance.[3]

II Historical lineage of corporate governance

With the sinking of the formidable *Spanish Armada* (first sailed in April, 1588 but struck by a terrible storm, it had to come back to the port loosing many ships and badly damaged itself), it was quite understandable that 'perils of the sea' were formidable especially in the Atlantic and Indian Ocean. But the 'desire to go for adventure for

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2 For instance, corporate social liability under s. 135 of Companies Act, 2013.

3 See Bob Tricker, *Corporate Governance-Principles, Policies and Practices* (Oxford University Press, 2012).

new trade opportunities was highly lucrative[4] with the discovery of each trade route with the east and the west. Companies were formed by many shareholders to make bigger and bigger ventures in the last phase of the sixteenth century. The English word 'company' has been taken from the French word used in its military force as '*compaignie*' (first recorded in 1150 AD)[5] meaning thereby, many people engaged in warfare together. Company also is etymologically understood as a group of people engaged in a specific job or mission.

East India Company,[6] which received its charter in 1600 was the first such company formed as a joint stock company by some British trading community and wealthier section of society joining hands to be engaged in trade in spices and goods from India, Africa and far-east. India was a romantic name to them, a land of rich wealth, in the east![7] As such, they perhaps thought trading in India would bring them fortune. These wealthier sections of the British people were eager to contribute capital and get the legal status for the enterprise to do the activities in its own name. So a charter was granted introducing for the first time the concept of authority given to the enterprise to carry on any activity on behalf of the crown. Thereafter, experiments started in the corporate form of business organization.[8]

Corporate form of business vehicle has seen various forms of systemic reforms and adjustments, initially with the main concern of establishment of distinct personality for the enterprise, secondly limiting the liability and third, managing the company by a few representatives for the company as its agent and also as the agent of the shareholders. Based on the tremendous success of the East India Company and rise of its share-price, there were several companies formed which did not have any charter but started all types of speculative transactions including making the shares sold at high price by promising very high rate of dividend. South Sea Company was such a company chartered in 1711 the shares of which were traded with a promise of high dividend. Share prices boomed and some people made money at the cost of the ordinary people, the fraud was known as bubble busting! As a result, the first Companies

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4 On Dec. 31, 1600, the English monarchy granted the East India Company a 5 year monopoly on trade to, and from the East Indies and Africa. By 1611 shareholders in East India Company were earning an almost 150% return on their investment. Subsequent stock offerings demonstrated how lucrative the company had become. Its first stock offering in 1613-1616 raised 418,000 pound and its second offering during 1617-1622 raised 1.16 million pound. Michael Cadnum, *Peril on the Sea* (Farrar Straus Giroux, New York, 2009).

5 William Allen Jowitt (ed.), *Dictionary of English Law* 431 (Sweet & Maxwell, London, 1959).

6 See for details of the history, Antony Wild, *East India Company: Trade and Conquest from 1600* (Lyons Press, 2000).

7 *Ibid.*

8 Denis Keenan (ed.), *Smith and Keenan's Company Law* (Pearson Education Ltd, 2002).

Act was passed by the British Parliament in the name of Bubbles Act, 1720 thereby prohibiting starting a company without a charter and preventing transfer of any shares of companies.[9]

British economy took a heat due to this negative Act.[10] Meanwhile rapid demand for industrialization in Europe required a very positive step for a vehicle for industrial movement. That required huge capital growth and involvement of public in the early growth of capitalism. Naturally company form of enterprise with (i) artificial personality, (ii) separate legal personality to take over the unlimited liability from the shareholders and (iii) intention to involve more and more people in the capital formation for industrial movement to grow – all these were the primary interests of the governments of that day. Out of more than four hundred years of history of company form of business organization, almost three hundred years were engaged in designing an ideal corporate structure distancing the ownership of sponsors/ promoters/ shareholders over the company making it as a legal person, not required to be legally owned by any other person or persons. That ultimately empowered the company to raise its capital, both equity and debt, from millions of shareholders thereby facilitating huge capital required for facilitating industrialization. Capitalism placed its footprint in the industrial growth. The limited liability concept in its present form and scale came only in the Act of 1854.

England, though a common law country, had to pass through the critical period of early industrialization and as such, required to overhaul and adjust its Companies Act several times, through new statutes in 1825, 1834, 1837, 1844, 1854, 1856, 1862, 1908, 1929, and 1948. Through all these statutes England ensured essential characters of a modern company such as its legal personality, limited liability of the shareholders to their contribution, separation of ownership from management, and making shares marketable and transferable to bring liquidity to ensure people's participation in corporate investment. Capitalism took its birth in the liberal democracy holding the hand of 'right to liberty' and 'individual freedom'. It could not happen within common law system taking loan for business and trade and then, on failure to pay back, the business owner would be not legally liable to pay for! In fact this was not only antithesis to common law; it was antithesis to private law as well. It was possible only when state allowed a law limiting the liability of members and the company being a legally competent person, to take over unlimited liability and then used to plead bankruptcy on the failure of the company to get the company winding up by the court. It was necessary perhaps on account of public policy to launch corporate form of business

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9 Robert R. Pennington, *Pennington's Company Law* (Butterworth's & Co, London, 1985).

10 Read for further details ch. I of S.M. Shah, *Lectures on Company Law* (Tripathy Publishers, Bombay, 1990).

organisation as the vehicle for introduction of industrialization. But limiting the liability of the members of the company would still be ethically a questionable step. Company drastically required a correctable avenue by adding a public and social interest dimension. Only public law could cure such apparently questionable ethical status by arguing that the state was all mighty and powerful, and can take all necessary steps to excuse and dissolve a defaulting company, which did fail to meet its obligations!

In the last about 75 years there have been serious challenges to the management of the corporate establishments especially on ethical grounds. Initially corporate management was professionalised on such ethical issues. Then capital market regulatory system was introduced and tightened in all developed and many developing countries. Secondary market development and growth necessitated organized system of market intermediaries and also the game rules for bringing the liquidity in the market that attracted investment from ordinary people of the country and abroad. With the huge growth and development of professional management in corporate affairs, followed by growing organized public investment funds, capitalism tested its first adversity in the deep depression in thirties especially in the US. Economists started debating on the social responsibility arising out of aggregation of massive assets structure *vis-a-vis* the corporate aspiration of earning 'increasing rate of profit' on investment at any cost.[11] Some economists favouring capitalism in view of political importance of liberty and independence attempting to make a solid base of capitalism started developing a

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11 S.C Sen, *New Frontiers of Company Law* 7-8 (Eastern Law House, Lucknow, 1971). The author narrates the three challenges identified by Berle and Means in their book *The Modern Corporation and Private Property*, published in 1927 as follows: First challenge arises from the scale of corporate enterprises and the dependence of society for most of its needs upon a limited number of major corporations controlled by a limited number of persons...Secondly, in terms of juristic theory of corporate personality each of these corporations was one and its assets belong to that one. Shares in the corporation gave no direct control to shareholders over the assets except eventually on winding up, and then only to the extent of solvency. Indirectly, and in theory, shareholders might control the assets by the use of their voting power in nominating and controlling the directors of the corporation. In practice, however, this was ruled out by the profound change in the incidence of shareholding. For great mass of shares in these giants were spread in small lots over tens of thousands of widely dispersed and unorganised individuals, manifesting little interest in the corporation save in the dividend declared. A few individuals with minority block of shares seemed paradoxically to increase with the size of the corporation, for larger it was, the more dispersed tended to be the bulk of the shares. The second challenge was, therefore, as to how to ensure that those comparatively few individuals who controlled vast properties of others by grace of outrun legal rules, did not abuse that power. The third challenge....if the society as a whole was deeply concerned with all aspects of corporate activity in whose interests were these vast aggregations of wealth and the activities of millions of men working in their enterprises to be controlled.

concept: 'directors' as the trustee of the shareholders.[12] Profitability and dividend was treated as benchmark of shareholders' faith on the management. That raised a very keen debate on social responsibility of a corporate entity and some authors argued[13] that just as a king got the status of benevolent king by reason of conscience and public pressure there was the emergence of a new type of capitalism with a corporate conscience. Interestingly enough at this juncture there were debates of 'service states' and 'welfare states' requiring moderation of corporate behaviour due to public interest.[14]

Thereafter there has been a challenge to capitalism in its citadel by the growing emphasis of various elements of public policy and public concerns that once strengthened the eco-political movement of socialism. US political system was very scared about such challenges especially coming from the academia.[15] The US moderated this onslaught with economic policy by increasing the 'net' and 'its quality of social security' and also by emphasising the 'corporate governance' carved out of 'corporate management'. Also, nominee directors from various organized investors and lenders also put restrictions on the management. Market became global. Market regulatory system became more transparent with introduction of dematerialization, attracting public investment through the schemes of mutual funds catering to various needs of

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12 *Id.* at 16. Sen observes that in the classic battle between Adolf Berle and Dodd, Berle suggested the directors are still only trustees of the shareholders. Dodd believed that directors of corporations must become trustees not merely for the share-holders but for the entire community.

13 *Id.* at 15.

14 William Ebenstein, *Great Political Thinkers* (Oxford & IBH, New Delhi, 2000). In Ebenstein's words: "Paradoxically, therefore, the more capitalism succeeds, the more it destroys its original institutional and ideological character by 'socializing' the framework of society. The first collectivists in capitalism were not its critics, not socialist propagandists, but the most successful capitalist entrepreneurs– men like Andrew Carnegie, John D. Rockefeller, Elbert H. Gary, Edward H. Harriman, Henry Ford. Like all empires, industrial empowers, too, have a tendency to level and flatten out differences, follow routine and precedent, disregard the individual local peculiarity for the sake of the standardized impersonal administration. Large-scale capitalist enterprise thus created the institutional conditions out of which some form of collectivism was bound to develop. Psychologically, there is less difference between large-scale capitalist and large-scale socialized enterprise than between small-scale and large-scale capitalist enterprise."

15 *Id.* at 743. Ebenstein further wrote, "The existence of 'industrial absolutism' within the walls of political liberty lies at the basis of the critique of capitalism by socialists and non-socialists. The notion has been increasingly accepted, not always in clearly formulated ideas or public policies that the original democratic balance between economic and political liberty must be restored, and that political liberty is doomed unless some way is found to recapture individual economic independence within the condition of large-scale enterprise. Non-socialists believe that the evils of monopolistic capitalism can be remedied through anti- monopolistic legislation, supplemented more positively by social welfare and security. Socialists believe that more radical changes are necessary, and that the basic economic decisions must be made by the community, not by private owners of the means of production; the basic industries, at least, will therefore have to be directly owned and controlled by the community."

risk appetite of the investors, tightening nooks against insider trading, systematically hard-tackling serious market fraud and introduction of many other strict game rules in regulating the market. That took at least thirty-forty years of regulatory system working to be fully functional. Economists debated on self-perpetuating managerial oligarchy, corporate socialism and regulator's responsibility on investors' protection.[16] Corporate governance was talked about to make company come closer to people's interest, especially those which are public companies collecting capital from the people. Attempts were made to bring harmony between private motive of earning higher profit at any cost and the public interest served by the company. Some of the management professionals[17] started arguing for protecting the interest of all stakeholders and not only of the investors alone. Market required more transparency, disclosure and accountability.

The corporate system has now taken another turn with new challenges by the end of the twentieth century. The multilateral Agreement of Trade related Investment Measures (TRIMS) was introduced under WTO system,[18] market game rules getting unified globally, origination of high-end private investment funds in the form of equity trust, inter-corporate relations, and strengthening of other private interests. The weakness of socialism has also been revealed with the fall of the Soviet conglomeration of states. Workers of the world became owners of intellectual property and technological innovation and were given individual recognition and regard as human resource. Corporate governance has now taken a new philosophical turn. It has become more legalistic rather than adhering to economic principles in arguing for corporate governance – its structure and strategy.

III Changes reflected in company law in India

Some changes in company law in India could be highlighted as follows:

(i) Wide dispersion of shareholding both geographically, numerically, and intellectually made shareholders only short term investors. They were neither interested in participating in any form in the annual general meeting (AGM) nor had the desire to keep those shares/stocks for longer time than necessary to encash capital appreciation. They were less interested to take a 'long term investment' view to participate in management by electing directors of their choice. Hence the control and management of a company fell in the hands of the minority

16 *Supra* note 11.

17 Galbraith, *New Industrial State* (Princeton University Press, 1967). In this work Galbraith explained his 'management wheel' at the centre of which he put his most powerful top management functioning as management technocrat and has become most powerful.

18 Trade Related Investments (TRIMS) is one of the seven main agreements comprising the system of WTO. These multipartite International Trade Agreements were executed in 1994 to come into operation in 1995 or with effect from such other dates as may be agreed upon.

shareholders who were promoters and controlling the empire sitting on the top of a pyramid-structure of relational companies. SEBI looked after the interest of the retail investors not because of shareholding but because of their intention to gain by way of market appreciation in trading the instruments. Shares/stocks became goods disposable under the Sale of Goods Act, no longer regarded as an instrument of owning and contributing the share capital of a company by vast number of shareholders.

(ii) The present system of dematerialization and converting the shareholders as mere numbers for the convenience of market trading, has completely taken away any initiative of the shareholders in the management of the company that could have been there otherwise. There was no sense of belonging or loyalty or involvement as a shareholder. The only interest that remained was encashing the capital appreciation at the quickest possible time!

(iii) Shareholders were only treated as a DP number and entitled to all 'beneficial interest on the share' and not the real owners of the share. Depositories were the real legal owner. A depository would have no interest but for passing of the benefits to the respective DP number. And a so-called shareholder (a depository participants' number) has the beneficial interest arising out of the share but no ownership right on the share. Legally speaking a DP number-holder has only a right *in personum* against the depository and against nobody else because he would have no right *in rem* as owner of the share. Benefits could both be financial and non-financial. An investor would not feel involved in the election of directors; instead of relying on the promoter-manager, according to him, would be better for him to maintain *status quo* and his short term interest on market capitalization.

(iv) Management class has soaked all powers in a company. The top management would effectively 'zero in' and 'pack-up' the board with his/her men and women. His/her choice would become the last voice. So would be the appointment of the auditor.

(v) Board of directors was supposed to make policies on various matters. More often the board would be kept engaged in some innocuous issues and on major issues the policy would either be made by the management at the behest of the chairman who was also CEO/CMD or at his dictation. Decisions would be taken *ad hoc* as desired by the boss.

(vi) In India most of the corporate houses belonged to a family and the head of the family remained the chairman of the controlling company seating on the top of related companies. He is the person on whose indication all salaried top management would move.[19] The concept and the value of 'public company' has

19 ENS Economic Bureau, "Governance based on process, structure, people necessary", *Indian Express,* Sep. 14, 2011.

not gone down the bone-marrow of those who were the 'lords' of the corporate world with minimum participation in capital of a company.

So, the core philosophy of corporate governance lies in the responsibility of social accountability that would be reposed in the corporate structure under the public policy concerning production and distribution of goods and services to facilitate industrial civilization! It would be politically unwise if not unethical to keep the use of such huge aggregation of assets completely with some individuals' hand in a corporation in the name of 'right to liberty' and 'individual freedom'. That was why law stepped in to reconcile individualism under private law with the public interest under the public policy responsibility, to make the corporate world conscious about the social responsibility, someone to be accountable and responsible for the same and lay down the policy and control in the deployment of huge corporate assets acquired by way of contribution of millions of stock and debenture-holders.[20] The philosophy would still be confined to getting the answer from strengthening the existing forum of shareholders and in constituting the board with wider participation and making the system work with transparency, responsibility and accountability. This attempt would remain within the liberal democratic framework through forums of allocated powers and interposing corporate governance with corporate management.

IV Core philosophy of corporate governance

The core philosophy of corporate governance relies on the quality of corporate democracy. N.R. Narayana Murthy very simply explained this by synthesising the economic significance of corporate governance with socio-philosophic context: "The primary goal of a corporation is to maximize shareholders' wealth in legal and ethical manner".[21] There could be two ways for democracy to operate. In a common law system of liberal democracy, there was a strong belief that corporate democracy would work only where dialectic operation of power play would be possible to lay down. That was why in a democracy, party system became a necessary concomitant. In a modern corporate entity where corporate governance was to be addressed through focussing only shareholders' interest there remained only one interested group belonging to promoters of the company which has a distinct interest to run the company. In India, the family system was extremely strong in the business promotional class. So, shareholders line up on the name of a corporate leader from a business family managing a company. Short-term investors would not bother about who would run the business so long as market remained responsive to the aspiration of the investors. Institutional investors would further strengthen the party in power. In sixties when

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21 Dr. P. Asthana (ed.), *ICSI-CCRT Workshop Proceedings on Corporate Governance* (Centre for Corporate Research and Training, Mumbai, 2000).

the professional management used to dominate, several means were attempted to strengthen the shareholders and make the corporate democracy strong. Some such methods were 'activation of proxy vote' and 'organising voting trust'. But nothing could really strengthen the corporate democracy because shareholders could not be warmed up by any one of these weapons used for 'conflict model'. They were rather showing their coolness and allowing minority shareholders to keep the control and management. They are only interested for capital appreciation and not even higher dividend.

The other model of corporate democracy would be consensual or allocative method in which there would be twin boards, one for policy planning, direction and control and the other to function as management board for day to day operation. Here the policy board would represent shareholders, bulk investors, lenders, employees and consumers. The policy making board would become an interested party against the promoter-management conglomerate. As such, the dialectic operation of democracy would operate. Common law-driven corporate governance could not find right dialectic operation to succeed. Twin-board of civil law system operated better because employees and customers would be interested to provide for policy direction and control the management.

The first ground of corporate governance would relate to separation of governance from the management. The key issues in this respect would be distribution of power and application of checks and balances criteria on the top management. Whereas management would be responsible for operation and execution, the governance factor would be responsible for policy making, planning and control. Corporate governance would depend on the quality of corporate democracy. A widely held public company with thousands of shareholders mostly with only short term investment-motive of keeping an eye on the secondary capital market, would not lead to a strong corporate democracy. There could be another factor that would relate to the governance in the public interest. Capitalism was unable to explain why a huge aggregation of assets could be left to be managed in the hands of a few individuals though the fund was raised from a large number of persons across the whole nation, nay, across the globe. How could there be retention of huge profit in the name of "plough back" for expansion of capital-base to be enjoyed by a few and adding extra power to management for cash manipulation? Marxists argued that there could not be any logic of such a ground of accumulation of profit. Capital would get interest, land would demand rent, and labour would get wages. What was this "profit" then? Was it a sum total of exploitation from every stakeholder especially, labours? Even a champion of capitalism would argue, if profit was the reward for risk undertaken by the shareholders, let that go to the shareholders as dividend! If the entire profit was to be distributed as dividend, the exploitation of the labours and of the consumers would then be

immediately revealed. For locating these two vitiating wings of capitalism, that is, to monopolize for rooting out competition in order to exploit the consumers and also the working class whom Marx referred to as 'labour', excessive dividend could play the role of spoiler of the game. Ultimately these two highly public interest-sensitive wings of a company had to be clipped, at least to a very large extent. Capitalism took the initial system-reform through 'anti-monopoly law' seriously imposing and clamping upon all such monopolistic activities, and also enforcing strictly labour welfare legislations.[22] The extra asset generally in the form of liquidity (purchasing power) retained with the top management made the top management of any giant corporation capable of building a massive personal empire. Market value of shares would go sky-high and the promoter-management coalition would make the 'corporate democracy' of thousands of short term retail investor-shareholders a happy hunting ground, so much so that the 'corporate democracy' would lose its entire value and relevance. To counter balance such an act of negation a 'corporate social responsibility' concept has been evolved to support the 'corporate conscience'. This CSR as it is known in short form now, carrying on social welfare services would supplement the benevolent and humanitarian activities supported by foundations established by corporate magnets of US. Bill Gate Foundation is the modern example for such a benevolent and humanitarian initiative undertaken by a foundation world over. Modern India's corporate bosses would now run such foundations led mostly by their wives.

Thus, the two criteria that represent the concept of corporate governance are (a) distribution of power and checks and balances by way of policy-planning and controlling the affairs of the company, whereas management would be responsible for day to day affairs; and (b) company's interest to show its concern for the society In case of the first, there were models of "corporate governance" whereas the second, the 'social responsibility' has nothing to do with corporate governance. CSR would only be a call to *corporate conscience* to respond to any public demand raising any serious question any time.

V Models of corporate governance

There were different models of corporate governance based upon variety of capitalism and the governance-management relation and its connectivity.

> (1) The Anglo-American unitary model: This is predominantly based on the interest of the shareholders. Here the board would be unitary, that is, one board of directors for the purpose of making policy, providing directions and also controlling the running of the company within the frame of which the top management would run the company

22 *Supra* note 11.

on day to day basis. Under the over-all control of the board there would be a management committee of the top managerial personnel. The management would be entirely accountable to the board. The majority of the members of the board would be elected by the shareholders. The company could have a few top management personnel as executive members of the board. They could be the managing director, executive director or whole-time director. There would be some nominated directors by the lending/shareholding institutions as could be agreed upon. Members of the board would be considered as the trustee of the shareholders. One of the cardinal principles would be that non-executive directors outnumber the executive members of the board. Non-executive members would hold key positions in nomination and appointment, audit, and compensation/remuneration sub-committees. There could of course be some major differences within the unitary system as practised in US and UK. In US the chairman of the board was generally the chief executive of the company though there were serious debates for allowing such conflict of interest. In UK usually the chairman would not be the managing director or the chief executive of the company.

(2) European dual model: This is also known as multi-stakeholder model. There would be two-tier board system in Netherland and Germany where the supervisory board (*Aufsichtsrat*) is made exclusively of non-executive members who represent the shareholders, debenture-holders, lenders and the employees. This board would prepare the policy, take overall business decisions, and also would review major business decisions. This board also would appoint the management staff and determine their compensation. The management board (*Vorstand*) on the other hand, would comprise the executives of the company who would run the day to day business of the company.[23]

(3) Japan's multi-stake holding model: The Japanese Unitary Board has the representation from the workers, customers, and the community. Such members were nominated by the interested group or by the government. The board was the policy making board and also would control the management.

(4) Management-focused unitary model: In sixties this model of corporate governance was predominant in the US for some years. The board comprised the professional management experts, both executive

23 *Supra* note 23.

as well as independent nominated by the shareholders, lenders and other stakeholders.

(5) Early Indian managing agency model: In the colonial period Indian companies (companies registered in India) under British capitalism introduced an irrevocable, perpetual and hereditary agency model. Since British imperialism was established by the East India Company in capturing political power through various tactical manoeuvres, company was always identified in an Indian psyche as 'His Master's Voice'! Indian National Congress (INC) termed these "managing agency houses" as "industrial zamindary". INC was therefore strongly committed to the abolition of both agrarian and industrial zamindary system.[24] Ultimately by the Act of 1956 this 'non-professional, hereditary, perpetual agency system,' a replica of the British imperialism, was abolished. But these agency houses had their hold on the Indian companies owned and operated by British shareholders until the country started nationalizing many of such giant companies and most of the others becoming sick. Shareholders did not have any voice on how would the company be managed. Management had been completely separated from ownership on shares of the company. The managing agents becoming the agent of the company managed and used to govern the organization in the name of the company. The family run giant Indian companies having ownership, with minority holding though, and management clubbed in same identity and the authority was exercised in the name of the company ideally suited to the old colonial tradition. All unfair and anti-competitive practices developed over the years out of this colonial practice. Naturally India never had the occasion to practise a corporate governance system with transparency and accountability on the part of the management. As a matter of fact, Indian shareholders and the management did never feel that there was a public concern in a 'public company'. Fact remained that there was no understanding of a 'public company' though these family led companies raised lakhs of crores from public funds without any feelings and concerns. Companies consider this mode of raising capital from public funds was their rights.

It was a romantic idea when SEBI introduced the concept of corporate governance not as a direct regulatory process but indirectly as a listing agreement, an idea more discussed less understood! The Companies Act of 2013 for the first time, included

24 For further discussion see Indian National Congress, Report of the proceedings of the 28th Congress Karachi (1913).

some features of corporate governance as understood in a common law country, such as, independent director, audit committee being chaired by an independent director conversant in corporate accounts and finance, accounting standard setting body, financial reporting system, derivative action, and the working condition and reporting requirement for the auditor.

A lot of other things would still be open for questions to be raised. There remained a provision for nominee directors. But these nominee directors were having interest conflict, as a director the deliberations in the board would be required to be confidential but they would also be required to disclose the status to the organization they represent. If the nominee director would represent trust, such non-disclosure could lead to an allegation of 'breach of trust', which is an offence but a disclosure to his organization would mean 'insider trading', which has been made an offence under 2013 Act.[25] There was no definite and transparent business ethical standard in India. Trade associations like FICCI or CII did not have any responsibility of codifying and/or enforcing any ethical standard on the members. The sense of productivity, cost and quality consciousness, transparency standard – all these were not comparable to any global or international codes. One would not be able to build up corporate governance in a vacuum. These conditions would be required to be a part of business culture. India's political governance has been clouded with corrupt practices. Country's political governance was taken as a factor of externality and hence subject to management. Often such expenses were non-transparent or shown in such a way that it could be allowed as the 'fast track decision making cost'.

Strengthening corporate democracy: Role of various committees in pursuit of new bench mark and direction

Several committees of the business communities, market regulators and the government appointed various expert committees for suggesting appropriate outline and regulatory system on and for corporate governance. Committees were also concerned with the growing distance created between the societies in general and the industrial world. Many professors of management science and economics started writing about the business ethical standards. It was rightly argued that "the first collectivists in capitalism were not its critics, not socialist propagandists, but the most successful capitalist entrepreneurs– men like Andrew Carnegie, John D. Rockefeller, Elbert H. Gary, Edward H. Harriman, Henry Ford," (to this list Bill Gate may be

25 The Companies Act, 2013, s. 195(2) stipulates that "If any person contravenes the provisions of this section, he shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher or with both."

added) – who incorporated big Foundations, established big corpus funds from their vast corporate earnings to carry on work for the social missions once they were out of their industrial empire. Many committees and bodies identified elements of corporate governance, notable among these were Cadbury Committee (1991), Greenbury (1995), Hampel (1998). These reports show the concern for corporate governance in modern corporate entities.

Review of the components of corporate governance.

The following recommendations were made by several committees on corporate governance. Director's service contract would not exceed three years without shareholders' approval.[26] Directors would submit report to the shareholders on effectiveness of internal control.[27] Institutional members would ensure compliance with the code of best practice,[28] institutional shareholders should disclose their policy on use of their voting rights,[29] annual report of the remuneration committee to the shareholders to be submitted with the London stock exchange,[30] shareholders to be invited to specifically approve all new long term incentive schemes, including share options to directors,[31] institutional shareholders to take a constructive interest in and test strategy and performance over time,[32] institutional shareholders to review their voting guidelines in view of corporate interest,[33] institutional shareholders to make public their voting records, institutional shareholders should encourage regular, systematic contact at senior executive level to exchange views and information on strategy, performance, board membership and quality of management, AGM to be made an opportunity for more meaningful participation of small investors,[34] business presentation and question & answer sessions to be arranged during AGM (Hampel), proxy votes to be counted and announced for and against on each resolution so that members attending and voting in person could be compared with (Hampel), no bunching of resolutions to put to vote, voting on each resolution to be separately taken (Hampel), Chairman of the Audit Committee should be available in AGM to respond to the question about its work (Cadbury, Hampel), annual accounts and

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26 Financial Reporting Council, Cadbury Committee Report on Corporate Governance (1991).

27 *Ibid.*

28 *Ibid.*

29 *Ibid.* Also see Financial Reporting Council, Hampel Committee on Report on Corporate Governance (1998).

30 Confederation of British Industry, Greenbury Committee on Report on Corporate Governance (1995).

31 *Ibid.*

32 Financial Reporting Council, Hampel Committee Report on Corporate Governance (1998).

33 *Ibid.*

34 *Ibid.*

director's report to be presented in AGM in person and discussion on it must be encouraged (Cadbury, Hampel), retail shareholders should have access to information in the same manner and to the same extent as was available to institutional members (Cadbury, Hampel), private shareholders to be represented by nominees has to be encouraged (Hampel).

In another report[35] there was an emphasis on protection of shareholders rights, such as, ownership, registration, transfer of shares, obtaining relevant information in time, participate in voting in general meeting, electing members in the board and share in the profits of the corporate. Shareholders would have the right to participate in all matters relating to amendment to constitutional documents, authorization to raise capital through additional shares, in all extraordinary transactions like sale or merger of the company. Shareholders of the same class should be treated similarly. Insider-trading and abusive dealing would have to be prohibited. Management has to disclose all material interest in transactions affecting the company. ISO 26000 stipulated the best practices in matters of social responsibility of the corporate.

In today's corporate entity, corporate democracy with majoritarian governance by way of having control over 50% of the members of the board would remain a far cry. In a country like India where family would control the corporate entity through minority holding, it was the promoter/sponsor and top management coalition that would generally manage the entire affair. A general body of shareholders meeting in a big hall or in an indoor or outdoor stadium would be a total confusion and as such there would be no clear way of operating corporate democracy to work on any issue. Democracy as a tool of change or rotation that could bring instability in a corporate system would not be accepted by the investors though it could be good to the shareholders or other stakeholders. The only way of strengthening the corporate democracy would be to activate the institutional holders to take prudent interest in the corporate entities especially ensuring timely communication of periodical information and company to be transparent in its accounting system and reporting.

Un-flapping Indian standard of corporate governance

All committees on corporate governance constituted in India had the same restricted meaning of triangular relational as the corporate governance. Shareholders, directors and management were the three players in the corporate governance to govern the affairs within legal and ethical standards. The first committee on corporate governance in India was Kumar Mangalam Committee. Most of the committees however defined 'corporate governance' having its essential parts as follows: (i) distribution of power so that management would be separated out of governance factors, (ii) accountability

35 OECD, OECD Principles of Corporate Governance (2004).

of the management, (iii) transparency in all actions. Indian model of corporate governance would be required to be tested on the basis of above factors. RBI Committee on Corporate Governance,[36] CII Code on Corporate Governance,[37] N.R. Narayana Murthy Committee,[38] Naresh Chandra Committee,[39] Irani Committee on Company Bill[40] etc. The features of corporate governance were not different in these reports and codes from that of the international standard.

Strengthening shareholders and the GM

Kumar Mangalam Committee highlighted the rights and responsibilities of shareholders as owners of the company. Legally speaking shareholders are not owners of the company because no person (either natural or artificial) can be owned by another person. Had the shareholders been the owners of the company, the limited liability principle could not be introduced. Shareholders are in reality, owners of the shares and hence they (a) are not to become responsible/liable for any liability of the company nor would they own any assets or any part of it of the company, (b) are responsible to pay the amount either as promised or as stipulated in the share as the owner of the share, and (c) are not to take any responsibility of the misfeasance, malfeasance and nonfeasance of the management of the company, management being not agent of the shareholders. Strengthening the shareholders by empowering them would be a delicate issue. When SEBI by way of regulation (ICDR) emphasised the retail percentage of shareholders, it really made two categories of shareholders in any large Indian companies like innumerable number of short term investors only to quickly encash capital appreciation and secondly, long term shareholders who wanted to put in a part of the capital of the company and identify their interest with that of the company. Indian mega-corporate lords were mostly all family promoters commanding the faith of these so called, millions of retail shareholders. People buy shares both through public issue as well as through secondary market keeping faith on the promoter-

36 Reserve Bank of India, Report of the Advisory Group on Corporate Governance (2001) *available at*: http://www.rbi.org.in/Scripts/Publication Report Details.aspx?UrlPage=&ID=220 (last visited on Oct. 13, 2014).

37 Confederation of Indian Industry Code on Desirable Corporate Governance (1998) *available at*: http://www.nfcgindia.org/desirable_corporate_governance_cii.pdf (last visited on Oct. 10, 2014).

38 SEBI, Report of the SEBI Committee on Corporate Governance (2003) *available at*: http://www.sebi.gov.in/commreport/corpgov.pdf (last visited on Oct. 10 2014).

39 Confederation of Indian Industry, Report of the CII Task Force on Corporate Governance (2009) *available at*: http://www.mca.gov.in/Ministry/latestnews/Draft_Report_Naresh Chandra_CII.pdf (last visited on Oct. 10, 2014).

40 Ministry of Corporate Affairs, Report of the JJ Irani Committee on Company Bill (2005) *available at:* http://primedirectors.org.in/pdf/JJ%20Irani%20Report-MCA.pdf (last visited on Oct. 10 2014).

chairman (commonly from a family owning minority shares and managing the company). They subscribe (sometimes over subscribe, too) on the call of corporate family captains like Mukesh Ambani, Anil Ambani, Rahul Bajaj, Ratan Tata or Kumarmangalam Birla or Hinduja. However, mutual funds, investment bankers, institutional investors, or financial institutions would evaluate the project and invest. These institutional investors go by corporate performance. But they also strengthen the hands of the promoter-management. If these types of investors could be encouraged to actively participate in AGM/GM and also to provide information necessary for any decision making to retail members, things could be better. The general information level and knowledge back-up of the retail shareholders in general in India remained very poor.

VI Companies Act, 2013: Some reflections on corporate governance

Despite the fact that Kumar Mangalam Committee found the concept of corporate democracy illusory, the new Companies Act, 2013 did not depart from same conventional and age old traditional way of attempting to empower the shareholders.[41] It did not even consider some of the cosmetic operation on corporate democracy as suggested by various committees, such as annual report to contain a compliance report, to include postal ballot or electronic method of voting carried in all major decisions.[42] However, a compliance report was simply an avenue of window dressing. The Act could have included a detailed report, as could be specified in the schedule, on the steps taken by the board of management for conducting workshops for shareholders both on-line as well as in real terms, on the role of shareholders in effective corporate governance as well as providing instructions on nominating and electing directors. Shareholders would have to be explained how the company auditor could protect the interest of the shareholders and of the company. They would also have to be briefed about the importance of appointing company's auditor strictly on merit. Shareholders would need to know also the manner and procedure of accounting record keeping. A responsibility undertaken by the board of management in this regard would in course of time develop a strong sense of corporate bondage with long term interest. Similarly a corporate governance reporting system could be introduced from an accredited and independent credit rating agency, which could be required to be publicly made available in daily economic newspapers. These would have strengthened the framework of

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41 SEBI, Report of the Kumar Mangalam Birla Committee on Corporate Governance *available at*: http://www.sebi.gov.in/commreport/corpgov.html (last visited on Oct. 10, 2014). In para 14.11 the Report states: "Currently, although the formality of holding the general meeting is gone through, in actual practice only a small fraction of the shareholders of that company do or can really participate therein. This virtually makes the concept of corporate democracy illusory."

42 *Supra* note 40.

listing agreement as proposed.[43] Electronic voting through SMS properly secured or through any other method, such as postal ballot could be introduced. Presently, the power to introduce such methods of online/postal participation is given to the Ministry of Corporate Affairs.[44]

The Companies Act, 2013 has the old content regarding shareholders' power to be exercised in general meetings.[45] But if these provisions did not ensure corporate democracy yesterday, there would be no reason for it to happen tomorrow. A fresh idea would be needed to ponder over. However in view of the way the institution of auditors, who were so badly moulded by some unscrupulous promoter-management coalition, the Act of 2013 contains some special provisions, such as (i) appointment manner and procedure would be provided under rules, (ii) appointment would be for a term of five years though annual ratification would be needed provided that listed companies and other classes of companies would not reappoint an individual auditor for more than one term at a stretch and a firm for more than two terms, (iii) there would be a 'cooling off' period of at least one term of five years for the auditor/audit firm of a listed company before considering for appointment again, (iv) in case of audit firm audit partners have to be rotated as provided in the rules,[46] (v) removal from office within the term would involve special resolution and the prior approval of the Central Government,[47] (vi) any conflict of interest has been prescribed as disqualification.[48] These legal stipulation intended to make the auditor independent and autonomous would go a long way.

A special attention is given in the Act 2013, to the appointment of independent directors in all listed companies. Taking lessons from various market-frauds the Act made a serious effort of cleansing the institution of independent directors to be appointed in a listed company under clause 49 of the listing agreement and brought the same under statutory prescription. The major distinguishing features can be highlighted as follows:

(i) A meaning of independent director was provided in section 149(6) which *inter alia* included positive qualifications as well as negative

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43 *Ibid.* Para 6.5 relating to clause 49 of listing agreement.

44 The Companies Act, 2013, s.180.

45 *Ibid.* Annual General Meeting (s. 96) would deal with declaration of dividend (s. 123), confirmation of report of the annual general meeting and filing with registrar (s.121), approval of financial statements placed before it by the board (s.129), appointment of auditor (s. 139), appointment of director (s. 152) and (2) the extraordinary general meeting (s. 100) would deal with issues like amendment of memorandum (s. 13), amendment of articles (s. 14), issue of sweat equity (s. 54), issue of bonus shares (s. 63), reduction of share capital (s. 66), buy back of own shares (s. 68).

46 The Companies Act, 2013, s. 139.

47 *Id.,* s.140.

48 *Id.,* s.142.

conditions.[49] The positive qualification includes qualification and experience as required under the rules; and negative conditions include any relation with the company having no conflict of interest directly and indirectly including no direct or indirect pecuniary relation with the company and its associate companies, no managerial relation with the company and all its relational companies, no employment relation with the company or any of its associates within the preceding three years, no shareholding together with all relatives more than 2% of the voting rights in the company etc.

(ii) Every listed company has to have at least one-third of the board as independent directors. The minimum number of independent directors in case of any class/classes of public companies would be prescribed by rules. Here the prescription of the Act varied from the prescription of the SEBI committee, which prescribed more than 50% of the members to be manned by independent directors. But the significant difference was that independent directors have been made non-rotational and holding the position for a term of five years and could not hold office for more than two terms in continuity. There has to be a cooling period of at least three years before an individual could be considered again in the same company after the said two terms.

(iii) The most interesting manner in which selection could be made by the board from a data bank maintained by institution/s as may be notified by the Central Government and the same would have to be approved by the company in a general meeting. The board would ensure that there would be appropriate balance of skills, experience and knowledge in the board so as to enable the board to discharge its functions and duties effectively.

(iv) Independent director could receive remuneration by way of fees as prescribed under rules and expenses could also be reimbursed. But there could not be any stock options for them.

(v) The Act also provides the (a) guidelines of professional conduct of independent directors, (b) independent directors role and functions, (c) duties of an independent director, (d) manner of appointment, (e) reappointment, (f) removal and resignation, (g) separate meetings, at least one to be held annually without any non-independent and management members to remain present to review their function, flow

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49 *Id.,* s.149(6).

of information and also review the function of the chairman, (h) evaluation mechanism.[50]

The board of a limited company would be divided into three parts in the Act 2013, like 1/3rd comprising independent members[51] who were non-rotational,[52] 2/3rd of the rest would be rotational to be appointed by the shareholders[53] and up to 1/3rd would be executive whole-time management representative to the board. It is evident that whatever a good law could have done, all precaution has been taken for making independent really competent, reliable and efficient. But a good law was not the only requirement, there has to be conscience of those who would allow the law to govern!

Another important provision of the 2013 Act is the provision on audit committee. In the earlier 1956 Act, listed company was required to have an audit committee under listing agreement only. The present Act[54] provides that the board of a listed company and such other classes of companies as required under rules, would constitute an audit committee with minimum of three directors having majority of independent directors in it. The members shall have the ability to understand the financial statements of the company. Some of the important task of audit committee are (a) recommending for appointment of auditor and also the terms; (b) review and monitor the independence and performance of the auditor, (c) examining the financial statements and auditor's report, (d) scrutiny of interoperate loans and investments, (e) evaluation of internal financial control and risk management, and (f) monitoring the use of funds raised through public offer. Audit committee would hear auditor and the management before considering audit report. The committee would also establish vigil mechanism and adequate safeguards against victimization of any employee of the company.

The standard of accounting and audit practice is the basis of good corporate governance. Indian accounting practice has been short of global practice not long ago. The Act of 2013 vide section 132 provides for constituting the National Financial Recording Authority (NFRA) by the Central Government to provide accounting and audit practice. NFRA (a) formulates and lays down accounting and audit policies and standards for adoption of the same and recommends the Central Government to make adoption of the same by class of companies and the auditors, (b) monitors and enforces the compliance of accounting and audit standards, (c) oversees the quality

50 *Id.,* s. 149(7).

51 *Id.,* s. 149 (4).

52 *Id.*, s. 149 (10).

53 *Id.,* s. 152(6)(a).

54 *Id.*, s. 177.

of service of the professionals associated with the compliance, (d) reviews the suggestions by the professionals for the betterment of the standards. NFRA has the power to investigate in case of professional misconduct, impose penalty if misconduct is substantiated and/or debar a professional from practice. Central Government may prescribe the standard of accounting as recommended by the Institute of Chartered Accountants in consultation with NFRA.[55] It may also be pointed out that there has been internationalization of standard practices. International Financial Reporting Standards (IRFS) has issued 15 standards *inter alia*, including ones on financial instruments, consolidated financial statements, fair value measurement, standard disclosures on financial instruments etc. The standard accounting and audit practice is one very significant step of integrating global market stitched with economic disclosure standards and norms. Such disclosure standards would certainly strengthen corporate governance. The Companies Act 2013 is therefore a strong step in the right direction. The application of unique standard globally would integrate the accounting and financial system world over. Such high disclosure requirement, transparency and authentication system is a precondition for flow of investment from any part of the world to another including listing procedure in several stock markets across the globe.

The auditor is the ultimate umpire in the game-rule on corporate governance. Umpire's knowledge and experience in the art of the game, his independence and neutrality, his straightforwardness and far-sight and his ability to deal with all events under pressure with character – are the strength of corporate governance. It is common experience across the world that it is the weak auditor and fallible audit practice that is the root cause of all corporate fraud by top management. It is true that human brains can puncture any system and fudging of accounts. Window dressing in asset statements and several other innovative methods are adopted by the fraudsters to challenge the intellectual skills of the auditors. It is true that an auditor is not a bloodhound but he has to be a watchdog. He has to use his sixth sense to understand any transaction, in which there exists conflict of interest of any managerial personnel, his private interest with the corporate interest. Often the fraudsters use high skill in fudging the accounts. A professionally competent auditor has the high sniffing skill though he does not have to create any sense of disbelief in the working environment. He must have the intelligence and professional competence to drive deep into any matter when he smells any foul game. Auditor's report must be candid, forthright and straight forward. The provisions in the Act would go a long way to strengthen the corporate governance.

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55 *Id.,* s. 133.

VII Corporate social responsibility and corporate governance

Truly speaking the provision for corporate social responsibility is not a part of corporate governance. Corporate governance is a corporate social responsibility (CSR). CSR is perhaps capitalism showing that it also possesses social concern to strengthen its economic significance against those who profess socialism or welfare economics. CSR neither has philosophic basis nor any strong economic logic except that it shows corporate concern and consciousness. One can hardly make any other person charitable-minded. No one would argue that manufacturing finished goods, or capital goods, or selling of quality goods or service on wholesale or retail counter at the cheapest price, or producing with quality and cost consciousness or keeping customers' care or creating employment, all these, are not sufficient social responsibility. Companies Act still tries to make corporate citizens nationalistic,[56] and charity minded.[57] In good old days, 'Jain' community in Rajasthan had a practice of keeping 6% of the profit for religious and charitable trust. Many such instances can be found in the cultural fabric of India. For example, the social concern of Jamshedji Tata in raising the standard of education and research has been phenomenal. Indian Institute of Science, Tata Institute of Fundamental Research or Tata Institute of Social Sciences, or Tata Institute of Environmental Science are some illustrious example. K.K. Birla was another tall business leader of the country with his heart fully committed to social concern especially in the field of education. In present times, Infosys Foundation (N.R. Narayana Murthy) or Azim Premji foundation are some evidences of corporate leaders' social commitment. But that effort was not injected or motivated externally for any economic, social or other return.

Why did India want to make history by a statutory prescription to become first country in the world to make business community to contribute its might for social cause? What is the signal? Is it because the state has understood after six decades of constitutional governance that either the state alone is incapable of 'promoting social welfare' or the state has the responsibility to bring everybody in the task of striving to promote social welfare?[58] Or was it because the state (or in other words, the political masters) after nearly four decades of constitutional governance since 44th

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56 S. 183 gives the board the power of contributing to National Defence Fund or any other fund approved by the Central Government.

57 In s. 181 the board has been authorised to contribute to bona fide charitable and other funds. However if the contribution has to exceed 5% of its average net profit for three years, permission would be needed in the general meeting.

58 Art. 38(1) of the Constitution of India in the ch. IV stipulating the directive principles of state policies directed that: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

amendment[59]suddenly realized that the country was driven in the reverse direction to what was contemplated in article 38(2) of the Constitution of India[60] because the business world was not sufficiently contributing towards that goal? Still we have to have CSR because in some developed country like US corporate magnets have their foundations spending millions of dollar in social and charitable work.

India is the first country to provide for statutory status for and obligation of CSR.[61] Every such company shall compose a CSR committee consisting of three or more directors of which at least one shall be an independent director. The committee shall formulate and recommend to the board a CSR policy and shall indicate activities to be undertaken by the company as specified in schedule VII and the amount of expenditure on such activities. The committee should monitor the CSR policy from time to time. The board is responsible to include CSR policy in its report.[62] The company shall give preference to the local area around the company. One immediate benefit would be that the company can link up itself with the local population and can make an impact on the social development around. CSR can be used by company as a part of the qualitative advertisement of the product.

VIII Conclusion

For corporate governance to be effective, corporate democracy is to be developed. This, of course, is a very difficult proposition especially when shareholders may be thousands in a company, spread over to various parts of the globe and their interest is predominantly short term by way of investors' interest. However, the Companies Act, 2013 has not made any substantial change in the power structure for the shareholders. Though the concern for strengthening corporate democracy was within

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59 The Constitution (Forty-fourth Amendment) Act, 1978.

60 Art. 38(2) provides: "The state shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

61 The Companies Act, 2013, s. 135. It imposes an obligation on all companies having net worth of Rs. 500 crore or more or turnover of Rs. 1000 crores or more or a net profit of Rs. 5 crore or more to spend at least 2% of the average net profit of the company made during the three years immediately preceding the financial year.

62 Schedule VII of the Companies Act includes the list of grounds on which CSR has obligation like eradicating extreme hunger and poverty, promotion of education, promoting gender equality and empowering women, reducing child mortality and improving maternal health, combating human immuno deficiency, ensuring environmental sustainability, enhancement of vocational skill, social business projects, contributing PM's relief fund or any other funds set up by the central government or the state government.

the objective statement of the bill to protect the shareholders' long term investment in the equity of the company, they are likely to be more concerned with efficient corporate management for immediate goal of encashing the short term gain due to market capitalization. Shareholders' concern for good governance by way of transparency and accountability of the management would primarily be focussed on the increasing or decreasing rate of dividend. Lenders interest would lie on the 'payable' capacity of the company. In between this diverse interest, retention of profit to increase the cash flow of the company would be more attractive to the lenders than paying of higher dividend. Employees' interest would relate to the increase of production bonus. The consumers would be more interested in quality of the goods, lowering the price and repayment of corporate debts. Government would focus on the payment of taxes, both direct and indirect. How would all these interests be served? Can it be expected only by strengthening the power of the shareholders by way of strengthening corporate democracy or increasing shareholders 'say' in the board?

The German dual model of corporate governance would operate better because in unitary model there would always be a chance of a collision of interest of the minority family promotional group's interest in firming up the grip on management and the shareholders' interest of getting higher dividend. In a dual model no such person can at least directly force the supervisory board. One of the most common areas of conflict of interest is the investment among the related companies. A dual board-structure is highly recommended with clear allocation of responsibility with a strong regulatory oversight.

The critical contents in the problem of corporate governance are therefore, as follows: (i) an effective system of corporate democracy is needed to be introduced with representation of all stakeholders according to the nature of interest and not simply of shareholders; (ii) the policy of the company is required to be stipulated by the 'policy making board' comprising independent directors who are not related directly or indirectly with the management or any related company and are also competent and capable of expressing independent opinion on account of their knowledge and experience in the business area of the concern; (iii) the management has to be efficient, quality conscious and cost sensitive; (iv) there has to be efficient institutional mechanism for oversight of the management functions; (v) the company regulatory bodies (SEBI for listed company, registrar in case of unlisted company) must have the power to audit the compliance of good governance standards, (vi) a mechanism of independent audit system responsive not only to the shareholders in the AGM but also to a CG oversight regulatory body, and the multi-stakeholders representative body to be introduced.

Statutory institutions like chartered accountants, company secretary, compliance officer, merchant banker, banker to the issue, internal auditor – all these institutions in which professionals do provide service to corporate management, must be able to play a role of independent professional. If these institutions can function independently as professional experts freely and without any fear, instances of Satyam, Saradha, or Sahara could have been nipped in the bud. In fact presently it is found that these, so called, independent professional institutions are too malleable to be relied on. The law must be such that for any latches of these professionals they ought to have forfeited their professional status.