CORPORATE GOVERNANCE IN TANZANIA AND INDIA

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUEMENTS FOR THE DEGREE OF LLM

(BUSINESS LAW)

UNDER THE GUIDANCE OF Dr.VERSHA VAHINI

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CERTIFICATE

This is to certify that the dissertation titled "***Corporate Governance in Tanzania and India***"submitted by **Said Hemed Khalfan (ID NO.548),** in partial fulfillment of the requirement for the award of Master Degree (Business Law) submitted to the **National Law School of India University,** is a record of bonafide research work done by him and it has not been submitted for award of any degree, diploma, associate-ship ,fellowship of any University /Institution.

Place: NLSIU, BANGALORE.

Date: 28/5/2014

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DR. VERSHA VAHINI.

DECLARATION

I hereby declare that the dissertation entitled "**Corporate Governance in Tanzania and India'** 'submitted for the award of Master Degree is the result of my original work carried out under the supervision of Dr. VARSHA VAHINI, **National Law School of India University** and it has not been submitted for any degree ,diploma ,associateship, fellowship of any University /Institution.

Signature of Candidate

Place: NLS

Date : 30/05/2014

DEDICATION

I dedicate this dissertation work to my supportive family without the enduring love and unwavering support of my wife and my son Noman, the pursuit of my master would not have been possible.

ACKNOWLEDGEMENTS

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Lastly I am very grateful to all my colleagues with whom I have been together and sharing many ideas and I make it clear that none of them should be associated with any mistake, error, and any kind of failure found in this work .all mistake found should associated to me.

With profound gratitude

....

Said Hemed Khalfan

LIST OF ABBREVIATION

1. B.D -Board of director
2. C.G -Corporate Governance
3. CA -Companies Act
4. CEO -Chief Executive Officer
5. CMSA -Capital Markets and securities Act
6. CACG -Commonwealth Association for Corporate Governance
7. CSR -Corporate Social Responsibilities
8. MCA -Ministry of Corporate Affair
9. OECD -Organization for economic Corporation and development
10. SEBI -Securities Exchange Board of India
11. Tz -Tanzania
12. UK -United Kingdom
13. US -United State of America

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CHAPTER ONE

INTRODUCTION

Since the 1970s corporate Governance has been a popular term and it is an issue of International concern and debate of being an analogy or just idea. Whether it could referred to as discipline on its own or as a part of business ethic hence on this, different discipline economics, management, law and political sciences considered the corporate as a necessary social mechanism to carry out day to day activities of life but in a narrow meaning as classically defined by the Cadbury report of 1992,corporate Governance refers to the system by which companies are directed and controlled and in another words it all about the relationship between the company or internal management (board of director)management and shareholder and stakeholder .

As I had say to the first line of my introductory part that it become popular to 1970s but this idea or concept of corporate Governance date back to the 1776(Tricker,2000;Denise,2001) when Smith,in The Wealth of Nations, raised the issue of lack of incentive on the part of directors to look after other people's money with as much care as the owners themselves would :

The director of the companies, being managers of the other people's money rather than their own, it cannot be expected that they should watched over it with the same anxious vigilance with which the partner in the private copartnery watched over their own (Smith,1776 cited by Tricker,2000).The above citation Smith did not use the word Corporate Governance but the term only emerged in the 1970'and 1980's but the word of Smith sound understanding of the issue of Corporate Governance when the owners of the corporation are different from those who manage it ,incentive problems tend to occur.

The debate on corporate governance is based or influence on the way in which corporation are view .In this aspect different school of thought they try to explain but take into the consideration that every scholar has its own focus on this concept .Cleark and.Clegg (1988) contend that the early conceptualization of the corporation tended to treat corporation as the property of equity capital provider (shareholder) for the pursuance of their economic interest .However an essential characteristic of a corporation is its ability to have a separate existence a part from those who own it and when the corporation has acquired its own separate existence than the issue of control arises .

Mintzberg (1984) state that ,historically ,control of the corporation was excised by its owners either directly or through control of management but when the ownership and management are separated as when the ownership becomes fragmented ,control of the corporation presents a significant challenge .The issue of separation of management from the ownership ,which result to the transfer of control of corporation from the owners to professional manager (Scott,1997) so on this received greater emphasis following the Berle and Means article: The Modern Corporation and Private Property (Berle and Means,1932) .In this article they suggest that the notion of ownership of property when applied to corporations especially large ones, is not straightforward and it is in this context that Minztberg come under the poses the question :who should control the corporation and for the pursuit of what goals? And he contended that as the ownership of the corporation become dispersed, owner control weakened and corporation came under the implicit control of their managers.

Apart from the above theoretical aspect and the opinion of the school of thought now days there has been a significant increase interest in corporate

Governance in this recent years ,a recent corporate scandal have attract academic attention but also attract public as well as the government .

During the 1990's the increase of Foreign Direct Investment in India as well as Tanzania after the economic liberation the need of effective Corporate Governance come into play since historical effect of the failure of public companies result to the Nationalization of some of the national companies both in Tanzania and India hence the government change the law and they try to put the guidelines so as manage the corporations

AIM AND OBJECTIVES OF THE RESEARCH

The main objective of the paper is to analyses the trend of Corporate Governance in Tanzania and India respectively.

Apart from that but also this paper focus on the theories and principle Corporate Governance which are followed by the said two countries namely Tanzania and India and which principle are the same and which are differ

RESEARCH QUESTIONS

Why Corporate Governance?

- What is the current situation with respect to the effectiveness of Corporate Governance in Tanzania and India?
- What are the Corporate Governance practice and guideline in each country that show a progressive march towards a better Corporate Governance?
- Whether there is sufficient law relating Corporate Governance in Tanzania and India.

SCOPE AND LIMITATION OF THE STUDY

The scope of this project is limited only to Corporate Governance in Tanzania and India though the researcher focus worldwide on theory aspect ,this limitation is necessary due to the vastness of the subject and also undertake a meaning fully discussion on the subject.

HYPOTHESIS

The changing of economic pattern by opening free economy under the head of privatization and globalization and changing political wind in Tanzania and India are the main drivers to the shaping of the Corporate Governance model.

SOURCE OF DATA

The research work is dependent on secondary source of information such as books, journals, newspaper and Internet data, every attempt has been made to acknowledge the source of data.

MODE OF CITATION

The researcher has followed a uniform mode of citation throughout this project.

OVERVIEW OF THE CHAPTERS

In this project it divided into seven chapters and here under is overview.

Chapter one of this project deal with the introductory part which, include the background of Corporate Governance as an International aspect in this era of Investment and free economic. It , also provide the recent experience of Corporate Governance in Tanzania and India how this aspect work and guide the Corporation and this specified one among the research question ,the same chapter focus on objective of the project, research problem, research question, scope of the research as well as the overview of the project.

Chapter two of this project focus on the theories of Corporation, here the researcher focus on the theory of nexus to contract whereby in this aspect the researcher give out the features of the theory of nexus to contract that this theory base more on economic aspect or some time we can say that it is economic description theory, a part from that, the same theory the researcher focus on the protection of the shareholder as the key factor of this theory.

Apart from the nexus to contract on the same chapter the researcher focus on entity theory .In this theory it base to the aspect that corporation is entity and it is party of public thus to said that it is entity and should not be aggregated hence the corporate law regulate the internal affair and the procedure of the company for the protection of shareholder hence the company has its existence outside the people constitute it.

Also on the same chapter the researcher try to compare the said theory it feature and how they differ between the two and hence the researcher give out the opinion on that.

Chapter three of this project focus on theory of Corporate Governance, in this aspect the researcher give out different meaning of Corporate Governance .

Apart from that but also on the same chapter focus on the two theory of Corporate Governance used namely Shareholder theory and Stake holder theory, Shareholder theory the researcher focus on issue of right and the responsibility of the Shareholder but also the business corporation is organized and carried on primary for the profit of the stockholder.

As to the Stakeholder theory the researcher focus on the aspect that the dependency of many different groups on the firm's management is a part of stakeholder ,also in in aspect the researcher would focus on descriptive justification of Stakeholder as well as Instrumental justification the same to the Normative justification .

Lastly on this chapter focus on the different between the theory namely Stakeholder and Shareholder theory and which between the two were followed by India and Tanzania.

Chapter four in this project focus on model of corporation here the researcher give out all model of corporation namely Anglo Saxon, Germanic model and Japanese model .On Anglo-saxon model reflect the liberalist approach to the Corporate governance, in this model firm is a property of those who have invested capital and for the pursuit of their economic interest hence in Anglo-Saxon the shareholder are the only stakeholder.

As to the Germanic model in this aspect corporate Governance is adopted as general view that firm is Institution, here in this model of Institution focus on the view that institution have autonomy as the social entity which encompassing the interest of various stakeholder .Also in the same area the researcher focus on the relationship of this model with social stakeholder theory as well as the decision making of shareholder on the appointment of chairman of the supervisory board .

As to the Japanese this is another story that firm is view as a community or nation here in this area I will focus on the conceptualization of this model of interlocking networking, also I will focus on the power of president in the Japanese corporation, the aspect of stakeholder theory on Japanese model

,lastly I will focus on the relationship between the Japanese model and Anglo-Saxon .

A part from that but also the researcher would focus on the Organization for economic Cooperation and development (OECD) as well as Commonwealth Association for Corporate Governance (CACG) hence on the two namely model of corporate Governance and OECD and CACG hence I would be in a good position to tackle the model by which India followed in the forthcoming chapter

Chapter five of this project focus on model of Corporate Governance in India, here the researcher would analyses which model by which India followed after perusal different source and test the aforementioned model of Corporate Governance to India. Also the same chapter I will focus on legal framework of Corporate Governance as well as the code of conduct which govern Corporate Governance

Chapter six of this project focus on model of Corporate Governance in Tanzania, here the researcher would analyses which model by which India followed after perusal different source and test the aforementioned model of Corporate Governance to Tanzania.

A part from that but also the researcher would focus on the Organization for economic Cooperation and development(OECD) as well as Commonwealth Association for Corporate Governance (CACG) hence on the two namely model of corporate Governance and OECD and CACG hence I would be in a good position to tackle the model by which India followed .

Also on the same chapter I will focus on the legal frame work of Corporate Governance in Tanzania, here I will focus on Companies Act 2002,The capital Markets and securities Act 1994.

Chapter seven the researcher come out with the finding and conclusion of the research here the I will give out the opinion concern the Corporate Governance in Tanzania and India where we fall down and why which area we can learn from each country and which area need Corporation.

CHAPTER TWO

THEORIES OF CORPORATION

The aspect of theories of corporation is a vague one while apparently metaphysical questions about "the nature of the corporation" might strike one as vaguely continental and surely alien to our hard-headed, pragmatic legal culture, theorizing about "what corporations are", In this scenario different authors they tried to touch on the theories of corporation which has a great value on corporate law.

Basically most of them theorists and commentator based on two aspect of corporate .The first dimension is the distinction between the corporation as an entity, with a real existence separate from its shareholders and other participants, and the corporation as a mere aggregation of natural individuals without a separate existence. The second dimension is the distinction between the corporation as an artificial creation of state law and the corporation as a natural product of private initiative.

In addition to these distinctions there is a third dichotomy or the third distinction that has received a good deal less attention, a public/private distinction. This third distinction has operated at a deeper level, explicitly and implicitly structuring thought about the nature of corporate activity and the appropriate goals of corporate law.

Historically, the political implications of the natural/artificial and entity/aggregate distinctions have been ambiguous, meaning different things at different times. The abidingly crucial issue in corporate legal theory has been the public/private distinction[1]. Whether corporate law is thought to be one or the other reflects a

[1] http://www.jestor.org/stable/13726

choice between a body of law concerned solely with the techniques of shareholder wealth-maximization or, instead, a body of law that embraces and seeks to promote a richer array of social and political values.

The theories of corporation as artificial entity change time to time during much of the 19th century, the idea of the corporation as an artificial entity characterized corporate legal discourse[2]. This view perceived the corporation as an entity, rather than an aggregation, and emphasized the state's constitutive role. The latter idea, in particular, was interpreted to justify a public law approach to corporate law, thus for example corporate law imposed various regulations so as to guide the corporation under the head of public interest designed to address important public concerns relating to the economic privilege and power that incorporation implied.

After having the above short philosophical aspect of theories of corporation now let's evaluate it in details.

ENTITY THEORY

A corporation is an artificial person enjoying in law rights and duties. A company is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of its members. Like any juristic person, a company is legally an entity apart from its members, capable of rights and duties of its own and endowed with the potential of perpetual succession[3].In other words; it has "legal

[2] id

[3] Hahlo's, CASEBOOK ON COMPANY LAW, 42(2nd Edn, Hahlo and Trebilock).

personality" and is often described as an artificial person in contrast with a human being, a natural person[4].

The said principle was laid down in the case of *Salomon v. Salomon*[5] where it was decided that a corporate body has its own existence or personality separate and distinct from its members and therefore, a shareholder cannot be held liable for the acts of the company even though he holds virtually the entire share capital. The case also recognized the principle of limited liability of a company.

Salomon case established beyond doubt that in law a registered company is an entity distinct from it member even if the person hold all shares in the company. There is no difference in principle between a company consisting of only two shareholder and company consisting of two hundred members and in each case the company is a legal entity.
The principle establish in Salomon case has been used time to time as in the case of Lee V Lee'sAir forming Ltd[6], that 1 of 3000 share inn Lee Air forming Ltd ,Lee held 2999 share .He voted himself the managing director and also become chief pilot of the company salary .He died in an air crashing while working for the company .His wife was granted for the compensation of his husband in the course of employment .The court held that Lee was a separate person from the company he formed and compensation was due to the widow and thus ,the rule of corporate personality enable Lee to be master and servant at the same time.

In the words of Chief Justice Marshal – "*A corporation is an artificial being invisible, intangible existing only in the contemplation of law. Being a mere*

[4] Gower and Davies, Principles of Modern Company Law, (8Th Edition, Sweet & Maxwell 2008) P 193
[5] [1895-99]All ER Rep 33
[6] 1961 A.C

creation of law, it possesses only the properties which the Charter of its creation confers upon it, either expressly or as incidental to its very existence".

In India the legal status and position of a company has been well explained by the Supreme Court of India in *Tata Engineering & Locomotive Company Ltd v. State of Bihar*[7], wherein it observed "*the corporation in law is equal to a natural person and has a legal entity of its own*".

Also in the case of Kondoi Tea Co Ltd[8] it was held in the Calcuta High Court that a company was separate person, a separate body altogether from its shareholders.

ARTIFICIAL AND NATURAL THEORY

A company is an artificial person but negatively speaking it is not natural person .It existence in the eye of law and cannot act on its own and it has to act through the board of director elected by the shareholders, the body of the director is the brain and the only brain of the company, which is the body and the company can and does act only them[9].

For the purposes of company law a company is a legal person like a natural person. It has the right to acquire and dispose of the property, to enter into contract with third parties in its own name, and can sue and sued in its own name[10].However, it is not a citizen as it cannot enjoy the rights under any Constitution or Citizenship Act.

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[7] AIR 1965 SC 40
[8] 1886 ILR 13 Cal 43
[9]http://www.ddegjust.ac.in/studymaterial/bba/bba-201.pdf
[10] Id

In State Trading Corporation of India v C.T.O[11]it was held that neither the provisions of the Constitution nor the Citizenship Act apply to it. It should be noted that though a company does not possess fundamental rights, yet it is person in the eyes of law. It can enter into contracts with its Directors, its members, and outsiders[12]. Justice Hidayatullah once remarked that if all the members are citizens of India, the company does not become a citizen of India.

NEXUS TO CONTRACT THEORY

The nexus to contract theory is an idea put forth by a number of economists and legal commentators which asserts that corporation are nothing more than a collection of contract between different parties namely primarily directors, shareholder employees, suppliers, and customers[13].

Before proceeding further on the theory of nexus to contract it is necessary to clarify the meaning of the nexus-of contracts conception. The conception neither can nor does mean what it literally says. In ordinary language, the term *contract* means an agreement. In law, the term means a legally enforceable promise[14]. Pretty clearly, however, the nexus-of-contracts conception does not mean either that the corporation is a nexus of agreements or that it is a nexus of legally enforceable promises. Instead, the conception means that the corporation is a nexus of reciprocal arrangements.
Nexus to contract was coined by economists, and "Economists tend to view contracts as relationships characterized by reciprocal expectations and

[11] 1963 SC(J705),
[12] http://www.ddegjust.ac.in/studymaterial/bba/bba-201.pdf
[13] http://en.wikipedia.org/wiki/Nexus_of_contracts
[14] S 2 (h) of the Contract Act 1872

behavior."[15].The economist or commentator of this theory believe on market aspect that lets market says that market can do any things and should be minimum by the state and everyone in the corporation has to be protect the interest since it the economic aspect and not political issue hence player can justified them self and no need of limited liability .

Nexus to contract as I had pointed out to the above paragraph that this is the economic aspect hence the parties to the corporation has the same right to decide the choice of law that govern their contract hence choice of law or forum is an important aspect on nexus to contract so when there is mandatory rule to followed on corporate law it disturb the market.

Scholars who approach this issue from a law and economics perspective reach the same result as the corporate bar. Those scholars argue that corporations should maximize value for shareholders and shareholders alone because shareholders, as residual claimants, this aspect base more on shareholder theory also the same follower of Anglo-Saxon model of corporate Governance.

NEXUS THEORY AND CORPORATE ENTITY

As I had pointed out that nexus to contract theory based on economic aspect that let's market decided thus to say that it economic discretion theory it is near to the aggregated theory, nexus to contract as I had said it based on economic theory and the commentator of this theory believed that should be minimum by the state and everyone in the company has to be protected since it is economic and not the political issue while for the corporate entity the issue of law state should protect the corporation and this is important aspect of corporate entity the

[15] Oliver Hart, *An Economist's Perspective, supra* note 2, at 1764 n.30. Hart builds here on Jeffrey N.Gordon, *The Mandatory Structure of Corporate Law,* 89 COLUM. L. REv. 1549 (1979).

same the state should regulate the company from the aspect of management and give out the restriction of the liberty of corporation .

Apart from that also nexus to contract based more on shareholder aspect and most of the commentator of nexus to contract is the follower of Anglo-Saxon who believed on shareholder primacy though this aspect change time to time as example to Indian now though is Anglo-Saxon but the new company Act 2013 change or shift to stakeholder by introduce the Corporate Social responsibility as mandatory according to the condition specified in the company Act[16].

Nexus to contract the player should justified them self because they know the business and lets them be free from limited liability while on the other hand the corporate entity theory based more on regulation aspect on how to manage the company for the interest of shareholder as well as stake holder hence though the nexus to contract they believed that they are no longer the entrepreneur but they are investor and they have the power to sell and buy ,so in this aspect as the corporate entity though they are investor the government has to regulate the affair of the company for the interest of shareholder ,stakeholder as well the public interest hence limited liability is a privilege and the state has power to regulate.

[16] Companies Act 2013.

CHAPTER THREE

THEORIES OF CORPORATE GOVERNANNCE

Before peed with the aspect of theories of corporate governance its better first to focus on the meaning of corporate Governance hence let's invited Webster's Dictionary, the term 'Corporate' means a body having the nature of, or acting by means of a corporation[17]. Before proceed with other meaning the term 'Governance' is derived from the word Gubernate, means to rule or steer. Even though the term governance is from political science, thus to say derived from political science discipline but these days due to the expansion of jurisprudential aspect it is also debated under management law ,public administration and other discipline . A broader view of CG can be grasped from some of the following definitions, According to Milton Friedman, "Corporate Governance is to conduct the business in accordance with owner or shareholders' desires, which generally will be to make as much money as possible which conforming to the basic rules of the society embodied in law and local customs"[18]. This definition clearly emphasizes the focus on the interests of shareholders without jeopardizing the interests of stakeholders (law and local customs).Thus to say that he ignore all others theories of corporate governance and he believed on shareholder theory

The Cadbury Committee's definition is: "Corporate Governance is a system by which companies are directed and controlled"[19]. As to the World Bank

[17] Mehta ,op,citpp 667-678

[18]Kumar, Ashok, "Corporate Governance in India," in Suryanarayana, A. (Ed.),*Corporate Governance: The Current Crisis and The Way Out*, 1st ed; The Icfai University Press, Hyderabad, 2005, pp. 44-45.

[19]http://www.jbs.cam.ac.uk/cadbury/report/index.html, website accessed at 8.4.2014, 10.40 a.m.

publication, *Corporate Governance: A Framework for Implementation,* Sir Adrian Cadbury states the following:

"Corporate Governance is holding the balance between economic and social goals and between individual and community goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of these resources. The aim is to align as nearly as possible the interest of individuals, corporations and society. The incentive to corporations is to achieve their corporate aims and to attract investment. The incentive for states is to strengthen their economies and discourage fraud and mismanagement[20].

In common parlance, Corporate Governance means protecting interests of shareholders but not at the cost of other stakeholders, but this aspect of shareholder interest I will discuss on the due course of aspect of theories of corporation However, there are varied opinions about the three terms namely Management, Governance' and Administration. The term 'Management' in the context of Corporate Governance means "executing strategic as well as all other decisions taken by the Board'. The Chief Executive Officer (CEO) is entrusted with the responsibility of managing the day-to-day affairs of business in consonance with the decisions of the Board. Moreover, in management, there is a hierarchy, where the CEO (being senior executive with managerial roles and responsibilities, is also a part of the Board) is on the top of the managerial pyramid, delegating authority and responsibility for management functions downwards while demanding accountability upwards. Thus to say that

[20]Machiraju, H. R., *International Financial Management*, 1st ed; Himalaya Publishing House,Mumbai, 2006, p. 255.

downwards received command from upwards or decision taken by the upward bound the downward.

SHAREHOLDER THEORY

This theory is based more or strongly emphasizes that shareholders are the primary stakeholders of a company or in another words this theory based on the idea that the sole purpose of the corporation is to maximize profit for the shareholder in the corporation in other worth the management of the firm are there to ensure the maximum return .The traditional shareholder perspective has its origin in agency theory and regards the corporation as a legal instrument for shareholders to maximize their own interests in the form of investment returns (Aguilera and Jackson, 2003; Gamble and Kelly, 2001; Letza et al., 2008).

The history behind of this theory was emerged due the different reasons and amongst the reason is the failure of corporation in USA and the development of capitalist during the 17 to 19 centuries based on the beginning of the incorporation of the company in England starting as the charter form for overseas trading and letter as in the form of legislation whereby it was seen as a mechanism for rising capital[21].

In recent decades, financial economists have studied in depth, the likely conflicts of interest among various stakeholders and the ways to resolve such conflicts. Collectively, these ideas are termed Agency theory. The theory is essentially concerned about developing the optimal contractual relationship and to harmonize the disparate expectations in order to maximize the effectiveness of

[21] Steve et al, shareholding versus stakeholding , a critical review of corporate governance,pg 6

all interest groups[22].Shareholder theory also known as Agency theory[23] due to the fact that the shareholder appoint the manager or direct for running the company and act as the agency of the shareholder and nothing else and thus why we call shareholder theory is an agency theory.

According to Rappaport, he has another view on this proposition that the business strategies should be assessed in terms of the economic value they yield to shareholders is well accepted in the business community. In other words, to suggest that companies be managed in the best interests of their owners is hardly disputable[24]. However, managers may not act in ways that maximize the wealth of shareholders[25]. If managers and directors do not act to maximize firm value, then they are likely to face threats of takeover[26]. These assumptions are predicated on the operation of an efficient, competitive environment, in which information asymmetries are minimal.

So in this scenario of shareholder theory, shareholder is an investor result to nexus to contract as I had mentioned to the theory of corporation hence due to that if you based on the economic aspect of investor to raise capital within the investment and not within the corporation hence it is not entity. In this aspect as I had point out that shareholder is also known as agency theory because

[22]Brigham, E. F. (1985), *Financial Management: Theory and Practice*, Hinsdale, Ill. :Dryden Press cited by Ying-Fen, Lin, "Board control. Performance and CEO Compensation in Taiwan," *Asian Review of Accounting*, Vol. 12, No.1,2004, pp. 34-35.
[23]S.R.Krishnapal, *Corporate Governance Practice in India*, D.PhilThesis,MaharajaSayajirao University of Paroda 2012[Unpublished]
[24]Rappaport, A. (1986), *Creating Shareholder Value: The New Standard for Business Performance*, The Free Press, New York cited in Wit, Bob De and Ron Meyer(Eds.), *Strategy: Process, Content, Context – An International Perspective*, 3rd ed;Thomson Learning, London, 2004, p. 601.
[25]Chandra, op. cit, p. 13
[26]Brealey, Richard A., Stewart C. Myers, Franklin Allen and Pitabas Mohanty

director act as the agency of the shareholder and not corporation ,the possibility of takeover if the director based more on shareholder and not the corporation.

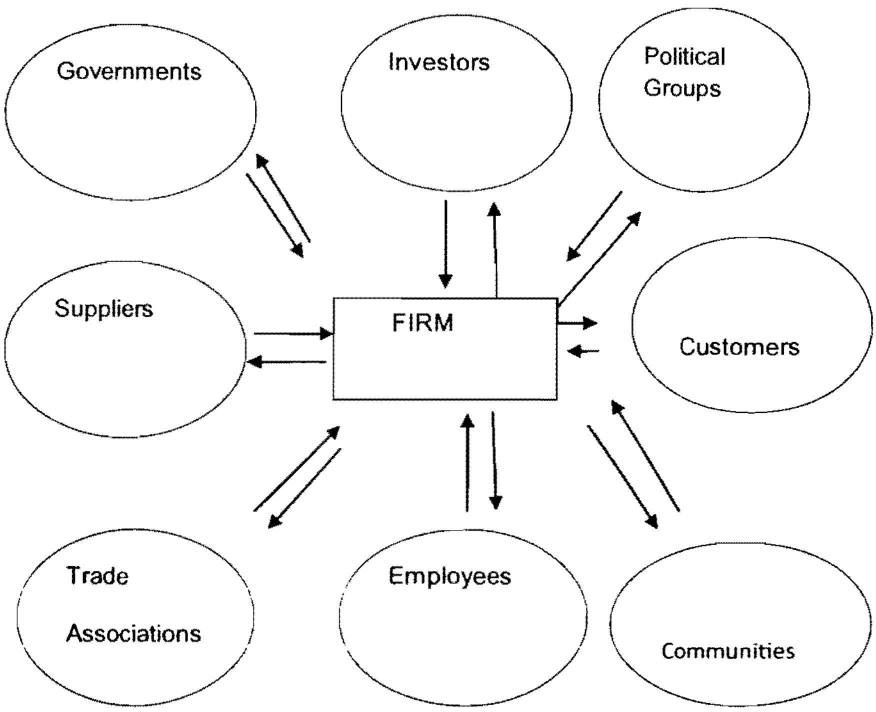
STAKEHOLDER THEORY.

Before I proceed with the stakeholder theory let's define the meaning of stake holder, In a plane meaning stakeholder is a person or group of person or organization that participate in the corporation in any manner whether as the shareholder or employee, but according to business dictionary stake holder means a person, group or organization that has interest or concern in an organization[27].

Sybille Sachs and Edwin Ruhli, define stake holder to mean those individuals or groups that influence the firm's strategy. On the other hand Donaldson and Preston define stake holder by their legitimate interest in the corporation, rather than simply by the corporation's interest in them. And for this they argued that all persons or groups with legitimate interests participating in an enterprise do so to obtain benefits and that there is no prima facie priority of one set of interests and benefit over another. Therefore to be a stakeholder one need to have an interest in the corporation whether direct or indirect and that interest should have an impact on the company's actions. Donaldson and Preston consider the following group to be the stake holder of the corporation as shown in figure 1.

[27]http://www.businessdictionary.com/definition/stakeholder.html#ixzz2QJhlpOOL

FIGURE 1



Source: Donalson and Preston, *the stakeholder theory of the corporation: concepts, evidence and implications.* 1995.

The above figure1 shows the relationship between the stakeholder and organization that in order to be stakeholder you should have some interest to the organization but also the same organization has the interest to the stakeholder.

After having explain the meaning of stakeholder now let's focus on the theory of stakeholder .In sharp contrast to the traditional wisdom of the shareholder approach, the stakeholder perspective of governance emerged in late 20th century (Gamble and Kelly, 2001; Letzaetal., 2004a). "Stakeholder theory views the corporation as a locus in relation to wider external stakeholders' interests rather than merely shareholders' wealth" (Letza et al., 2004a, p.243) and in the other words stakeholder theory stresses the dependency of many different group on the firm management.

In its basic form the theory states that the successful management of stakeholder relationship is the key for firms' success (Donaldson and Preston, 1995; Jansson, 2005; Letza et al., 2004a; Sternberg, 1997). The concept 'stakeholder' first appeared in the management literature in 1963 and was indicated to generalize the notion of stockholder "to those groups without whose support the organization would not exist" (Freeman and Reed, 1983) hence due to the aforementioned logic that without the group supporter the corporation would not exit it means that corporation as a social entity which has real personality on its own and recognized as the group in process of corporation. That means that corporation is not artificial thus it is a real and not aggregation of its members and individual right it has distinctive mind and capable to act, has its own right and duties and responsibility for its own actions and their consequences[28].

According to Jayati Sarkar Subrata Sarkat the stakeholder theory envisage the corporation as the community so as to scope the governance is extended to include a part from the shareholder ,the interest of the non-investing stakeholder at large like employee, customer, suppliers, potential pollute etc. .Stakeholder theory supporter are on the opinion that any bad decision from the manager or

[28] Id pg 9

management for the interest of the shareholder or shareholder value would impact them as the stakeholders because they invest human capital.

SHAREHOLDER vs STAKEHOLDER THEORY.

The above two theories of Corporate of course has difference as the word of each suggested .The shareholder theory based on shareholder primacy and nothing else or the manager primarily duty to maximize shareholder return as the victory of stakeholder theory which say that manager duty is to balance the shareholder's financial interests of other stake holder such as employee, customers and the local community even if it reduce the shareholder return and this now recognized in the new companies Act 2013 by establish the Corporate Governance Responsibility.

The shareholder theory they believed that business corporation carry on primary by the profit of stockholder As pointed out in the ***Dodge v Ford Motor Co***[29] whereby the Supreme Court of Michigan was of the view that "*A business corporation is organized and carried on primarily for the profit of the stock holders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits or to the non-distribution of profits among stock holders in order to devote them to other purposes.*"

This decision signify that the only purpose of the corporation is profit making oriented for it shareholder and it is the legal duty of the director to see this aim is maintained and not otherwise and failure to implement this amount to the breach

[29]Dodge v Ford Motor Co 170 N.W 668(Mich.1919)

of their obligation which is within the law to maximize the long run interest of the corporation shareholders who took risk in raising the capital of the corporation but bear in mind that the said decision based on that time but now it is another story especial in India after introduce the aspect of Corporate Social Responsibility within the Companies Act 2013 hence now the Act change the from the shareholder theory to stakeholder theory but according to a significant line of corporate precedents, the principal obligation of corporate directors is to increase the value of the residual claim that is to say the directors duty is to increase shareholder wealth in its traditional guise, this based on the concept of shareholder primacy norms which derived from the conception of the corporation as a thing capable of being owned. And the shareholder owns the corporation, while the shareholders are merely stewards of the shareholder's property.[30]the property right theory emphasize that although the company is considered to be as a legal person separate from its owner's, the nature of the shareholder as the company's owners never changes and the company is legally bound to serve the interest of its shareholders hence due to this the proponent of the shareholder theory argued that if the company acts for any social goal or purpose beyond the shareholder's interest it will provide opportunities for the managers to justifies their abuse of power and for government to intervene in corporate decisions which will leads to the allocation of corporate recourses in an inefficient way[31].this to some extent seems to be true and since under the capitalist economy market determine the corporate decision it is the best way to avoid government intervention in the company decision so that to the

[30] Stephen M. Bainbridge, The new corporate governance in the theory and practice, pg 32
[31]Id

shareholder theorist the best way is to have one objective that is shareholder wealth maximization[32].

Apart from that but also both the theory shareholder and stakeholder theory are normative theories of corporation social responsibility, dictating what a corporation's role ought to be, by extension they can also be seen as normative theories of business ethics since the executive and managers of a corporation should make the decision according to the right theory.

Also another fundamental distinction is that the stakeholder demands that interest of all stakeholder be considered even if it reduce the company profitability but for shareholders do anything you can to make a profit.

Lastly the stakeholder theory has three justification namely descriptive, Instrumental and normative description, as to the descriptive is what is to ought ,the manager or director believed that when the company take big decision and what is perception take the interest of other , example is Infosys their decision always consider the right of stakeholder like employee customer ,also the same to that when shareholder want to sell the share to another person hence as director can make certain measure to make sure that no take over because the manager interest would be affected.

As to the instrumental justification that if you protect the interest of employee everyone is willing to work to the company that care the interest of employee hence this long time relationship is good sign of company and more profit .

Normative aspect is that you should protect the interest of shareholder in respect to the interest of stakeholder like employee, supplier or customer hence stakeholder should be protected.

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[32]WalidM.Adam."*Corporate Social Responsibility in Tanzania critical Appraisal*," 7,(Dissertation thesis National law School of India University 2013 [Unpublished]

INSTITUTION THEORY

This theory based on the organization aspect that not only give out good and service but also be a part of social and cultural system to be not just entities that churn out goods or services, but as "social and cultural systems"[33] Therefore, the theory holds that organizations and their actors also seek legitimacy, beyond just engaging in a scramble for resources. In view of the broader role the theory envisages for companies, it effectively empowers people in organizations to address the expectations of external and internal groups, beyond the narrow set figuring in the Agency Theory.[34]

RESOURCE DEPENDENCE THEORY

This theory based on the aspect of board of director that in the organization they were alpha and omega or the key source of all resource This theory is strongly contingent on the presence of a competitive environment by assuming the availability of efficient, competent and skilled directors, the power of director help to improve the economic standard of organization by maximize the profit in the organization.[35]

SIGNALLING THEORY

Due to the increase of accounting scandals have renewed attention to corporate transparency so as to have good impression to the society as well as investor.

[33]Judge, William Q., Thomas J. Douglas and Ali M. Kutan, "Institutional Predictors of Corporate Governance Legitimacy," Submitted to *Journal of Management,* December 4, 2006, p. 4 available at http://www.ask.com/web?qsrc=2417&o=10148&l=dis&q=institutional+theory+and+Corporate+governanace, website accessed on 9.4.2014, 11.38am.
[34]S.R.Krishnapal"*Study of Corporate Governance in India"38* (D.PhilThesis,The Maharaja Siyajirao University of Baroda 2012)[Unpublish]
[35] Id pg 38

According to signaling theory, under information asymmetry, corporations with superior information transparency signal better corporate governance[36].

Spence (1973) stated that if information asymmetry exists between a company's managers and investors, the company can provide information to the investors in order to eliminate the asymmetry. In other words, if information asymmetry exists, there is no way for the investor to understand the real situation of the company's operations. Prior research indicates that investors rely on the information sent out from the company to make investment decisions (Poitevin, 1990; Ravid and Saring, 1991). In practice, companies with good operating performance often disclose information to the public to promote positive impressions of their Company and this is amongst the good company which implements the rule of corporate Governance[37].

Manager or director of the organization has to disclose the information pattern the organization for the interest of firm and this aspect is important for the increase of share price hence the choice of timing of time on the disclose of information is very importance aspect in signaling but take into the consideration not do in siding trader this result to the legal consequence by the regulatory regime.

STEWARDSHIP THEORY

As the name suggested this theory based on the director fiduciary duty towards the company to act as stewards of shareholders' interests as well as the stakeholder interest The term 'fiduciary' comes from two Latin words i.e., *fide* means faith and *fiducia* means trust. It refers to one who is invested with trust,

[36] S.Duztas,"*The effect of board Characteristics Information Technology maturity and transparency in company performance, 40* (D.PhilThesis,Yeditepe University graduate Institute of social Science,2008)[Unpublished]
[37] Id

and spells out a sacred legal and ethical relationship between the fiduciary and the beneficiary. A director is a fiduciary of a public limited company.[38].

[38] S.R.Krishnapal"*Study of Corporate Governance in India*"*38* (D.Phil Thesis,The Maharaja Siyajirao University of Baroda 2012)[Unpublish]

CHAPTER FOUR

MODEL OF CORPORATE GOVERNANCE

The aspect of model of corporate governance based on the aspect of Good corporate governance hence to achieve this there are difference model and as we know that good corporate governance is very important for economic development, not only for the individual company, but also for the economy as a whole. Therefore, quality of governance should be continuously improved and good governance should be promoted. However, what is not measured cannot be improved. Hence, there is a need for a model to measure the quality of corporate governance. Most attempts to measure the quality of corporate governance focus on compliance related issues. The various rating models also seem to focus on the inputs of governance, such as the composition of the boards, the separation of the CEO and Chairman roles but interestingly do not pay attention on sufficient on the quality of information as well as decision making process to the organization so due to the above corporate Governance model come to cure or remedy the shortcoming.

Corporate Governance model aim to incorporate not only structural aspect of governance such as the issue of composition of a board from top to down but also on the issue of sound judgment and the result of oversight and guideline function of the board of director.

The Model of Corporate Governance also seeks to check whether if there is a sound, integrated approach to governance; whether the determined approach is deployed systematically throughout different process and level of the organization hence due to the above explanation now let's focus on the model of Corporate Governance and for the purpose of my research I will focus hereunder model namely market outsider (Anglo –saxon), the network group (Germanic countries and Japan) and Latin model.

Corporate Governance model apart from the above there two aspect which are based on national level but for the International level we have two initiative which is so important when you discuss the issue of model of Corporate Governance namely Organization for Economic Corporation and Development (OECD) and the Common wealth Association for Corporate Governance (CACG).The OECD and CACD are the minimum a benchmark against which member countries can compared their system and carry out country specific initiative .

ANGLO SAXON MODEL

The Anglo-Saxon model the same refer to the American model is reflects the liberalist approach to corporate governance and applies to the US, the UK, Australia, New Zealand and Canada, South Africa and other members of Commonwealth (Tricker, 1994; Weimer, 1995; Bradley et al., 1999). Shareholder interests and their sovereignty are emphasized in the decision-making processes of corporations and they do not focus on stakeholder decision making. This results from the view that a firm is a property of those who have invested capital and for the pursuit of their economic interests (Scott, 1996).

I had pointed out to the above paragraph shareholders are the only stakeholders who exert influence over the managerial-decision making processes. Managers are viewed within the model as the agents of shareholders and are required to maximise shareholder value: the only objective they are required to pursue (Fisher and Lovell, 2003).

The success of corporations in the Anglo-Saxon model is measured primarily by returns on invested financial capital. Various approaches have evolved within this model which is applied to encourage managers of corporations to promote the interests of shareholders including performance-related compensation schemes, transparent accounting standards, and development of effective boards of directors (Roe, 2003).

The ownership of corporations is generally widely dispersed in the Anglo-Saxon model, (Roe, 2003; Weimer and Pape, 2000). For example, private individual shareholders own over 20% of the companies in the UK, and institutional shareholders (investments funds) hold 67% of equity is listed corporations. Increasingly, changes are beginning to take place in the UK as institutional shareholders acquire significant stakes in corporations (Clarke and Clegg, 1998). However, the ownership by institutional shareholders of any individual firm tends to be insufficient to promote any identity with the long-term development of the firm. Ownership of shares in any company is only part of a portfolio.

The board system in the Anglo-Saxon model is one-tier, with decision management and decision control roles combined: executive and non-executive directors sit on the same board (Maassen, 1999). This combination reflects the original concept of business as founded on the entrepreneurial flair of the founders and hence the combination of decision-making and decision implementation roles in the same person. However, this combination is also viewed as advantageous because of the flexibility brought about by speedy decision-making leading to quick adaptation (Clarke, 1993). Changes that have been advocated within this model include increasing the number of non-executive directors to strengthen control over management (Cadbury, 1992). Separating the positions of board chairman and chief executive officer, as well as formation of various board committees, are important reforms being encouraged within the Anglo-Saxon model (Hopt and Leyens, 2004)

The board of directors in the Anglo-Saxon model is unitary which gives primacy to shareholders interest. The directors are appointed by the shareholders by exercising their voting rights based on proportionate holding of the paid-up equity share capital in the company.

The board comprises of two types of directors viz. inside executive directors (generally called executive directors) and outside non- executive directors (also called as independent directors). director and the purpose of the independent director is to supervise the executive director or some time can I say that monitor executive With the corporate governance reforms underway in these countries, there is a gradual growth in the presence of independent directors.

For example, among the top 100 companies (the FTSE- 100) the average percentage of non-executive directors is above 55 percent in the U.K... The independence of non-executive directors has gained significance in the U.S.A. and the U.K. in the recent years. The board of directors in the Anglo-Saxon countries functions through committees of the board. The most common committees being audit committee, compensation committee and nomination committee[39]

The market for corporate control is active in the Anglo-Saxon model. Mayer (1994; cited by Tam, 1999), posit that active markets for corporate control are the most important feature of corporate governance within the Anglo-American model, especially for listed companies, and hence the name "outsider" model.

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[39]http://www.yourarticlelibrary.com/corporate-governance/anglo-saxon-model-of-corporate-governance

Developed countries in which the outsider model applies generally have highly developed capital markets for corporate control (Roe, 2003; Weimer and Pape, 2000). Laws and regulations also facilitate markets for corporate control. KPMG (1995, cited by Pape, 1999) contend that the number of defense techniques applied within this model is lower than that in other countries following other models.

The use of long-term performance-related executive compensation to align shareholder interests with those of managers is of great significance, and reflects a conflict perspective of corporate governance (Maassen, 1999; Pape and Weimer, 2000). The alignment of interests through the use of performance-related schemes is an attempt to persuade managers to think and act likes the owners of the corporation's (Roe, 2003). The nature of economic relationship absent (Shleifer and Vishny, 1997) although the Anglo-Saxon countries do provide an institutional environment that supports market-oriented relationships (arms-length transactions), characterized by the possibility of quickly adapting to changing circumstances (Clarke, 1993). This nature of the relationship leads to a short-term orientation in investment decision-making processes (Sebora and Rubach, 1998; Gilpin, 2001).

GERMANIC MODEL

In countries in which the Germanic model of corporate governance has been adopted, a firm is generally viewed as an institution (Pape, 1999). This institution is considered to have autonomy as a social entity, encompassing the interests of various stakeholders, including shareholders (Moerland, 1995a,cited by Pape 1999). This view is based on the social theory of stakeholder involvement in corporate governance. Stakeholders able to exert influence on the managerial decisions-making processes in the Germanic model include employees, lenders, and shareholders (Rubach and Sebora, 1998; Monks and Minow, 2002). The efficiency of the model is based primarily on the return on social capital (Rubach and Sebora, 1998; Roe, 2003).

The German corporate governance model is based on the dual-board system comprising of a supervisory board (Aufsichtscrat) and an executive board (vorstand).The supervisory board consists of both full time employees (usually one half) and of non-executive outsiders such as professional advisors to the company, representatives from banks and other firms with which the corporation has a relationship. The executive board consisting entirely of full time managers is appointed by the supervisory board[40].The domain of the executive board, well laid down, pertain to strategic planning, day to day oversight of the business and review of performance of the company. The executive board, although, enjoys a high degree of managerial autonomy, the most important decisions are confirmed by either the supervisory board or the shareholders. The two boards tend to act together in directing the business and the supervisory board relies upon the reporting from the executive board.

The three organs of corporate governance in German model are the supervisory board, the executive board and the shareholders. Comparatively less developed financial market, closely held large block holding of shares, inter-firm cross shareholding, dominant role of banks, and employees representation in the two-tier boards of directors are the striking aspects of corporate governance system in Germany Code was published in 2002. The Code also referred as the Cromme Code has been modified several times, the latest being in 2010.

[40]http://www.yourarticlelibrary.com/corporate-governance/anglo-saxon-model-of-corporate-governance

The Code applicable to the listed corporations gives flexibility and promotes self-regulation as it contains recommendations on what are regarded as key elements from which companies can deviate but are obliged to disclose the deviations i.e. 'comply or explain'. The uniqueness of the code lies in the 'suggestions' contained in the Code which can be deviated by the companies without even disclosing the non-observance.

The Code aims at making the German corporate governance system transparent and understandable. Its purpose is to promote the trust of international and national investors, customers, employees and the general public in the management and supervision of listed German corporations. The Code clarifies the obligation of the Management Board and the Supervisory Board to ensure the continued existence of the enterprise and its sustainable creation of value in conformity with the principles of the social market economy.

The Germanic model reflecting the Institutional view of a corporation, the supervisory boards of directors are constituted by representatives of both shareholders and employees. In Germany, the law requires companies employing at least two thousand employees to have fifty percent of the directors on the supervisory board representing employees (Hopt and Leyens, 2004), hence this is to say that this model they made to create harmony between capital and labour in the creation of wealth so due to this scenario in Germanic model employee participation in the decision making process made it as the distinguished feature due to the fact that the company should inform employee representative about any important decision and not only that but also consult the representative in making the personnel decision so the Germanic model based on stakeholder principle

Germanic model despite the wide powers to the stakeholder, shareholders have a slight advantage in decision-making through the appointment of the chairman of the supervisory board who has a casting vote in the event of a tie in the vote in this aspect it different from the Anglo –Saxon model. Shareholders can also dismiss members of the supervisory board with a three quarters majority vote (Oxford Analytica, ibid). However, the power of shareholders in this approach does not equal shareholder power in the Anglo-Saxon model. For example, in Germany, the principle of one-share-one vote has not been followed generally, and the law provides less protection for shareholders (La Porta et al., 1997).

The board system in Germanic countries is a two-tier one (Pape, 1999; Maassen, 1999; Hopt and Leyen, 2004). As to the board arrangements as I had pointed out to above page consist of a supervisory board, referred to in Germany as "Aufsichtsrat" and the executive boards "Vorstand". The system makes an effective separation between decision management and control as executive directors do not sit on the same board as supervisory board members (Maassen, 1999). The members of the executive board are appointed by the supervisory board, to which it is accountable, and is responsible for day-to-day management of the company (Weimer and Pape, 2000; Hopt and Leyens, 2004).

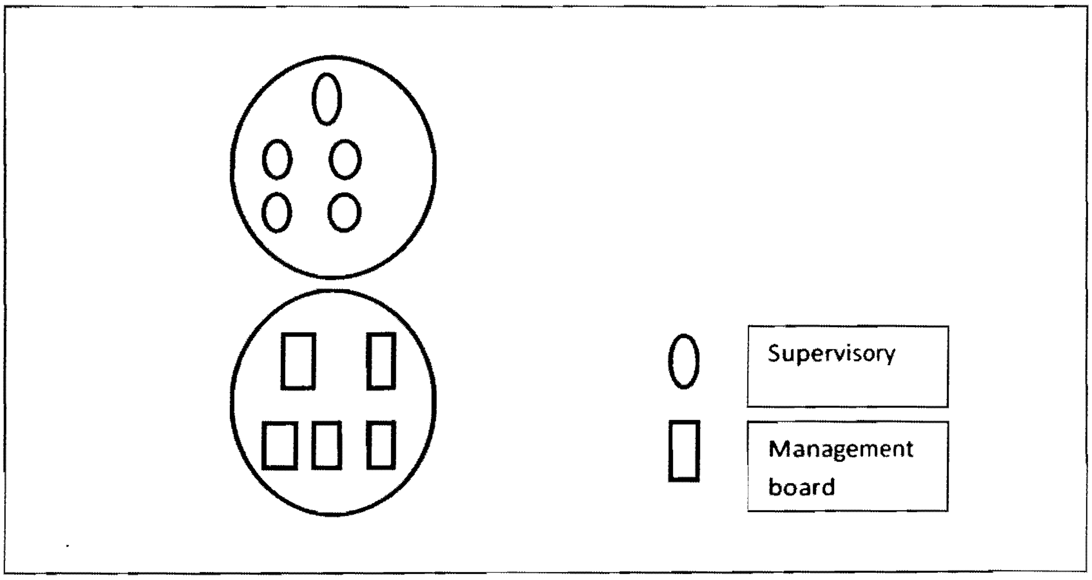
As to the ownership and debt structure of Germanic model listed corporations, bank have been a major source of both equity and credit capital and these amongst the notable feature of this model by finance to the German companies[41]. Due to this, it is also referred to as a Bank-Oriented System of governance. It is more of an institution oriented structures I had pointed out to

[41]Masami, Atarashi, "Corporate Governance - A Japanese Perspective," Focus, *Productivity*, Vol. 40, No. 4, January-March 2000, p. 514.

the above pages. The system of CG based on Germanic civil law is called Insider model[42].

As to the agency problem does not arise as firms are only coordination devices, aligning self-interest with that of the stakeholders.

There is a Dual Board (Figure 2), the Supervisory Board (i.e., Supervisory Directors) and the Management Board (i.e., Executive Board Members).



The Dual (Two-Tier) Board Structure

[42]Machiraju, op. cit., pp. 259-261.

Source: Tricker, Bob, Essential Director (The Economist), Replika Press Pvt. Ltd., Kundli, 2004, p. 42.

The above figure 2 shows the management system of Germanic model, in Germanic model supervisory Board is responsible for accounting aspects, strategic acquisitions and closures, dividends and appointment to the Management[43] Board. The Management Board is responsible for running the company. In this model The companies are closely associated with a Universal Bank that owns shares and the bank has Board representation since in this system financial Institution has a big role in capital of the companies so for most of the decisions, the consent of the Universal Bank is required. The power of the top management in this model is less than that in the Anglo-Saxon Model.

JAPANESE MODEL

Historical Japanese model of Corporate Governance base on community due to the fact they were the follower of that type of life. Dore (1993) posits that, in Japan, a firm is viewed as a community or a nation. This conceptualization is demonstrated in practice by the presence of interlocking networks, the *kereitsu,* consisting of the top 200 Japanese firms (Weimer, 1995; Gilpin, 2001). The objective of following such a model is to promote social capital (Rubach and Sebora, 1998).

The model is later constructed along Western (i.e. American) theories, a practice that goes back to World War II. For example, the board of directors in theory represents the interests of shareholders and is intended to control management. Management, in turn, is accountable to the board. However ,though they mixed up with the western culture of Corporate Govemance the Japanese board has

[43]S.R.Krishnapal"*Study of Corporate Governance in India"38* (D.PhilThesis,The Maharaja Siyajirao University of Baroda 2012)[Unpublished]

developed its own identity that reflects the character of Japanese society (Tricker, 1994). The Japanese model recognizes multiple constituencies in corporate governance as opposed to shareholders alone in the Anglo-Saxon model and this is the peculiarity of this model contrary to others model of Corporate Governance

In Japan collective stakeholder conceptions are deeply embedded in corporate thinking in practice, from the keiretsu principle of related companies, to Kaizen, continuous improvement, to the kanban of just-in-time production and the suppliers it depends upon: the importance of relationships are paramount" (Yoshimori, 1995 cited by Clarkeand Clegg, 1998).

The key players of Japanese Key Players in the Japanese Model system of corporate govemance are many-sided, centering around a main bank and a financial/industrial network or keiretsu. The main bank system and the keiretsu are two different, yet overlapping and complementary, elements of the Japanese model[44]. Almost all Japanese corporations have a close relationship with a main bank. The bank provides its corporate client with loans as well as services related to bond issues, equity issues, settlement accounts, and related consulting services[45]. The main bank is generally a major shareholder in the corporation as to the Germanic model but also Japanese model has more features or key player namely main bank (a major inside shareholder), affiliated company or keiretsu (a major inside shareholder), management and the

[44]See Bergloef, Eric, 1993. "Corporate Governance in Transition Economies: The Theory and its Policy
Implications." in Masahiko Aoki and Hyung-Ki Kim, editors, Corporate Governance in Transitional
Economies: Insider Control and the Role of Banks. Washington, D.C.: The World Bank.
[45]See EWMI/PFS Program / Lectures on Corporate Governance - Three Models of Corporate Governance –
December2005.doc

government[46]. Note that the interaction among these players serves to link relationships rather than balance powers, as in the case in the Anglo-US model. As I had pointed out the above page that The main source of funds of Japanese companies is mostly banks and other financial institutions which provide debts as well as equity capital by a consortium led by a major bank called 'main bank'. The banks are linked through Keirestu as most banks are affiliates of Keiretsu.

Banks hold considerable amount of shares in the companies on a long-term basis and build strong relationship with the client firms. The bank executives are also offered board membership. Thus, the corporate governance system in Japan is a relationship model which is based on supports of the bank and the government.

Board membership in Japanese firms is frequently offered as a reward to long-serving committed employees. Nearly 90 percent of the directors are senior managers or former company employees. This ensures participation of employees in the governance of the companies and extracts long term commitment to the firm Unlike the Anglo- Saxon model based on primacy of the shareholders, the Japanese model seeks to balance all stakeholders such as creditors, employees, managers and government[47].

The structure of the board of directors in Japanese model is the traditional unitary board where important decisions need action by the entire board. On the face of it, the structure resembles the U.S. companies. But in practice, the boards of Japan's major corporations represent the interest of the company as

[46] Id page 7
[47]http://www.yourarticlelibrary.com/corporate-governance/anglo-saxon-model-of-corporate-governance

an integrated social unit, not the interest of shareholders[48] as to the Anglo – Saxon model this base more on the welfare of the society(except through share price appreciation).

Theoretically, board of directors has the ultimate authority to oversee the functioning of the company on behalf of the shareholders, in practice; however, the boards have surrendered traditionally most of their authority to the company President. Thus, power of governance in Japanese company is concentrated in the company President and an operating committee of the top executives which evaluate the performance of the firm against its goal and also select new board members and officers.

Banks and financial institutions do not exercise any direct power over a company as long as the company is run successfully in terms of growth and market share. However, where there are signs of poor performance and governance becomes suspect, the main bank intervenes effectively by reviewing the investment plans and assumes the rule of oversight over the management[49]. Japanese model is thus based on contingency governance in which the company enjoys a relatively high degree of autonomy in usual business situations but is subject to external control by the main bank when the company is in distress[50].

This model of corporate governance has a one-tier board of directors similar to those found in the UK or US; and this reflects the influence of the Anglo Saxon model through the legal system. The governance structure of Japanese firms comprises the general assembly of shareholders, the board of directors, the

[48] Id
[49] Id
[50] Id

office of representative directors and the office of auditors (Aoki, 1981 cited by Weimer, 1995).

All these parties have different responsibilities. The formal responsibility of the board of directors is to make corporate decisions (Monks and Minow, 2002). The office of representative directors is responsible for executing the decisions of the board of directors. The role of the office of the auditors is to supervise the activities of both the board of directors and the representative directors. In the formal separation of the office of the auditors from both the board of directors and the representative directors, the Japanese system resembles that of Germany. However, it also partly resembles the Anglo-Saxon model in that the board of directors is elected and can be dismissed by the general assembly of shareholders[51].

The importance of the markets for the Japan economy is higher than in Germany but lower than in the UK or US. There is no active market for corporate control, a fact considered to be connected to the Japanese culture of consensus as opposed to competition. Hostile takeovers are considered a curse (Moerland, 1995a, inMonks and Minow, 2002).

As to the issue of hostile this phenomenon of hostile takeovers is also becoming common in Japan. For example, in January 2000, the M&A fund launched Japan's first hostile takeover bid for an ailing property developer, Shoei. The offer was unsuccessful, but it was applauded. In early 2000, the German Pharmaceuticals firm BoehringerIngelheim made a US$190 million an over-the-counter bid for a Japanese drugs firm, SSP. The German firm, which already

[51]LemoyonL.Melyoki*"Determinants of effective corporate Governance in Tanzania"84*(D.PhilThesis,University of Twente ,2005)[Unpublish]

held 20% ownership, wanted full control of the company. This bid was also not successful because society was seen as not yet ready for this phenomenon[52].

Also in September 2004, when the Japanese banking sector saw the two large banks; Sumitumo Mitsui Financial Group and Mitsubishi Tokyo Financial Group, bid to take over the UJ bank points to the changing Japanese perception of takeover activities. These events are clear indications that changes are taking place within the Japanese model of corporate governance[53].

After having discussed in detail now I am on the position to show the structure of taxonomy of governance corporate system. Figure 3

[52] Id page 85

[53] Id

Figure 3: Taxonomy of governance corporate system

Source: Tricker 1994;Weimer and Pape 2000

	Market /outsider mode	**Network/insider model**		**Latin Model**
	Anglo-Saxon	**Germanic**	**Japanese**	**Latin**
Countries	US, UK, Canada, Australia, New Zealand, South Africa and the Commonwealth countries	Germany, Switzerland, the Netherlands, Austria, Scandinavia	Japan	France, Spain, Italy and Belgium
Concept of the Firm	Instrumental and shareholder-oriented	Institutional	Institution	Institution
Board system	One-tier	Two-tier (executive and supervisory board)	Boards of directors, office of representative directors, office of auditors: de facto one-tier	Optional (in France), in general one-tier

Stakeholder(s)	Shareholders	Banks, employees, in general oligarchic group	City Banks, other financial institutions, employees	Financial holdings, the governmen t, families, in general oligarchic group
Importance of stock exchange	High	Moderate/high	High	Moderate
Active external market for corporate control	Yes	No	No	Low
Relative ownership concentration	Low	Moderate/high	Low	Moderate
Executive remuneration	High	Moderate/high	Low/moderate	High
Nature of relationship	Short-term	Long-term	Long-term	Long-term

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD) AND COMMON WEALTH ASSOCIATION FOR CORPORATE GOVERNANCE (CACG)

The collapse of large corporations with the devastating consequences on society including the loss of jobs and investments in the industrialized countries and in Asia has led to increased recognition of the importance of corporate governance for the socioeconomic development of countries[54]. This realization has motivated a number of initiatives aimed at responding to the corporate governance challenges worldwide. These initiatives are being carried out both at national and at international levels. Internationally, these initiatives are being spearheaded by multilateral organizations including the World Bank, the Organization for Economic Cooperation and Development (OECD) and the Commonwealth Association for Corporate Governance (CACG) hence the formulation of this International corporate Govemance principle help a countries[55] member to formulate their specific principles of Corporate Governance (Monks and Minow ,2002;OECD,1999;2004). The broad membership of the OECD and CACG organizations suggest that these principles reflect the views of a large number of countries with respect to the correct approach for addressing the challenge of corporate governance.

[54] Id

[55] The original member countries of the OECD are Austria, Belgium, Canada, Denmark,France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway,Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.The following countries became members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of theOECD Convention)

The OECD and CACG principles are minimum benchmarks against which member countries can compare their systems and carry out country-specific initiatives (OECD, 1999; 2004). A number of countries have developed their own principles of best practice that address the issues of corporate governance in their own countries[56]. For example, the Peters Committee and the Tabaksblad Committee developed recommended principles for corporate governance in Dutch organizations in 1997 and 2003 respectively. The King's Committee issued principles of corporate governance for South Africa in 1994 and 2002[57].

THE OECD PRINCIPLE FOR CORPORATE GOVERNANCE

Any International treaty has its principle that govem the member state but also the said principle open to the whole world .The principle of effective corporate Governance issued by the OECD in 1999 and updated 2004 are organized under six heading and hereunder are ; ensuring the basis for an effective corporate governance framework, the rights of shareholders, equitable treatment of all shareholders, the role of stakeholders in corporate governance, disclosure and the responsibility of the board of directors. The first principle, introduced in the revised set of principles released in 2004, addresses the corporate governance framework and institutional structures.

I: Ensuring the Basis for an Effective Corporate Governance Framework[58]

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the

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[56]LemoyonL.Melyoki *"Determinants of effective corporateGovernanceinTanzania"84(*D.PhilThesis,University of Twente ,2005)[Unpublished]
[57] Id
[58]*See* OECD 2004

division of responsibilities among different supervisory, regulatory and enforcement authorities that the member state should make sure that division of responsibility or I can say that separation of power amongst supervisory, regulatory and enforcement authorities[59].

The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets. In this aspect the member state should make sure that they consider the above when they draft their regulation on Corporate Governance rule in order to give wider participation and the promotion of transparent as well as efficient market.[60]

The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and enforceable. As main purpose of this principle to make sure that rule of law and transparent in order to achieve the goal of OECD hence all member state should consider these aspect[61]

The division of responsibilities among different authorities in a jurisdiction should be clearly articulated and ensure that the public interest is served. As well known that public Interest has different facets and has meant different things to different people at different times so the member state should make sure that they put into consideration on their jurisdiction when they practice this aspect of Corporate Governance[62].

Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfill their duties in a professional and objective

[59] Id
[60] Id
[61] Id
[62] Id

manner. Moreover, their rulings should be timely, transparent and fully explained[63].

II: The Rights of Shareholders and Key Ownership Functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights. Basic shareholder rights should include the right to secure methods of ownership registration concern to the share property right as well as the ownership of the corporation since this aspect has numbers of problem once when it come to the issue of foreign corporation that there are some countries where by the land own by the Government only like Tanzania so at any time if he think fit under the head of public Interest the right of occupancy can be terminated. Also the issue of convey or transfer shares is amongst the area where by this OECD principle focus in this second principle that the right of shareholder should be preserved hence if you are member of treaty.

Also obtain relevant and material information on the corporation on a timely and regular basis in order to know what going on in the corporation as the shareholder because you part of the corporation and the owner as well and this result to be a active member of the corporation in the general shareholder meetings and by doing that you can elect and remove members of the board but also to be a part of the decision in the corporation for the benefit of corporation.[64]

As to the participation in the election board requires transparent procedure hence the shareholder should be informed of the rules, including voting procedures, that govem general shareholder meetings so as to elect the director who will protect and advance their interest and this reflect the traditional aspect

[63] Id
[64] Id

of Anglo –Saxon view on Corporate Governance and it is amongst the goal of OECD.[65]

In liberalist aspect of Corporate Governance Shareholders are sovereign and are entitled to exercise unlimited control over corporation but the OECD[66] principle is contrary to that it base more on Anglo –Saxon and shareholder should have the right and opportunity to ask questions to the board, including questions relating to the annual external audit, to place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limitations because shareholder has unlimited right though there are some countries where by the shareholder have limited right like in Japanese model.

Effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated. Shareholders should be able to make their views known on the remuneration policy for board members and key executives. The equity component of compensation schemes for board members and employees should be subject to shareholder approval and also Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia and what OECD member should focus when they draft their regulation on Corporate Governance[67].

Capital structures and arrangements that enable certain shareholders to obtain a

degree of control disproportionate to their equity ownership should be disclosed and this is part of transparent aspect in OECD[68].

[65] See OECD 2004.
[66] 2004
[67] See OECD 2004
[68] 2004

The issue of merger and acquisition procedures governing the acquisition of corporate control in the capital markets, and extraordinary transactions such as mergers, and sales of substantial portions of corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class also a part from that but also the issue of Anti-take-over devices should not be used to shield management and the board from accountability[69].

Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. Institutional investors acting in a fiduciary capacity should disclose how they manage material conflicts of interest that may affect the exercise of key ownership rights regarding their investments[70].

III: The equitable treatment of the shareholder.

The OECD (1999; 2004) principles state that: "the corporate governance framework should ensure the equitable treatment of all shareholders, including the minority and the foreign shareholders". In this respect, the principle calls for the enactment and enforcement of laws that provide adequate protection of shareholder rights. Investor protection flows from the first principle. Rights can only be meaningful if they are protected[71]. This principle appears to reflect the possibility of conflicts of interest between minority shareholders and company

[69] OECD 2004
[70] Id
[71] LemoyonL.Melyoki *"Determinants of effective corporate Governance inTanzania"94(*D.PhilThesis,University of Twente ,2005)[Unpublished]

insiders- management, directors and possibly large shareholders who may collaborate to appropriate private benefits of control (Denise and McConnell, 2003). Consequently, a governance framework should provide effective protection of these vulnerable interests[72].

IV: The role of stakeholder in Corporate Governance

As I had pointed out the principle of Corporate Governance based on two approach namely liberalist and communitarians, but this doesn't means that they didn't focus on stakeholder role ,but it focus on the way that based on the said two approach. The broad membership of the OECD includes countries that subscribe to the various perspectives of corporate governance namely the liberalist as well communitarians hence the OECD[73] emphasis that the corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises[74].

Stakeholders in the corporation play important role hence the rights of stakeholders should be established by law or through mutual agreements so as the stakeholder to think as part of the corporation as this reduce the number of takeover in the corporation though some of the commentator is on the opinion that director should focus on the interest of shareholder.

In Japanese model Stakeholders has more influence on the decision making contrary to Anglo –Saxon that base more on shareholder as I had said to the

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[72] Id page 94
[73] 2004
[74] Id

above so according to this principle four of OECD[75]give out the right to the stakeholder and their representative bodies should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this hence since the member countries of OECD subscribe the various perspective of corporate Governance they are bound on establishment of role of stakeholder in Corporate Governance

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V: Disclosure and Transparency.

These two terms depend to each other that if the corporation discolored every things that is to say attained transparent hence due to the important of this the corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

Disclosure should include, but not be limited to, material information on the financial and operating results of the company, Company objectives, major share ownership and voting rights remuneration policy for members of the board and key executives, and information about board members, including their qualifications, the selection process, other company directorships and whether they are regarded as independent by the board also include related party transactions whether the transaction follow the procedure according to the law govem the corporate law[76].

Also to disclose to the shareholder as well stake holder the foreseeable risk factors of the corporation so the public to know what the future prospect of the

[75] Id

[76] OEDC 2004

corporation so as any interested who wish to invest may invest without any future problem.

Financial Information should be prepared and disclosed in accordance with high quality standards of accounting and financial and non-financial disclosure also an annual audit should be conducted by an independent, competent and qualified, auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the company in all material respects[77].

Lastly on this principle five, the corporate governance framework should be complemented by an effective approach that addresses and promotes the provision of analysis or advice by analysts, brokers, rating agencies and others, that is relevant to decisions by investors, free from material conflicts of interest that might compromise the integrity of their analysis or advice[78].

VI: Responsibility of the board

The OECD principle also address the role of the board of directors broadly out lining what the board should do and what not to do hence the corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders[79].

Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders but also where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly. The principles further

[77] Id
[78] Id
[79] Id

outline the key board functions related to effective monitoring of management performance and hereunder are[80]:

i. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.
ii. Monitoring the effectiveness of the company's governance practices and making changes as needed.
iii. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
iv. Aligning key executive and board remuneration with the longer term interest's of the company and its shareholders.
v. Ensuring a formal and transparent board nomination and election process.
vi. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse unrelated party transactions.
vii. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.
viii. Overseeing the process of disclosure and communications.

Also the board should be able to exercise objective independent judgment on corporate affairs, by consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest. Examples of such key responsibilities

[80] Id

are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key executives, and board remuneration[81].

The OECD members should make sure that they follow and drafting well their rule and regulation on Corporate Governance so as to fulfill the need and objective of Organization for economic Corporation and development for the benefit of shareholder as well as stakeholder and improvement in the profitability and efficiency of the members countries.

COMMON WEALTH ASSOCIATION FOR CORPORATE GOVERNANCE (CACG)

This is amongst the International association for Corporate Governance based on the commonwealth countries. In 1999 CACG released a set of principles for corporate governance (CACG, 1999). The principles are aimed at achieving numbers of outcomes including an improvement in the profitability implementation of effective Corporate Governance and efficiency of Commonwealth countries, 'business and business enterprises; improving the capacity to create wealth and employment; and ensuring the long-term competitiveness of Commonwealth countries in the global market place, the stability and credibility of the Commonwealth financial sectors both nationally and intemationally[82].

Apart from that but also improve the relationship between business enterprises and their various stakeholders: shareholders, managers, employees, customers, suppliers, labor unions, communities, and providers of finances[83]. The board of

[81] OECD
[82] LemoyonL.Melyoki *"Determinants of effective corporate Governance inTanzania"96*(D.PhilThesis,University of Twente ,2005)[Unpublished]
[83] Id page 96

directors is focused upon, in the CACG principles of corporate governance, as the principal mechanism for addressing corporate governance issues and this association based on the principles reflects the shareholders' supremacy as the primary beneficiaries of corporate activity and as a legitimate constituency[84]. The principles of CACG based on fifteen aspects and hereunder are:

Principle i

Exercise leadership, enterprise, integrity and judgment in directing the corporation for continued prosperity.

Principle ii

Ensure that, through a managed and effective process, board appointments are made that provide a mix of proficient directors who can bring independent judgment to bear on the decision-making process.

Principle iii

Determine the corporation's purpose and values, determine the strategy to achieve its purpose and implement its values in order to ensure that it survives and thrives, and ensure that procedures and practices are in place that protect the corporation's assets and reputation.

Principle iv

Monitor and evaluate the implementation of strategies, policies, management performance criteria and business plans.

Principle v

Ensure that the corporation complies with all relevant laws, regulations, and codes of best practice.

Principle vi

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[84] Id

Ensure that the corporation communicates with shareholders and other stakeholders effectively.

Principle vii

Serve the legitimate interests of the shareholders of the corporation and account to them fully.

Principle viii

Identify the corporation's internal and external stakeholders and agree a policy, or policies, determining how the corporation should relate to them.

Principle ix

Ensure that no one person or block of persons has unfettered power and that there is an appropriate balance of power and authority on the board which is, *inter alia,* usually reflected by the separation of the roles of chief executive officer and chairman, and by having a balance between executive and non-executive directors.

Principle x

Regularly review processes and procedures to ensure the effectiveness of internal systems of control so that the decision-making capability and the accuracy of its reporting and financial results are maintained to a high level at all times.

Principle xi

Regularly assess its performance and effectiveness as a whole and that of the individual directors including the chief executive officer.

Principle xii

Appoint the chief executive officer and at least participate in the appointment of senior management, ensure the motivation and protection of the intellectual capital intrinsic to the corporation, ensure that there is adequate training in the corporation for management and employees and a succession plan for senior management.

Principle xiii

Ensure that the technology and systems used in the corporation are adequate to properly run the business such that it remains a meaningful competitor.

Principle xiv

Identify key risk areas and key performance indicators for the business enterprise and monitor these factors.

Principle xv

Ensure that the corporation will continue as a going concern for its next fiscal year.

After having discus the above two set of International aspect concern to Corporate Governance that all principles are similar but the OECD set of principles of corporate governance which are broader in scope. Since the one-tier board system is acknowledged in member countries, the independence of the board is of paramount importance but also both set of principle address the factors that determine the effectiveness of the board in the controlling function ,the board constitution ,independence board leadership structure access of information by the director as well as the board committee.[85]

Lastly both the said International association aim to realizing the improvement in the profitability and efficiency to the member state.

[85] Id

CHAPTER FIVE

HISTORICAL ASPECT AND LEGAL FRAME WORK OF CORPORATE GOVERNANCE IN INDIA

Every country has its history so the historical development of Indian corporate laws has been marked by many interesting contrasts. At independence, India inherited one of the world's poorest economies but one which had a factory sector accounting for a tenth of the national product. The country also inherited four functioning stock markets (predating the Tokyo Stock Exchange) with clearly defined rules governing listing, trading and settlements, a well-developed equity culture (if only among the urban rich), and a banking system replete with well-developed lending norms and recovery procedures[86]. In terms of corporate laws and financial system, therefore, India emerged far better endowed than most other colonies. The Companies Act[87] built on this foundation, as did other laws governing the functioning of joint-stock companies and protecting the investors' rights[88]. Historical corporate developments in India were marked by the managing agency system as the result to the birth of dispersed equity ownership but also gave rise to the practice of management enjoying control rights disproportionately greater than their stock ownership[89]. The turn towards socialism in the decades after independence, marked by the Industries (Development and Regulation) Act[90] and the Industrial Policy Resolution[91], put

[86]This section draws heavily from the history of Indian corporate governance in OmkarGoswami, 2002, "Corporate Governance in India," *Taking Action against Corruption in Asia and the Pacific* (Manila: Asian Development Bank), Chapter 9.xviii
http://www.oecd.org/dataoecd/32/18/31557724.pdf
[87] 2013
[88]Panchastra,Bhavi' '*An Empirical study on Corporate Governance in India Banking sector*' '26 (PhD thesis Saurashtra University 2012) [Unpublished]
[89] Id
[90] 1951
[91] 1956

in place a regime and culture of licensing, protection, and widespread red-tape that bred corruption and stilted the growth of the corporate sector. The situation worsened in subsequent decades and corruption, nepotism, and inefficiency became the hallmarks of the Indian corporate sector[92]. The corporate bankruptcy and reorganization system has also faced serious problems. India's system is driven by the Sick Industrial Companies Act[93] (SICA), which considers a company "sick" only after its entire net worth has been eroded and it has been referred to the Board for Industrial and Financial Reconstruction (BIFR). As soon as a company is registered with the BIFR, it wins immediate protection from the creditors' claims for at least four years and this help the shareholder of the company[94]. Between 1987 and 1992, the BIFR took well over two years on average to reach a decision, after which the delay to resolution roughly doubled. Very few companies emerge successfully from the BIFR and even for those that need to be liquidated the legal process takes over 10years on average, by which time the assets of the company are usually almost worthless[95].

As to the corporate Governance in financial sector in this may well explain why Indian banks under lend and invest primarily in government securities. Though financial disclosure norms in India have traditionally been superior to most Asian countries, noncompliance with disclosure norms is rampant and even the failure of auditors' reports to conform to the law attracts nominal fines and little punitive action[96]. The Institute of Chartered Accountants in India almost never takes action against erring auditors. While the Companies Act provides clear instructions for maintaining and updating share registers, in reality minority shareholders have often suffered from irregularities in share transfers and

[92] id
[93] 1985
[94] Id at 10-11.
[95] Id
[96] Id

registrations[97]. Sometimes non-voting preferential shares have been used by promoters to channel funds and expropriate minority shareholders[98]. The rights of minority shareholders have also been compromised by management's private deals in the relatively infrequent event of corporate takeovers. Boards of directors have been largely ineffective in India in their monitoring role, and their independence is more often than not highly questionable. For most of the post-Independence era the Indian equity markets were not liquid or sophisticated enough to exert effective control over the companies. Listing requirements of exchanges enforced some transparency, but non-compliance was neither neither rare nor punished[99]. All in all historical therefore, minority shareholders and creditors in India remained effectively unprotected despite the laws on the books but now due to the enforceability of Corporate Governance were protected[100]under the banking regulation[101] and this is amongst the advantage of Corporate Governance.

The years since liberalization began in 1991 have witnessed wide-ranging changes in both laws and regulations, driving corporate govemance as well as the general consciousness about it. Perhaps the single most important development in the field of corporate governance and investor protection in India has been the establishment of the Securities and Exchange Board of India in 1992 and its gradual empowerment since then. Established primarily to regulate and monitor stock trading, it has played a crucial role in establishing the basic minimum ground rules of corporate conduct in the country. Concerns about corporate governance in India were, however, largely triggered by a spate of

[97]*See companies Act 2013*

[98]Panchastra,Bhavi' '*An Empirical study on Corporate Governance in India Banking sector*' '27 (PhD thesis Saurashtra University 2012) [Unpublished]

[99] Id

[100] Section 45(2)(3)(4)(5) of Banking regulation Act 1949

[101] Act1949

crises in the early 1990's—particularly the Harshad Mehta stock market scam of 1992--followed by incidents of companies allotting preferential shares to their promoters at deeply discounted prices, as well as those of companies simply disappearing with investors' money[102].These concerns about corporate governance stemming from the corporate scandals, coupled with a perceived need to opening up to the forces of competition and globalization, gave rise to several investigations into ways to fix the corporate governance situation in India. One of the first such endeavors was the Confederation of Indian Industry Code for Desirable Corporate Governance, developed by a committee chaired by Rahul Bajaj. The committee was formed in 1996 and submitted its code in April 1998. Later the SEBI constituted two committees to look into the issue of corporate governance--the first chaired by Kumar Mangalam Birla, which submitted its report in early 2000, and the second by Narayana Murthy, which submitted its report three years later. These two committees have been instrumental in bringing about far reaching changes in corporate governance in India through the formulation of Clause 49 of Listing Agreements (described below). Concurrent with these initiatives by the SEBI, the Department of Company Affairs, the Ministry of Finance of the Government of India also began contemplating improvements in corporate governance.

These efforts include the establishment of a study group to operationalize theBirla Committee recommendations in 2000, the Naresh Chandra Committee on Corporate Audit and Governance in 2002, and the Expert Committee on Corporate Law (the J.J. Irani Committee) in late 2004. All of these efforts were aimed at reforming the existing Companies Act of 1956 that still forms the backbone of corporate law in India.

[102]See OmkarGoswami. 2002. "Corporate Governance in India." *Taking Action against Corruption in Asia and the Pacific* (Manila: Asian Development Bank),Chapter 9.

(A) Organizational Framework: The organizational framework for corporate governance initiatives in India consists of the Ministry of Corporate Affairs (MCA), the Confederation of Indian Industry (CII) and the Securities and Exchange Board of India (SEBI).

In 1998, the Confederation of Indian Industry (CII), "India's premier business association," unveiled India's first code of corporate governance[103]. However, since the Code's adoption was voluntary, few firms embraced it. Soon after, SEBI appointed the Kumar Mangalam Birla Committee to fashion a code of corporate governance. In 2000, SEBI accepted the recommendations of the Kumar Mangalam Birla Committee and introduced Clause 49 into the Listing Agreement of Stock Exchanges. Clause 49 outlines requirements vis-a-vis corporate governance in exchange-traded companies.

In 2003, SEBI instituted the N.R. Narayan Murthy Committee to scrutinize India's corporate-governance framework further and to make additional recommendations to enhance its effectiveness. SEBI has since incorporated the recommendations of the N.R. Narayan Murthy Committee, and the latest revisions to Clause 49 became law on January 1, 2006 (SEBI, vide circular SEBI/CFD/DIL/CG/1/2006/13/1 dated 13thJanuary, 2006).

(B) Clause 49 of the Listing Agreements: The SEBI implemented the recommendations of the Birla Committee through the enactment of Clause 49 of the Listing Agreements. Clause 49 may well be viewed as a milestone in the evolution of corporate governance practices in India. The terms were applied to companies in the BSE 200 and S&P C&X Nifty indices, and all newly listed companies, on March 31, 2001. These rules were applied to companies with a paid up capital of Rs. 10 crore or with a net worth of Rs. 25 crore at any time in the past five years on March 31, 2002, and to other listed companies with a paid

[103]Bhat&Varun, publication of Iowa Law Review, University of Iowa dated 1st May, 2007.

up capital of over Rs. 3 crore on March 31, 2003. The Narayana Murthy Committee worked on further refining the rules, and Clause 49 was amended in 2004. The main provisions of Clause 49 as inserted vide SEBI F. No. SMDRP/Policy Cir 10/2000 dated 21.02.2000 in the Listing Agreement of Stock Exchange are:

I. Board of Directors; II. Audit Committee;III. Remuneration of Directors; IV. Board Procedure;V. Management; VI. Shareholders;VII. Report on Corporate Governance; VIII. Compliance Certification

The composition and proper functioning of the board of directors emerges as the key area of focus for Clause 49. It stipulates that non-executive members should comprise at least half of a board of directors. It defines an "independent" director and requires that independent directors comprise at least half of a board of directors if the chairperson is an executive director and at least a third if the chairperson is a nonexecutive director. It also lays down rules regarding compensation of board members, sets caps on committee memberships and chairmanships, lays down the minimum number and frequency of board meetings, and mandates certain disclosures for board members. Clause 49 pays special attention to the composition and functioning of the audit committee, requiring at least three members on it, with an independent chair and with two-thirds made up of independent directors--and having at least one "financially literate" person serving. The Clause spells out the role and powers of the audit committee and stipulates minimum number and frequency of and the quorum at the committee meetings. With regard to "material" non-listed subsidiary companies (those with turnover/net worth exceeding 20% of a holding company's turnover/net worth), Clause 49 stipulates that at least one independent director of the holding company must serve on the board of the subsidiary. The audit committee of the holding company should review the subsidiary's financial statements, particularly its investment plans. The minutes of the subsidiary's board meetings should be presented at the board meeting of the holding company, and the board members of the latter should be made aware of all "significant" (likely to exceed in value 10% of total revenues/expenses/assets/liabilities of the subsidiary) transactions entered into by the subsidiary.

The areas where Clause 49 stipulates specific corporate disclosures are:

- Related party transactions;
- accounting treatment;
- Risk management procedures;
- Proceeds from various kinds of share issues;
- Remuneration of directors;
- A Management Discussion and Analysis section in the annual report discussing general business conditions and outlook; and
- Background and committee memberships of new directors as well as presentations to analysts.

In addition, a board committee with a non-executive chair should address shareholder/investor grievances. Finally, the process of share transfer, a long-standing problem in India, should be expedited by delegating authority to an officer or committee or to the registrar and share transfer agents. The CEO and CFO or their equivalents need to sign off on the company's financial statements and disclosures and accept responsibility for establishing and maintaining effective internal control systems. The company is also required to provide a separate section of corporate governance in its annual report, with a detailed compliance report on corporate governance. It should also submit a quarterly compliance report to the stock exchange where it is listed. Finally, it needs to get its compliance with the mandatory specifications of Clause 49 certified by auditors or by practicing company secretaries. In addition to these mandatory requirements, Clause 49 also mentions non-mandatory requirements concerning the facilities for a non-executive chairman, the remuneration committee, half-yearly reporting of financial performance to shareholders, moving towards unqualified financial statements, training and performance evaluation of board members, and perhaps most notably a clear "whistle blower" policy.

In some areas, like certification compliance, the Indian requirements are even stricter. There are, however, areas of uniqueness as well. The distinction drawn between boards headed by executive and non-executive chairmen and the lower required share of independent directors is special to India—and is also somewhat intriguing, given the prevalence of family-run business groups. The market reaction to the corporate governance improvements sought by Clause 49 seems to have been quite positive, somewhat in contrast to the mixed response to

Sarbanes-Oxley's adoption .Tarun Khanna and YishayYafeh use an event-study approach to measure the stock price impact of the adoption of Clause 49 by Indian firms[104]. Focusing on the May 7, 1999 announcement by SEBI about the formation of the Kumar Mangalam Birla committee, when a earlier application to large companies was expected, they report that large firms that adopted these measures first witnessed a 4% (7%) positive price-jump in a two day (five-day) event-window beginning with the announcement day compared to smaller firms that were required to implement the reforms at the same time.

The Ministry of Corporate Affairs (MCA) had appointed a Naresh Chandra Committee[105] on Corporate Audit and Governance in 2002 in order to examine various corporate governance issues. It made recommendations in two key

[104]See TarunKhanna and YishayYafeh, 2005, Business Groups in Emerging Markets: Paragons or Parasites? *Finance Working Paper N° 92/2005*, European Corporate Governance Institute.
[105]www.business.gov.in/corporate_governance.

aspects of corporate governance: financial and nonfinancial disclosures: and independent auditing and board oversight of management. The Ministry of Corporate Affairs (MCA) had also set up a National Foundation for Corporate Governance (NFCG)xxiii in association with the CII, ICAI and ICSI as a not-for-profit trust to provide a platform to deliberate on issues relating to good corporate governance, to sensitize corporate leaders on the importance of good corporate governance practices as well as to facilitate exchange of experiences and ideas amongst corporate leaders, policy makers, regulators, law enforcing agencies and nongovernment organizations. The foundation has been set up with the mission to:

1. Foster a culture for promoting good governance, voluntary compliance and facilitate effective participation of different stakeholders;

2. Create a framework of best practices, structure, processes and ethics; and

3. Make significant difference to Indian corporate sector by raising the standard of corporate governance in India towards achieving stability and growth.

(C) Legal Framework[106]An effective legal framework is indispensable for the proper and sustained growth of the company. In rapidly changing national and global business environment, it has become necessary that regulation of corporate entities is in tune with the emerging economic trends, encourage good corporate governance and enable protection of the interests of the investors and other stakeholders.

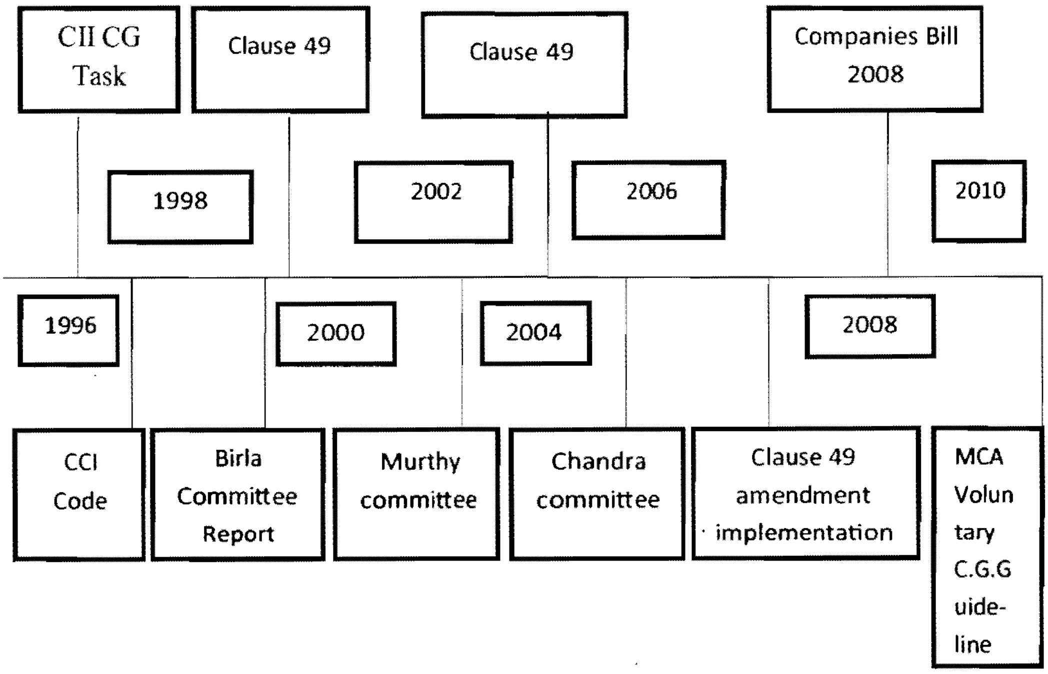
Since the late 1990s, significant efforts have been made by the Indian Parliament, as well as by Indian corporations, to overhaul Indian Corporate Governance. The current Corporate Governance regime in Indian straddles both voluntary and mandatory requirements like Voluntary Guidelines by Ministry of Corporate Affairs. And for listed companies, the vast majority of Clause 49 of the

[106] Id

listing agreements requirements is mandatory. The voluntary guideline on Corporate Governance by Ministry of Corporate Governance is a benchmark for the Corporate Governance practices in the Indian corporations, and hopefully the corporate world will make the best use of it. The new companies Act[107]is the successful of the long fighting of Corporate Governance and others law related laws hence it is my opinion that on this new companies Act 2013 this scenario would be successfully for the benefit of shareholder ,stakeholder as well as the economic aspect of India

Corporate Governance major development

Figure4



[107] 2013

Source: International Journal of Computational Engineering &Management Vol 15 Issue January 2012.

As I had pointed out that the legal frame work of corporate Governance cover mostly two laws namely Company law and SEBI laws hence in addition to what I had said as to the company.

Let me add something conceming to the new company Act 2013 that since the Ministry of Corporate Affairs (MCA) is the main authority for regulating and promoting efficient, transparent and accountability of corporate governance in the Indian corporate sector. This Act is the result of amendment of important legislations namely Companies Act, 1956 and Companies Bill, 2004and others amendments so as to bring more transparency and accountability in the provisions of corporate govemance. Though the new Act come into force but there are some are by which the old companies Act 1956 would be used until further notification[108].The new companies Act 2013 focus on Board structure and responsibility ,disclose and report, risk control and compliance ,auditing and auditor and corporate social responsibility.

As to the section 117[109]The concept of Corporate Governance receives statutory recognition, under this Section 117 in the Companies Act, 2013 that the board of directors of every listed company and such other classes of companies as may be prescribed shall constitute an Audit committee which consist of minimum of three director with Independent director forming majority and that majority of members of Audit committee including its chairperson who shall has the ability to read and understand the financial statement.

[108]http://www.dnaindia.com/money/report-to-strengthen-corporate-governance-companies-act-2013-implemented-1974297

[109] Companies Act 2013

As to the s 129 of act2013 is amongst the section which cover the aspect of Corporate Governance in this new Companies Act. Financial statement is among the criteria of successfulness of Corporate Governance in the company and the logic behind is money Of Investors and should be protected, this section continue to give out that the financial statement should complied with accounting standard[110] but not only that but also at every annual general meeting of a company shall lay before such meeting financial statement for the financial year[111] and if it is happened that the company has one or more subsidiaries ,it shall addition to financial statement as provided under section[112] ,prepared the consolidated financial statement of the company and all of the subsidiaries in the same form and in the manner as of its own which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under the subsection 2 of the section 129 of the Act[113] and the logic of this section[114] is that in order to protect and fair financial statement of the company and its subsidiaries separately and to avoid the mixed of financial statement of parent company and its subsidiaries hence in this section it show that this disclose of financial statement report help to control the risk of financial difficult in the companies and its subsidiaries.

Also as to the section 149 of the Companies Act, 2013 is all about the composition of board of director that a minimum number of three directors in the case of a public company ,two director in the case of private company and one director in the case of one person company[115].Section 149 (4) prescribes that

[110] Section 133 of the Companies Act 2013
[111] Id
[112] Section 129(2) of companies Act 2013
[113] 2013
[114] Id
[115] Section 149(1)(a) of the company Act 2013

1/3[rd] of the board has to be comprised of independent directors in case of listed public companies.

In a common parlance meaning Independent is the director who doing his duties independently but according to Section 149 (6) of the Companies Act, 2013. Under the Companies Act 1956, there was only a negative definition, and any person above the age of 21 could become an independent director. However, under Section 149 (6) of the Companies Act, 2013 an independent director needs to have at least *subjective* integrity and relevant expertise and experience. This ensures that the Board has to at least explain why it chose a particular person as independent director. Independent Directors are recommended to the Board of Directors by a Nomination & Remuneration Committee (consisting of non-executive director of which not less than half of which consists of Independent Directors)[116]A non-executive director is a director not involved in the day to day running of the company. The purpose of having independent directors is to have people on the Board who are not puppets of the majority/controlling shareholder or any other interest.

However what matters is not formal independence but substantive independence. While at the time of appointing independent directors, the Board merely has to comply with the formal requirements laid down in Section 149 the Courts *should* be able to look at whether directors were *actually* independent. Section 149 (8) of the Companies Act states that Independent directors have to comply with Schedule IV of the Companies Act which is essentially a Code of Conduct. Although Schedule is called a "Code", looking at the language of Section 149 (8), one could argue that it is binding on Independent Directors.

[116]See Section 278 of the Companies Act, 2013

As to the director liability there is a safe harbor provision in the Companies Act, 2013 to restrict the liability of independent directors. Section 149 (12) states –

"Notwithstanding anything contained in this Act,—

(i) An independent director;

(ii) a non-executive director not being promoter or key managerial personnel,shall be held liable, *only in respect of such acts of omission or commission by a company which had occurred with his knowledge,* attributable through Board processes, *and with his consent or connivance or where he had not acted diligently* (emphasis supplied)"

This safe harbor provision applies to-

(a) Offences under the Companies Act (the act says notwithstanding anything contained in *this* Act)
(b) Does it cover penal offences such as fraud, breach of trust, dishonor of cheques? Unlikely.

"Knowledge" under Section 149 (12) refers to both actual and constructive knowledge. An instance of this is the very next ground: "attributable through board processes".

As to the director duties as specified under the new companies Act[117]but for Common Law, a director has to act in the interests of the company, and not of the shareholders. However, the interests of the company are most likely aligned with the interests of the members of a company, except when the company is

[117]Section 166 of the Companies Act, 2013

near insolvency when the company's interests are primarily aligned with the interests of the creditors, and the shareholders' rights are subsumed.

As I had said to the above paragraph the director has the same duties to protect the interest of stakeholder as stipulated under the said Act[118]this is slightly problematic since stakeholder interests are non-homogenous, and quite often intangible unlike shareholder interests which are quantifiable and homogenous.

Moreover, in England, the model followed is the *Enlightened Shareholder Value System* where the directors have to act in the interests of the shareholders, and while doing the same, they ought to do what they can for other stakeholders. The Indian law on the other hand mandates directors to act in the interests of all stakeholders together, which is very confusing.

A part from the director issue as to the issue of related party transaction[119] this is the common phenomena to Asian countries include India, these transactions usually occur in family owned companies or controller owned companies. This is because the promoter usually has several other group companies, to which the assets might be diverted thereby harming the minority shareholders of the company hence the issue how we can regulate related party transactions.

1) Disclosure
2) Explain why such transactions are necessary
3) Shareholder/Board Approval

The Companies Act 2013, for the first time introduced the requirement of shareholder as well as board approval for entering into Related Party

[118] Id
[119] Section 188

Transactions The meaning of related party transaction has been defined under SEBI new SEBI circular dated 14/7/2014 as:

"A 'related party' is a person or entity that is related to the company. Parties are

Considered to be *related* if one party has the ability to control the other party or Exercise significant influence over the other party, directly or indirectly, in making financial and/or operating decisions".

As to the section 245 of the Companies Act 2013 creates the "class action" remedy. This is different from a derivative action since most remedies under Section 245 (2) are remedies against the company. However, under Section 245 (2) (g), damages can be claimed even against auditors, directors and lawyers. This is contrary to the rule of privity and might encapsulate some sort of derivative action.

As I had pointed out Corporate Social Responsibility has been introduced through Section 166(2)[120]direct directly introduced through Section 135[121]. We have already studied how CSR has been introduced through Section 166 (2) of the Companies Act, 2013. CSR has also been directly introduced through Section 135.

The concepts of corporate social responsibility in its wider perspective have different aspect not only to contribute to the community development but also to the corporate itself because the corporation has different responsibility to different constituencies of its stakeholders. Due to the fact that the basic element of the CSR is that the company needs to meet the expectations of

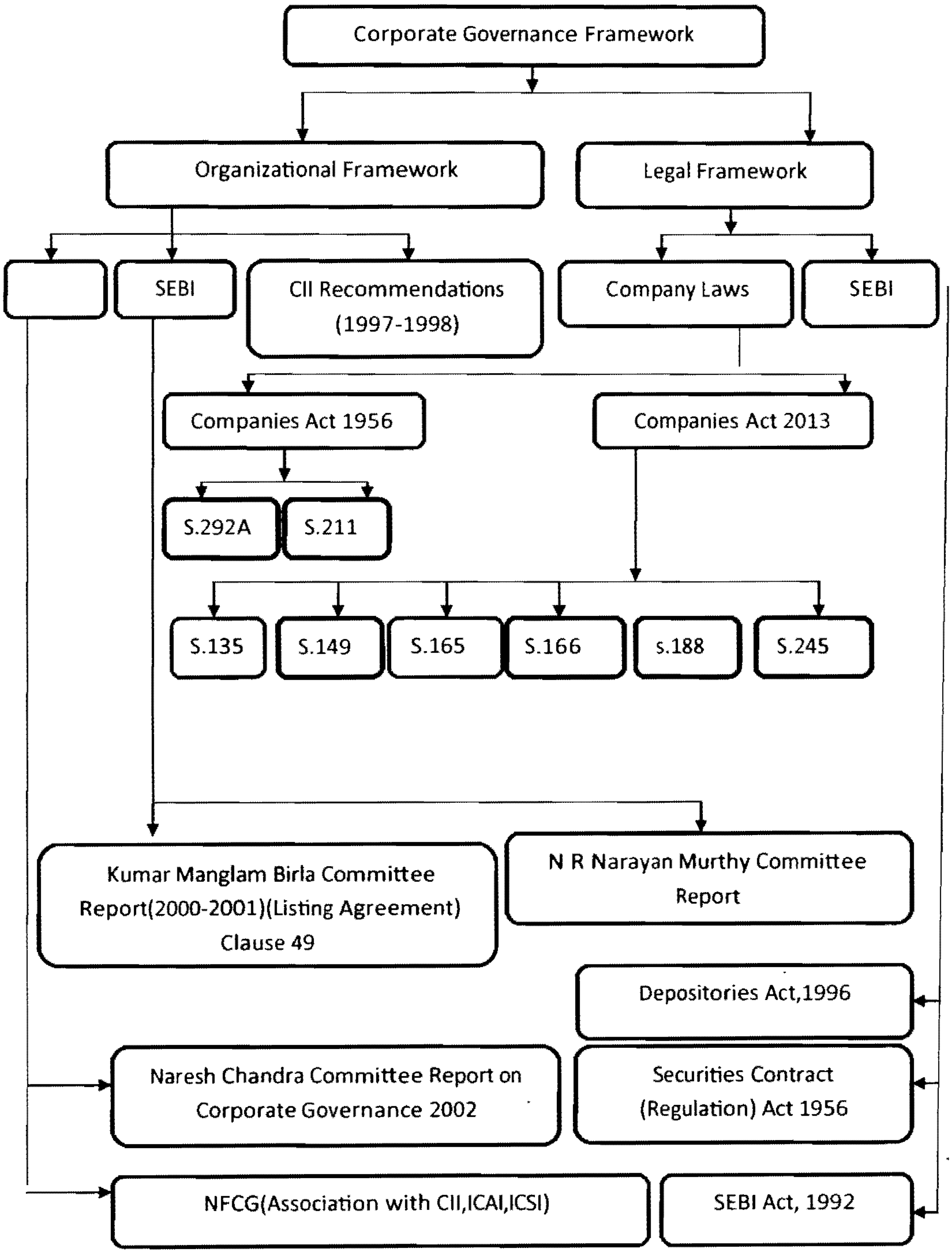
[120] Companies Act 2013
[121] Companies Act2013

groups other than shareholders, even though directors remain formally accounted to the investors who invest in the company

The reason behind for this corporate Social Responsibility is to give back the society of what you earn for the whole of year or financial year and this result to branding or appeal to the conscious customer as well as help the society because they were part of the company hence all companies having net worth of rupee five hundred crore or of rupee five crore or more during the financial year shall constitute a corporate social responsibility committee of the board consisting of three or more director out of which at least one director shall an independent director[122].

After having explain more on historical aspect of Corporate Governance in which cover organization frame work as well as legal frame work now see **figure 5 of Corporate Governance frame work.**

[122] Section 135 of the companies Act 2013


Corporate Governance Framework
Organizational Framework
Legal Framework
SEBI
CII Recommendations (1997-1998)
Company Laws
SEBI
Companies Act 1956
Companies Act 2013
S.292A
S.211
S.135
S.149
S.165
S.166
s.188
S.245
Kumar Manglam Birla Committee Report(2000-2001)(Listing Agreement) Clause 49
N R Narayan Murthy Committee Report
Depositories Act,1996
Naresh Chandra Committee Report on Corporate Governance 2002
Securities Contract (Regulation) Act 1956
NFCG(Association with CII,ICAI,ICSI)
SEBI Act, 1992

MODEL OF CORPORATE GOVERNANCE IN INDIA

India has been passed mountains to mountains on Corporate Governance so as to achieved its model of Corporate Governance and it came from the path – dependence model and according to this model, the evolution of CG system is path-dependent i.e., convergence of CG is barred by the national history trajectories and political considerations[123] In the last decade, India as to other countries has been moving towards adoption of the Anglo-Saxon Model of CG and amongst the reasons is to please the investor but also others reason include global political-economy pressures and problems emanating from the previous model, viz., the Business House Model of CG.[124] And the logic of this movement is it gives importance to shareholders' interest and promotes product-market competition. The move to the Anglo- Saxon Model can help conglomerates to maintain control of their business provided their business still remains competitive[125]. Most features of the Anglo-Saxon Model exist in the Indian corporate scenario barring a few, such as the dispersed equity ownership. Amongst the feature Anglo-Saxon Model is the problem of agency issues exist between managers and shareholders and this is the because of the fact that shareholder always they didn't differentiate between ownership and management in the corporation but for Indian context, agency issues are less between managers and shareholders, and more between dominant shareholders (promoters) and minority shareholders. These features of CG in India are expected to exist, at least in the foreseeable future. However in India, the regulatory mechanisms and market for corporate control seem similar as in

[123]S.R.Krishnapal"*Study of Corporate Governance in India*"33(D.Phil. Thesis, The Maharaja Siyajirao University of Baroda 2012)[Unpublished]
[124]Id,at 34
[125] Id

the US and UK[126]. Also, the Indian Companies Act[127], hence Indian CG system significantly follows the pattern of the Anglo-Saxon Model.[128]

Indian economic reform policies[129] are closely related to the Anglo-Saxon Model, characterized by a single-tier Board structure, where directors are representatives elected by shareholders and a strong dependence on capital markets that works as a disciplinary tool.[130]The Anglo-Saxon Model is based primarily on the Agency Theory[131], with a unitary-Board and it seeks to focus on the interests of shareholders.[132]

Hence for the purpose of this dissertation not Aim on the position to say that the model by which India implement on Corporate Governance is Anglo –Saxon due to the aforementioned characteristic that corporation follow in India and the change that took place on Corporate Governance from the old model that are based more on political Interest to the new aspect of Corporate Governance that based on shareholder Interest although the new Act 2013 change the scenario and now base on shareholder as well as the stakeholder as stipulated in the companies Act section 166 and 135,hence the said change I am on the opinion that India continue to follow the Anglo –Saxon on its own style.

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[126] Id
[127] 2013
[128] Panchali, op. cit, p. 69.
[129] 1990's
[130] Reed, Darryl and Sanjoy Mukherjee (Eds.), *Corporate Governance, Economic Reforms, and Development – The Indian Experience,* 1st ed; Oxford University Press,2004, p. 44.
[131] *See* chapter two
[132] Id

CHAPTER SIX

HISTORICAL ASPECT OF CORPORATE GOVERNANCE IN TANZANIA

Tanzania is union between the mainland Tanzania (former Tanganyika) and Zanzibar to form United Republic of Tanzania and it therefore a unitary system. This union forms two governments namely Government of the United Republic of Tanzania exercising authority over all Union matters in the United Republic and matters concerning Mainland Tanzania and the Revolutionary Government of Zanzibar has authority in Zanzibar over all matters, which are not Union Matters.

For the purpose of my dissertation on this part of Tanzania[133]the issue of Corporate Governance is under both country means Zanzibar and Tanzania hence my focus would be based on Tanzania mainland.

Historically as the others countries like India, Tanzania ownership of corporations based on state ownership, implies that the significant experiences of corporate governance will be related to state owned corporations. Between 1967 and 1992, state-owned corporations were the most common type of large corporations found in Tanzania. In these corporations, corruption,

[133]See the Union list, The Constitution of Tanzania and the Government of the United Republic. Foreign Affairs, Defense and Security, Police. Emergency Powers, Citizenship. Immigration, External borrowing and trade, Service in the Government of the United Republic, Income tax payable by individuals and by corporations, customs duty and excise duty on goods ,manufactured in Tanzania collected by the Customs Department, Harbors, matters relating to air transport, posts and telecommunications. . All matters concerning coinage and currency for the purposes of legal tender (including notes), banks (including savings banks) and all banking business; foreign exchange and exchange control, Industrial licensing and statistics. Higher education, Mineral oil resources, including crude oil other categories of oil or products and natural gas, The National Examinations Council of Tanzania and all matters connected with the functions of that Council, Civil aviation, Research, Meteorology, Statistics, The Court of Appeal of the United Republic and Registration of political parties and other matters related to political parties.

(embezzlement and nepotism) managerial incompetence, political interference and government subsidization of failing corporations were the predominant characteristics of corporate governance. Bagachwa et al. (1992) point out that the lack of accountability and effective control of these corporations left the managers with unfettered power. So during that time based on one party system, anything should be discussed on party based system

The paucity of corporate govemance in state-owned corporations in Tanzania has

resulted in dismal performance and the failure of these corporations (Wangwe, 1992).The system of central planning, including the state ownership of corporations, is being reformed through a series of market-promoting schemes[134]. This process formally started in 1986 following an agreement between the Government of Tanzania and multinational financial institutions – the IMF and the World Bank - in 1986 (Mukangara, 1993; World Bank, 2002)[135]. The reforms included adoption of competition friendly policies and the transfer of ownership of state assets/corporations to private shareholders. There had been earlier minor reforms towards a market orientation, e.g. the National Economic Survival Programme (NESP) of 1981-1982[136]. Following this reforms, a number of corporations have been privatized as a result Some of the privatized corporations have shown significant improvements in their performance because now based on private ownership Indeed, privatization has been viewed as a solution to the problem of governance (Wangwe, 1992)[137].

As I had pointed out on the historical aspect of Tanzania, Tanzania is also a member of the British Commonwealth. The member countries of the

[134] LemoyonL.Melyoki ''*Determinants of effective corporate Governance in Tanzania*''12'(D.PhilThesis,University of Twente ,2005)[Unpublish]

[135] Id

[136] Id

[137] Id

Commonwealth have agreed to undertake measures to improve corporate governance practices (CACG, 1999). CACG points out that corporate governance is important in improving the competitiveness of member states in attracting capital and in enhancing the performance of corporations[138]. This adds to the need to understand current practices and make such understanding the basis for further improvement initiatives in the Tanzanian context like India during the 1990's when the change of economic aspect of monopoly system to the open market system. The privatization initiatives of the 1990s and beyond reverse the nationalization policies of the 1960s and 1970s. In a similar way, the leadership code introduced by the Arusha Declaration was reversed in 1991 through what has come to be called the Zanzibar Declaration (Tripp, 1997)[139]. The adoption of the Zanzibar Declaration is viewed as a move to realize individual rights in a liberal economy, including the right to own property. This resolution is mainly relevant to senior civil servants since it allows them to now own rentable property, shares in privately-owned companies and accept directorship appointments in privately-owned companies.

The Zanzibar Declaration is sometimes argued to have allowed the ruling elite to transfer the base of their influence from political processes to shareholding and directorships. However, these can be viewed as mutually supporting and reinforcing[140].The Leadership Act, introduced in 1995, is a dilution of the TANU leadership code. While it does not bar civil servants from engaging in the activities barred by the Leadership Code of 1967, it requires them to publicly declare their property through a government-controlled register[141]. Despite the

[138] CACG 1999

[139] LemoyonL.Melyoki*"Determinants of effective corporate Governance in Tanzania"45'*(D.PhilThesis,University of Twente ,2005)[Unpublish]

[140] The debate surrounding the appointment of the Speaker of Parliament to a directorship position of a private company points to this assertion (Guardian, May 21st 2003).

[141] Id

intention to prevent the use of office for personal gain, recent claims of corruption by senior civil servants have shown that the effectiveness of this mechanism is questionable[142]. The Presidential Commission on the state of corruption in Tanzania pointed to deficiencies in the Leadership Code Act[143] including: the fact that it does not specify the ethical standards that should be adhered to, involves the President in the evolution of ethical standards, provides for a lengthy process of inquiry into indictments, provides room for the concealment of illegal income by differentiating between declarable and non-declarable assets, provides no explicit power to the Ethics Commissioner and fails to provide for penalties to be imposed on those who breach the ethical code (URT,1996).

The economic reforms in Tanzania include attempts to evolve local sources of capital for firms, to replace the government which prior to these reforms provided capital for state-owned enterprises[144]. Hence in this respect, the Capital Markets and Securities Authority (CMSA) was established[145]to regulate securities business in Tanzania, promote a security market and establish the stock exchange[146].However stock market is still in early stages of development with only seven firms currently listed and still running slowly and until now there are around seventeen companies register[147]

[142]The claims against a senior civil servant by one politician which prompted contradictory steps by the authorities dealing with corruption, as reported in the press, are indicative of the difficulty in applying this law. Rai, 17th-23rd July; 7th -13th August, 2003, Mtanzania, July, 16th, 2003,
[143] 1967
[144]LemoyonL.Melyoki*"Determinants of effective corporate Governance in Tanzania"46"*(D.PhilThesis,University of Twente ,2005)[Unpublish]
[145] 1994
[146]The stock exchange (Dar es Salaam stock exchange-DSE) was established in 1996 and began operations in 1997
[147]http://en.wikipedia.org/wiki/Dar_es_Salaam_Stock_Exchange

MODEL OF CORPORATE GOVERNANCE IN TANZANIA

As I had distinguished the different models discussed previously now I am on the position to tackle the model of corporate governance in Tanzania. The concept of the firm is undergoing reassessment towards a shareholder-instrumental orientation. The ongoing reforms, which embrace notions of the liberal market economy, are strongly geared toward this view that is amongst the characteristic feature of Anglo –Saxon that the shareholders are the only constituency.permitted to participate in the key affairs of a company in Tanzania such as the appointment of directors and voting at shareholder meetings. The companies Act give more right to the shareholder rather than stakeholder for those type of share The company ordinances permit the issuance of different classes of shares, equity shares, preference shares, and redeemable preference shares[148] These classes of shares carry varying rights in influencing the decision-making processes of the company. The company ordinances also allow companies to vary the rights attached to the different classes of shares subject to court approval so due to that characteristic it show Tanzania based on the shareholder primacy and this is Anglo –Saxon characteristic.

The power given shareholders by the companies Act[149] to influence decision-making is exercised at the annual general meeting. Among the key decisions made by shareholders during these meetings is the election of directors and auditors[150]. Directors' remunerations are also decided upon during these meetings. In practice, directors propose remunerations to shareholders at the

[148] Companies Act 2002
[149] Id
[150] Id

annual general meeting, who then debate and approve them. Directors are empowered to propose auditors and determine the auditors' fees[151] .

Apart from the above but also the board system reflects the British one: a one-tier or some time we can say common law system whereby civil law they focus on two tiers board in which decision management and control roles are combined and this is also amongst the characteristic of Anglo-Saxon based on shareholder primacy.

LEGAL FRAMEWORK OF CORPORATE GOVERNANCE IN TANZANIA

The main legislations that guiding corporate Governance in Tanzania are Companies Act[152]and the Capital Market and Securities Act[153]but this only applied for listed companies, Apart from that but also the specific entities may also apply in the governance of the entities concerned like the Universities Act 2005 that establish the Universities, Re-organization and vesting of Asset and liabilities Act No.23/1997 as amended which established Consolidated Holding Corporation, the Public services retirement Benefit Act No.2/1999 which established the Public Services Pension Fund and other Act which have effects on the Corporate Governance include those specific regulatory agencies.

The Companies Act[154] was draft so as to take into the consideration of developments in Corporate Governance and directors duties (Winkelhof) also this Act[155] stipulated the issue of director's duties including duty of care and due

[151] Id sec 132
[152] 2002
[153] 1994
[154] 2002
[155] Id

to that specifically give out the age of director in a companies to be 21 and this any director have the duties to disclose their age.

Apart from that but also prohibit director to take loan from the same company and the logic behind of this section is to avoid mismanagement of company fund, also a statutory procedure for removal the directors, personal liability for the company's debt if the person disqualified from being a director, prohibition of tax free payment to directors and the requirement that director's service contract are available for the inspection at the registered office.

The Act[156] provide the regulatory frame work for the corporate Governance in private companies while the public Corporation Act 1992 provides the same in public corporations. The director of the corporation is appointed by the shareholder at the company annual meeting and must upon the appointment, sign, and delivers for the registration at the companies registry consent in writing to act as directors.

Let's now focus on shareholding structure of the company, the CA 2002 provides that a private company must have minimum of two members to able to carry on its business and this power articulated in the company's article, and this include voting powers at any general meeting and the power to approve decision made at director level.

As to the issue of internal control of business risk are also mentioned to the Act[157] which stipulated that every company keeps proper account for all sums of money received and expended ,its sale and purchases and its assert and liabilities ,not only that but also all the companies must appoint auditor at annual

[156] Companies Act 2002
[157] Id

meeting ,who will incur the civil liability for the professional negligence if the audited account are in accurate and will be criminal liability if they Intentionally circulate false account[158]

In this aspect other Corporate Governance I will focus on Capital Market and Securities Act guideline on Corporate Govemance by the public Listed Companies in Tanzania contain the list of recommended best practice in Corporate Governance since Tanzania is a member of CACG as well as followed the norms of OECD which were developed to promote the standard of self-regulationto bring the level of governance in line with International standard.

The said guideline required the responsibilities of the board of directors should be defined, and that the appointment and qualifications for an effective board and remuneration of the directors should also be disclosed.

As to others countries like India ,Tanzania Corporate Govemance for listed company required to ensure equitable treatment of shareholder including the minority shareholder on all issue related to the company like receiving information on the company performance through the distribution of regular annual report and account for every but also should have a right receive information on voting rule and procedure ,to participate and voting at general shareholder meeting ,place items on the agenda and be entitled to ask question or seek clarification on the company's performance[159]hence according to the aforementioned guideline is how the Corporate Governance .

[158] Id

[159] Capital Market and Securities (Corporate Governance)guideline 2002

CHAPTER SEVEN

Finding and conclusion

The research in this work has found the following amongst the aspect of corporate Governance in Tanzania and India, some are resemble and other differ hence the hereunder are.

Both countries follow the Anglo –Saxon model of corporate Governance that based more on shareholder primacy that it is the duties of the director to make sure that he maximizes the profit of companies but in application on this in Tanzania aspect the duties of director according to section 181-185 is to act in the best interest of the company, its members and employees and exercise due care, skill and diligence in all their actions so the law doesn't specified about duties toward community but for India it is another story that the new companies Act 2013 under section 166 on duties of director is towards company, shareholder, community hence on this aspect the director has a huge burden not only to the shareholder but also to the society so due to that the possibilities of director to be sue by the company if the shareholder as well as the stakeholder interest not fulfill .

Also on the same point the Act give out the duties of director toward the companies and to protect the interest of minority's shareholder and if the interest ware injured they can make now make an application to the court for its intervention or for Permission to start a derivative action on behalf of the company if the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of the members in general or the minority in particular as stipulated under section (S233, 234) Tanzania companies Act 2002 as to the India companies Act 2013 under section the same has this but it has two separate section one for the Individual action under section 241 and for the classic action is under section 245 of the Act hence in this aspect both the Act protect the minority as well majority

The researcher also find that the new companies Act has change from shareholder primacy as indicator of Anglo-Saxon model to stakeholder theory that you should protect the interest of stakeholder with the view of shareholder as the justification of stakeholder theory and this due to the section 135 ,Corporate Social Responsibility ,and it is amongst the duties of director as stipulated under section 166 of the Act 2013 as mandatory but this aspect you cannot find under the Tanzania Companies Act 2002 as mandatory it is not mandatory and has no section in the Act it based more on philanthropy hence I am on the opinion that why mandatory as stipulated under section 135 by specific companies and not for those companies and this is unfair and should not be mandatory and it is some sort of another 2% tax to others companies while the same they pay tax .

As we know that others Tanzania companies is family owned companies and they take advantage to do business with other companies as result to infringed the other shareholder interest and the Tanzania Companies Act is silence on this aspect of related party transaction has due to this it time for Tanzania to learn from India on this issue though the India they introduced this as a result of Satyam scandal(2008) on related part transaction, these transactions usually occur in family owned companies or controller owned companies. This is because the promoter usually has several other group companies, to which the assets might be diverted thereby harming the minority shareholders of the company hence by put this section 188 in the new companies Act is a lesson to Tanzania to have this section without waiting another Satyam to appear.

Hence according to the above all two countries namely Tanzania and India has developed in their Corporate Governance according to the need of the corporate system since the logic of Corporate Governance is transparent, fully disclosures fairness result to the greater accountability and credibility to the corporation so both countries they successful according to the circumstance of each countries so on this it time for India as well as Tanzania to enact the laws ,rules and regulations without waiting the scandal to happen but also to learn from other countries scandals so to prevent the same scandal not to happened to the future.

Also the issue of having being a director of more than one companies this is common all around the world hence in this it proper for the benefit of company and can do his duties without any interest the same to attend the all companies meeting, the answer of this question is no, and there is possibilities of interest hence though the law is clear that the director should disclosed the interest but if not than he infringe his duties so on this the new companies Act under section 165(1) that no person after the commencement of this Act shall hold office as director ,including any alternate directorship ,in more than twenty companies at that same time ,the logic of this section is clear that to avoid the conflict of interest doctrine but in this in my opinion the number is to high and at least two to three companies with the conditions that the company should have separate type of business so as to avoid the said public interest. As to Tanzania Companies Act 2002 the Act is silence on number of directorship due to the Tanzania circumstance hence to say due to the Tanzania circumstance has no leg to stand that prevention is better than cure hence no need to wait for scandal to happen that to act on that ,to narrow down the issue in this aspect I general conclude that the number of directorship should not more the three companies with the conditions of different type of business.

Lastly but not list the issue of sufficient laws relating to the Corporate Governance for India have sufficient laws by enacting this new Companies Act but some area need to check up again according the Indian scenario that by point of the duties of directors specific as in section 166(2) this result to conflict that whose duties toward whether the company or communities hence in this it is in my opinion that the companies law should follow the Tanzania or common law principle of duties of directors.

T o close up the discussion lastly the issue of social equity which introduced under section 149 the new companies law on board of director that maximum is fifteen director and amongst them should have at least one women director, the idea of this section has different advantage on the company that now the women at least they can get faith on the company by having a women director but also this depend upon the type of business if happened that that company deals with women stuffs than she can do well on that professional hence on this I am on the opinion that it is a lesson to Tanzania scenario of having this social equity to the companies Act of 2002.

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