

STRUCTURE AND POWERS OF BOARD OF DIRECTORS OF PUBLIC AND PRIVATE COMPANIES- HOW FAR SIGNIFICANT FOR CORPORATE GOVERNANCE COMPARISON BETWEEN INDIA AND OTHER COMMON LAW COUNTRIES

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INTRODUCTION

In order to understand and appreciate the power and structure of the Board of Directors, it is necessary to have some understanding of the concept of corporate governance. It is interesting to note that there is no single definition of corporate governance that can be applied to all situations and jurisdictions. The term 'Corporate Governance' has been defined in various ways depending on the institution or author, country or legal tradition.¹Corporate governance has been defined as;

...the system of checks and balances, both internal and external to companies, which ensures that companies discharge their accountability to all their stakeholders and act in a socially responsible way in all areas of their business activity.²

It also establishes relationship amongst manager, directors, shareholders and other creditors, who save and invest their capita to earn money in form of dividend.³Since, the company is separate from its shareholders and BOD carries its own identity which consists of two organs: the general body of shareholders and the board of directors. Additionally, it should be noted that the governing power has been given to board of directors and should remain within the reach of shareholders to appoint and to remove⁴. Also, Political accountability is assured by guaranteeing

¹'Corporate Governance Manual-International Finance Corporation (IFC)' (2nd edn Hanoi, October 2010)<http://www1.ifc.org/wps/wcm/connect/8a40ee804a81f904ad3dfd998895a12/CG+manual+for+Vietnam-second+edition-Eng.pdf?MOD=AJPERES> accessed 5 August 2015

²Jill Solomon & Aris Solomon, *Corporate Governance And Accountability* (2nd ed.,Wiley 2007) 14

³Dr. Vrajlal Sapovadia & Akash Patel, 'Levers of Corporate Governance in India: Critical Analysis through Prism of Legal Framework' [2013]ssrn.com/abstract=2214441

⁴A Ramiya, *Guide to the Companies Act 2* (18th edn, LexisNexis India, 2015) 2833

that the representatives of the people come back to the electorate periodically.⁵It is a very established phenomenon that company being an artificial entity is not able to function itself: the person of a company is manifested through its board of directors.⁶For the first time in India, BOD has been defined in 2013.⁷This definition recognises the common law concept to say that the board of directors can act only collectively.⁸

With the changing phase of time, boardroom is considered as the superior body for making decision in the management of the corporation. It takes care of all the day to day business activities of the corporation. The BOD is constituted through various directors and the name of them varies but responsibility on their shoulder is almost the same.⁹ The minimum number of director is also prescribed according to the nature of the company. In case of public companies, private companies and one person companies the minimum number of directors are three, two and one respectively.¹⁰ For determining the maximum number of directors in the board the Irani Committee had recommended that there need not be any limit to the maximum numbers of directors that a Company may have. Limit to maximum number of directors should be decided by the company in the Articles of Association.¹¹The same was incorporated in the companies act.¹² Also, provisions for appointment of independent directors, women directors and resident directors were absent in the 1956 Act which is now inducted in the 2013 Act.

The 2013 Act has set forth about the power and function of the BOD and also specifically mentioned about the restriction to exercise the powers which will be discussed later in this paper. The act also presents that the act/ power exercised by the BOD should not be inconsistent with

⁵The same pattern has been accepted in the company Law.

⁶LVV Iyer, *Guide to Company Directors: Powers, Rights, Duties and Liabilities*(2nd edn, Wadhwa& com Nagpur 2003) 550

⁷The Companies Act 2013, S 2(10), Board of Directors to mean the collective body of the directors of the company.

⁸Ramiya (n 4)

⁹Y PAPA Rao&Rajasree PR, 'Escalating The Concept of Corporate Governance in India through Women Directors: A Virgin Approach' [2014] 4 CLJ 103

¹⁰The Companies Act 2013, S 149

¹¹Jamshed J. Irani, Report on Company Law (New Delhi, the 31st May, 2005)

¹² The Companies Act 2013, S 149(1)(b)provides that a maximum of fifteen directors may be appointed. However, by passing a special resolution, a company can appoint more than fifteen directors. As per s. 259 of the 1956 Act, the Central Government's approval was necessary to increase the number of directors beyond 12. This requirement has been done away with in the 2013 Act.

that of the Act, MOU and AOA of the company.¹³Some of the important powers enumerated under the relevant legal provisions are related to diversification of business, approval of mergers and amalgamation etc.

The first part of the project considers in general the issue of structure of the board and their relative merits and demerits. Second, this article discusses about the comparison between the approach followed in the India and Germany with respect to these structures. Third, this article discusses about the provisions of the Companies Act 2013 and 1956 regarding the Power of BOD and relationship between shareholders and BOD. Finally, this article states the conclusion of the paper.

STRUCTURE OF THE BOARD IN PRIVATE AND PUBLIC COMPANIES

The construction of model of the corporate governance is differing from nation to nation. The structure of board plays significant role in influencing corporate growth and are governed and regulated by legal and regulatory framework in order to protect shareholders rights and control mismanagements. Mainly across the world, two approaches have been followed to establish and maintain a corporation's governing board. Some countries use a two-tier approach, which establishes a management board and a supervisory board (Germany).¹⁴The other countries follow unitary or single tier board system where the governing body is comprised of a single board (Anglo Saxon countries such as UK, US, Canada and India).¹⁵

¹³Companies Act 2013, S 179

¹⁴Ryan M. Vassar, 'Comparative Corporate Governance: An International Review of the Corporate Board of Directors' (William Mitchell College of Law Research Paper Seminar: Comparative Corporate Governance, 2010). In these type of system, the managerial board is consist of entirely executive directors while, the supervisory board is consist of non-executive directors.

¹⁵Consist of both executive and non-executive directors. See S Tripathi, 'Comparative Board Structures under Corporate Governance Framework'[2013] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282924 accessed 11 August 2015

Various committees on worldwide have given different opinion upon the structure of the BOD. Some of them such as Cadbury report (UK)¹⁶, King report (South Africa)¹⁷ and Higgs report (UK)¹⁸ have preferred single tier approach to the two tier structure. Kings Report states that unitary board structure facilitates the unitary board structure provides better collaboration among all board members while making strategy, planning, performance, resources, standard of conduct and communication with stakeholders.¹⁹ The Higgs report concludes that it is important to establish a spirit of partnership and mutual respect on the unitary board. This requires the non-executive director to build recognition by executives of their contribution in order to promote openness and trust.²⁰

Structure of Board in Germany

In Germany, two tier board structures has been followed in which stock corporations are required to maintain two boards; a management board²¹ and a supervisory Board²². These two boards have their own power and functions; nobody is allowed to serve at the same time in a corporation's management board and supervisory board. Moreover, the size of the board is determined by the law and is not subject to the intervention of the shareholders.²³ It is very much evident that in Germany the supervisory board have successfully fulfilled their functions but when it comes to the efficiency of control, it had lots of criticism with it. The power to appoint and supervise the member of the management has been given to the supervisory board. Members of the supervisory board do not have any executive role in that capacity. Members of the management board cannot serve as members of the supervisory board and vice versa, but the supervisory board may consist

¹⁶ Cadbury Committee Report, Report of the Committee on the Financial Aspects of Corporate Governance, Compliance with the Code of Best Practice, (Gee Publishing, London, 1995)

¹⁷ King Report on Corporate Governance, The code of corporate practices and conduct, (The institutes of directors of South Africa, 1994)

¹⁸ Derek Higgs, Review of the role and effectiveness of non-executive directors, (The Department of trade and Industry, 2003)

¹⁹ King Report on Corporate Governance (n 17)

²⁰ Derek Higgs (n 18)

²¹ The management board is in charge of the management of the company according to its own business judgment and represents the company in its business dealing and in litigation. See Grit Tungler, 'The Anglo American Board of directors and the German supervisory board-Marionettes in a puppet theatre of corporate governance or efficient controlling devices?' [2000] 12 (1-2) Bond Law Review 230-264, 231

²² *ibid.* Work as a watchdog of the company to prevent serious abuse of power and also considered as a guardian of the interest of the interest of shareholders.

²³ Angualia Daniel, 'Balance of Power between Shareholders and The Board in Corporate Governance' [2010] <http://ssrn.com/abstract=1612962>

of, for example, representatives of the Company's employees and external managers.²⁴ Therefore, In Germany, the board is not too independent to its shareholders.

Structure of BOD in India

Sec 149 of 2013 which is corresponding to Ss. 252, 253 of 1956 Act states that only individuals can be director. The number of director remains same in both the Act. The only difference is that 2013 Act has added the concept of One Person Company which can be registered as private company. Further, it provides adequate safeguards to the OPC if the sole director dies then the appointment of another individual as Nominee Director. On the demise of the original director, the nominee director will manage the affairs of the company till the date of transmission of shares to legal heirs of the demised member.²⁵

²⁴S Tripathi (n 15)

²⁵Jamshed J. Irani, 'Expert Committee on Company Law' MCA (New Delhi, the 31st May, 2005)

Who is a director?

According to the 1956 Act, it is not the name by which a person is called as a directors but the position he occupies, i.e. his powers, duties and rights that determines whether in fact he is a director or not.²⁶In contradiction with the earlier definition, the concept of director is changed. New Act states that the actual fact of appointment to the BOD of an individual determines his character as a director. Thus, the position occupied by the person as director, even without the formal appointment, no longer matters. Therefore, a shadow director or a de facto director occupying the position of a director without the formal appointment to the BOD would not fall within the ambit of the exhaustive definition of the director.²⁷However, we have to see that a shadow directors or de facto director is not ordinarily a director under the 2013 Act unless expressly stated.²⁸

Inclusion of Women Directors

In 2010 the UK government commissioned to report the boardroom gender diversity. It was found out in that study that women were not adequately represented in board. According to the study at the time of making up only 12.5% of the women were holding board membership and just 5.5 of the executive positions.²⁹ After this study, UK government proposes to mandate a 25% representation of women on the Board of listed companies, by 2025.³⁰Also, in 2006, CNMV opined that a good gender balance on board of directors is not only a matter of ethics and social justice, but it is also ‘an efficiency objective’ and represents ‘economically rational conduct’, thus appealing to the business case for female boardroom appointments.³¹

In India also, a step has been taken through 2013 Act that specifically mentioned that at-least one women director has to be there in the BOD of public and listed company..³² The transitional

²⁶ B K Sen, *Company Law* (2nd end, Eastern Law House 1990) 380

²⁷Ramainya, (n4)2834

²⁸The Companies Act 2013 S 185(2).

²⁹Lord Davies of abersoch, ‘Women on Boards’ (UK Government 2011)

³⁰Ramiaya (n4) See Also Department for Business, Innovation & Skills (25 March 2015)<https://www.gov.uk/government/collections/women-on-boards-reports>

³¹ Spanish Securities and Exchange Commission 1988

³² The Companies Act, 2013 S 149(1) :The following class of companies shall appoint at least one woman director-(i) every listed company; (ii) every other public company having - (a) paid-up share capital of one hundred crore rupees or more; or (b) turnover of three hundred crore rupees or more: (Rules for Chapter XI (after incorporating

period of one year has been prescribed to the companies for the compliance with this provision. It has been found out that before this act, 70% of the companies in India did not have female in their board. To give the rightful due to the women and to fill up the gender disparity in the corporate world, this section has been incorporated.³³ Though, the companies have not been complied with the requirement and hence, SEBI passed a circular that non-compliance with the requirement of the provision will lead to penalty of Rs 50,000 at initial stage.³⁴

A women director should not only be inducted in the listed companies and other companies which satisfy the threshold limit prescribed by the provisions of the companies act, but also be inducted on the other boards without differentiating the type and nature of the companies with a view to ensure good governance. This will have an impact on the growth and development of the corporation and will be contribute to the economy of the nation.³⁵

Amendments upto November, 2014) Government of India Ministry of Corporate Affairs Notification New Delhi, dated 31st March, 2014)

³³ See, Mint, 'Planned Provision - Woman director on every board with five or more directors' (Mar 09, 2011) <http://www.prsindia.org/media/articles-citing-prs/planned-provision-woman-director-on-every-board-with-five-or-more-directors-1567/> Also 'Woman director norms are for 'gender diversity'Sebi' *The Economic Times* (Apr 19, 2015, New Delhi)http://articles.economictimes.indiatimes.com/2015-04-19/news/61303920_1_non-compliant-companies-least-one-woman-director-women-directors

³⁴ SEBI, CIR/CFD/CMD/1/2015 (April 08, 2015)

³⁵ [2014] 4 CLJ 106

Small Shareholder Directors

The concept of small shareholder director was inducted in 1956 Act by the 2000 amendment Act and same is incorporated in the 2013 Act. “Small shareholders” means a ‘*shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.*’³⁶A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.³⁷ Any other listed company may also opt to have a director representing small shareholders suo motu and in such a case the provisions of sub-rule (2) shall not apply for appointment of such director.

However, the discretion to have a small shareholder is being given to the company. But if the company refuses to the same, it will have to explain the reasons behind the refusal. It will make difficult for companies to refuse such a move. Also, there are a lot of disclosures and transparency in the Companies Act, 2013. Therefore, even if companies fall foul of norms, the disclosures will reflect this. This will, in turn, be reflected on the corporate governance of companies and their valuation could be affected.³⁸

The other requirement is if the small shareholders intending to propose a person as a candidate for the post of small shareholders’ director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signatures specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director. If the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice. [Sub – Rule (2) of Rule 7]

The notice for appointment of a person as small shareholders’ directors shall be signed by not less than one thousand small shareholders or one tenth of total number of small shareholders. This notice shall also be complied provision of Section 160 read with Rule 13 of these Rules.³⁹However the rule is silent on his accepting directorship in any other rival company after completion of his tenure. There is no cooling period for accepting such appointments in rival companies.⁴⁰

Resident Director

Since, 1956 act does not specify whether a director should be resident in India or not. Most of the multinational companies have their directors outside India. **The Irani Committee** has recommended that every company should have at least one director from India to ensure the availability in case any issue arises with regard to the accountability of the board. This recommendation was based on the Australian Law.⁴¹The same recommendation is inaugurated in the 2013 Act.⁴²

The main intention of the legislature was to ensure the regularity of board to monitor directly the management on the daily basis and shall be responsible for the act and deed of the company. The presence of the resident director in board will lead to the expeditious statutory action steps and will be a step forward towards meeting the timely corporate compliance requirements. It will also put a check on the foreign company.⁴³

Independent Director

Independency in itself is very subjective. 'To what extent should independent be granted so that it does not cause threat to the governance and to what should independence be limited so that its absence and presence do not become identical are of paramount importance.'⁴⁴The concept of independence is to be understood in which context has been incorporated under different

³⁶ The companies (Appointment and Qualification of Directors) Rules 2014, Rule 7 (1): A listed company, may upon notice of not less than one thousand small shareholders or one-tenth of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders.

³⁷ The Companies Act 2013, S 151

³⁸ PriyaNair, 'Some muscle for small shareholders' *Business Standard* (7 April 2014) http://www.business-standard.com/article/pf/some-muscle-for-small-shareholders-114040700035_1.html accessed 20 August 2015

³⁹ 'Small Shareholders Directors' <http://aishmghrana.me/2014/07/09/small-shareholders-directors/> accessed 20 August 2015

⁴⁰ Ramiya (n 4)

⁴¹ S venugapalan, 'Irani Panel's Recommendation on the board of directors' [2005] 63 (1)SEBI and Corporate Laws 13

⁴² The Companies Act 2013, S 149 (3) stipulates following requirement:

"(3) Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty -two days in the previous calendar year."

⁴³ Nikita Snehil, 'MCA clarifies on residency requirement of resident director' *Moneylife* (30 July 2014) <http://www.moneylife.in/article/mca-issues-another-clarification-on-resident-director/37930.html>

⁴⁴ 'Beyond "Independent" Directors: A Functional Approach to Board Independence Source' (2006) 119 (5) Harvard Law Review 1553-1575

legislation, by following two perspectives: Disinterested Outside Model⁴⁵ and Objective Monitor Model.⁴⁶

The 1956 Act did not have any particular provision regarding the appointment of an independent director on its board. Though, the provisions were later on incorporated in the Clause 49 of the Listing Agreement (“Listing Agreement”).⁴⁷ 2013 Act says that an independent director in relation to a company means a director other than a managing director or a whole-time director or a nominee director. Irani Committee has clearly recommended on the status of nominee directors that they should not be considered as independent directors since they are the representatives of the particular section.⁴⁸

It is very much evident from the provisions of the statute that every listed public company should have at least one third of independent directors. In case of other public companies, the discretion has been given to the CG to decide the number of independent directors in the board.⁴⁹ If any conflict arises in the appointment of number of independent directors, then the company shall comply with the requirement of specific law.⁵⁰

Indian corporation follows disinterested outsider model. The duties, power and function of the independent directors has been prescribed in the Sch IV.⁵¹ Additionally, it is stated in the 2013 Act that the appointment of independent directors shall be subject to the approval of shareholders

⁴⁵When a person who linked neither directly nor indirectly to the transaction of a company itself or to its subsidiary.

⁴⁶The ID is expected to perform some duties which it has towards the shareholders of the companies.

⁴⁷‘Companies Act 2013: Greater Emphasis on Governance Through the Board and Board Processes’ (June 04, 2014)http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/companies-act-2013-greater-emphasis-on-governance-through-the-board-and-board-processes.html?no_cache=1&cHash=ca550459d744bead6c8090812a8c1561

⁴⁸Irani committee , See also Pranav Mittal, ‘the role of independent director in corporate governance’ [2011] 4 NUJS Law Review 285-298, 294, Institutional investors such as FIs and banks provide huge loans to the companies and in order to protect their interests, they nominate their Directors on the Board of Companies. The function of these directors is to safeguard the financial interest of the institution who nominated them and to ensure that no decision is taken by BOD which goes against the financial institution. Such directors are not considered responsible to the extent they have knowledge about the business of the company.”

⁴⁹Ramiya (n 4) See also, The Companies (Appointment and Qualification of Directors) Rules, 2014 Rule 4: requires public companies which are not listed to have at least two Independent. (i) a paid up share capital of rupees ten crores or more or (ii) turnover of rupees one hundred crores or more or (iii) outstanding loans or debentures or deposits which in aggregate exceed rupees fifty crores or more.

⁵⁰The Companies (Appointment and Qualification of Directors) Rules, 2014: Rule 5

⁵¹Ayush Raj, ‘The Concept of Independent Director’ [2014] 3 CLJ 18, See also, an Independent Director may be appointed only at a meeting of the shareholders [see clause IV(2) of Schedule IV] and any vacancy caused due to resignation or removal shall be filled up within 180 days [see clause VI(2) of Schedule IV].

in the general meeting. However, the main problem lies in this regard is that, Act as well as rules do not state about the approval or ratification by the shareholders if the Board fills in the casual vacancy caused in the office of an Independent Director.⁵² Even if the shareholder appoint them the problem can't be solved. In the existing legal system, the main problem is minority-majority (Shareholding pattern) not the manager-shareholder agency problem.

As far as role of independent directors on the board is concerned, they play both advisory and monitoring role. Independent directors may be seen as watchful monitors of controlling shareholders that work on behalf of minority shareholders.⁵³ Independent directors may also be seen as advisor to the controlling shareholder.⁵⁴ At times, independent directors may act as an arbitrator in order to best serve the purpose of settling typical internal conflicts between shareholders and management.⁵⁵

COMPARATIVE ANALYSIS BETWEEN INDIA AND GERMANY

There are many differences and similarities that may be drawn from the comparison in board structure of India and Germany. In India and other single tier board structure countries, the BOD have been divided into executive and non-executive directors; it is best practice that half of the board of larger companies should be comprised of non-executive directors. Whereas, the presence of supervisory board completely negates it.⁵⁶ Though in India, the board is divided but it does not make a clear demarcation between the power and function of different directors as it exist in the supervisory and management board of Germany. Furthermore, the supervisory board decides upon the appointment, remuneration and removal of management body which is not in the single tier boards.⁵⁷ In addition to it, if any major decisions taken by the management that will be subject to the ratification of the Supervisory board which is also not required in the single tier

⁵²Ramaiya, Madhuryya Arindam, 'The Independent Director: Has it Been Indianised Enough?' [2013] 6 NUJS Law Review 230-271, 234

⁵³Afra Afsharipour, 'Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts' [2011] 34 (4) Seattle University Law Review 1001

⁵⁴Vikramaditya Khanna & Shaun J. Mathew, 'The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence' [2010] 22 NLSI Rev 35, 45

⁵⁵Yuan Zhao, *Corporate Governance and Directors' Independence* (1st ed., Kluwer Law International 2011) 92

⁵⁶the Combined Code on Corporate Governance (as amended in 2006)

⁵⁷Ryan M. Vassar (n 14)

board. In Germany, employees have active participation in the appointment of the Supervisory board, no such participation to protect the interest of employees is found in Indian structure. Additionally, every part of information relating to management has to be communicated to the supervisory on regular basis but no such requirement in necessary in single tier board.⁵⁸

As we have already discussed the differences between the two board structures. Moreover, it is a basic presumption that the two tier board is antiquated and more hectic as the decision of management board is subject to the approval. The appointment of non-executive, independent and nominee directors is to be considered as a move towards the two tier system. In two tier board, it seems as most stable due to the supervision and control whereas in India, the presence of non-executive directors put a check on the function of the executive directors. However, it was suggested that corporate corruption and insider trading is very much prevalent in India and thus a supervisory board is required to oversee and protect the interest of the shareholders, employees and company as a whole.⁵⁹

POWER OF BOARD OF DIRECTORS

The board has also been said to function as the ‘corporate conscience’, setting overall standards and reviewing major plans from legal and ethical points of view. It has already been discussed that there are two organs of the company. The power of the board is determined according to the nature of the company. In Private Companies, division of power is not there because shareholders and BOD are generally same people. While, in Public Companies, the board tends to exercise more of a supervisory role, and individual responsibility and management tends to be delegated downward to individual professional executive directors (such as a finance director or a marketing director) who deal with particular areas of the company’s affairs.⁶⁰ As Gower observed of in his book that till the end of the nineteenth century, the directors were merely an agent of the company and all the powers were exercised in the general meeting.⁶¹

⁵⁸CarstenJungmann, ‘The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board System - Evidence from the UK and Germany’ [2006] 3 ECFR 426, 438

⁵⁹ibid

⁶⁰Angualia Daniel (n 23)

⁶¹ Gower, *Principles of Modern Company Law* (3rd ednSweet & Maxwell 1997) 130

In some of the cases the court has made clear demarcation between the power of shareholders and BOD. In the case of *Automatic Self Cleansing Filter*⁶² the court observed that the demarcation of power between the board and shareholders is based upon the construction of the articles of association. Further the court held that AOA is a contract where the members have given their consent that directors are only authorised to manage the affairs of the corporation and members would not interfere within their boundary.⁶³ Moreover, 'the power of BOD can be taken away by the alteration of AOA. 'Also the court has further said that 'directors' power could not be overruled by mere majority of shareholders'⁶⁴ The modern doctrine was explained in *Shaw & Sons (Salford) Ltd case*⁶⁵ that shareholder can't take over the power which is vested with the BOD but BOD can usurp the power vested in the shareholder by the AOA.⁶⁶

Powers of Board under UK Company Act 2006

Part 10 of the 2006 Act does not directly give powers to the directors, but, under the Model AOA for private companies limited by shares, the directors' functions are to manage the company's business: and to exercise all the power of the company for any purpose connected with managing the company's business.⁶⁷ It is very pertinent to argue at this juncture that in UK, the power of directors is derived from the AOA and not from the free-standing grant of authority from the State.⁶⁸ It is clear that UK companies are still based on the principle of partnership with the significance that the directors are the agents of the shareholders.⁶⁹ It is clearly drawn from the statute that the power of the board is coextensive with that of the power of the company. Also the *Model Business*⁷⁰ clearly states that: Powers of board will oversee all the business and affairs of the corporation.⁷¹ However, 2006 Act has done away with this concept. It states that every

⁶²*Automatic Self Cleansing Filter Syndicate Co v Cunningham*, [1906]2 Ch. 34

⁶³ *ibid* 44 (Cozens-Hardy L J)

⁶⁴ *ibid*. 'They are not puppets, they are not even agents, they are servants of the company and at the end of the day they are the company.'

⁶⁵ *John Shaw & Sons (Salford) Ltd v Shaw*, [1935] 2 KB 113 (Greer LJ)

⁶⁶ *ibid*

⁶⁷ Saleem Sheikh, *A Guide to The Companies Act 2006* (1edn, Routledge-Cavendish 2008) 358

⁶⁸ Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) 366

⁶⁹ Susan Watson, 'The Significance of the Source of the Powers of Boards of Directors in UK Company Law' [2010] *Journal of Business Law*, Forthcoming http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695792 accessed 18 August 2015.

⁷⁰ Model Business Corporation Act 2006

⁷¹ *ibid*.s 8.01: This power is subject to the limitation in the AOA or in Shareholders agreement.

power shall be exercised according to constitution of the company.⁷² Most companies do not have special articles and most have not passed special resolutions to restrict the directors' powers, so the reality is that in most companies the directors can make any decision unless the Act says it needs a resolution in general meeting is required.⁷³

The Act of 2006 has solved the problem of ultra-vires doctrine. Earlier, the companies were supposed to write interminable objective clause to make it clear that it has power to do certain things. However, 2006 Act clearly states that if AOA does not put any restriction on the power of the company, the power of the company is unobstructed.⁷⁴ A company with no constitutional restrictions on its range of activities may in theory conduct an unlimited range of lawful activities.⁷⁵

Furthermore, in UK also the powers of the director have been divided into two manners: Directly exercised by the board and power exercised with the consent of the shareholders in general meeting. It is the duty of the director to in the interest of the stakeholder as whole keeping in mind the interest of the company to make it success.⁷⁶ The Act clearly states that all serving directors have right to inspect the document of the company and shall be accompanied by the experts, if required at all.⁷⁷ In addition to it, directors have the independent power to make provisions in the benefit of existing and former employees of the company keeping in mind the interest of the company as whole.⁷⁸ Some other powers have been given to the board that can only be exercised with the approval of the shareholders in general meeting or by the resolution of the board. To exercise this power, director has power to call general meeting of the shareholders.⁷⁹

⁷² For companies formed under the Companies Act 2006, there are different model articles and different model articles for public and private companies. (The Companies (Model Articles) Regulations 2008 will apply to all new companies incorporated under the Companies Act 2006 on or after 1 October 2009.). If articles are not registered, models are imposed on the companies

⁷³ Directors' powers' <http://www.companylawclub.co.uk/directors-powers>

⁷⁴ The Companies Act 2006, s 31

⁷⁵ John Davies, 'A guide to directors' responsibilities under the Companies Act 2006' (2007) CCET 26 <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/business-law/tech-tp-cdd.pdf>

⁷⁶ The Companies Act 2006, s 172

⁷⁷ *Conway v Petronius Clothing Co Ltd*, [1978] 1 WLR 72

⁷⁸ The Companies Act 2006, s 247: when the company's business ceases or is transferred wholly or in part.

⁷⁹ Company Act 2006, s 302

Power of Board in India under 1956 Act and 2013 Act

Two types of powers have been provided to the BOD under Law.⁸⁰ These powers have been conferred upon directors to enable them to discharge the function of superintendence, control, direction of management of the companies and also the administration of the affairs of the companies.⁸¹ 1956 Act as well as 2013 Act provided with the wide powers to the Board of directors and left it at the discretion of the companies to squeeze it as well. It is quite clear from the provisions of the act that powers of the directors are co-extensive with those of the company.⁸² “Subject to the provisions of the Act” puts limitation on their powers;

- Certain power may not be exercised by the BOD in terms of the provisions of the Act;
- The BOD may be required to do certain formalities in terms of the provisions of the act for exercising certain powers and doing certain things.⁸³

Now we examine the role of BOD under the 1956 Act as well as 2013 Act and under the other legal provisions. It is well settled that directors, do not act as an agent for the majority. Also, their power can't be taken away by the resolution passed by majority or unanimously in the general meeting. Once the power has been given to BOD they are only entitled to decide the manner in which it has to be performed.⁸⁴ It can be concluded that there is clear cut separation of power between the shareholders and BOD and is not subordinate or superior to each other.

Individual director per se does not have any power unless it is being delegated to him by the BOD. The power can be delegated to any committee of director,⁸⁵ managing director or any other principle officer of the company. Although it is not clear from any of the source or otherwise, to the effect that the maxim *delegatus non potest delegare* will no longer operate in India against the directors, its operation against them.⁸⁵ The delegated power of the BOD is specified in the proviso of sec 179(3) of 2013 Act.⁸⁶ Power which is exercised by the board by passing board resolution

⁸⁰General Powers of BOD and Power exercised with the consent of the members in General Meeting.

⁸¹M L Sharma, 'Position, Function and powers of the board of directors under the companies act 1956' [2006] 67(1) SEBI and Corporate Law 29

⁸²The Companies Act 1956, s 291 and The Companies Act 2013, s 179

⁸³M L Sharma, (n 81)

⁸⁴The Role of Directors or Board of Directors (Bod) in a Company?' <http://taxguru.in/company-law/the-role-of-directors-or-board-of-directors-bod-in-a-company.html>

⁸⁵R. K. Goel, 'Delegation of Directors' Powers and Duties: A Comparative Analysis' [1969] 18(1) The International and Comparative Law Quarterly 152-177, 156

⁸⁶(d) to borrow monies;(e) to invest the funds of the company; (f) to grant loans or give guarantee or provide security in respect of loans;

in the meeting: to make calls on shareholders in respect of money unpaid on their share, power to authorize the buy-back of securities, power to issue debentures, power to borrow moneys otherwise than on debentures, power to invest the funds of the company and power to take and make loans, to approve financial statement and the Board's report, to diversify the business of the company, to approve amalgamation, merger or reconstruction, to take over a company or acquire a controlling or substantial stake in another company, any other matter which may be prescribed.⁸⁷

Apart from this, BOD has power to form opinion about the solvency of the company in respect of buy back shares⁸⁸ power to fill up casual vacancies in the office of directors by appointing alternate, additional and nominee director,⁸⁹ power to constitute Audit Committee, nomination and remuneration committee and stakeholder relationship committee and specify terms of reference thereof,⁹⁰ power to make donation to political parties,⁹¹ contribution to the defence fund,⁹² power to accord sanction for specified contracts in which one or more directors are interested,⁹³ power to receive notice of disclosure of director's interest,⁹⁴ power to invest in shares or debentures of any other body corporate,⁹⁵ power to make a declaration of solvency, where it is proposed to wind up the company voluntarily,⁹⁶ power to approve the text of advertising for inviting public deposits.⁹⁷ Some of the powers can only be exercised by resolution passed at the meeting with consent of the Directors present at the meeting.

Certain power of the BOD can be exercised only through passing of resolution in a general meeting under the 2013 Act. This applies to all companies whether private or public, and requires a special resolution. Under the 1956 Act, these powers were restricted to only public companies

⁸⁷ Companies Act 2013, s 179 corresponding Ss 291,292 Companies Act 1956.

⁸⁸ Companies Act 2013, s 68 corresponding s 77A Companies Act 1956

⁸⁹ Companies Act 2013, s 161 corresponding s 313 Companies Act 1956

⁹⁰ Companies Act 2013, Ss 177,178 corresponding s 292 A of Companies Act 1956

⁹¹ Companies Act 2013, s 182, corresponding s 293A(2) of Companies Act 1956

⁹² Companies Act 2013, s 183, corresponding s 293B of Companies Act 1956

⁹³ Companies Act 2013, s 188, corresponding s 297(4) of Companies Act 1956

⁹⁴ Companies Act 2013, s 184, corresponding s 299(3)(c) of Companies Act 1956

⁹⁵ Companies Act 2013, s 186, corresponding s 372A of Companies Act 1956

⁹⁶ Companies Act 2013, s 182, corresponding s 488(1) of Companies Act 1956 [Section 488(1)]

⁹⁷ Companies Act 2013, s 73, corresponding 58(A) of Companies Act 1956

to be exercised by passing ordinary resolution. The private companies have now been brought at par with the public companies and they are also subject to stringent control and regulation.⁹⁸

In case of any clash of powers between the board and the general meeting, the opinion of those will prevail in whose sphere the power is listed. In the case of a matter which is not positively listed one way or the other, it will depend upon whether it pertains to management or is such a residual matter which ought to go before the ultimate controllers or the company's destiny, namely, the general body of shareholders.⁹⁹

CONCLUSION

The concept of corporate governance and the role of director in corporate governance are very much prevalent in current scenario. The board should be accountable to the stakeholders. The board is appointed by the shareholders and is accountable to them for the company's progress and actions. The board has to ensure that they direct the company effectively and that they retain the confidence of the shareholders. Accountability implies acceptance by the Board of its responsibility for any decision or course of action adopted by it, the consequences thereof, and a commitment to resolving any issues that arise as a result. Both are fundamental tenets of corporate governance.¹⁰⁰CA 2013 has introduced significant changes regarding the board composition and has a renewed focus on board processes. However, some changes are made in the Act and these changes are a step in the right direction. Since, the new act has been tried to maintain the gender diversity in the boardroom by making compulsory appointment of women in board. However, it would have been better approach had it been the compulsory appointment of women as independent director. Further, the discretion has been given to the company in case of appointment of small shareholders directors. But, the law is silent on his accepting directorship in any other rival company after completion of his tenure. There is no cooling period for accepting such appointments in rival companies. Also, the liability of the nominee directors

⁹⁸G D Agrawal, 'New Prespective for national companies-private companies brought at par with public companies by companies act, 2013' [2014] 119 CLA (Mag) 44-49, 47

⁹⁹Ramaiya A, *Guide to the companies Act* (17th edn, Lexis Nexis India 2010) 3537

¹⁰⁰ King's Report on Corporate Governance for South Africa, King Committee on Corporate Governance, Institute of Directors. (July) 2001 at page110

should be specified in the Act. Appointment of independent directors in the board is a very significant step towards the corporate governance.

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Cases

Automatic Self Cleansing Filter Syndicate Co v Cunningham, [1906]2 Ch. 34

This case has discussed in detail about the effect of the distinction of power between the BOD and shareholders. That to sell the assets of the company and undertaking was a management decision. The court explained that, if any power is vested with the director through the AOA, then the shareholders can't interfere in the domain of the powers of board unless otherwise provided under the statute. The reason given by the court is since the directors are already been appointed by the members and subject to the limitation laid down in the AOA, the directors should be allowed to work according to their own standard.

Conway v Petronius Clothing Co Ltd, [1978] 1 WLR 72

In this case, the director asked the court to make an order so that they can access the books of account for purpose of inspection. The court said that right to inspect is a common law right provided to every individual director so that they can carry out their duties in a proper way and also for the benefit of the company. It is an assumption that whenever the directors exercised

this right, they will exercise only keeping in mind the interest of the company and thus the directors are not supposed to cite any reason for the inspection of the documents.

John Shaw & Sons (Salford) Ltd v Shaw, [1935] 2 KB 113 (Greer LJ)

I have relied on the opinion of the lord Greer in this case. He observed that since the power to instruct for the bringing of the action was vested with the 'permanent director' only and not to the director per se. Further he said that the decision of those directors can't be taken away by simply passing any resolution of shareholders.

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Articles

Afra Afsharipour, 'Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts' [2011] 34 (4) Seattle University Law Review 1001

This article has discussed in detail about the ownership structure of the corporation. In this article, the author has explored the role of the directors in controlling the companies and emerging concept of independent directors in India. Further, it has divided the evolution of

corporate governance in India into two parts: the development of some industry group and clause 49 of listing agreement; introduction of corporate governance guidelines in response to the satyam scandal and amendment to the company act 1956.

Angualia Daniel, 'Balance of Power between Shareholders and The Board in Corporate Governance' (2010) <http://ssrn.com/abstract=1612962>

The central idea of this article is the balance of power between the shareholders in general meeting and the director in a corporation. The article has described that the power of shareholder is restricted and can only be exercised if permitted by the AOA and MOA of the company. The author further said that board has lots of power with it and failure to exercise this power in proper way leads to the failure of the corporation. Lastly, the article analysed the manner in which the principle of corporate governance should be implemented by the state and by the company.

Ayush Raj, 'The Concept of Independent Director' [2014] 3 CLJ 16-22, 18

This article examines the link between corporate governance and economic efficiency through the appointment of independent directors on the basis of research suggested for the institutionalization of the independent director. It argues the practical problem faced in relation to the function of the directors and has made some suggestion in proper and effective functioning of the board.

Beyond "Independent" Directors: A Functional Approach to Board Independence Source' (2006) 119 (5) Harvard Law Review 1553-1575

This article starts with the critical analysis of the definition of the Independent directors on the basis of disinterested outsider model, objective monitor model and unaffiliated professional model. It further examines the function of independent directors and how it would help in securing the good corporate governance. The argument put forth by the author that it is not the subset of independent director which will help in ensuring the good GC but the independent attitude of the unit of the board itself. Finally the article has described that is comprised of independent monitors, gray mediators, and managers.

Carsten Jungmann, 'The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board System - Evidence from the UK and Germany' [2006] 3 ECFR 426

In this article the author has discussed in detail the structure two tiers and unitary system of the board. The author has followed comparative approach to analyse the advantage and disadvantage of these board in ensuring corporate governance. The author has tried to find out whether full governance can be achieved through any of this structure.

Dr. Vrajlal Sapovadia & Akash Patel, 'Levers of Corporate Governance in India: Critical Analysis through Prism of Legal Framework' [2013]

The author has tried to describe CG in term of the sustainable relationship of amongst important stakeholders, growth the company and for growing economy. The article described succinctly the devices of CG and the main factors which have impact on the corporate governance in India. The author has divided these factors into two parts: Internal deals with shareholders, independent directors, audit & nomination committee and External: including auditors, Registrar of Companies, stock exchanges, Security Exchange Board of India and the Competition Commission of India.

G D Agrawal, 'New Prespective for national companies-private companies brought at par with public companies by companies act, 2013' [2014] 119 CLA (Mag) 44-49

Outlined in this article is how the 2013 Act hasan initiative which aimes to increse the higher compliance in the private companies which were absent in the 1956 Act snd stimulate the new concpet of upliftment of the democracy in private company also. SO that all national comnpany in india is on the march of its greatness and should not remain only in the sphare of business vehicle model.

Grit Tungler, 'The anglo American Board of directors and the German supervisory board- Marionettes in a puppet theatre of corporate governance or efficient controlling devices?' [2000] 12 (1-2)Bond Law Review 230-264

This article also discussed about the two tier and single tier structure of the board, their composition, size, responsibilities and their independence. In which structure, the board will be very more accountable and Suggestions for a More Efficient Supervisory Board.

John Davies, 'A guide to directors' responsibilities under the Companies Act 2006' (CCET 2007)

The author has discussed the role, power, function and duties of directors under the Company Act 2006. The author has discussed the new concept incorporated under the 2006 act which were absent in the earlier act. Also tried to find out the problems in the existing system by comparatively analysing the law of some other European countries.

M L Sharma, 'Position, Function and powers of the board of directors under the companies act 1956' [2006] 67(1) SEBI and Corporate Law 29: It just provides the commentary on sec 291 to 293 of the Companies Act 1956 by highlighting the opinion of different courts in India.

Pranav Mittal, 'the role of independent director in corporate governance' [2011] 4 NUJS Law Review 285-298

The author has analysed the emergence of independent director in light of the Satyam scandal. According to the author the basic idea behind the appointment of ID in board room was to deter fraud and mismanagement, inefficient use of resources, inequality and unaccountability of decisions. The author recommended that there is a strong need to define independent director on the basis of IFC model. The central idea of this article is to link up the presence of ID with the corporate governance with the help of the existing company act and the recommendation given by the different committees on this issue.

R K. Goel, 'Delegation of Directors' Powers and Duties: A Comparative Analysis' [1969] 18(1) The International and Comparative Law Quarterly 152-177

The author presents an idea on the delegation power of the Board in India by drawing analogy from the US law. He argues that direct possession of inherent powers of delegation and the existence thereof should not depend upon the authorization of shareholders. Further, a proper balance has to be struck between the board's inherent power to delegate and its ability to surrender its duties and delegate all its functions.

Ramaiya, Madhuryya Arindam, 'The Independent Director: Has it Been Indianised Enough?' [2013] 6 NUJS Law Review 230-271

This paper has discussed about the feasibility and viability of the ID as a tool for the CG in Indian context. Since, the concept has been emerged in the US in a completely different situation than what afflicts Indian listed companies. Moreover, both countries have different problems: in US, it is the agency problem which led to the emergence of the ID while in India,

the problem lies with the shareholding pattern. The main objective of this paper was to find out what further steps are required at the regulatory or legislative level.

Ryan M. Vassar, 'Comparative Corporate Governance: An International Review of the Corporate Board of Directors' (William Mitchell College of Law Research Paper Seminar: Comparative Corporate Governance, 2010)

The author has discussed the formation of structure of board in US and some other countries and the rationale behind its implementation, and its advantage and disadvantage. It concluded by comparing key differences between the approaches and determining which approach might be more favourable. The author has suggested that we should follow the hybrid approach.

S Tripathi, 'Comparative Board Structures under Corporate Governance Framework' [2013] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282924

The author has drawn a comparative analysis between India and Germany on the basis of board structure followed in these respective countries. The article gives an overview about the role and of different directors in the different structure of board and which should be followed to curb malpractice of corporation. The author has tried to conclude that Board structure is the only instrument which played an important role in achieving CG.

S venugapalan, 'Irani Panel's Recommendation on the board of directors' [2005] 63 (1)SEBI and Corporate Laws 13

The article discusses recommendation given by the Irani committee for the purpose of enacting new companies act. The author has figure out the various recommendation if the committee on the BOD, such as the qualification, remuneration and strength of the board and most of this recommendation has been incorporated under the 2013 Act.

Susan Watson, 'The Significance of the Source of the Powers of Boards of Directors in UK Company' Law [2010] Journal of Business Law, Forthcoming http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695792

The author has tried to solve the controversy whether the BOD are an agent of the shareholder or they have different status in itself. The article has dealt with the origin of power of board in UK by arguing that the entire power of board has been derived from AOA not from the statute and hence, indirectly it is a delegation of power by the shareholders to the board. In this article,

the author has tried to critically examine the shareholder primacy and agency theory under corporate law by comparatively taking into account the laws of Australia and New Zealand.

Vikramaditya Khanna & Shaun J. Mathew, 'The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence' [2010] 22NLSI Rev 35

This article critically discussed about the loopholes in the existing legal system regarding the role of independent directors in the boardroom. For this purpose the author is trying to draw an analogy from the role of ID in ensuring CG in US. The author further demonstrated the corporate governance requirement in india by interviewing some of the independent director on the boardroom culture, selection process, responsibility and so on.

Y PAPA Rao & Rajasree PR, 'Escalating The Concept of Corporate Governance in India through Women Directors: A Virgin Approach' [2014] 4 CLJ 100-112, 103

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