JETIR.ORG ISSN: 2349-5162 | ESTD Year : 2014 | Monthly Issue
JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR)
An International Scholarly Open Access, Peer-reviewed, Refereed Journal

CORPORATE CRIMINAL LIABILITY & CORPORATE GOOD GOVERNANCE IN INDIA: RELATION AND IMPORTANCE

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ABSTRACT:

We are in this world in an age in which companies alike in wealth to countries call the shots and control much of the earth's assets. Because corporate interfere in so many areas of social life, they must be accountable towards society and the environment. In India as in the rest of the world there is a rising realization that capital markets and corporations are, after all, formed by society and must therefore dole out it, not merely profit from it. And that consumers and citizens' movement can make all the difference. It has been pragmatic that the company does not exist by itself and is not an end to it. It is an limb of society. It exists for the sake of society. Free enterprises cannot be warranted as being good for company. Company can be justified only as being good for society. With companies more and more becoming larger than most governments in terms of the resources they command and the force they have on people's lives, it could be argued that corporate governance practices require as much notice from the public as that of government.

Hence, there is an urgent need to define the role of principles of corporate criminal liability in increasing corporate good governance. For this , first of all, we need to understand the concept corporate good governance and corporate social responsibility particularly the concept of public good and secondly, deterrent effect of the principles of corporate criminal liability in bring about reduction in 'the number and magnitude of corporate crimes.

KEY WORDS:

Corporate Good Governance, Corporate Social Responsibility, Corporate Criminal Liability, Economic Globalization, India

INTRODUCTION:

There can be no denying that in today's free market economy, the dictates of liberalization and globalization and the growing number of corporate scams like Enron and WorldCom have brought issues relating to the role and liability of the corporations specially the one relating to corporate criminal liability and corporate good governance to the fore. The adequacy and the quality of corporate governance shape the growth and the future of any capital market and economy. Corporate governance has succeeded in attracting a good deal of public interest because of its apparent importance for the economic health of corporations and society in general.

DEFINITION OF CORPORATE GOOD GOVERNANCE:

Today, the term **'Corporate Good Governance'** besides being a buzzword of the decade has almost become an accepted, one have come our with various statutes and regulations providing a definition and a framework for the Corporate good governance especially after the collapse of some of the big industrial empires in the developed part of the world. However, it's still difficult to provide a uniform definition that would encompass all facets that the term represents and in absence of the same, most of the companies end up complying with the statutory requirements rather than practicing the corporate governance in its true spirit for the improved performance and risk management.

The World Bank and other international financial institutions definition of it is given in the following terms.

"Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set and the means of attaining those objectives and monitoring performance".[1]

DEVELOPMENT OF THE CONCEPT:

It has also been observed that corporate governance is about promoting corporate fairness, transparency and accountability.[2]

Hence, in simple terms, corporate governance is nothing but such conduct on the promoting corporate that brings transparency and accountability to their actions and if corporate follow such conduct, it inevitably leads to better economic performance. Every company has to justify itself as an economically viable entity but more than that, it has to justify itself as a socially responsible one.

The seeds of modern Corporate Governance were probably sown by the Watergate scandal in the United States. As a result of subsequent investigations, US regulatory and legislative bodies were able to highlight control failures that had allowed several major corporations to make illegal political contributions and to bribe government officials. This led to the development of the Foreign and Corrupt Practices Act of 1977 in USA that contained specific provisions regarding the establishment, maintenance and review of systems of internal control. This was followed in 1979 by the Securities and Exchange Commission of USA's proposals for mandatory reporting on internal financial controls. In 1985, following a series of high profile business failures in the USA, the most notable one of which being the Savings and Loan eollapse, the ***Treadway Commission*** was formed. Its primary role was to identify the main causes of misrepresentation in financial reports and to recommend ways of reducing incidence thereof.

The Treadway report published in 1987 highlighted the need for a proper control environment, independent audit committees and an objective Internal Audit function It called for published reports on the effectiveness of internal control It also requested the sponsoring organizations to de develop an integrated set of internal control criteria to enable companies to improve their controls.

While developments in the United States stimulated debate in the UK, a spate of scandals and collapses in that country in the late 1980s and early 1990's led shareholders and banks to worry about their investments. These also led the Government in UK to recognize that the then existing legislation and self-regulation were not working. In 1987, the British Government set up the Serious Frauds Office to be responsible for investigating and prosecuting serious or complex frauds. Cadbury committee (1993) is also another important draft on this point, followed by Green bury committee.

INDIAN RESPONSE OF CORPORATE GOOD GOVERNANCE:

[1] OECD April 1999, Available at Iittp:i/wwv.oecd.org/dataoecdI41 2:2956774pdf last visited on Aug 10,2005 at 11:30 A.M. This OECDs definition is consistent with the one presented by Cadbury [1992, page 15]. OECD Committee also linked good governance to participatory development, human rights and emocrarisation, and identified the rule of law, public sector management, controlling corruption and ucmg excessive military expenditure as important dimensions of good governance.

[2] Wolfensohn. J., President of the Word bank, as quoted by an article in Financial Times, June 21, 1999 Accountability is a core element of governance as is equity, transparency, participation and adherence to the rule of law.

In India as in the rest of the world there is a growing realisation that capital markets and corporations are, after all, created by society and must therefore serve it, not merely profit from it. And that consumers and citizens' campaign can make all the difference. Because, corporations
intervene in so many areas of social life, they must be responsible towards society and the environment. In India, the process of corporate governance gained momentum with the submission of Report on Corporate Governance by Kumar Mangalam Birla committee appointed for the purpose. Based on the recommendations of the Committee, the governance processes have been codified and made mandatory by way of incorporating a new Clause, i.e., Clause 49, in the Listing Agreement. Since then, there have been frequent changes in the field of corporate law aiming at better corporate governance.

The Indian Companies Act, 1956 contains the basic law relating to the companies in India. It provides right and liabilities to the companies considering it both a business institution and a social institution Section 291 of the Companies Act 1956 is notable in this regard which makes powers of directors in corporate management coextensive with those of the company itself. At the same time, managers are made responsible for the acts done by or on behalf of the company' 155 under Section 5 of the Act which deals with 'Officers in default' The said Section specifies seven categories of officers of a company, who shall be treated as officers in default, irrespective of whether they were a party to the default or not Further, under Section 253 only individuals can be appointed as directors of a company.

The idea behind Section 253 is that as the office of a director is to some extent an office of trust, there should be somebody readily available who can be held responsible for the failure to carry out the trust and it might be difficult to fix that responsibility if the director was a corporation or an association of persons' 156 The Act also provides the legal basis for venous corporate governance norms that are considered essential for proper corporate operation and protecting the rights of stakeholders. For example, provisions relating to fraudulently inducing persons to invest money.

Violations of such norms are defined as offences with associated penalties. Hence, under Indian law, legal provisions on corporate criminal liability and corporate social responsibility both are incorporated in the same act.

But, merely following the codified provisions may not deliver the desired results. Rather, good corporate governance and effective management should be reflected in the day-to-day corporate functioning enmeshed with ethics and a sense of accountability towards various stakeholders. The corporate action should be within the four corners of the law. Companies should not only follow letter of law but the spirit should also be honored. The companies have a responsibility towards the society in which they work. Their social responsibility extends to consumers, workers, shareholders and to the community. Their economic power must be used for the welfare of the society. Observation of Bhagwati, J. would not be out of place here:

". . . maximization of social welfare should be the legitimate goal of the company. Company should not only be responsible to share holders but also to workers, consumers and the members of the community and should be guided by considerations of national economy and progress."[3]

Equally important in this regard is the concept of corporate citizenship. It has been observed that the Company shall be committed to be a good corporate citizen, not only in compliance with all relevant laws and regulations, but also by actively assisting in the improvement of the quality of life of the people in the communities in which it operates. with the objective of making them self reliant Such social responsibility would comprise, to Initiate and support community initiatives in the field of community health and family welfare, water management, 'vocational training, education and literacy and encourage application of modem scientific and managerial techniques and expertise This will be reviewed periodically in consonance with national and regional priorities. The Company would also not treat these activities as optional ones, but would strive to incorporate them as integral part of its business plan. The Company would also encourage volunteering amongst its employees and help them to work in the communities. The Company is encouraged to develop social accounting systems and to carry out social audit of their operations.

NEED AND IMPORTANCE FOR CORPORATE GOOD GOVERNANCE:

Today, corporate good governance is at centre stage of the both national and international agenda. No single term has come to dominate development discourse in the new millennium as much as ‘corporate good governance’. The governance systems affect the way the company functions and hence impact its performance. Corporate good governance is the social, legal and economic process by which companies function and are held accountable. It is the system by which companies are run. Corporate good governance is indispensable to effective market discipline: Corporate good governance is the in thing today.

Commenting upon the importance of the corporate good governance in bringing economic stability, Mr. James Wolfensohn, President of the World Bank, once remarked that “the proper governance of the corporations is now as important in the world economy as the proper governing of countries”. The aim of good governance is to facilitate growth and nurturing of the corporations while ensuring that it remains accountable for the power and patronage it exercises. For such governance to be achieved there will always be the need for self-regulation by the company and external regulation by law, i.e. the Government, the regulatory agencies, professional standard setting bodies, organizations of different stakeholders etc.

Even the legislators today are more concerned with ensuring that companies are carrying on their business in accordance with-sound ethical principles. The society, too, today has become alive to the manner in which companies operate. Need for a good governance culture in a company became a burning issue, especially after the crisis in the South East Asian economies in the mid-nineties and the failure of Enron, WorldCom in the world’s largest free economy and capital market, the United States of America. The breakdown of ethical values in governance in these economies - emerged as the main culprit behind the mega economic and corporate collapses in South East Asia and the USA.

Corporate good governance also known as the Corporate Social Responsibility (CSR) is the government and business community response to growing public pressure to make corporate entities socially responsible and accountable for their act and omissions. While there is no agreement on a clear definition of corporate good governance or corporate social responsibility, there seems to be a growing recognition that the social responsibility of the corporations is much more than a mere involvement in social affairs and charity at a complete discretion of business.

Corporate good governance may be broadly viewed from two perspectives socialist and capitalist. From socialistic perspective, it is about nurturing enterprises while ensuring accountability of the board towards the stake holders From the capitalistic Perspective it is about maximizing value for shareholders subject to meeting the financial and other legal contractual Obligations Corporate governance practices pervade through a wide range of issues, from economic to social, from internal structures and processes to External influences through markets, from efficient functioning of the board to day to day control systems; and above all from qualitative issues to quantifiable ones.

Corporate good governance is based on the principles of transparency, accountability, fairness and responsibility. Corporate good governance demands that the business institution possesses a high level of internal efficiency and resilience. It should have a definitive structure and should be sensitive to the needs and aspirations of the citizens. Corporate good governance also promotes higher productivity, better quality and lower costs. Good corporate governance practices reward the companies who observe them regularly or make it a part of their policy framework. The presence of an effective governance system, within a company and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of a market economy. As result, the cost of capital is lower and firms are encouraged to use resources more efficiently, thereby underpinning growth.

Another reason why the issue of corporate good governance has assumed so much significance is the fact that the world has shrunk to be a global village, thanks to the information technology revolution and the free trade and economic liberalization policies being adopted by nations the world over. As a result, there has been a huge surge in the concept of multinational corporations, which have investors, employees, and other stakeholders, across national boundaries. Thus, a breakdown of 'governance' in one country of operation of such MNCs and the resulting corporate failure is bound to have a domino effect all over the globe and not in just one country. Therein lays the importance of a good governance culture for all the stakeholders of such MNCs.

To fulfill the societal expectations and provide good governance, statutory compliance by the companies is a pre-requisite. A measure of good Corporate Governance lies in bridging the gap between the precept and practice of multiple statutes by the company effectively and to comply with various statutes and regulations framed there under, towards the ultimate aim of protecting the interest of investors' democracy.

ROLE OF CORPORATE CRIMINAL LIABILITY IN CORPORATE GOVERNANCE:

The role good corporate governance plays in promoting national competitiveness, economic / financial stability, growth, job creation, poverty alleviation and higher living standards is quite visible in our daily life. The stringent penal provisions not only ensure their compliance but also can be of great help in bringing about considerable reduction in the number of corporate crimes be they economic or white crimes or violations of statutory regulations under welfare laws. It can be said that the purpose of sentencing a corporation is, therefore, to compel a change of behavior in the group and to induce a 'clean corporate culture'. Further, Corporate wrongdoers are not motivated by the altruistic desire to benefit shareholders. Instead, they commit crimes to benefit themselves.

In relation to economic crimes, it has been observed that disclosure and transparency affect both a company's operations and its performance as an investment. Operationally, rigorous disclosure and transparency systems enable management and the board of directors to allocate resources rationally and to run the business in accordance with strategic plans. In this respect, disclosure and transparency to managers and directors influence the company's ability to generate cash flows, its intrinsic value. Financial corporations like banks and money lending institutions play a dominant role in regional and national finance. Shortcomings in the governance of banks not only lower returns to the bank's shareholders, but, if widespread, can destabilise the financial system To restore confidence to both debt and equity markets, policy-makers and regulators need, in addition to ensuring adequate banking laws and regulations and supervision of banks' operations, to promote sound corporate-governance practices in the banking sector. .

The regulation and governance of financial institutions play a threefold role in corporate governance. The continuing need for equity capital often drives good corporate governance, since a company's track record with equity investors greatly determines its ability to raise funds through secondary issuances. Where this need for equity is reduced by soft lending practices, companies have less need to return to the equity market for additional capital and therefore less reason to care about how the equity market views their governance. Second, effective monitoring by lenders can help prevent or catch borrower problems or abuses that might otherwise go undetected by the debtor's shareholders finally, good financial-institution governance promotes returns to the institution's own investors, which, in turn, promotes financial-system stability.

Not only a higher standard of corporate good governance contributes to economic progression, the failure to maintain standards brings in major shocks to the economy. Commenting upon the need for greater corporate accountability to reduce number of human right violations by the corporations, some human rights activists have observed that:

"Economic globalization has prolonged the reach of corporate power and it is more urgent than ever that companies be brought within the rule of human rights law. Voluntary initiatives by themselves are not enough -- deliberate approaches only work for the well intentioned. The historical veracity is that some form of legal framework is essential to hold back abuses as corporate bodies have an equally important role to play in caring and developing human rights around the world."

In the same way, if corporations are held liable for their actions ensuing in the loss of human life with the help of corporate killing model, they will be forced to implement requirement of various corporate liability laws such as those relating to safe working conditions, helpful in ensuring compliance with security and safety norms, scheming pollution and degradation of the environment and even to reinstate land and natural wealth. This as a result will help in reducing the number of accidents inside and outside the factory premises due to injurious working conditions.

This will additional reduce the option of repetition of accidents like, Bhopal Gas leak case. Hence, corporate criminal liability and corporate good governance both are interconnected and interdependent concepts and both and equally helpful in ensuring obedience of each other.

CONCLUSUION:

The law have conferred and assigned a special position to the companies, which is not available to other forms of associations. It expects the companies to add for the growth and development of the nation. The companies are anticipated to perform their "Social responsibilities" so that people can enjoy a qualitative life the role of the companies is so important that we can see provisions moving and regulating their functioning in almost all the spheres of life. This is mainly, so in a country like India which is a "Welfare State" by nature. The State makes various laws and regulations keeping in mind its welfare state role.

Hence, a balance ought to be maintained between social responsibilities of the company on the one hand and conferment of absolute independence and freedom from interference upon the company on the other. In the present state of affairs companies play a very important role in the growth and development of nation. Thus, they should be encouraged and aggravated to contribute more. This can be achieved by providing them extra benefits, concessions and privileges. Their functioning and operations should not be made complex by forcing them to comply with needless and technical official procedure. In fact, the various technical and procedural formalities governing them should be made more liberal and basic so that the "corporate governance" can become a real and effective governing force.

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