Pakistan Economic and Social Review
Volume 59, No. 1 (Summer 2021), pp. 27-50

CONCEPT OF COMPANY VIS-À-VIS DIRECTORS' DUTIES IN MODERN HISTORY OF CORPORATE LAW: A COMPARATIVE STUDY

TAUSEEF IQBAL AND MUHAMMAD MUMTAZ ALI KHAN*

Abstract. In comparative legal scholarship, particularly comparative corporate law, the major studies are directed towards comparing the current legal provisions, while legal developments of these provisions are sporadically investigated. Still where such an attempt has been made, the arguments therein are rarely substantiated with any descriptive analysis of statutory laws. This article analyses, in historical perspective, the substantive legal provisions of different jurisdictions in the period 1850-1910. After conducting a detailed study of the developments of company laws in these countries, it is argued that politico-economic factors coupled with political ideologies at national and international level, are the prime reasons for the legislation of company law. These factors are common irrespective of legal family the country under study belongs to.

Keywords: Company Law, Comparative Law, Corporate governance, Duties of Directors, History

JEL Classification: K10, B10

*The authors are respectively Senior Assistant Professor at Bahria University, Islamabad and Director at Punjab Higher Education Commission, Govt. of the Punjab, Lahore – Pakistan.
Corresponding author's e-mail: mumtaz.ali@punjabhec.gov.pk

I. INTRODUCTION

In recent years, much attention has been devoted to the current issues of comparative corporate law such as impact of shareholders' activism on board decisions or shareholders' litigations etc. However, the developments of legal solutions of these issues especially in comparative perspective are utterly missing in legal discourse. The current research discusses comparative legal developments of company law, in particular director's duties in modern times. For the purpose of this study, four leading jurisdictions, namely US (Delaware), England, France and Pakistan, have been chosen to figure out the factors which were underpinning company development across these jurisdictions. By including countries from both civil and common legal families, it is intended to show that there were hardly any differences in these countries as far as corporate law developments are concerned. The various legislations and case laws of each era of development are substantially consulted in order to support the thesis of this work. The research primarily centres upon director's duties as well as the changing concept of company in modern history. Since modern legal developments roughly expand over last two centuries, the research is divided into three phases that correspond to the shift in the understanding of company. The first phase roughly expanded from mid-19th century to first decade of 20th century, the second from 2nd decade to 8th decade of 20th century while the last phase starts from 1980 and still continues (Talbot, 2007).

This article only deals with the first phase of comparative company law developments discussing the enactments and case laws of 19th century wherein interests of one stakeholder of the company, namely shareholder, were dominating. Sometimes, even the whole legislation was passed to secure or promote those interests although such an inclination was not without compelling reasons as discussed below. Therefore, the direction of director's duties was evidentially aligned to achieving the best interests of shareholders.

THE FIRST PHASE OF DEVELOPMENT

This phase starts with the last half of 19th and ends with first decade of the 20th century. Special company law statutes were introduced in all jurisdictions eschewing the need of special charter to be obtained either from the king or parliament. Previously each company would approach the state's sovereign and start the business only if such an approval was obtained (Murphy, 2007).[1] The law of the period tended to accept shareholders as dominant actors in the affairs of a company. Predominantly a company had a functional role i.e. to earn profit for the shareholders. Likewise, directors' duties were directed to that functional approach of company. It is also noteworthy that company laws of that era were not immune from the influences of socio-economic factors. The following subsections will analyse company law legislations that were enacted during this period, different aspects of director's duties as well as factors influencing these developments.

ENGLAND

In England, the formal journey of modern company law starts with Joint Stock Companies Act 1844 (Kingdom, 1844). The Act provided for registration of a company by doing away with the charter-granting prerogative of the Crown. Under the Act the proposed company, at the time of registration, had to submit to registrar a deed setting out the details as required in schedule A of the Act. This schedule, inter alia, provided for the qualification and duties of directors, thus para 29 empowering shareholders to regulate director's duties. This Act, for the first time, defined director as the one who directs, supervises and manages company's affairs.

The company, under the Act, was closer to a partnership than a modern corporate entity. English Court in Re the Prince of Wales Life

---

[1] After King Louis XIV, France was in the state of bankruptcy and John Law's system proposed new structure that included establishment of bank to overcome currency shortage and a trading company to help reduce state debts. For the time being, the system flourished and immense surge was seen in the price of shares was seen. People swapped government debts with company shares and in months share price surged. However, this bubble burst when balance of payment problem arose due to excessive money and in 1720, through a royal order, value of share and banknote was reduced to almost half resulting in total mistrust on banking and capital market. In England also South Sea Company with almost same object was created whose share's sale/purchase met with same fate. To curtail these trends Bubble Act was passed in 1720 that banned joint stock companies in Britain unless company is chartered by parliament.

and Educational Assurance Company[2] held the company as partnership that is incorporated in which shareholders are dormant and directors are active partners. For all major decisions affecting shareholders, directors were duty bound to get their approval. Directors could not sell or purchase shares of the company or extend loan to fellow directors except so approved in general meeting (Kingdom, 1844, p. Section 27). Similar was the case regarding contracts between company and director in which directors would be interested either directly or indirectly (Kingdom, 1844, p. Section 29). Directors were also responsible, under the Act, to maintain account books of company and got them verified from auditors (Kingdom, 1844, pp. 34-5). Although the Act granted legal personality to a company through the process of registration, it still lacked an important feature of modern company i.e., limited liability. Shareholders were liable for the debt of the company while possessing correspondingly powerful role in company's affairs-the facts that fits to partnership than the modern company.

In the same year, the Winding Up Act 1844 (Kingdom., 1844) was enacted to liquidate companies which could no longer continue their business. According to the scheme of the Act, directors were required to present all accounts and books before the court prior to the confirmation of company's bankruptcy (Kingdom., 1844, pp. Section 12-15). The Act favoured shareholders, who still had unlimited liability, by giving them the right to approach the court for ascertaining the causes of company's bankruptcy. Resultantly the prosecution of delinquent directors/persons and cessation of company's existence might ensue (Kingdom., 1844, pp. Section 26-7). The provision aimed at compensating shareholders who still had unlimited liability for the debt and losses of company.

An important feature of modern company and natural corollary of separate personality of a company was not granted untill passing of Limited Liability Act 1855 (Kingdom T. P., 1855). All new companies or existing unlimited liability companies might obtain limited liability privilege upon fulfilment of certain conditions namely, share capital cap, solvency of company and addition of the word limited in the name of

2 The Prince of Wales Life and Educational Assurance Company against Robert Palmer Harding, Official Manager of the Atheneæum Life Assurance Society, [1858] 120 ER 477(Eng.).

company amongst others. Directors were required, while declaring any dividend, to consider that the dividend payment would not bring insolvency to the company (Kingdom T. P., 1855, p. Section 9). The next year, Joint Stock Companies Act 1856 (Kingdom T. P., The Joint Stock Companies Act 1856 (19 & 20 Vict. c.47), 1856) was passed which consolidated different company law legislations including winding up law and helped remove many ambiguities. The Act for the first time provided for the office of inspector to examine company's affairs who would be appointed either by Board of Trade[3] on member's application or by special resolution of members (Kingdom T. P., The Joint Stock Companies Act 1856 (19 & 20 Vict. c.47), 1856, pp. Section 48-52).

The modernization of company law was not without cost and thus the process of legal reforms continued to buckle down the emerging problems especially faced by shareholders. Thus, the next legislation that surfaced was Companies Act 1862 (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89)) which is also termed a masterpiece of legislation (Evans, 1859).[4] Although, it was based on previous acts but had some new features that aimed at further simplifying registration procedure (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89), p. Section 17), introduction of a company limited by guarantee (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89), p. Section 9), inclusion of previously excluded insurance companies under its umbrella (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89), p. Sectin 209), transfer of winding up jurisdiction to the Court of Chancery (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89), p. Section 170), abolishing the office of creditor's representative during winding up etc. Matters regarding management and administration of companies were left flexible besides providing default Table A that could be modified at the time of registration of the company (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89), p. 1st Schedule). Statutory duties of directors further augmented in respect of record keeping and transparency provision and directors could be liable to fine if

3 Board of Trade was a sixteen member's body of British Government and dealt with matters relating to patents, trademarks, company regulations, labour etc.

4 The Act with expansive scope also helped to achieve a visible increase in company registration which was previously sluggish even after Limited Liability Act 1855.

they knowingly contravene these provisions. In winding up proceedings, this Act empowered the Court to order producing of all books, monies, registers and other documents of the company in order to extract information regarding the trade or estate of the company (Kingdom T. P., The Companies Act 1862 (25 & 26 Vict. c.89), p. Section 115).

In response to commercial frauds perpetrated against shareholders' wealth, Director's Liability Act 1890 was passed. The Act held directors, promoters and officers of the company personally liable if prospective shareholders suffered any loss because of the information contained in prospectus.

To tackle widespread fraud entrenched in British business circles to lure investors, Board of Trade appointed the Davey Committee in 1894 that submitted its report in 1895 (Robb, 2002).[5] The committee also recommended a draft bill that was passed later in 1900. The committee proposed an objective duty clause whereby director should act prudently and to make good to the company in case of default to perform that duty (Davey, 1895, p. 179). Drastic changes regarding duties of director were recommended but legislature struck them down on the ground that such amendment would discourage a prudent and honest man from accepting directorship. However, its recommendations regarding share qualification of directors and prior consent to becoming a director were incorporated in 1900 Act.

The chain of legislation resulted in more exacting duties of directors to better safeguard the interest of shareholders. This trend had it consequence where even honest directors were becoming too vigilant in accepting this office. Thus, to ease the situation, the Loreburn Committee of 1906 recommended to empower the Court to relieve any director of liability for negligence or breach of trust if he acted honestly. This recommendation was made part of Companies Act 1907.

---

5 Stock Fraud includes creating market for share by way of dummy applications for shares sale/purchase of share even before full allotment thereto (Eupion Gas Company 1874). Similarly management frauds include hiding actual information from shareholders, embezzlement of company assets, and misuse of company's fund (Artisans' Dwelling Company).

The question of conflict of interest of directors remained a key area in company law development. Where any director becomes party in a contract/transaction of the company, a reasonable doubt would arise in shareholder's mind as to which side of the transaction the director is playing? If being a party to contract, he pursues his personal interest, the interest of company/shareholder would be at stake although he was hired by shareholders for fostering their interests. Thus, the issue of self-dealing went through similar changes in different phases of company law developments. English Court in famous case Aberdeen Railway Company v Blaikie Brothers (Aberdeen Railway Co v Blaikie Brothers, 1854) held down a contract in which director of the company was also the partner of another contracting firm. Lord Cranworth regarded directors as agents who owed duties to the company and opined ".no-one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect". The self-dealing issue, however, has seen transformation since then.

DELAWARE

Delaware, being a British colony in 18th century, continued to keep English laws in force after independence. Delaware Constitution of 1776 continued English common and statutory laws that were in practice at that time. Notorious Bubble Act and its repeal were also extended to American colonies in 1744. The practice of granting charters to corporations was exercised by legislature, as was the case in England.[6]

However, Delaware Constitution of 1831 put restriction upon legislature for grant of incorporation charters. All new incorporations would require 2/3 majority of both houses, and incorporating act would last for twenty years exempting only those corporations having public improvement work (The Constitution of the State of Delaware, 1831, p. XVII). Gradually work of legislature for granting special acts amplified and by 1875 it became indispensable to enact a general law of

6 Bank of North American was the only corporation ever to have received charter from Delaware legislature in 1786.

corporations. The legislature was empowered though an amendment in the Constitution to frame an enactment for corporations. Interestingly concept of limited liability of shareholders had emerged in Delaware in the first decade of 18th century (Livesay, 1968, pp. 171–194) prior even to England wherefrom it had inherited corporate laws.[7]

First General Corporation Act was enacted in 1875 with limited scope. Section 9 provided duties of directors and officers included running the affairs of the company and the maintenance of capital. This Act provided regulations in different forms for different types of companies. The Act, however, had a cumbersome procedure.

The Act of 1883 (The Delaware General Corporation Law, 1883) was the first comprehensive legislation in terms of company law developments of that era. This Act provided more details regarding appointments, qualifications and powers of directors and officers (The Delaware General Corporation Law, 1883, pp. Section 23, 25-6). Directors were to conduct company business and to get recorded share capital or increase thereof (The Delaware General Corporation Law, 1883, pp. Section 17-20). The Act also provided for the winding up of company and obliged directors, if deem fit and resolved thereof, to call the meetings of shareholder in order to obtain their approval for winding up (The Delaware General Corporation Law, 1883, p. Section 21). When company stood dissolved, directors etc. were to act as trustees until the final settlement of company's account (The Delaware General Corporation Law, 1883, p. Section 32). The procedure for incorporation, nonetheless, remained cumbersome (Arsht, 1976, pp. 1-21).[8]

In the year 1897, an important development took place whereby legislature was divested of making, amending or renewing corporation's law except for certain matters of public interest. These matters related to incorporation of municipalities, banks and charitable purpose etc (The Delaware Constitution, 1897, p. Chapter IX). Legislature however retained powers of revocation of corporation where abuse of corporate

---

7 The late arrival of limited liability in England in 1855 is mainly ascribed to lack of jurisdictional competition as was existing in American states of that time.

8 Despite general corporation law, special acts of incorporation by legislature didn't reduced. In 1897 approximately 115 special acts regarding incorporation were passed compared to only 10 incorporations under general act of 1883.

power took place. Furthermore, legislature by 2/3 majority of both houses avowed for a general corporation act.

First general incorporation law under the new Constitution was enacted in 1899; an Act heavily drawn from New Jersey corporation law. At the advent of 20th century Delaware could claim to have modern corporation law. The Delaware General Corporation Law (The Delaware General Corporation Law, 1899) was applied to all private corporations except banks. The most important development was the doing away with cumbersome procedure of incorporation. The Act provided different provisions for different types of companies. Each company had, beside general powers, certain specific powers peculiar to the nature of business.[9]

Regarding directors, there was not much difference in their status and responsibilities as was provided in previous Act of 1883. Section 2 of the Act authorized companies to make bylaws for the management of the companies. An important amendment in 1901 (Delaware General Corporation Law Amendment Act, 1901, pp. Section 5-8) provided that certificate of incorporation may contain provisions to define, regulate or limit the powers of companies or its directors in order to conduct the affairs of business. Resultantly it was left upon company's bylaws to determine powers and duties of directors where shareholders might validly exercise their influence.

In last quarter of 19th century, it was common in US that any self-dealing contract between a company and its directors could be avoided at the option of either the company or its stockholders irrespective of the fairness or otherwise of the contract (Enriques, 2000, pp. 297–333). The fact alludes to the importance of shareholders whose consent and not the fairness of contract was relevant. In Delaware, courts at that time relied heavily on decisions of other state courts, especially New Jersey Court and plenty of such references in Delaware legal discourse can be found. Director was considered as trustee and any contract between a company and director was not altogether void, nonetheless voidable at the option of cesti que trust. Even the fairness of contract was irrelevant for that

9 Different types of companies with special powers included Loan and Building Associations, Railroads, Telegraph and Telephone companies.

purpose (Smith, 2018, p. 41). Mr Justice Dixon in (Stewart et al. V. Lehigh valley railroad Co, 1875) remarked that board of directors should not support contract between a company and a director only because the director had abstained from decision-making. Instead, the participation of interested director should be in favour of shareholders who were appointed him as director and he should make good of any advantage he obtained because of that contract.

FRANCE

In France, Colbert's Ordinance (France, 1673) was the first commercial code. It provided two types of business structures; partnership (société générale) providing unlimited liability of partners, and limited partnership (société en commandit) with both active and sleeping partners, where active partners had unlimited liability and sleeping did not (France, 1673 , pp. Article 7-8). The Ordinance did not make any mention of joint stock companies (JSC) that enjoyed royal patronage and special consent. Law on these companies was said to be more liberal than other countries. It did however lack the characteristics of limited liability and share transferability. Only after 1780 did these characteristics start appearing in company charters (Freedeman, 2011).

An important legislation in the form of Commercial Code 1807[10] embarked a new era in the development of French company law which was influenced from Colbert's code. In addition to the existing two forms of business organizations, the Code recognized joint stock company (société annonyme).[11] The latter can be called the ancestor of modern public limited company that intended to fit huge businesses. However, it still needed formal royal consent to start business.[12] Under the regulations provided by interior ministry, the procedure for registration was quite cumbersome.

---

10 Code de Commerce (10–15 September 1807), Bulletin of laws No 164, p 161 (hereafter referred to 1807 Code) (Fr.).

11 Id art. 19

12 Explaining the motives of such consent Regnaud de Saint-Jean d'Angléy, a councillor of state, said that this company attracts public investment even poor investor. It might tend to bad administration and loss of public investment if not properly supervised by state. See René Piret, René Piret, ... L'Évolution de la législation belge sur les sociétés anonymes 23 (Paris, Casterman (imprimé en Belgique)) (1946)

Under the Code, joint stock company (JSC) was to be managed by temporary representative (mandataires à temp) who might or might not be shareholder or being remunerated or not by company.[13] The practice of temporary representative had been existing in big companies before becoming part of the Code.[14]

At the advent of 19th century, the practise of impairing capital of a company was present. Directors of companies had the duty to make returns to shareholders even if company earned no profit. For that purpose existing capital of the company might be used that might impair company's capital. From 1820 onwards and upon the implied wish of Conseille d'Etat,[15] company's charter started providing for maintaining minimum reserve in company's account. Once that reserve was attained only then a company could pay dividend to shareholders. Consequently, later charters of companies started to provide for the dissolution of company if its capital reduced to a certain fraction of company' capital (Freedeman, Joint-Stock Business Organization in France, 1807–1867, 1965).

For the regulation of company, Conseille d'Etat did not prefer to lay down any standard charters. In practise, the charters of companies were not uncommon which inter alia dealt with appointment, election, powers and duties of managers and directors. Thus, duties and functions of the directors were left at the choice of promoters or shareholders of the company. These functions and duties were not different from contemporary companies in other countries (Freedeman, Joint-Stock Business Organization in France, 1807–1867, 1965).

Despite some relaxation by government to simplify procedural hurdles of creating and sustaining JSC[16], French business had, contrary to its English counterpart, the choice of limited partnership (société en

---

13 1807 Code art. 31

14 Paul Barby, Le Régime actuel de l'administration des sociétés anonymes 20 (Sirey) (1943)

15 Conseil d'Etat is a body in France that acts as legal adviser of the executive and supreme court for administrative justice.

16 The registration procedure for SA was detailed out in regulation of Interior Ministry in 1807. The procedure was further refined and simplified in 1817 and 1818 but still *Société en commandite* had the edge of simple procedure.

commandite par action). The judicial recognition of issuing bearer shares by active partners of latter form of business paved the way for competing French JSC. The limited liability of sleeping partners and absence of requirement of royal charter also attracted businessmen to run large or medium size business without resorting to cumbersome formalities of JSC. Resultantly JSC was being used under the mask of partnership.

Since under the law sleeping partners of limited partnership could not participate in the management, the managers had become imperious in these companies17 and at times misusing their powers. The Law of 1856 (France) put curbs on manager (commandite).[18] Among others, the Law provided for a surveillance committee, composed of at least five shareholders, to scrutinize the activities of managers (France, p. Article 5). The persons on committee were to be held liable if they failed to perform their duties. Consequently, limited partnership started decreasing in numbers partly also because reputed persons avoided sitting in surveillance committees.

The Law of 29th May 1863 introduced Société à Responsabilité Limité (general limited liability company) which was exempted from governmental authorization. This company could be called JSC without governmental authorisation. The Act was inspired from the then English company law developments (Freedeman, Joint-Stock Enterprise in France, 1807-1867. From Privileged Company to Modern Corporation, 2011).[19] For the administration of companies, it copied article 31 of 1807 code with the addition that such administrators had to be chosen from amongst shareholders. An important contribution of the Act was to

17 The term société (company) is used for all types of business organizations in France including partnership.

18 The literal meaning of commandité is the one who is in control or possession of something. The legal meaning connotes a person who manages the business on behalf of other members. For more details see A. Frémery, Études de droit commercial: ou Du droit fondé par la coutume universelle des commerçans 36–38 (Alex-Gobelet) (1833)

19 Law of 1856 put curbs on société par action. Earlier France had more liberal company law than England. England passed Company Law 1856 that had both features of free incorporation and limited liability making it more attractive. The English businessmen who would cross channel for commidite had to look back to their own country for liberal laws.

augment the role of shareholders in the administration of the company.[20] Managers of the company were to possess 1/20th of total capital and such shares were not alienable (France, Company Law of 29 May, 1863, p. Article 7). They had to submit to registrar of commercial tribunal a copy of bylaws of the company as well as minutes of general meeting (France, Company Law of 29 May, 1863, p. Article 8). They were to get prepared accounts and put before general assembly (France, Company Law of 29 May, 1863, p. Article 15). Likewise, where a company lost 3/4th of capital, managers had to call a company meeting to decide the dissolution of the company (France, Company Law of 29 May, 1863, p. Article 20). This Act was, however, repealed by the Law of 1867 (France, Law of 24 July, 1867 for Commercial Companies, 1867, p. Article 47).

French corporate law development, in its historical perspective, made compromises between the need for large business and the fear of fraud. The latter was not uncommon and attracted governmental regulations from time to time. In the last half of 19th century, however, French business had paved way for a JSC that would be free from governmental authorization (Adelson, 2012). But it was not until 1867 when JSC obtained this freedom through an Act of the parliament (France, Law of 24 July, 1867 for Commercial Companies, 1867, p. Article 21). Insurance companies, however, continued to be regulated and authorized by the government.

The Law of 24th July 1867 was a major development in the life of commercial companies of France. The Act is called at times la grande loi (grand law) or loi organique (foundational law). The law was also inspired from England for more liberal regime. Even a foreigner might be elected to board of directors if statute of the company so permitted. For creating a company, total capital ought to have been subscribed and 1/4th thereof should have been paid by shareholders (France, Law of 24 July, 1867 for Commercial Companies, 1867, p. Article 1).

For the administration of JSC, it inherited same provisions of 1863 Act. Managers might elect a director who might be amongst them or, if company's bylaws so permit, a stranger. The directors whom some extra powers were entrusted would be called CEO or directeur général. The

---

20Barby at 27

powers of revocation of directors/managers were obviously to remain with shareholder. This appointment of director was only a legal endorsement of a practice already existing in commercial life.[21] Due to such delegation of power, one could observe some ambiguity about control and management of company (Joly, 2012, pp. 87–105).

Directors were to have ownership of share of the company with the object, as article 26 indicated, to "constitute the security against the acts of the board of directors". Such shareholding, however, might be obtained after assuming directorship and in most cases it was merely a formality as directors could hold few shares to meet this condition. It is noteworthy that the term board of directors has not been used in the entire Act. For the powers and duties of directors the Act was silent thus leaving promoters and shareholders with powers to determine such powers and duties. In other words they possessed powers and performed duties liberally subject to any restriction imposed by shareholders of the company.

For limited liability partnership (SCA), a two tier-board came forth. Beside provisions of commercial code for its administration, an additional supervision in the form of surveillance board was made mandatory. The board, consisting of at least 3 shareholders, was to be appointed by shareholder's general meeting. Their duties included monitoring company's affairs, verifying books, bills, drafts and voting. It was to present its annual report before general meeting. It was liable for its duties but not for the acts of management (France, Law of 24 July, 1867 for Commercial Companies , 1867, pp. Article 5, 9, 10).

On self-dealing, Law of 1867 provided that any contract between a company and its director would not be permitted in which director had a direct or indirect interest unless such a contract was approved by general assembly of shareholders (France, Law of 24 July, 1867 for Commercial Companies , 1867, p. Article 40). Moreover, such an approval of shareholder had to relate to issues of market or company's business, the case of fraud however would not fall under such approval (Balensi, 1975). These provisions on self-dealing did not prove quite effective and an important amendment was introduced by legislature in the Law of

---

21Barby at 33

1943. Case law further bolstered the powers of shareholder by providing that if any damage ensued resulting from the conduct of director, general assembly of shareholders can ratify it posterior (Expoziția Universală din, 1867). Hence the situation is not different from other countries in so far as the powers of shareholders in matters of paramount importance to the company are concerned.

For the next half a century, no major legal development directly addressing the management of companies could be observed, except the 1893 Act (Parliment, 1893) that provided for the liability of directors in case of invalid acts.

PAKISTAN

Company law developments in Pakistan[22] date back to pre-partition India ruled by Britain. A form of JSC had existed in South India for trade purposes in mid-17th century particularly after arrival of Europeans. Certain trade hurdles between Indian and Europeans led to growth of JSCs. Often a contract constituted such companies for the purpose of trades between Indian merchants and Europeans companies (Rungta, 1970). Generally, such contracts would provide that Indian merchants would not use the capital for trading with any other company thus leading to a monopolistic environment. Moreover, when any British company wanted to operate in India, a consultation was made with East India Company.[23] Resultantly by the end of 18th century, East India Company assumed almost all free trade of India either through its servants or some free merchants permitted by the company itself.

Certain servants of East India Company (EIC) were also running their independent trading business. When EIC restrained them from independent trading, they resigned from company job and went for their own private business. The organizational structure used for these

22 Pakistan and India, previously British India, got independence from British Empire in mid-August 1947.

23 East India Company was initially a British trade company that acquired Emperor Charter in 1600 and sole right of trade with India. With the passage of time and weaker internal situation of India, it became de factor ruler in many parts of India unless in 1857 British Crown assumed direct rule of India.

independent businesses was called agency house. These agency houses dealt with almost all businesses of the time and due to European superiority in capital and skill, assumed a substantial part of foreign trade.

Radhe Shyam Rungta enumerated four stage of company development in India before 1850. Firstly, it started with the emergence of banking and insurance companies that were needed to ever-expanding trade activities. Second stage arose after the breakup of Calcutta agency houses in 1929 that further stimulated banking and insurance companies. Invention of steamship and expansion of trade and commerce was the third stage, while innovation of railway track comes at fourth stage (Rungta, 1970, p. 10).

Corporate status was, like in England, a privilege rarely granted. Before Companies Act 1850, only five companies[24] were incorporated by Indian charters (Rungta R. S., 1962). Indian Lawyers, like their English brethren, resorted to partnership and trust for the organization of these companies, while management rested with small committees of directors. Since there was no clear distinction between company and partnership, JSC had to face legal difficulties in resorting to court. The Court considered JSCs a rather larger partnership, and would press, even in trust suit, the consent of all shareholders before admitting a case. Shareholders were still exposed to unlimited liability. The need for a general legislation for companies instead of individual charter acts could be fairly envisaged at this point of time.

In the wake of these developments, a bill was initially drafted by J.E.D. Bethune, an Anglo-Indian lawyer, and was passed on the 27th December 1850 as Companies Act (Registration of Joint Stock Companies Act, No 43 of 1850 (Pak.), 1850). The Act was addressed only to registered companies, while registration was not mandatory. The Act showed, for the first time, the interest of Indian Government in commercial institutions and first serious legislation on company law in India.

---

24 Three of these companies were presidency banks of Calcutta, Bombay and Madras, while other two were Bengal Banded Warehouse Corporation and the Assam Company.

Under the Act, seven or more persons with transferable shares could register themselves as a company. The various provisions of the Act regarding auditing and accounting helped to boost the confidence of investor. The funds so generated were, in addition to opening ways for industrialization in India, to cater the capital need especially for railway companies. The Act had contemporary popular provisions such as prohibiting companies dealing in its own shares (Registration of Joint Stock Companies Act, No 43 of 1850 (Pak.), 1850, p. Section VIII 3rd), loaning to directors (Registration of Joint Stock Companies Act, No 43 of 1850 (Pak.), 1850, p. VIII 4th), auditor report to court etc (Registration of Joint Stock Companies Act, No 43 of 1850 (Pak.), 1850, p. VIII 7th). The Act amalgamated the winding up provision of English Acts of 1848 and 1849.

The Act however was not altogether welcoming. The registration was made optional as against English law where it was mandatory, and in Section I it showed a material deviation from English law.[25] The Act provided for auditing of account which job, due to lack of professional auditor at that time, was done by shareholders themselves. Likewise, there was no mention of prospectus in the Act. Limited liability of shareholders was missing and Companies Act 1857, following English Act of 1855, made this important addition in British India.

Companies Act of 1857 (Companies Act of 1857, No. 19 of 1857 (Pak.)., 1857) extended limited liability to companies except insurance and banking companies and latter obtained it by Companies Act 1860. Second important development was Act of 1866 (Companies Act 1860, No 7 of 1860) that followed its English predecessor of Companies Act 1862. Like English legislation, it was comprehensive company law legislation in India replacing existing legislation that had undergone many amendments from time to time.

Like English legislation, the 1866 Act provided for maintenance of books of account and audit. The addition of Table A at the end of Act provided flexibility for making internal rules including rules regarding management and administration of the company. Directors had statutory

---

25 The sections only entitled and not compelled partnership/associations to be registered as companies.

duty of keeping and maintaining books of records of company, and to be liable to fine if found negligent to perform that duty. Shareholders continued to have powers to make liability of director unlimited (Companies Act 1860, No 7 of 1860, p. Section 76).

Another important legislation enacted in 1882 (Companies Act 1882, No 6 of 1882 (Pak.).) Wherein were incorporated various changes that took place in English company law. A worthwhile contribution of the Act was to correct the misapplication of certain provisions that encouraged companies to defraud on company registrar and shareholders. Company would submit two different sets of accounts to company registrar and shareholder's meeting. The law made it duty of directors and managers to provide the same balance sheet to registrar that was adopted by company in general meeting (Companies Act 1882, No 6 of 1882 (Pak.)., p. Section 74). The Act, however, failed to protect shareholder and to mend the management of company. It, nonetheless, did protect the policy of what is good to Britain. There was lack of will, rather wisdom, to adopt company laws in Indian environment (Rungta R. S., 1962, p. 215). Shareholders were still weaker to stronger agency house.

Indian local investors (shareholders) particularly in the business of foreign trade were depending upon the system of agency house or management agency house that was peculiar to Indian business environment. These houses would provide professional services to investors' especially local investor. The agency house system, in theory, would stipulate vesting of management of JSCs in the hands of professionals, whereas in practice such agency houses performed multifarious functions like initiation, promotion, underwriting and management of the company. It established its roots in India between 1834 and 1847 (Kling, 2011).

Professional and technical skills in European mercantile companies and mistrust on Indians for business management were two chief factors giving birth to agency houses system. Thus B.B. Kling opined "the agency house was only subsystem in the economy with the capital, business experience and continuity to provide entrepreneurial and managerial talent" (Kling, 2011, p. 40). The investors both local and Europeans looked to these houses for management in business like banking, insurance and technical entrepreneurship. These agencies would work, at times, as secretaries and treasuries of the main company. The important function relating to taking risks and fund employment and control, however, vested with board of directors or committee of directors as was known in those days (Rungta R. S., 1962, p. 224). The agency contract had to determine the duties and powers of such agents depending upon nature of business of the company. Most of these houses were run by ex-servants of EIC, thus making it difficult for government to better protect the interests of shareholders. However, since economy need capital that would come from shareholders/investor, they were not out-rightly neglected

On issues of self-dealing, in British India, Company Act 1850 did not permit company to extend loan to director except banking companies in which case also the sanction of shareholders was mandatory. Similarly, any contract giving advantage to director at the cost of company was untenable. Case law also forbade director from making profit out of any sale/purchase of company property (Anderson v Spence's Hotel Co.,).

II. CONCLUSION

The point of time discussed in this article corresponds to second industrial revolution in modern history as well. Capital was the pivotal part in the success of this revolution and shareholders were primary source to gather the capital. Their interests thus were realistically valuable to policy makers of the era. That is why company was largely understood as a functional tool whose purpose was to earn profit for shareholders. At times, a short-term benefit to shareholders stood paramount as compared to the survival of the company. In France, the practise of making returns to shareholders out of capital alludes to this fact. Legislation empowers these shareholders to make bylaws of company for regulating the conduct of directors and managers. State was the primary harbinger in the aid of shareholders.

Another argument for shareholder dominancy was the gradual evolution of company. At the initial development, both in civil and common law countries, company evolved out of partnership and was considered a highly regulated partnership than a company. That is why shareholders got themselves recognized as owners of the company since concept of separate legal personality had not been firmly established. For all-important decisions, shareholders dominated and exerted their influence to run the company according to their own priorities and preferences. Shareholder could, and even today can, make the liability of directors unlimited. In all jurisdictions under this study, the preparation of company bylaws rested in the hands of shareholders who could regulate duties of directors and managers according to their need.

Besides vesting of powers in shareholders to make bylaws, certain duties were specifically imposed upon directors in all jurisdictions that ultimately favoured company and shareholders. The additional duties of book keeping and transparency therein indicate this fact. Even the English Davey committee proposed rigorous duty regimes for director, a move that was not, however, fully implemented.

Initially the law of trust regulated the newly conceived office of director as the latter was confided by shareholders for their money and expected alike duties. English case law placed directors as trustee of company and shareholder by imposing both important duties of diligence and loyalty (Cameron's, Etc., Rly. Co., Ex Parte Bennett). In Charitable Corporations v Sutton (174) Lord Hardwicke determined the nature and extent of director's duties. While deciding an issue of misappropriation of company funds by director and committeemen, he attributed duty of diligence and loyalty to directors. He did not even absolve directors who were indirectly involved and had merely endorsed the files of such misappropriation. To impose fiduciary duties, English Courts tilted toward exacting standards and compelled directors to restore the property of company that he had misapplied. In imposing such liability, the Court did not make any distinction between active and passive behaviour of directors. Contrarily in France directors were considered agents and agent related duties and functions were expected of them.

Both legislature and courts realized the subtlety of the self-dealing issue on the part of directors and managers. In this phase any such transaction between company and director was not welcoming. The approval or ratification by shareholders for self-dealing transaction was required under the law. The logic was obvious that their money was managed by directors who were not yet adequately regulated.

It also reveals that State took interest in the development of the company mainly for economic goals. Since capital would come from shareholders, State had to regulate company in favour of shareholders and at the cast of directors. Both 1844 English Company Act and 1863 French Law came forth in aid of shareholders. The general implications of other legislations of the era are not different.

In this period company law had started and remained in the process of development. It could not resist the trends of commercial and economic environment waves of its times. As a natural corollary, concept of company, directors' duties and self-dealing transactions were also transformed under that influence. Modern concept of company as a legal person separate from shareholders had not firmly established in practice. Hence, shareholders successfully confirmed their dominance and duties of director were directed towards safeguarding the interests of company and more importantly the interest of shareholders.

REFERENCES

[1742]UKCC 26 ER 642(Eng.).

Aberdeen Railway Co v Blaikie Brothers, (1854) 1 Macqeen 461 (United Kingdom House of Lords 1854).

Adelson, J. (2012). The Early Evolution of Business Organization in France. Business History Review, 226–243.

Anderson v Spence's Hotel Co., (1866)1 Ind. Jur. N.S. 378 (Pak.).

Arsht, S. (1976). A History of Delaware Corporation Law. Delaware Journal of Corporation Law.

Balensi, Y. (1975). Les conventions entre les societes commerciales et leurs dirigeants / Yvan Balensi; preface de Jean Hemard. UNCITRAL Law Library.

Cameron's, Etc., Rly. Co., Ex Parte Bennett, 1854] UKCC 52 E.R. 134 (Eng.).

Companies Act 1860, No 7 of 1860. (n.d.). Pakistan.

Companies Act 1882, No 6 of 1882 (Pak.). (n.d.). Pakistan.

Companies Act of 1857, No. 19 of 1857 (Pak.). (1857). Pakistan.

Davey, L. (1895). Davey Committee Report.

Delaware General Corporation Law Amendment Act. (1901).

Enriques, L. (2000). The Law on Company Directors' Self-Dealing: A Comparative Analysis. International and Comparative Corporate Law Journal.

Evans, D. M. (1859). Facts, Failures and Frauds: Revelations, Financial, Mercantile, Criminal. Groombridge & sons.

Expoziția Universală din, Paris, 30 Juillet 1867, D. 1867.2.238 (Paris Court 1867).

France, P. o. (1673). Colbert's Ordinance.

France. (1867, July 24). Law of 24 July, 1867 for Commercial Companies.

France. (n.d.). Company Law of 29 May, 1863.

France. (n.d.). Law of 17July, 1856 for Limited Partnership.

Freedeman, C. E. (1965). Joint-Stock Business Organization in France, 1807–1867. usiness History Review.

Freedeman, C. E. (2011). Joint-Stock Enterprise in France, 1807-1867. From Privileged Company to Modern Corporation. University of North Carolina Press.

Joly, H. (2012). Une histoire du conseil d'administration. REVUE FRANÇAISE DE GOUVERNANCE D'ENTREPRISE.

Kingdom, P. o. (1844). Joint Stock Companies Act 1844, 7 & 8 Vict. c.110 (Eng.).

Kingdom, T. P. (1855). Limited Liability Act 1855 (18 & 19 Vict c 133).

Kingdom, T. P. (1856). The Joint Stock Companies Act 1856 (19 & 20 Vict. c.47).

Kingdom, T. P. (n.d.). The Companies Act 1862 (25 & 26 Vict. c.89).

Kingdom., T. P. (1844). Joint Stock Companies Winding-Up Act 1844 (7 & 8 Vict c 111).

Kling, B. B. (2011). The Origin of the Managing Agency System in India. Cambridge University Press.

Livesay, H. C. (1968). The Lobdell Car Wheel Co., 1830-1867. Business History Review, 42(2), 171 - 194.

Murphy, A. (2007). Corporate Ownership in France: The Importance of History. In R. Morck, A History of Corporate Governance around the World: Family Business Groups to Professional Managers. University of Chicago Press.

Parliment, F. (1893). Law of 1st August, 1893 amending Law of 24 July 1867. Bulletin of laws No. 26952 (Fr.).

Registration of Joint Stock Companies Act, No 43 of 1850 (Pak.). (1850). Sub-Continent.

Robb, G. (2002). White-Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929. Cambridge University Press.

Rungta, R. S. (1962). Indian Company Law Problems in 1850. The American Journal of Legal History, 298-308.

Rungta, R. S. (1970). The Rise of Business Corporations in India 1851-1900. Cambridge University Press; First Edition.

Smith, J. E. (2018). The law of private companies: Relating to business corporations organized under the general corporation laws of the state of Delaware with notes, annotations, and corporation forms. Hansebook.

Stewart et al. V. Lehigh valley railroad Co, 38 N.J. Law 505 (1875).

Talbot, L. (2007). Critical Company Law (1st ed.). Routledge-Cavendish.

The Constitution of the State of Delaware. (1831).

The Delaware Constitution. (1897).

The Delaware General Corporation Law. (1883).

The Delaware General Corporation Law. (1899).