

41st National Convention of Company Secretaries

Transitioning from Company Secretary to Governance Professional

BACKGROUND

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METAMORPHOSING INTO A GOVERNANCE PROFESSIONAL

Dr. S K Dixit* and Ms. Lakshmi Arun#

“The role of the Corporate Secretary continues to evolve... Gone are the days of the horn-rimmed, pencil sharpened, visor clad, minute taker; the Corporate Secretary is now:

- an active partner with the directors to ensure Board effectiveness and good governance;
- an advisor to the Board to ensure that policy and intent are manifested correctly;
- a resource to provide trends and information; and
- the ombudsman for all members of the co-operative community to ensure a commitment to the values that we hold dear”¹.

We have been debating and applying The governance principles have been debated, defined, refined and applied right from ‘Kautilyan’ period. Over thousands of years, the lesson that was learnt is.

‘Governance never becomes obsolete. Governance never fails’

The inevitability of imbibing governance into corporate culture has been recuperated especially over last two decades after experiencing the colossal scandals that negatively impacted the countries world-over, resulting in intensified regulations in the form of disclosures, control mechanisms, regulatory filings etc. Transition of financial reporting that got extended from management controls to non-financial disclosures in the form of sustainability/integrated reporting, extension of economic objective of business to triple bottom line covering societal and environmental objectives are classic examples. Others include the emergence of institution of independent directors, whistleblower, auditor’s independence, risk management system, compliance management etc.

At macro level, this transition involves external and internal governance mechanism in the form of dynamically changing phase of business and the adaptability of the corporate to sail through these changes while maintaining ethical conduct.

The application of governance principles in dynamic business context clearly indicates a correlation with changing profile of Company Secretaries from record keeper to conscience keeper to governance professionals. 3rd benchmarking study indicated that the specialised role of Company Secretary had evolved into Chief Governance Officer. Need less to say that Company Secretaries are Metamorphosing into governance professionals².

This article intends to cover the attributes of governance professional in tune with changing internal and external mechanisms that imbibe governance into business either through regulations or beyond regulations.

While discussing the internal and external mechanism to corporate governance, it is relevant to discuss the influential parties involved in the process and these include Board of Directors, Management, Shareholders and stakeholders such as lenders, suppliers, customers,

* Director, ICSI. The views expressed are personal views of the authors and do not necessarily reflect those of the Institute.

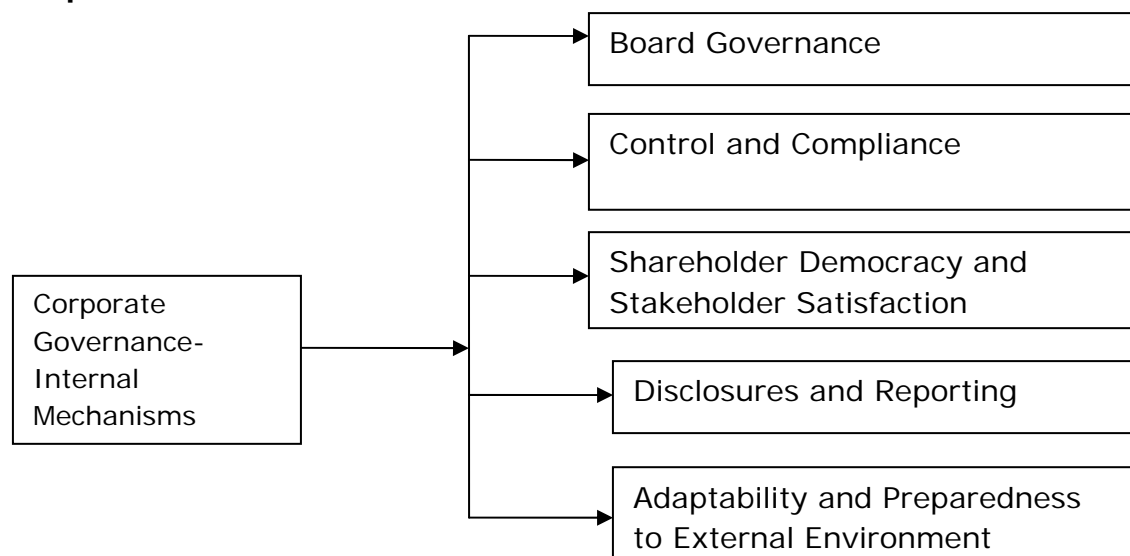
Assistant Director, ICSI. The views expressed are personal views of the authors and do not necessarily reflect those of the Institute.

¹ Michael Barrett, Chief Operational Officer at Gay Lea Foods

² Benchmarking Governance Practice in Australia, 3rd Benchmarking Study conducted by Chartered Secretaries Australia, 2005

government and regulators. Company Secretaries - the governance professionals act as catalyst among the participants of governance.

Corporate Governance – Internal Mechanism



Board Governance

The principal role of the Board of Directors – as representatives of the shareholders, is to oversee the function of the organization and ensure that it continues to operate in the best interests of all stakeholders. They need to set the tone from top in promoting a transparent culture that promotes good governance. Their role is wide enough covering diversified activities such as effective strategies, optimum composition of Board/Board Committees, contribution of independent directors, executive compensation, nomination and selection of right candidates for directorship, effective organisation specific risk management, sensitivity of business to dynamic environment and so on.

Control and Compliance

Controls relating to corporate governance includes internal controls, risk management system etc that are policy related issues being implemented by an entity's Board of Directors, Audit Committee, Management, providing reasonable assurance of achieving business objectives towards reliable financial reporting, operating efficiency, and compliance with laws and regulations.

Corporate compliance is both self-regulated and externally regulated. Self regulated compliance include diligence in drafting covenants, environmental initiatives and other non-mandatory compliances. Many companies self-regulate to improve business performance, to ensure employee safety, to preserve environment, and to reduce costs. Companies proactively complying with external regulations tend to avoid severe legal consequences and to maintain a positive public image.

Regulatory compliance needs to be viewed as a natural extension of the governance obligations cast on top management and corporate Boards. An inevitable requirement of compliance management is the presence creation of a compliance-conscious environment at every level of

the company and the education and training of employees to avoid engaging in any activities that might raise legal compliance concerns. Corporate Compliance Management is to be developed as a radically different and effective system that deploys legal as well as information technology tools.

Shareholder Democracy and Stakeholder Management

Stakeholders include an array of persons covering shareholders, employees, vendors, suppliers, customers, regulators, and the society as well. Stakeholder management include aspects such as vendor/supplier feedback/assessment, investor redressal, effective compliance, creation of a connect between business and the society etc.

The term shareholder democracy has relatively dynamic connotations which can influence or even determine a company's course of life. But, in India the shareholder democracy has been eluding the investors and shareholders despite the laudable efforts made by the regulatory authorities.

Disclosures and Reporting

Asymmetry of information to stakeholders – a concept introduced by George A. Akerlof's in his article "The Market for Lemons": Quality Uncertainty and the Market Mechanism" (1970) relates quality and uncertainty. He developed the notion of asymmetric information, using the automobile market as example. Akerlof explained that in many markets the buyer uses some market statistic to measure the value of a class of goods. The asymmetry is between the information held by the seller of the used car, for example, and the buyer. Thus, the buyer sees the average of the whole market, while the seller has more knowledge of a specific item. Akerlof argues that this information asymmetry provides the seller with a reason to sell goods of less than the average market quality. Then, the average quality of goods in the market will decrease and so will the market size, which can lead to market failure.

As regards corporate governance, the asymmetric information refers to the quantum of information that the insiders know better than the other share/stakeholders. Good governance practice is to keep the information asymmetry at the minimum level. This can be achieved by making honest disclosures and maintaining transparency.

Moreover the stakeholders' demand on the disclosure levels is being increased over a period of time that also reduces the information asymmetry. The journey from financial reporting to sustainability reporting to integrated reporting reflects transition on the disclosure levels to minimize the information asymmetry. This transition is depicted in the following Reporting Milestones.

1960 - Emphasis on Financial Reporting

1980 - Financial Statements, Management Commentary, Environmental Reporting, Governance and Remuneration.

2000 - Financial Statements, Management Commentary, Governance and Remuneration, Sustainability Reporting.

2020 – Integrated Reporting, Management Commentary Governance and Remuneration, Financial Statements, Sustainability Reporting.

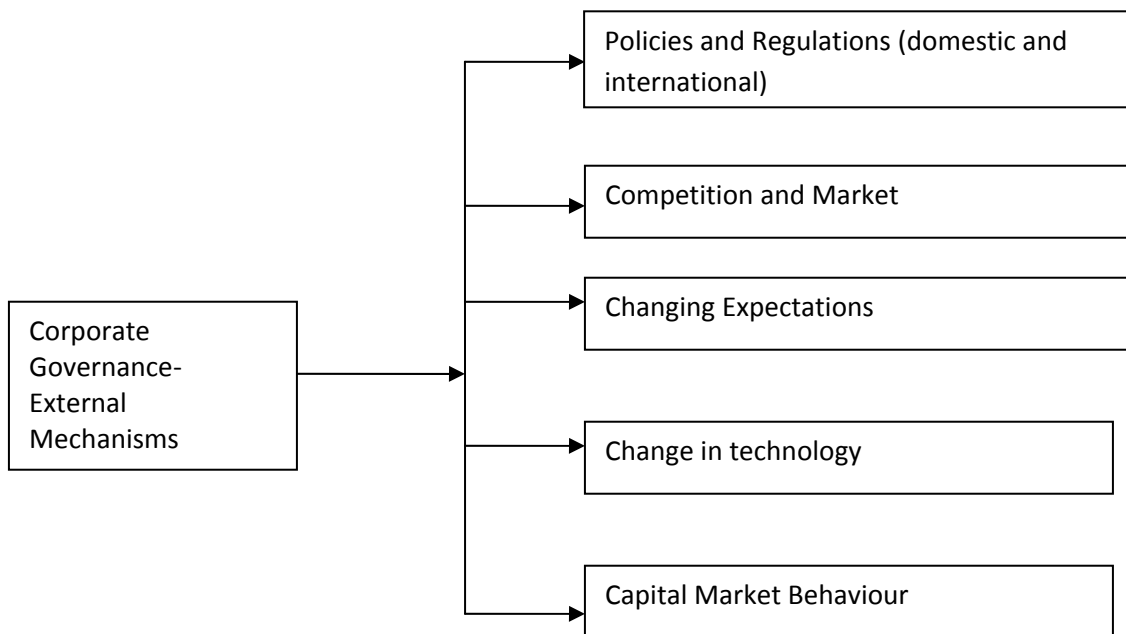


Adaptability and Preparedness to External Controls

It refers to identification and preparedness of general and industry specific external controls in form of change in regulations, market behaviour, technology, and customer-base and so on and requires an effective mechanism such as co-ordination of functional heads to study the emerging regulations, markets and other business dynamics.

External Corporate Governance Mechanism

External Corporate Governance Mechanism refers to development that influences the governance system of the company that are not in its control. A company should adapt it-self in tune with external environment for business sustainability.



Policies and Regulations

The regulatory landscape has experienced dynamic transmission in recent years due to a number of factors and particularly enhanced interface and interaction on going the businesses at global level and incidences of misgovernance. Historically, specific industries such as energy, utilities, manufacturing, health care and aviation had stringent compliance requirements

³ Source www.iirc.org

for legal management with respect to their respective sectoral obligations. As the world has shrunk into one single flat platform, the regulations across borders influence one another. Examples regulatory requirements relating to cross the border mergers, principle based regulatory actions like sustainability reporting, non-financial disclosures etc. Further compliance of regulations across the borders due to cross border deals, influence of technology on regulatory framework etc influences corporate governance mechanism.

Competition and Market

Meeting Competition means enhanced operational efficiency, cutting costs, keeping down administrative expenses and affording quality products at reasonable prices to the consumers. Corporate Governance should ensure that the businesses follow good competitive practices. Since competition influences and impacts corporate governance, the Policy of competition and Governance in an organization must include strategies commensurate with Fair Competition. In this this context Competition Compliance Programmes is indeed a true instrument in the hands of business to remain competitive on sustainable basis.

Technology

It refers to the adoption of business process in tune with the technological advancement. It requires continuous monitoring of technology upgradation that impact the business processes.

Changing Expectations

Stakeholders’ expectations have undergone a profound change especially since the last decade. The importance of quality has been extended to quality of people, quality of environment and quality of governance which is beyond the quality of products and services. Thus, the goal of business should not be confined simply to the creation of financial wealth for the shareholders, but the human wealth, intellectual wealth, reputational wealth, environmental wealth and governance wealth. As a result of changing expectation paradigm of society from profit based approach to triple bottom line approach, the duties and responsibilities of directors and other senior executives have been redefined and raised to a higher standard of obligation, to the corporates, its shareholders and other stakeholders.

Company Secretary – As Governance Professional

As discussed in the introductory paragraphs, company Secretary is the advisor and executor of internal governance and acts as interface between the internal and external elements of corporate governance.



Attribute of Governance Professional

General Attributes towards internal and external governance

- Advise the company on ideal Board composition with right mix of executive/non executive and independent directors.
- Advise on effective board room practices.

- Insist on making effective disclosures to stakeholders on financial and non financial matters.
- Address the sustainability issues of business.
- Bring environmental sensitivity in board room discussions and business processes.
- Act as an effective compliance managers.
- Guide the Board on corporate governance policy of the company.
- Strengthen the stakeholders communication mechanism, media policy etc.
- Make effective contribution in corporate strategies.
- Update the Board and functional head on legislative and regulatory developments.
- Actively participate and contribute in improving the internal control systems including risk management.
- Devise, develop and monitor effectiveness of Competition Compliance Programme.

The profession of Company Secretaries has evolved over a period of time and that process continues. Stakeholder expectations, environmental considerations, the competitive landscape, are driving the pace and direction of the evolutionary process. Therefore, it is critical to track these factors closely so as to be able to frame the right strategies and responses. These aspects are exhaustively considered in ICSI vision 2020. It is revealed in the ICSI vision 2020 document that the expectations of stakeholders demands Company Secretaries to change their skill sets, knowledge base, and attitudes to be metamorphosing into a Governance Professional.

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TRANSITIONING FROM COMPANY SECRETARY TO GOVERNANCE PROFESSIONAL

CS Alka Kapoor*

The dawn of new millennium envisaged the concept of uniting the global economy with the tools of digital technological, liberalization and globalization. The “Vasudeva Kutumbakkam” or the “Global Village” was an obvious choice to accommodate myriad of growth and development. The global village provided a level playing field for all countries. Healthy interaction between the developed and the developing countries in the field of trade and the exchange of technological know - how helped the global economy prosper remarkably. Attracting capital for growth and economic development is crucial, this calls for good governance practices to be adopted, implemented at every governance level. Indispensable role of Governance Professional shall help the economy navigate to a consequent rise.

Globalization made it possible for domestic producers to expand and emerge on the international scene. It made possible for consumers to choose from a wide range of local and imported commodities.

The Indian economy grew impressively, at an average annual rate of 6.4 percent. From 2002 to 2011, when the average rate was 7.7 percent, India seemed to touch newer heights. The economy was moving ahead of the economic controls and capturing its unused potential. The last two decades have seen India grow as an open economy.

Due to various external factors Indian economy is currently witnessing free fall of rupee and unsustainably large current account deficit, this has shaken the Indian repute and investor confidence. In addition to this, poor and stubborn governance policies and practices, embedded corruption practices and crony capitalism are threatening to suck economic stability of the country.

In a recent report launched by the Global Competitiveness Report of the World Economic Forum (WEF), an independent non-profit foundation based in Geneva, India has dropped in the latest global ranking of countries' competitiveness.

The country's competitiveness, on a continuous decline since 2009, slipped to 60th in the Global Competitiveness Index (GCI) 2013-14 (total 148 economies). The report identifies inadequate supply of infrastructure, inefficient bureaucracy, corruption and tax regulations as four of the top-16 most-problematic factors for doing business in India. The country ranked 96th in the "basic requirements", including four categories of institutions, infrastructure, macroeconomic environment and health and primary education.

According to Transparency International Corruption Perceptions Index 2012, corruption is a major threat facing humanity. And the high level of corruption in India has been widely perceived as a major obstacle in improving the quality of governance. The Index 2012 ranked India at 94th position with the score of 36, depicting high level of corruption in the country.

* Director, ICSI. The views expressed are personal views of the authors and do not necessarily reflect those of the Institute.

Governance - Wheel for Economic Growth & Revival

The goal of governance initiatives should be to develop capacities that are needed to realise development that gives priority to the poor, advances women, sustains the environment and creates needed opportunities for employment and other livelihoods.

- UNDP 1994 Initiatives for Change

The concept of governance is divided into three broad spectrum:

- First an economic role for the state: this has been conceived in five fundamental tasks, viz. (a) a legal foundation, (b) non distortionary policy environment with macro economic stability, (c) investment in basic social services and infrastructure, (d) protecting the vulnerable, and (e) protecting the environment.
- Second set of specific policy reforms that interalia include fiscal consolidation, reduction and re-direction of public expenditure, the maintenance of competitive exchange rates, financial, trade and investment liberalization, and overall deregulation.
- Third, non-economic aspects of governance include transparency, accountability, Participation and responsiveness in process of government and effective enforcement of contracts.

The basic goal and purpose of economic governance must be to achieve through the process of policy making and management, the full harnessing of the productive potential of human and physical resources and generating a broad-based, equitable (and sustainable) process of growth. Sustainability is important because it may be possible to artificially stimulate growth in the short run but the key test is the ability to maintain the momentum once created.

Governance is essential for the growth of the economy. It transcends the jurisdictional and sectoral boundaries; it permeates through government, corporate world and civic organisations for the benefit of the stakeholders. A well-performing economy rests on a foundation of good governance, including transparent and predictable decision making and implementation; oversight mechanisms that guard against arbitrariness and ensure accountability towards stakeholders. Good governance is at the core of improving the delivery of services. It provides the mechanism for linking inclusion, decision making, and accountability.

Indian economy in its eleventh five year plan aspired for inclusive growth. To achieve inclusive growth, Indian policy makers are focusing on creating a virtuous cycle of development by establishing sound governance institutions and developing capacity, tapping into the economic potential of people and places by reducing economic and social disparities and effective public administrations. Inclusive growth once promoted in all the spheres of governance shall deliver to reduce poverty and other social and economic disparities, and also to sustain economic growth. So far, one major step inclusive growth is the provision for CSR in the Companies Act, 2013.

According to the website of United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) "Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive

and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.” The same has been elaborated in United Nation Development Programme (UNDP) Policy Document “Good Governance and sustainable development”.

The Rig Veda states “*Atmano mokshartham jagat hitayacha*” i.e. the dual purposes of our life are emancipation of the soul and welfare of the world. Thus, the public good should be the welfare of the society; or in other words, the private good or self-promotion should be subservient to the greatest good of all.

Set of values defining good democratic governance consists of governance characterized by transparency, accountability and responsiveness, as well as the political culture and mechanisms that can support the achievement of these objectives.

“Transparency” is open access to information and free flow of information. It is based on openness as a core value. It consists of information and communications.

“Accountability” is the clear assignment of responsibility for the management of resources with efficiency, the achievement of results with efficacy, the production of desired and expected outcome impacts, and the design of policies, programmes and projects that can accomplish the foregoing. Accountability is based on responsibility as a core value. It consists of information and communications, as well analysis and evaluation.

“Responsibility” involves interest articulation and aggregation, and the incorporation of citizen demands in decision-making and resource allocation processes, as well as the evaluation of policies, programmes and projects in the light of citizen interests and needs. Responsiveness is based on participation as a core value. It too, consists of information and communications, as well as analysis and evaluation.

All three above constituents are based on closely related values of openness, responsibility and participation and none of these elements can function properly without ethics and integrity.

“Oversight” consists of the functioning of checks and balances within and between the powers of the state, as well as between the citizens and state, to ensure transparency, accountability and responsiveness based on ethics and integrity.

Governance and growth dynamics

It is considered necessary to create a corporate culture of consciousness, transparency, confidence among investors and prospective investing public. It refers to a combination of laws, rules, regulations, procedures and voluntary practices to enable companies to maximise shareholders’ long-term value. Good corporate governance practices are *sine qua non* for sustainable business that aims at generating long term value to all its stakeholders. Good Corporate Governance practices are essential to ensure inclusive growth, wherein every section of society enjoys the fruits of the corporate growth. Sound and efficient corporate governance practices are the basis for stimulating the performance of companies, maximizing their operational efficiency, achieving sustained productivity as well as ensuring protection of shareholders’ interests. It ensures the health of the economies and their stability.

Hence improvements in democratic and economic performance calls for

- better policies, more efficient infrastructure, a transactionally more efficient bureaucracy, transparent and participatory approach– all of these can contribute to a better investment climate, and thus potentially to growth.
- broader commitment to 'fairness' shall contribute more broadly to improvements in the investment climate, and hence to growth.

Economic Growth and Contribution of Corporate Governance

'Corporate governance' is just another side of the coin, since the economies largely depend on corporate economies. Contribution of corporate sector to GDP justifies implementation of good governance for economic growth. Corporate Sector viz. industry, manufacturing, mining & quarrying, service contributed 27%, 1.98%, 15.24%, 59.29% respectively to the GDP in the financial year 2012-13. Further they are the major drivers of growth, they account for nearly one-fourth of Gross Domestic Saving and one- third of Gross Capital Formation in our economy.

Corporate governance is the corporate architecture of a nation. A good Corporate Governance system ultimately leads to National Governance. Good corporate governance is a source of competitive advantage and critical to economic progress. The quintessence of Corporate Governance is transparency, accountability, investor protection, better compliance with statutory laws and regulations, value creation for stakeholders and societal value.

“Corporate Governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.”

- Sir Adrian Cadbury in Corporate Governance and Development, Global Corporate Governance Forum, World Bank, 2003.

Corporate governance is essentially a function of the mindset and culture prevalent in the organization's operating environment. Corporate governance cannot be looked at in isolation; it is heavily influenced by the overall governance eco-system. Recent scandals in corporate India have raised questions not only about the practices adopted by companies to solicit business but also about the standards of accountability in public administration including within the government machinery and institutions. These larger governance issues will need to be addressed along side governance issues within corporates.

According to Stijn Claessens and Burcin Yurtoglu several channels through which corporate governance affects growth and development:

- The first is the increased access to external financing by firms. This in turn can lead to larger investment, higher growth, and greater employment creation.
- The second channel is a lowering of the cost of capital and associated higher firm valuation. This makes more investments attractive to investors, also leading to growth and more employment.

- The third channel is better operational performance through better allocation of resources and better management. This creates wealth more generally.
- Fourth, good corporate governance can be associated with a reduced risk of financial crises. This is particularly important, as financial crises can have large economic and social costs.
- Fifth, good corporate governance can mean generally better relationships with all stakeholders. This helps improve social and labor relationships and aspects such as environmental protection.

All these channels matter for growth, employment, poverty, and well-being more generally. Empirical evidence using various techniques has documented these relationships at the level of the country, the sector, and the individual firm and from the investor perspectives.

Drivers of good governance: Governance Professionals

The concept of professionalism derives from a discourse based on self-regulation, independence and expertise. A profession arises when any trade or occupation transforms itself through "the development of formal qualifications based upon education, apprenticeship, and examinations, the emergence of regulatory bodies with powers to admit and discipline members, and some degree of monopoly rights." Few essential traits of profession are:

- Expert and specialized knowledge in field which one is practicing professionally.
- Excellent manual/practical and literary skills in relation to profession.

Most professionals are subject to strict codes of conduct enshrining rigorous ethical and moral obligations.

Ethical infrastructure and code of conduct which lay stress on accountability, evaluation, transparency and social justice are essential for good governance. In a self regulated regime, governance professionals draw attention due to presence of these essential constituents. They are looked upon by the regulators and other stakeholders as ethical and trustworthy professionals whose judgment and competence has made a mark in growth and development of the society as a whole.

Governance Professionals have a significant impact on the level and quality of governance and development of a conducive governance culture within the organisation whether it is banking sector, insurance sector, non-governmental organisation (NGO), financial markets etc. The governance professional assists an entity to adopt a vision and strategy enforcing the elements of good governance. Governance professional provides effective and efficient safeguard against corruption, fraud and mismanagement and ensures responsiveness towards its multiple stakeholder groups. A governance professional in any organisation shall

- Lead and advise on best practice in governance, risk management and compliance
- Ensure abiding by the compliance framework to safeguard organisational integrity thereby benefiting the organisation and the society
- Promoting quality standard and ethical behaviour in the organisation

Company Secretaries as Governance Professionals

It is a well known fact that Corporate Governance has taken a front seat over the economic benefits. The investors prefer better governed companies over less governed, as a measure to protect their investment.

The role profile of the Company Secretary has undergone major transformation over the years.

As back as 1971, Judge Lord Denning commented that the secretary "is an officer of the company with extensive duties and responsibilities ..." over the recent years, responsibility for developing and implementing the processes to promote sustained good corporate governance has come largely within the role profile of Company Secretary.

In India the profession began its roots in 50's when Government diploma in Company Secretaryship was introduced. Later in the year 1968 the Institute of Company secretary was set up as section 25 company to take over the charge of work relating to Company Secretaries examination and allied matters. In the year 1980, the government moved the Company secretary Bill, 1980 to convert the Institute into a statutory body.

While moving the Company Secretaries Bill, 1980 for consideration by the Lok Sabha on 16th June 1980, the then Minister of Law, justice and Company affairs, Shri P Shiv Shankar said *"An essential ingredient in the healthy growth of the corporate sector is the induction of professional management. The government attaches special importance to the development of professional management, so that the corporate sector can evolve and function in tune with the changing needs of the times, and the social responsibilities that this important segment of the economy has to shoulder. The profession of Company secretaries has an important part to play in the introduction of professionalism in the area of corporate management."*

However, before setting out specific responsibilities of the Company Secretary, it is important to note that the most effective company secretary is one who is regarded by the Board as its trusted adviser and who:

- keeps under review legislative, regulatory and governance developments that may impact the company and ensures that the board is appropriately briefed on them;
- provides where appropriate, a discreet but challenging voice in relation to board deliberations and decision making, drawing in particular on professional experience and historical knowledge of the company.
- Spots risk and pursues the policies and procedures that bring such exposures to levels deemed acceptable.

The role of Company Secretary was exemplified way back in Adrian Cadbury Report on "The Financial Aspects of Corporate Governance" as under:

"The company secretary has a key role to play in ensuring that board procedures are both followed and regularly reviewed. The chairman and the board will look to the company secretary for guidance on what their responsibilities are under the rules and regulations to which they are subject and on how those responsibilities should be discharged. All directors should have access to the advice and services of the company secretary and should recognise that the

chairman is entitled to the strong and positive support of the company secretary in ensuring the effective functioning of the board.”

The role of corporate secretary is increasingly important and visible one as the person in that role is generally responsible for the company’s corporate governance. The professionals who manage the corporate secretary function effectively combine practical knowledge of the detailed requirements with sound practices and processes to ensure a high standard of governance.

As the position has grown to become more of a top-level role, more firms have come to recognize it as an important component to its regulatory regime. Further as the expectations of the shareholder and other stakeholders rise, there has been a surge for governance professionals to ensure transparency and fairness in the corporate conduct. Furthermore, calamitous corporate governance failures and economic collapses that can largely be traced to lapses in appropriate risk monitoring and disclosure, have as altered the expectations delivering good governance.

Company Secretary is expected to be fully equipped with knowledge in various areas to offer support and advise to Board of Directors to enable them to make sound and ethical business decisions. If Company Secretary fails to provide right advise to Board of Directors at the right time and in right amount, it can result in costly mistakes.

Transitioning from Company Secretary to Governance Professional

“My predecessor was a lawyer, whereas I clearly have a strong background. I studied business, then started working in our group’s headquarter and then moved on to several management positions in foreign subsidiaries. Prior to my appointment as corporate governance officer, I worked on the post-merger strategy and integration of our biggest acquisition deal ever.

The reason the board chose me is simply that our company wants the board to have a strong strategic influence and more involvement in the day-to-day business.

(A CGO whose predecessor’s title was company secretary).”

A transition in a profession is a silent, invisible movement towards attaining intangible perpetual gains. The profession of Company Secretary in India has undergone many stages of transformation from Record keeper to Compliance officer, from Compliance officer to Business manager, from Business manager to Board Room Advisor and now transformation beckons for Governance Professional.

The Companies Act 2013 leapfrogs from the regime of control to that of liberalisation/self-regulation, which enables the corporates to play as per the rules of the game in a dynamic environment. The independence of the corporates is circumscribed by a stringent framework of accountability. This calls for good amount of self-regulation and corporate governance on their part, which necessitates the services of fiercely independent, but competent and responsible governance professionals.

The onus of implementation of the provisions of the new Companies Act therefore rests on the sturdy shoulders of the company secretaries. The Companies Act, 2013 substantially enhances and elevates the role of Company Secretary as it includes him as a “Key Managerial Personnel” in a company. This provision showcases strategic importance of the Company Secretary in

governance architecture of any company. The position of company secretary has been equated to the position of Chief Executive Officer, Whole Time Director and Chief Financial Officer. “Key Managerial Personnel” as an officer in default under the Act means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer; and
- (v) such other officer as may be prescribed

Importantly, the role of the company secretary has been widened under the Companies Act which seeks to provide 'substantive oversight' role to Company Secretaries as against a technical compliance role envisaged so far under the existing company law.

Further the Act provides for inclusive functions of company secretary which are enlisted below:

- (a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
- (b) to ensure that the company complies with the applicable secretarial standards;
- (c) to discharge such other duties as may be prescribed.

Relevant extracts from the Draft Rules under Companies Act, 2013 that incorporate the duties of Company Secretary are as under:

- 1) To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;
- 2) To convene and attend Board, committee and general meetings, and maintain the minutes of these meetings;
- 3) To obtain approvals from the Board, general meetings, the Government and such other authorities as required under the provisions of the Act.
- 4) To represent before various regulators, Tribunal and other authorities under the Act in connection with discharge of various functions under the Act;
- 5) To assist the Board in the conduct of the affairs of the company;
- 6) To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and
- 7) To discharge such other duties as may be assigned by the Board from time to time.
- 8) Such other duties as have been prescribed under the Act and Rules.

The way regulation has developed over the years has really catapulted the company secretary into view. The very first function enumerated above gives a holistic view of the expectations of the regulators from Company secretaries. Further due to the changing legal dynamics the role of the company secretary as an advisor to the Board/Chairman is far more important now. The profession is moving towards a more strategic role.

Suggested list role includes:

- **Facilitating governance processes:** This involves advising the chairperson on setting the agenda, presenting management reports to the board and its committees, and ensuring that the board follows established procedures. Essentially he should keep track of changing economic and legal situation and keep the management and the board informed of these decisions.
- **Supporting board meeting:** The company secretary in its new role, is responsible for preparing board documents, correctly drafting, recording and distributing the minutes, as these have evidentiary significance and follow-up after the meetings.
- **Ensuring compliance:** He must ensure compliance in all internal rules and external laws and regulations applicable to the company. Compliance needs to become part of the company culture, and as a Governance Professional, CS must spearhead this effort.
- **Stakeholder management:** With the increasing awareness, stakeholders are far more aware of their rights. As a governance professional i.e. CS needs to assist company in inculcating a culture of responsiveness towards all the stakeholders whether it is community, environment, etc.
- **Integrating new directors:** The CGO facilitates the integration of new, non-executive directors into the business and their role on the board.
 - orientation of new directors and ongoing board education;
 - developing and implementing guidelines, criteria and instruments to evaluate and enhance individual member and board performance;
 - support board succession planning and overseeing independent directors' rotation.
 - contribute to the drafting of the directors' remuneration policy and may ensure its compliance. Accordingly, disclosure requirements as per Corporate Governance norms may also be complied with.

Global Convergence of Company Secretaries to Governance Professional

Dynamism and globalisation requires Boards of Companies to be competent to handle the pressure of compliance under various jurisdictions. The Company Secretary is the most coveted officer to ensure compliances across jurisdictions and this is the reason that today appointment of a Company Secretary is being made mandatory in various jurisdictions. Singapore, Malaysia, Maldives, Hong Kong, Kenya are some of the countries which have made the appointment of a Company Secretary mandatory for all companies. The role of Company Secretary is transforming at the global platform into the Governance professional.

In U.K. it is mandatory for every public company to have a Company Secretary. In South Africa, a public company or state-owned company must appoint a person knowledgeable or experienced in relevant laws as a Company Secretary. In Australia, a company other than a proprietary company must have a Company Secretary. In Mauritius, every company other than

a small private company or a company holding Category 2 Global Business Licence should have a Company Secretary.

Australia-ASX Corporate Governance Principles and Recommendations with 2010 Amendments

The Company Secretary plays an important role in supporting the effectiveness of the board by monitoring that board policy and procedures that are followed, and coordinating the timely completion and dispatch of board agenda and briefing material.

It is important that all directors have access to the Company Secretary. The Company Secretary should be accountable to the board, through the chair, on all governance matters.

The 3rd benchmarking study i.e. *Benchmarking Governance Practice in Australia*, conducted by Chartered Secretaries Australia (now the Governance Institute of Australia) in 2005, indicated that the specialised role of **Company Secretary** had evolved into the **Chief Governance Officer**, according to the CSA press release issued on 28 March 2006:

“...directors are using them (Company Secretaries) as a resource to ensure all their boxes are ticked. In 97 per cent of organisations, Company Secretaries have primary responsibility for the increasingly complex and important area of corporate governance. No longer just an administrative role, the Company Secretary provides essential, high-level strategic advice; and companies are clearly willing to pay for it”.

UK Corporate Governance Code 2012 (Revised)

The Code is a reflection of the expectations from governance professional i.e Company Secretary. It provides that the Company Secretary's responsibilities include ensuring good information flows within the board and its committees and between senior management and non executive directors, as well as facilitating induction and assisting with professional development as required. The Company Secretary should be responsible for advising the board through the Chairman on all governance matters. All directors should have access to the advice and services of the Company Secretary, who is responsible to the Board for ensuring that board procedures are complied with.

South Africa- King Committee Report- 2009

The principles outline the role of company secretary in the governance domain. The principles provide that the Board should be assisted by a competent, suitably qualified and experienced Company Secretary

The board should appoint and remove the Company Secretary.

The board should empower the individual to enable him to properly fulfil his duties.

The Company Secretary should:

- have an arms-length relationship with the board;
- not be a director of the company;
- assist the nominations committee with the appointment of directors;
- assist with the director induction and training programmes;
- provide guidance to the board on the duties of the directors and good governance;
- ensure board and committee charters are kept up to date;

- prepare and circulate board papers;
- elicit responses, input, feedback for board and board committee meetings;
- assist in drafting yearly work plans;
- ensure preparation and circulation of minutes of board and committee meetings.

In South Africa, Section 88 of Companies Act, 2008 provides for the duties of Company secretary. It provides thus-

A company's secretary is accountable to the company's board. A Company Secretary's duties include, but are not restricted to—

- providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

- reporting to the company's board any failure on the part of the company or a director to comply with the Memorandum of Incorporation or rules of the company or this Act;

- ensuring that minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded;

- certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of this Act, and whether all such returns and notices appear to be true, correct and up to date;

- carrying out the functions of a person designated for the purpose of annual return compliance.

Singapore Code on Corporate Governance, 2012

The code provides that the directors should have separate and independent access to the Company Secretary. The role of the Company Secretary should be clearly defined and should include responsibility for ensuring that board procedures are followed and that applicable rules and regulations are complied with. Under the direction of the Chairman, the Company Secretary's responsibilities include ensuring good information flows within the Board and its committees and between senior management and non-executive directors, advising the Board through the Chairman on all governance matters, as well as facilitating orientation and assisting with professional development as required. The Company Secretary should attend all board meetings.

Conclusion

The Company Secretary should endeavour to achieve excellence and gain proficiency. The professionals need to take broader strategic view about their company needs; acquire significant business knowledge of processes and systems of the company and utilise the same in driving board level consultancy. To flourish as a true governance professional in such a demanding environment, we must recognize the need for change.

Charles Darwin observed long back that:

It is not the Strongest, it is not the most innovative, but one who is most responsive to change who will survive.

Few mantras to survive the new winds may possibly include:

- **Continuous Knowledge management to sustain the competitiveness:** It is recommended to strategize actions to enable smoother transformation. An enthusiastic approach to discover new avenues, new technologies or doing better within the given and known avenues shall be the key to success. Adhering to core secretarial activities may not be advisable. Diversification and integration of newer opportunities into the portfolio shall strengthen the governance profession.

It is certain that we can not keep with change with traditional skills, as today's knowledge is tomorrow's obsolescence and remaining competitive and continuing excellence in such an environment requires certain triggering factors. Continuing Professional Education (CPE) is one such factor that triggers competence, excellence, self- confidence, and motivation, positive attitude that makes us agile to keep up with and reap the benefits of change.

- **Embracing and nourishing good governance:** A Governance professional is expected to infuse in the organizational culture DNA of good governance and take a lead in developing a conducive environment for delivering excellence. Embracing a culture of transparency and disclosure is an essential ingredient for achieving organizational and professional growth.
- **Adherence to Code of Conduct:** A key expectation of members of self-governing professions is that they accept legal and ethical responsibility for their work and hold the interest of the public and society as paramount. In a self regulated regime, it is a moral duty of us, as Company Secretaries, to strictly abide by the Code of Conduct laid down by the Council of the Institute of Company Secretaries of India.
- **Focus on long term sustainable value creation and addition:** Every corporate decision should focus on sustainable value creation. A governance professional should assist organisation in drafting and calibrating a perspective which not only creates and adds value to the profession, organisation and economy as a whole.

Re-energising economic growth is the key challenge in current scenario, as an economic enabler, Governance professional needs to ensure the practice of good governance across the organisation, acting with integrity and impartiality, assisting and guiding policy making that delves the economy and proper decision making that assists in efforts towards improving profitability and economic growth thereby facilitating optimal resource management in the best interests of holistic economy.

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TRANSITIONING FROM COMPANY SECRETARY TO GOVERNANCE PROFESSIONAL

Archana Kaul*

“Just as the modern government cannot be run without the secretariat, similarly no modern company management can be carried on without a Company Secretary; that is our conviction”.

- Late D.L. Mazumdar, First Secretary, Department of Company Law Administration

People attribute different meanings to a concept or it so happens that a concept may offer different meanings in various contexts. One such concept is ‘Company Secretary’. It is interesting that this concept employs various terms for the one meaning. In the UK and other Commonwealth countries the terminology ‘Company Secretary’ is applied to this concept whereas ‘Corporate Secretary’ is used in the USA and the more focused terminology ‘Board Secretary’ is employed in China to express the roles, destination and sphere of activity. Switzerland, alternatively, uses the plain terminology ‘Secretary’ in the context of the ‘board of directors’ in the Swiss Code of Obligations. In India, the terminology ‘Company Secretary’ is used.

Company Secretary has come a long way from the days of Brett, M.R who referred to him as a mere servant (*Newlands v. National Employers' Accident Association* (1885)54 LJ QBD 428). Subsequently another judgement in the same terms came from the 19th century British Judge Lord Eisher, M.R. in the leading case of *Barnett Hoares & Co v. The South London Tramways Company* (1887) 18 QBD wherein he observed:

“A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts”.

This was the lowly position or status ascribed by Lord Esher to the office of Company Secretary, and was very much adopted in a number of subsequent cases that came before the courts, till 1970s.

However, in the eyes of the judiciary, the Company Secretary’s position improved marginally being referred to as the natural mouth piece of an incorporated legal entity having a general authority on matters relating to the company’s affairs and administration. In 1971, Lord Denning M.R. in the celebrated case *Panaroma Developments Ltd. Fidelis Furnishing Fabrics Ltd.* declared:

“But the times have changed. A Company Secretary is a much more important person now-a-days than he was in 1887. He is an officer of the company with extensive duties

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and responsibilities. This appears by the role which he plays in the day –to –day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day –to –day running of the company’s business. So much so that he may be regarded or held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company’s affairs, such as employing staff, and ordering cars and so forth. All such matters now come within the ostensible authority of a Company Secretary”.

The court for the first time pronounced in unequivocal terms the ostensible authority of a Company Secretary to enter into contracts on behalf of the company connected with the company’s administrative affairs.

In India, the Supreme Court in *Turner Morrison & Co. Ltd. v. Hungerford Investment Trust Ltd.*, AIR 1972 SC 311, not only recognized the importance of the Company Secretary as a principal officer but also took a curious view of the secretary’s position making him liable to pay the costs for not discharging his responsibilities properly by involving the company in an in fructuous litigation.

CS Profession in India

The law has under gone vast changes ever since the Companies Act, 1956 came into existence and now most lately the Companies Act, 2013 has accorded an exalted status to a Company Secretary bracketing him as Key Managerial Personnel along with the Managing Director /CEO&CFO. Thus, the position of Company Secretary has climbed the top of the professional ladder in the last 55 years, a situation never contemplated by the founding fathers.(*Chartered Secretary, November 1988*).

It is apposite to point out that the first serious attempt to build up the professing of Company Secretaries was made in 1956 when an Institute of Company Secretaries was established under the Government patronage only to be wound up in 1956. Saddened with this experience, the Government established an advisory Committee for conducting the Company Secretaries examination in India and the first such examination known as GDCS was conducted in 1961. The abortive attempt of 1956 prompted the government to take the responsibility of establishing the Institute of Company Secretaries of India in 1968.

As mentioned above, the law in India has under gone vast changes ever since the Companies Act, 1956 came into existence. Of all the statutory functionaries envisaged under the Act, the one that has come into great prominence is the Company Secretary. For many it will be surprising to realize that statutorily the Company Secretary is an officer of the company co equal to that of ‘director or manager’. This statutory position has been in existence a long time is evident from the fact that the definition of the officer contained in section 2(11) in the Indian Companies Act, 1913 included ‘secretary’. The legal position continued to be the same even under the Companies Act, 1956 and in this context the attention is drawn to the definition of

'officer' in section 2(30) of the said Act. Thus, the Company Secretary is a principal officer of the company with statutory functions and responsibilities; but the realisation of this position in the corporate world has come much later.

Globalisation and the CS Profession

Globalisation as we witness has become a dominant feature of the world economy as more and more nations are becoming integrated into the global economy through trade and capital flows. We are witnessing a sea change in the business, economic and social environment the world over. Today, we see a new era that has been created by the revolutionary technological advancement in various fields that has radiated visions of possibilities, generated new hopes and given rise to new business opportunities and temptations.

Back home, the economic reform and liberalisation over the last two decades and more have brought transformation in our country is witnessed by increased number of industries, better employment opportunities, better literacy rates, role of technology, migration of rural population and rapid urbanization, inclusiveness, regulatory reforms, increased FDI inflows, vibrant capital markets etc. As regards businesses, it is witnessed by cross border mergers, increased awareness about good governance and transparency through business disclosures, sensitivity to society and environment, sustainability initiatives etc.

The changing global business environment has not only brought changes in the role and responsibilities of the Company Secretaries but has transformed it into new dimensions obliterating almost the concept of their role in a company performed by them hitherto. The changes have thrown up new challenges and opportunities that have spurred the professional instincts of Company Secretaries to identify themselves with the totality of business and managerial responsibilities. Thus, a Company Secretary has emerged as a key professional in the corporate management providing solutions to the core management team and harmonise the basic decision making process to bring it in line with key factors of the corporate world.

Governance and the CS Profession

Given the wide spread significance of corporate governance world wide, the significance of the governance has considerably gained prominence in India as well. Many companies as we are aware have come under intense public scrutiny for their perceived ethical deficit. This has mandated excellent management of compliances in corporates by professionals in relation to various corporate governance measures.

Keeping pace with developments in corporate environment, the ICSI as a responsible professional body took upon itself the task of promoting Good Governance in Corporate India by taking a number of initiatives in this direction. Further, recognising the fact that Corporate Governance is the key to development of corporate sector, the Institute has adopted a farsighted vision: *"To be global leader in development of professionals specializing in corporate governance."*

With increasing emphasis on good governance and introduction of various provisions relating to corporate governance, Company Secretaries are playing a crucial role in safeguarding the interests of the stakeholders. In fact, they have been instrumental in promoting compliance and good governance norms and have achieved an outstanding recognition in the corporate sector. Being expert in corporate governance, corporates are seeking their professional expertise so as to guide their destiny in the governance regime by ensuring better compliance management, besides building sound compliance policies and procedures, optimal collaborative processes and efficient compliance structures.

More so, with the market driven economy becoming more and more important, disclosures made by corporates are the most important inputs in decision-making by various stakeholders. The credibility of disclosures becomes very important in infusing investor confidence which can be ensured none other than Company Secretaries. It may be pointed out here that we are going through a significant time now with the changing public attitude and tolerance for the lack of transparency and corruption. There is a real desire in the society for greater transparency at all levels. But the situation is not going to improve unless we create a culture of greater transparency. In such a scenario, Company Secretaries will be playing a crucial role in making the companies understand their core purpose of business and helping them in systematizing the same so that transparency becomes a part of the company's culture.

Corporate governance has no more remained aloof from society's interest. It now engulfs interest of the present and future generations as well. Corporate interests are so intertwined with environmental, ecological, societal, biorhythmic and climatic interests that companies can no longer abdicate the responsibility for the effects of their actions on these vitals for the society and generations to come. Long-term business success will require that sustainable practices be deeply embedded in the DNA of all organizations. Sustainability is rapidly becoming a strategic priority for the corporate sector. Considering the importance of sustainability in businesses, the Ministry of Corporate Affairs (MCA) in July 2011 issued National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (NVGs). These guidelines strongly encourage reporting on environment, social and governance issues. In August 2012, SEBI has mandated the top 100 listed entities to include Annual Business Responsibility Report (ABRR) in their annual report in order to assess fulfillment of the environmental, social and governance responsibilities.

The domain of sustainability reporting is going to assume considerable significance in near future. Studies reveal that among Indian companies environmental and social impact assessments and measurement of the return on sustainability initiatives are presently in a nascent stage, which affects the quality of sustainability reporting. Company Secretaries have a key role to play in sustainability reporting. The educational background, knowledge, training, and exposure that a Company Secretary acquires, makes him a versatile professional. They can guide the Boards in right decision making and ensure that the companies develop strategies that mitigate environmental and social risks and focus on the long-term. Company Secretaries can contribute to sustainability strategy formulation and

reporting thereby help the companies in managing their economic environmental and social impacts. More so, it is equally important that the sustainability report is prepared by the companies under the supervision and directions of a Company Secretary. The compliance specialization of Company Secretaries can be leveraged to gain sustainable benefits and competitive advantage by using their capabilities to the fullest.

To conclude, the profession of Company Secretaries through its glorious history has linked itself to the collegiate of established professions and is growing apace. Today, Company Secretaries have carved out for themselves a place of vital importance in the corporate sector by dint of their core competency, expertise and meritorious performance. ICSI is one of those several Institutes in various countries that have spearheaded the movement of internationalization of this profession. The CS profession is commanding respect not only in the corporate sector but is well regarded by other professionals as well as by governmental authorities and agencies concerned with corporate governance in India.

With corporate governance gaining ascendancy all over the world, a greater number of companies are expecting their advisers, consultants to be strategic thinkers, understanding national and international regulatory pressures and contributing proactively to company's prosperity. The Companies Act, 2013 transports India into the big league in corporate governance and democracy. It has strengthened the position of Company Secretaries by according them the status of Key Managerial Personnel along with Chief Executive Officer/Managing Director and Chief Financial Officer. The new law transits Company Secretaries to corporate governance professionals thereby showcases strategic importance of the Company Secretary in governance architecture of any company. The day is not far off when Company Secretary Professionals will be recognised as the 'Guardians of Company's Governance' and an independent adviser to any corporate.

"A new dawn is ahead of us. The onus is on each one of us to herald this dawn with passion and commitment. Our future generation will then radiate in its sunshine".

DEVELOPMENT & REGULATION OF CS : THE PATH FORWARD

CS Debtosh Dey*

Introduction

Historically, a 'secretary' occupied a key position in administration of an organization right from medieval days. The functions of a secretary have since undergone a sea change with transformation of many societies from monarchic forms and after industrial revolution. In this article, we will take important clues from history, contemporary developments of various disciplines, recent changes in India and abroad for outlining the path forward for CS profession.

Industrial revolution (1760-1820) ushered an era of mass production with large capital, needing separation of management from ownership. Consequently, corporate form of business¹ organization evolved with distinct legal personality having name, domicile, common seal, contracting capacities and perpetual succession (unless wound up).

Two broad issues came up ever since large-scale factory based mechanized productions replaced small domestic hand-productions. Such issues also point to corporate form as an essential mode for the transition. These issues are as follows :

1. Professionalization of Management

Professional management is essential for maneuvering risks attached to large capital invested in anticipation of demands for products. Separation of management from ownership in corporate form, created a favorable ground for such professionalization. The great wars with the great depression in between (1914-1945), accelerated professionalization of management.

In modern management, 'Risk Management' is an important philosophy embracing various models including scientific models (causal and quantitative), economic models, behavioral models and quality models. Such models aim at predicting and improving business results as effects of organizational processes in different ways. Organizational processes include innovations and continuous improvements for competitive edging. Also, corporate form itself is a means of sharing risks by large number of members with limited liabilities.

Several management proponents right from Fayol and Taylor to Maslow, Deming, Drucker and Kaplan (to name a few) contributed to management discipline, making it a new science out of an old art.

Professional development needs institutional support for the following twin educational processes :

1. Acculturation – Archival of past works/ manuscripts and researches for future needs.

* ACS

¹ Corporate form is also extended to non-profit making organizations much as it is a mode for conducting business with large number of members

2. Enculturation – Instruction and training through classroom (including present day’s video conferencing or so called ‘virtual classroom’), practice, self-study (including e-learning), etc with formal entry and exit norms. Many schools also believe in indoctrination.

MBA degree, for example, became popular across the globe with various institutions and universities accrediting it for management education. US was the first nation to introduce the course in 1900.

Several other accrediting institutions are known for imparting education on various functional specializations. For example, Institute of Chartered Accountancy of England & Wales (ICAEW) (1880), Institute of Chartered Secretaries and Administrators (ICSA) of Britain, 1891 (re-established under Royal Charter in 1902), Institute of Certified Public Accountants, US (1896), International Association of Administrative Professionals (IAAP) of US which conducted the first Certified Professional Secretaries (CPS) examination in 1951, Chartered Institute of Public Finance & Accountancy (CIPFA) (1973).

It is noteworthy that the Institute of Companies Secretaries of India (ICSI) was initially formed as a company under section 25 of Companies Act, 1956 in 1968, taking up secretaryship training activities from the Company Law Board in 1960. Later, ICSI was re-established under Company Secretaries Act (CSA), 1980 passed by the Parliament with effect from 1st January, 1981.

2. Social Responsibilities

- a. Factory-based mass production was seen as curbing employment and treating labour as cogs without fair remuneration, basic amenities, safety and stability of tenure. Many countries have since enacted labour legislations for addressing these issues..
- b. Plants which destroy and pollute environment need to be operated with safeguards. Also, restrictions have been established by many countries for use of scarce resources.
- c. Powers of managing a company are vested in its Board of directors, subject to the provisions of company law and Articles of Association (AOA) of the company. Board cannot keep company’s members at bay, defraud its investors, lenders and other creditors or misuse public money. Several duties are cast upon directors and officers/ employees in-charge for accounts, records, disclosures, audit, borrowings, investment, debt payments, registration of charges, members’ meeting, internal controls, etc.
- d. Corporate forms could be potential sources for empire building through mergers, chain & cross holdings and other forms of controls beside unfair practices of all forms. Legislations on related party transactions, competitions, protection of intellectual properties, standards for weights and measures, anti-adulteration laws, etc seek to prevent such social evils.
- e. As a nation undertakes various industrial, commercial, monetary and fiscal policies, corresponding legislatures become obligatory on the part of enterprises.

Social Responsibilities of company are being termed as ‘Corporate Social Responsibilities’ (CSR) in the present day. In its broad perspective, CSR requires every company to be accountable for its actions right from its published statements (prospectus, advertisements and financial statements) to product quality, employee remunerations, environment handling

and use of public money. It also includes all such activities which aim at improving quality of life of employees and community. Sometimes, it is compared with Corporate Ethics. As ethics goes beyond mere fulfillment of legal obligations, so also CSR which is a moral duty of every corporate. Many companies track CSR index as a part of Balanced Score Card (BSC).

The key concept behind CSR is stakeholder orientation covering customers, suppliers, employees, owners, community and society at large.

Standards formulated by ISO and other international bodies on environmental management and occupational health & safety systems (OHSAS). After world-wide financial scams, International Financial Reporting Standards (IFRS) have been drastically modified and enlarged. Many countries are increasingly mandating directors and auditors of companies to report on specific aspects including related party transactions, inter-corporate loans and investments, charges on properties, taxes, employee payments and other matters.

It is the duty of company secretaries to ensure implementation of compliance procedures and keep directors posted on compliance. New Indian Companies Act, 2013 also makes provisions for CSR (u/s 135 read with Schedule VII) for certain companies including annual spending for it.

Thus, corporate management is confronted with two basic issues viz. risk management and social responsibilities. Risk management calls for appropriate demand-supply strategies, drawing the best from marketing, operations, human resources and finance under given circumstances. The complexity has multiplied manifold with ongoing globalization and technological advancements. Whereas, discharging social responsibilities is increasingly becoming a wider periphery covering specialized knowledge of various legal compliance, depending on the company.

It is often contended that CS is after all a support service and it cannot drive business. Even it is conceded that marketing plays a key role in strategic planning, human resources are key building blocks of an organization, finance is last word in control and as "supply finds its own demand", operations beget ultimate value for money to customers. Still, there are societal obligations as stringent as may inflict lifting of corporate veil.

Developments in India

Company law in India was adapted mostly from British company law, starting with 'Registration of Joint Stock Companies Act' in 1850. This was recast and amended several times till Companies Act, 1956 was implemented. Sachar Committee was subsequently appointed by the Central Government (CG) for review of the Act (as also of MRTP Act). The committee, in its report of 1978, recommended various measures on professionalization of management along with social responsibilities. Based on such recommendations, the CG had extensively amended the Companies Act in 1988.

The amended Act of 1988 provided, inter alia, for whole-time secretary in a company of prescribed² share capital by inserting section 383A. Such a 'secretary' included member of Indian Institute of Companies Secretaries of India (ICSI), though the rule also provided for other prescribed qualifications.

Later in 2000, the above section also included compliance certification by 'secretary in whole-time practice' for smaller* companies.

It is worth noting that the defining section 2(45) of Companies Act, 1956 included *ministerial* and *administrative* duties of a 'secretary' besides duties under the Act. The adjectives in italics may need clarifications though these are of little significance now after new Companies Act, 2013.

Companies act, 2013 makes new provisions which have enlarged the opportunities of company secretaries as discussed below :

1. Section 203 requires prescribed class/ classes of companies to appoint whole-time 'Key Managerial Personnel' (KMP) which includes a 'Company Secretary' (CS). Section 2(51) also defines KMP as including a CS. Meaning of CS or 'secretary' is to be found in section 2(24) which refers to CS as defined under Companies Secretaries Act, 1980 and appointed by a company to function as such under Companies Act. Section 205 defines functions of a CS in more clearer and concrete terms than before. These are as follows :

- a) Reporting to the Board on compliance of Companies Act including its rules and *other laws* applicable to the company.
- b) Compliance of secretarial standards.
- c) Other prescribed duties.

The first function virtually covers any and every law that applies to the company in question.

Thus, besides Company law, other laws generally applicable to all companies like Direct Tax, Sales Tax/ Service Tax & Labour laws as appropriate as well as laws relating to securities & SEBI guidelines (for listed companies) are relevant for secretarial compliance report to the Board.

Likewise, laws which are specific to a company are relevant e.g. for a mining company, the Mines laws, for a manufacturing company, the Factories Act and Excise Duty Act as appropriate, for a shipping company, the Marine Laws and Service Tax law as appropriate, for a NBFC, the RBI guidelines and so on. Again, if a company undertakes foreign trade, it would attract Foreign Trade (Development & Regulation) Act and Foreign Exchange Management Act (FEMA) apart from related tax laws dealing with cross-border transactions

² Whole-time secretary was mandatory for a company with paid-up share capital of Rs 5 crores or more (the initial limit was Rs 25 lakhs in 1988). Compliance certification was mandated for a company not requiring a secretary but having paid-up share capital of Rs 10 lakhs or more, by a 'Secretary in whole-time practice' as defined in section 2(45A) [in reference to Company Secretaries Act, 1980 and not being in full-time employment].

New Companies Act, 2013 mandates CS as one of the 'key managerial personnel' (KMP) to be appointed as a whole-timer for prescribed class(es) of companies. The prescription is yet to follow.

(e.g. Customs Duty Act and/ or Service Tax law, related sections of Income tax Act on international transactions, etc).

The above is comparable with section 2(2)(c)(vi) of Company Secretaries Act, 1980 which prescribes similar coverage in advisory functions of a 'company secretary in practice' in relation to legal or procedural matters on management of a company.

The second function is a new area which will establish 'standards of care' for a CS and ensure uniform practices.

Other duties in the third function, are yet to be prescribed.

2. Section 204 provides for secretarial audit by 'Company Secretary in practice' (CSIP) in case of a listed or prescribed class of company. CSIP is defined u/s 2(25) in reference to Company Secretaries Act, 1980. Key significances of secretarial audit are as follows :
 - a. CSIP has rights, duties and liabilities similar to those of an auditor u/s 143.
 - b. It is the duty of the company to provide all assistances and facilities to the CSIP for auditing *secretarial and other related records* of the company.
 - c. CSIP shall report any fraud s/he comes across as being committed against the company by its officers/ employees to the Central Government as per prescribed procedure (Since section 143 applies *mutatis mutandis* to both secretarial audit and cost audit). Otherwise, penalty is prescribed.
 - d. CSIP has to take into account the prescribed standards for accounting and auditing as mandated u/s 143 (Other relevant sections dealing with such standards are 132 and 133)
 - e. Board's report u/s 134 has to attach secretarial audit report and explain any qualification, observation and other remarks of the CSIP.

Change of term from 'Secretary in whole-time practice' of 1956 Act to 'CSIP' now, is noteworthy.

3. Section 92, dealing with Annual Return, extends requirement of certification by CSIP also to unlisted companies having prescribed paid-up share capital and turnover. Other important changes on the subject include the following :
 - a. Disclosure of penalties or punishments imposed on the company/ directors/ officers, appeals made against such imposition and details of compounding of offences.
 - b. Extract of Annual Return to form part of Board's report u/s 134
 - c. Penalty for defaulting CSIP

Note : Sub-point (a) would require CS, if any, and the CSIP to obtain relevant information from legal professionals of the company (whether officers or practitioners). Usually, such disclosures are furnished under 'Notes on Accounts' in financial statements.

4. Other changes involving CS – Earlier prohibition of CS being one of the two directors of a company (i.e. private company), is dropped. Further u/s 177, CS as one of the KMP, has right to attend meetings of Audit Committee when it considers auditor’s report but s/he cannot vote. This is a new provision.

Winds of Change

1. The financial crisis of 2007-2010 roused several doubts about MBA programs. Since a large proportion of MBAs join finance function, their roles were called into serious questions after the meltdown of global economy.
2. The Institute of Chartered Accountants of England Wales (ICAEW) initiated a move to merge with the [Chartered Institute of Management Accountants](#) (CIMA) and the [Chartered Institute of Public Finance and Accountancy](#) (CIPFA) in 2005. However, this initiative did not materialize.
3. In India, Limited Liability Partnership (LLP) has been introduced recently in 2009 whereby cross-functional professionals like CA, CS, etc can undertake business of professional services together.
4. There are reports on ongoing discussions for areas of partnerships among the three premier institutes of India viz. the Institute of Chartered Accountants of India, the Institute of Cost Accountants of India and the Institute of Company Secretaries of India. These include common entrance test.

The above winds of change along with recent Companies Act, 2013 as already discussed, point to bigger challenges to CS profession in the coming days.

Path Forward – A SWOT Analysis

The recent changes in new Companies Act, 2013 and the winds of change are quite favorable atmospheres for further professional developments of CS. At this stage, it is necessary to take stock of possible opportunities and threats as well as strengths and weaknesses of CS. These are summarized as follows :

SI	Strategic Areas	Path Forward
1	Opportunities	a) Review of draft financial statements – Since CS appointed by a company has to sign such statements, s/he may independently review these and discuss with Audit Committee/ Chief Internal Auditor and Statutory Auditors (Usually, draft financial statements are handed over to auditors. These are signed after completion of audit). b) Review of internal control for legal compliance covering all laws applicable to the company – The vastness of compliance now enshrined in Companies Act, 2013 may require the CS appointed by a company to co-ordinate with concerned officers/ employees in-charge for ensuring compliance. c) Review of contract vetting and authorization procedure – Since

		contracts are sources of transactions, major and long-term contracts may be vetted by legal department/ professionals including tax experts, if necessary. CS may review the process in consultation of Internal Audit/ Audit Committee.
2	Threats	<p>Legal compliance is a support service to an enterprise. It cannot drive enterprise's business.</p> <p>A CS can position himself/ herself as a specialist in managing business laws. This will also require orientation to modern management techniques including quantitative analysis, information & communication management besides fair coverage on general & functional managements. This is expected to improve his/ her personal influence over others. Even for understanding legal implications, it is necessary to understand company's business generally. These techniques will surely improve aptitude for learning company's business.</p> <p>There is a misconception amongst many that CS is a specialist in Company Law only. This impression may need proper projection of CS's roles specially to corporate management.</p> <p>Since days of big challenge are ahead in the wake of changing expectations from CS, the profession should adapt latest skills of management for preparing future CS..</p>
3	Strengths	The main strength of CS lies in his/ her legal knowledge specially in the fields of business, corporate and monetary laws. As law has various branches, it is seldom possible for a company to involve large number of professionals at a time. CS is rightly the profession which can provide a single window in legal matters. CS can also co-ordinate with legal professionals within or outside the company.
4	Weaknesses	As threats reflect on weaknesses, paragraphs deliberated under point 2 above are relevant.

Conclusion

We have seen in this article that secretaryship is a distinct profession which has grown over ages. As large business is facilitated through corporate form which is subject to various regulations, CS has an important role to play in supporting the top management in legal compliance. Though management and accounting professions have also grown contemporarily, CS profession has clearly emerged with its own domain of specialization. Indian Companies Act, 2013 has enlarged the roles of CS profession to a large extent. The vastness of duties that a CS appointed by a company may have to discharge, may require CS to have powers of review before signing financial statements and for compliance reporting. Therefore, the

regulating body (The Institute of Companies Secretaries of India) has a major task of pursuing this issue with the Ministry while preparing future CS professionals for meeting the challenges.

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EMERGING ROLE OF PROFESSIONALS IN THE SOCIETY: SPECIAL REFERENCE TO INDIAN ECONOMY

CS Sudhir Kumar Saklani*

Introduction

It may be worth repeating the definition of what is a profession which we have often used: 'It is a body of men and women identifiable by a reference to some register or record, recognized as having a special skill and learning in some field of activity in which the public needs protection against incompetence, standards of skill and learning to be prescribed by the profession itself, holding themselves out as being willing to serve the public, voluntarily submitting themselves to self-imposed standards of conduct beyond those required by the ordinary citizen law, and undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public confidence'. In nutshell, a professional is therefore established by his quality and accuracy of performance.

The place of the professions in society is a theme of utmost importance and it is one which is being considered not only in this country, but in many parts of the world.

Relation between Economy and Society and the role of professionals

The economy is a fundamental part of contemporary society. Besides being a social institution in its own right, it also contributes to the administrative, educational, ethical, legal, and religious organization of society; in short, the social superstructure. The society to be the result of an economic base and a social superstructure; it is also the economic base which determines all other social structures including ideology, politics, and religion.

With the growth and development in this superstructure, the complexity of managing it has been increasing day by day. To overcome such complexities, the role of professionals is increasing.

The ever greater dependence of modern society upon professional services, there is an increase in the variety of such services and in the number of the professions. Many practitioners of older professions and for most or all of some newer professions are to serve the society and the society *inter alia* has to pay for the service rendered by professionals.

While the community at large is in all times and places concerned with the manner in which professional services are performed, this is especially so in our times; indeed, the community at large is the client of some new professions and, in increasing measure, of older ones.

Therefore, the professions as central feature of society, is a key to the understanding of social structure.

Importance of Professions

Herbert Spencer considered the elaboration of professions the essential feature of civilized society. Other institution arose to defend, sustain, and regulate life¹.

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¹ The Principles of Sociology (London, 1896).

It cannot be too often repeated that the hallmark of the professional man must be his integrity and his independence, although a professional must have regard to his client's interests and he also has a duty towards country and the community.

A profession involves a particular kind of relationship with clients arising from the complexity of the subject matter which deprives the client of the ability to make informed judgments for himself and so renders him to a large extent dependent upon the professional man. A self-imposed code of professional ethics is intended to correct the imbalance in the relationship between the professional man and his client and resolve the inevitable conflicts between the interests of the client and the professional man or of the community at large.²

It must always be remembered that the work of the professionals is to help those who consult him to avoid or overcome the frustrations and difficulties that arise from potential or actual conflicts of interest, whether between individuals or between citizens and the State or some other authority.

Challenges before the Professions

The professions have been defined in many ways. However, the most common thread is that, unlike others, members of the professions are required always to act in a spirit of public service. That is, they are bound always to put the interests of others before their own.

The problem is that although the argument has merit, the actual practice of many professionals seems to make a lie of it. Whatever the facts of the matter, many people do not believe that the professions are motivated by a spirit of public service. Too many people see the professions as being elitist and secretive. Too many people think that the professionals put the interests before all others. Too many people recall the activities of professional people who surrendered their independence and judgement to become nothing more than 'hired guns'.

The other counter argument against the professions is along the lines that people ought to be able to choose less competent or committed advisers. Let each individual take a personal risk and pay for what they get. The first element involves pointing out that this would relegate the poor (or more likely the middle class) to a position in which they could only afford the services of the less skilled.

The second is that society has always thought it prudent to reserve certain tasks to particular groups who have displayed special competence or who have been prepared to offer special advantages in return for their privileges. It is easy to see how a concern for the health and safety of the community might justify the introduction of a special regime for health professionals.

Similarly, the pursuit of justice on behalf of those whose interests conflict with those of the rich and powerful lends support for maintenance of a legal profession which recognises that its members should pursue a vocation and not just run a business in the law; and we can see how dependent we are on accountants and journalists to ensure that the information we rely upon is true and fair.

² Sir Edmund Liggins TD, "The role of the professions in modern society", Annals of the Royal College of Surgeons of England (1976) Vol 58.

Increased competition may make the professions more efficient. However, as is increasingly recognised, efficiency is not the only value. A just society may also need to ensure that it keeps in place an informal set of checks and balances designed to ensure that some of the less pleasant aspects of the market economy are kept at bay.

Having said this, if the professions are to mount a convincing case in favour of exemption from the full force of competition law, then they will need to do more than talk about their ability to give primary importance to the provision of public service.

Beyond this they will have to take the initiative and put the principles into practice. But they should be warned, the community will not tolerate mere displays of window dressing. A strategy based on the manipulation of images would be the ultimate act of folly.³

Indian Economy after Global Financial Crisis

Following the slowdown induced by the global financial crisis in 2008-09, the Indian economy responded strongly to fiscal and monetary stimulus and achieved a growth rate of 8.6 per cent and 9.3 per cent respectively in 2009-10 and 2010-11. High rates as well as policy constraints adversely impacted investment, and in the subsequent two years viz. 2011-12 and 2012-13, the growth rate slowed to 6.2 per cent and 5.0 per cent respectively. Nevertheless, despite this slowdown, the compound annual growth rate (CAGR) for gross domestic product (GDP) at factor cost, over the decade ending 2012-13 is 7.9 per cent.

After achieving double-digit growth continuously for five years and narrowly missing double digits in the sixth (between 2005-06 and 2010-11), the growth rate of the services sector also declined to 8.2 per cent in 2011-12 and 6.6 per cent in 2012-13. In 2011-12 the sector that particularly slowed within the services sector was Trade, Hotels, and Restaurants, Transport and Communications, and its growth further declined in 2012-13. Activities in this sector, being forms of derived demand, tend to grow at a slower rate with the slowdown of economic activity in the industry and agriculture sectors.

In the last decade, growth has increasingly come from the services sector, whose contribution to overall growth of the economy has been 65 per cent, while that of the industry and agriculture sectors has been 27 per cent and 8 per cent respectively.⁴

One thing is clear that the agriculture has very low productivity but employs over half the labour force. In contrast, financial and brokerage services are the most productive sector in the economy, but employ a tiny share of the labour force. While the share of employment in services has been growing very slowly, the share of value added is significantly higher.

Today, the Indian economy is transforming itself from agrarian to industrial and to service sector. The Service Sector which will be the major sector of world economy⁵ for the rest 21st Century require more professionals like company secretaries who shall be competent to drive the economy with ease.

³ Simon Longstaff, "Professions in society" at <http://www.ethics.org.au/ethics-articles/professions-society> visited on September 9, 2013.

⁴ Economic Survey 2012-2013.

⁵ The India Economy is mainly dependent upon Agriculture sector, but from last two decades the share of agriculture sector in economy is not at par with other sectors, it is expected that the Services sector in India will cross the other sectors by 2025.

Conclusion

The Professionals are the Instrument of Society to achieve the social objectives. The professionals are part and parcel of social system and social superstructure. The professions can only grow on the line and set up of social norms. Apart from this, the professionals require strategies to oust the shortcomings and enhancing the socio-economic conditions of the society in the emerging environment.

MANAGEMENT PROFESSIONALS: THE WHEELS ON WHICH AN ORGANIZATION MOVES

Akinchan Buddhodev Sinha*

Introduction

Management involves integration of vital resources, viz; men, materials, machines, time, etc. Of all these it is men or human capital which injects life into the organization. All resources would lie idle if human resource does not perform the task of integrating other non-living resources, thereby leading to the creation of different utilities, i.e. Form utility, Time utility, Ownership utility etc. Moreover, in today's competitive scenario it is extremely important to ensure sound linkage of various processes/activities, i.e. production, finance, marketing, operations etc., otherwise an organization may suffer paramount losses if any of the linkages is missing. For instance, if a production manager is planning to increase the plant capacity from current 70% to 90%, then it will call for higher consumption of raw materials, labour and other necessary inputs, which in turn, demand for higher budget allocation for the production department. Now if production manager is not working in sync with the finance manager then it may result into financial crunch as production manager may place the order for the raw materials and other necessary inputs without having the knowledge of funds available at the disposal of the finance manager. This example can be extended to understand the importance of integration (a key ingredient in management) for other processes too.

An issue that is gaining steam along with other major issues like persistent poverty, climate change, financial market instability and economic globalisation, is that of corporate sustainability. The growth of an organization is determined by its sustainability. If proper measures are not in force then even a giant organization can also collapse like we have witnessed in the case of Lehman Brothers post Global Economic Crisis. Thus while chalking out a business plan or planning for an upcoming project, it is essential to evaluate the outcomes of such actions as a slight error can threatened the sustainability of the organization.

Thus the above discussion reveals that actions of management professionals demands perfection and they have to do a 'Balancing Act', i.e. on the one hand they have to manage the existing business operations smoothly as well as ensuring drawing and implementation of strategic plans. Another key point that today's management professionals needs to focus is that of managing change, as there is a saying that, "The only thing that is constant is change", and in order to manage the change effectively for making the organization sailable, management professionals should possess necessary skills to make changes at various levels of the organization.

How Management Professionals can contribute?

As discussed that it is the people who drive the organization. In this regard, management professionals needs to play a prominent role of organizing resources so that an effective performance is guaranteed. However, it will be possible when all resources are given due

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weight-age, especially the work force who should not be merely treated as helping hands rather as human assets. Management professionals can consider the following points in this direction for accomplishing the organizational objectives:

a) Strategic approach: The management professionals especially HR professionals can provide suggestions regarding how to strategically manage people as business resources. It encompasses recruiting and hiring of employees, co-ordination of employees and their financial and non-financial benefits and designing of training programs. In this way, HR and other management professionals step into the shoes of consultants rather than merely being an employee of an isolated business function.

b) Collaboration: '*With outsiders we need to embrace competition and with own people we need to strike collaboration*'. Keeping this mantra in point, management professionals at all levels should work together. For example, HR professionals can advise managers and supervisors how to assign employees to various roles in the organization, thereby assisting the organization in adapting successfully to the business environment. Instead of rigid management approach, a flexible approach is the need of the hour, whereby employees can be shifted around different business processes based on the priorities and employee preferences.

c) Commitment building: Merely doing the assigned duties on the part of the management professionals will not serve the purpose. They need to march an extra mile and come up with strategies aimed at enhancing employee commitment to the organization. This starts with recruiting and selection process, where employees are assigned responsibilities according to their qualifications, experience and expertise. Management professionals should try their level best to create a congenial work atmosphere so that employees are encouraged to develop a long-term relationship with the organization.

d) Building capacity: Management professionals should held in developing a competitive advantage, which comprise of capacity building of the company so that in future it can offer better products to its customers thereby strengthening its goodwill. An important component of capacity building is effective human resources. Thus at the time of employee selection due care should be exercised so that the person selected for a position contributes immensely towards the organization.

Apart from playing a key role in ensuring accomplishment of organizational goals, management professionals also needs to pay due attention to the interests of stakeholders, like, shareholders, debenture holders, customers, government agencies, credit rating agencies, academicians engaged in research activities etc., and so it calls for stakeholder management.

Stakeholder management is crucial to the success of every organization. In order to ensure effective stakeholder management, stakeholder analysis is a must, as it will assist in exploring the information which a management professional need to communicate with the stakeholders. For instance, after conducting stakeholder analysis, finance manager may understand that shareholders need the data of P/E ratio, Reported Net Profit After Tax, Turnover, Operating Profit for the last five years in order to form decision regarding whether to keep their funds invested in the company's stock or sell it off! Similarly, it may come to the light of the management that government agencies like Income Tax Department may require the data pertaining to Profit Before Tax for past five years and likewise so on and so forth. But a pertinent

question that crops up at this juncture is how management professionals can plan their approach to stakeholder management? To some extent the answer of this question lies in the first step, that is time management, which implies the quantum of time the management professionals need to allocate for stakeholder management depends on the size and difficulty of the projects and goals, time available for communication and the amount of help a management professional need in the form of sponsorship for the project, inputs from experts, review of material to improve quality etc. to attain the desired results. The next step involves, perusing the list of stakeholders in order to gain an understanding pertaining to the levels of assistance the management professionals expect from them and the roles they are expected to play, if needed during implementation of a project or business plan. The third step involves identification of the messages that management professionals need to convey to the stakeholders in order to gain their support for the projects or goals. Finally, it is necessary to find out what needs to be done in order to win and manage the support of the stakeholders. With the given time and resources, management professionals need to decide upon how to manage communication with the stakeholders and collecting feedbacks from them.

Issues to be addressed

After discussing regarding the pivotal role a management professional can play in building a robust organization, it is equally essential to discuss the issues that need to be addressed so that future management professionals are capable of handling gigantic business challenges.

Future leaders need to be high performers so that they can perform extremely well not only in their home country but also in international environment, as in this era of globalisation, the world has become a global village and businesses are expanding their wings beyond their domestic frontiers. So it is high time that organizations start focussing on building an army of strong next generation leaders. But a survey reveals that even high performing companies there is a real lack of confidence regarding next generation of leaders. Further the survey revealed that merely 54% agreed that they have a strong pipeline of future leadership talent, compared with 43% of the low performing companies. To add to the woes, companies are even less optimistic that they will be able to get leaders with sufficiently diverse experience and backgrounds.

Groysberg of the Harvard Business School observed a similar gap between current and future leaders in his own surveys, with a significant discrepancy between executives, views of their top management team today and their views of the next group of leaders. It is aptly said by Groysberg that, "Companies are simply not doing what it takes to build next generation of leaders". Further he remarked that, "They have a capable CEO and executive team, but when you look at the leadership bench, it doesn't exist".

Therefore, it is high time to address the alarming situation so that management professionals who are wheels of an organization develop requisite managerial and leadership qualities so that once the present generation of leaders retire the next generation of management professionals is ready to fill the vacuum.

Conclusion

Howsoever attractive looking a vehicle is, it is of no use if it is either having no wheels or the wheels are of poor quality, as it is wheels only that will help the vehicle to move. Similarly, it is

compulsory for every organization to diligently do their manpower planning so that right person is selected for the right job so that tomorrow he/she become an asset rather a liability for the organization. An organization can become a banyan tree from a seedling if it is nurtured properly and its custodians that is management professionals give their best in managing the organization. So a management professional needs to devise ideal plans, strategies and approaches as an on-going process for making an organization growth oriented and sustainable. However, the following measures can be considered by a management professional while drawing the road map for achieving excellence with the help of human capital, a) Aligning and integrating of talent management across the business, b) Rethinking on the approaches to international mobility and re-integration, c) Creating a right blend between global and local talent management, d) Using of analytics to identify talent gaps in order to gain better understanding of workforce behaviour and e) Adoption of a long-term approach for developing the next generation of leaders.

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GOVERNANCE CHALLENGES IN NGOS

CS Saurabh Jain*

Non-Governmental Organisations (NGOs) deal in public money for public good, however for legal and practical purposes the ownership of all funds lie with a group of people, who own and manage the affairs of the NGO. Over the years, the way NGOs manage their affairs has become a topic for discussion at various fora mainly owing to the lack of openness and transparency in their governance.

It is more than accepted but in some countries including ours we haven't risen up and woken up to the situation and to the kind of opportunities and more importantly the challenges that it presents. The reason is simple, that we are still not aware or that we have still not made a calculation of the kind of investment that is being made into this sector on an year to year basis and we are kind of on a road which is one way traffic where these investments are bound to increase from year to year because it is now an accepted philosophy and a part of applied sciences of governance all over the world of governing countries and the people in the organisation. Starting with a governing of countries that NGOs must play and continue to play an important and a more critical role as we progress and as we have to fight the common problems of an individual.

Good Governance

The word "good governance", where does this word "good governance" originate? The first reference to the word good governance is found in a period just after the cold war. It is a term that was used for the first time by the World Bank in IMF as a prescription attached to the various aids it was providing to the different countries. World Bank and IMF felt that every receiving dollar or every recipient of the aid for the purposes of development of their own countries ought to follow a procedure in terms of accountability and transparency. In terms of cutting down on the fiscal deficit, in terms of controlling the expenditure, and providing responsiveness and participation to the common citizens. These were the kinds of terms that were included as a pre-condition of every kind of support that came from the World Bank and IMF and the term used as elements of Good Governance starting, there is no reference to the term "Good Governance" in any time of corporate literature before this. This is the first reference that we find to the term good Governance.

Now from this onwards we moved on to an era when governance became to be more or less evident. One of the primary reasons for that was that the world was beginning to follow more and more of the western models. As time progressed it was also realised that the prescriptions that were coming from the World Bank and IMF were not really applicable to the entire world because the convictions and the ground realities in various parts of the world were totally different. The lessons had to be learnt even here in India. Gradually as the term came to be adopted in a more evolving type of a manner by the corporate sector and the other organisations all over the world it became to be viewed as a set of institutional practices that

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The article is based on the deliberations by Lion A P Singh (Past International Director, Lions Club International) at the 14th National Conference of Practicing Company Secretaries held at Kolkata on July 19-20, 2013

arbitrates between the conflicting states of interest and interest of the non-controlling stakeholders. The claims and the expectations of stakeholders may be in conflict with each other so there needs to be a set of checks and balances that takes care of all this and this was the beginning of the concept of good governance in the corporate sector.

Good governance in any sector as may be applicable today or even for the next couple of decades will not be visible to us in terms of a physical structure, it will never be physical. Compliances will only be a small part of it. Good governance will be essentially in the nature of a magnetic field which is there but which is not seen whose influence can never be denied and can never be wiped off, no matter what the externalities may be. Application of extremely strong externalities may suppress the influence but the influence will always be there and it will always bounce back, now that's the magnetic field around anything on this planet earth.

When we talk of implementation and introduction and adoption of a system of good governance, we are basically moving towards an idea where this kind of governance which comes out of the mindset in the acceptability of the people who are involved in the process to implement and adopt it.

Non-governmental Organisations

The NGO sector is a very different sector. Business produces goods and services and so long as it can sell those goods and services and have the customers satisfied, the purpose of the business is honestly and properly taken care of. The government is supposed to control, bring in legislation, bring in regulations, bring in laws, bring in policies which are good, amend the ones which need to be amended, it's got to be responsive and it's got to implement them properly. But the purpose of an NGO is a good human being. It is a good state in which we may find ourselves. It could be fighting for a case of global warming, for climatic reasons. It could be fighting a curse like measles, like polio, like blindness. It could be anything of that sort. So the end product of an NGO basically even if it is in terms of the hospitals and the schools that the NGOs set up, is a good human being.

Measurement of the output of an NGO

Measurement of the output of an NGO is extremely difficult, but the measurements are being made in some parts of the world. Those are the kinds of studies that are being conducted regularly in the West. They are coming up with systems of developing Return on Investment (ROI) on NGOs and investments that are taking place through NGOs and that's just about the next stage that will happen in this country too. So, if we want to prepare ourselves that's the direction in which we will have to go. Now with the kind of investments that are taking place in the NGOs and the investments which are in billions of Rupees, we need to make sure that the resources are properly utilized and they are utilised in an optimum manner. It's for this reason that we are talking of professionalism in the NGOs.

Today if it's *Ramakrishna Mission*, or any other *Pratishthan*, if it is *Bharatiya Sevashram*, or the Chambers of Commerce & Industry and by whatever name they exist are also NGOs. They are absolutely NGOs because they are not into business but they are providing a service for a better society. They are also NGOs of a very different nature. Perhaps they are not regulated and the variety of NGOs where relevance of Governance is much better, but there number is

very small and the investment in them is also very small. But what about the other NGOs, where the investment is in terms of thousands of crores of Rupees, and we have named just one or two of them because those are the ones that are known across this country and the people do identify them. We need to appreciate the common accepted principle that professionalism has been introduced in the corporate sector through the introduction of Independent Directors. The reflection of the independent directors on the Board of NGOs is represented by experts, because an NGO which is dealing with a health issue, we may be involved with that NGO but we may not have the knowledge, the information and the expertise about the specific health related, education related or anything that the NGO might be working with those issues.

Such NGOs draw in experts, who don't have a stake there. They have no financial investment in the NGO, rather they draw upon the resources. There may be a remuneration that may be paid to them, there may be a recognition that goes into the position held by them. Now, how do we balance it? There is an outsider coming and sitting on the Board and the outsider's going to have a say, how important, that say of the outsider is going to be is what we term as an expert. The reflection of it in the Corporate World is that of an Independent Director. The Independent Director has no stake in the company, has no investment, has nothing at stake, rather he has been appointed by somebody who's got stake. So the question that was raised was that, how really Independent is he, and the same question comes in here.

Let us consider an example, in July 2007, companies ranked Lions Club International the best non-governmental organization worldwide with which to work, according to ratings compiled by the *Financial Times* in association with Dalberg Global Development Advisers and the United Nations Global Compact.

Lions Club International Foundation, established in 1968 to channel funds from Lions clubs worldwide, focuses on humanitarian relief, especially the fight against preventable blindness. Of the 34 global organizations rated most highly by companies, LCIF came first when assessed by execution, communication, adaptability and accountability.

The assessment, published in the *Financial Time's* Corporate Citizenship and Philanthropy special report, highlights companies' growing interest in long-term partnerships to tackle an expanding range of social issues.

The rankings were prepared by Dahlberg and based on assessments from 445 companies involved with non-governmental organizations (NGOs) and international agencies to increase transparency, accountability and evaluation in the fast-growing world of non-profits.

Why did this happen?

The prime reason why it happened was that the bulk of the finances that are available, which are in a few billion USD are made available and are applied all over the world at the recommendations which are very strictly adhered to and almost blindly followed. Those recommendations come from the individuals appointed on the Board by the World Bank and UNICEF and WHO because the foundation believes those people will have the expertise to run and steer global programmes which the volunteer leaders of the country organisation would not have. So they have blindly without it being a written law made it a practice that any kind of recommendation coming in by the appointees of the WHO and the World Bank are 100%

applied in terms of spending and investing thousands and millions and billions of USD over the last 20 years and that's been a policy and they have gone by the words of the experts. That was one of the prime reasons why the Financial Times felt that the investment being made through this particular foundation and the funding that is provided to it from all over the world is best invested. That's a lesson to be learnt how much power and authority are we going to allow to be invested and rested with the Independent Directors in the Corporate World and with their counterparts or their shadow in the world of NGOs which are the experts.

The next issue there is to measure the quantum of administrative expenditure in any corporate sector, also the managerial remuneration needs to be disclosed, the questions of managerial remuneration are often called for or the matters are always questioned. In the times of the economic meltdown we saw the kind of remuneration which was being drawn by some of the leaders in the corporate world at the top level. Some of the shameful levels at which they were drawing, and some of them who continued to draw, others who had the call of the conscience to say that they would stop drawing those but the fact in NGO level is a very strange and a very important issue to be addressed, what is the level of investment or the expenditure that is going to take place on administrative issues.

Legislative Framework

There is no particular law governing NGOs, likewise the NGO law normally varies from country to country and normally within the country also there are various kinds of registration which permit different board and trustee structure. For instance a public charitable trust can be formed with one or two trustee who are permanent in nature. Such law belong to an era when charities were entirely based on the funds / assets bequeathed by a particular donor/ author. But when such trust are registered for fund raising and donor based projects, it raises a serious question mark on the public ownership of the NGO.

Similarly various other forms & registration also provide the possibility of the ownership being in the hands of a private group of people. In our country, the NGOs are registered as co-operatives, under the Registration of Societies Act, some of them may be trusts and very few of them may be registered under Section 25 of the Companies Act, 1956. What kind of administrative expense are we really talking of? We have tens to thousands of such NGOs in our country where the expenditure amount on administration alone may be in excess of 10 to 20 crores of Rupees annually. It may be even higher. Today we are at just the threshold where with the passage of Companies Act, 2013 serious application of CSR Funds with Corporates over a certain amount of turnover and over a certain amount of profit has been mandated.

The funds are available and all of us are aware that many corporates have got their own charitable wings, their own charitable arms which they have created through their own foundation. So the investment of those CSR funds can then be made through those charitable wings through their very own charitable foundations which are actually extensions of those corporates. For example, an industrial house 'X' has got 20 different foundations under which it may run its hospitals and colleges and various other programmes. There is no bar on that CSR fund coming in from that corporate sector into their own foundation for the CSR funds. The question which is very important, which is going to arise, which is arising even today is what is the limit to which the administrative expenses may be permissible for those corporates.

There is no law in this country that takes care of it. There's nothing that prohibits it under the Societies Registration Act, even the Indian Trusts Act is totally silent on that issue. It may at best lead to certain registrations or certain non-registrations and accession issues which will become irrelevant to the Industrial houses once the amounts were large and there is nothing there prohibited even under section 25 of the Companies Act, 1956. And this has been noted in the West. Especially in the UK there are special Boards which are doing a kind of a rating of the NGOs. And it's going to be the next step in this country like we have ratings in the corporate sector, there have to be ratings in the NGO sector also. Because these ratings will then determine whether or not the investment in the administration of those NGOs is reasonable. It's got to be within reasonable terms. When we talk of professionalism we also understand that entrepreneurial talent has to come in. With entrepreneurial talent coming into NGOs, we also understand that people have to be properly rewarded. It's not that one can run the big NGOs free of cost. But it is also true that doesn't happen, we cannot find a *Swami Vivekananda* in everybody who will give us his entire life walking in the robes, even if we find some of them today, they will just be a handful but if that good work is to be done, we have to get entrepreneurial talent in to the NGOs and that entrepreneurial talent has got to be rewarded. The reward's got to be almost at par with the Industry, but even then there have to be checks and balances, because if those checks and balances are not there, the entire process would be lost.

NGOs vis-a-vis NPOs

The word NGO is often interchangeably used with the word 'NPOs', in the West. They have started using the word NPO's which is a non-profit organisation because they say certain government organisations which are also NPOs need to be viewed similarly. Makes some kind of sense! In our country we are still sticking to the word NGOs. We have no central body or a state run body across any of the states or in the country which can give us a listing of all the NGOs. We can be reading papers that we have got 10 billion NGOs in the country. But there's nobody who can give us a list. There is no listing of NGOs in this country even today.

Today also when the government agencies call a meeting of NGOs, the invitees are handpicked, they are the NGOs who the concerned government official may be knowing or about whom he may be preferring to call to a meeting and offering them certain opportunities. There is not a single portal from the government of India which puts up info in respect of issues which may be of interest to NGOs for NGOs to respond therein. There is no communication that is taking place, but the communication is taking place in the West. The West has rating agencies, that look at the purpose and the mission and the objects of the NGOs and see how well there NGOs are making up and the corporates then take a call where they should invest and when the corporate invest in that particular NGO they build up their own brand value because they say that we are working with so and so NGO. We are working with so and so organisation, with so and so entity and they are working with such and such entity gives a boost to their own brand and level.

We could do it here, if we do it in this country, the money that flows into this sector is tremendous, the money will be properly spent. The money will be properly invested and there would be a good Return on Investment (ROI) on it. One may be wondering as to what kind of an

ROI are we looking at. But there's literature on ROI. A Google search on "ROI on NGO's" gives us hundreds of results we find that it's all work in progress. Tremendous work is going on and its work in progress. It's very simple, supposing that an organisation which is dealing with polio patients, it could be *Rotary International*, it's dealing with the individuals who are visually impaired, that could be the Lions Clubs International. That could be any other organisation. Supposing in the last 20 years they have impacted say 3 million people in the country, based on the records available in public domain. We can calculate the ROI in it. To calculate the ROI in it supposing they have made that an individual who was suffering from polio or that individual who was suffering from visual impairment capable of earning just bread and butter and the minimum level say of just Rs. 250 per day and that individual works for 250 days in a year - the total input in the economy is 18,750 crores of Rupees. Now that's the ROI and that's not multiplied by any weighted factor because any money that comes in, has to also be multiplied with the weighted factor, to take care of the velocity of the circulation of that money because the person does not keep the money with him.

The money one has, goes into buying the product, let's say one buy's a bread from a guy who is running a store, who buys it from someone who is running a bakery and the guy who's running the bakery buys the inputs from the farmer, so that the process is on. If the economist has to study that in the worst case the factor is 1.5. So if we multiply 18,750 crores with 1.5 it's a mind boggling figure which one or two organisations are giving in this country and there are hundreds of such organisations in this country so that's the kind of ROI that we are looking at. There is no estimation of that ROI. There is no realisation of the fact that the kind of investments that are going there and the opportunities there and the kind of return that needs to be built out of it.

The term NGOs is interchangeably used in the West with NPOs, which is non-profit organisations. And this leads to an important issue regarding social enterprises. There are social enterprises all over the world which are treated at par with NGOs. There's no pronouncement from the government regarding what's going to happen in our country. What's a social enterprise, a social enterprise is an enterprise which is run for a social cause but which is run with application of proper business techniques. Greatest example of that is Dr. Mohd. Yunus's *Grameen Bank* in Bangladesh - in the process of micro finance. *Grameen* runs the entire operations as a social enterprise. The best of management consultants and the best of MBAs and the best of financial analysts and the best of enterprise resource planners in different parts of the world are in employment with them and they work with them. They get payment almost at the industry rates. But what's going to be the future in this country, where are we going to look at NPOs, social enterprises and the NGOs and that entire conglomerate in this country.

Another issue that needs consideration is the opportunity to get CSR funds from the corporate sector. The NGOs do not have the capacity to get those funds. These funds usually get channelled into the industrial houses' own run NGOs and foundations, whereas it should go into the foundations of the community and the country. It's not going to happen because our NGO's need capacity training. It's for institutions and professionals like company secretaries to provide them the capacity training. How do you approach a corporate, what does a corporate look for in a partner. What is the kind of longevity that corporates look for in a partner. How is the merging

of the two brands going to take place in the long run. How do they value themselves. Seeing their brand together with the name of the NGO, on their advertisement page.

These are the kind of management issues that need to be taught and capacity has to be created and education has to go down, which is happening in the West and which is not happening here and that needs to be taken care of and the last most important issue is when we are talking of accountability and when we are talking of transparency, we do not have accounting standards for NGOs in this country still. They are emerging in the West. They have always followed them.

Again a Google search reveals that Accounting Standards are being developed for NGOs in the West. We are still sleeping, it's time to wake up. Somebody from amongst us, somebody from Institutions like ours will have to bring up these issues before the Government to see that we come up with accounting standards, reporting standards, compliance standards and transparency standards by the NGOs because that is a tremendous future.

It is high time that we as professionals act as conscience keepers of the Corporate and guide them towards CSR activities in true letter and spirit.

ROLE OF NGOs IN GOVERNANCE

Akansha Rawat*

Introduction

Governance is all about fairness, accountability, transparency, equity and ethics. And the function of governance is to rule, lead, create and maintain structures and systems and monitor performance. In fact, how people govern depends upon their values and beliefs, their ability to make decisions, as well as their capacity to ensure effective implementation of decisions.

India has a long history and tradition of voluntary action. Voluntarism in the country has gained momentum with the advancement of the society. In the contemporary time, the role of voluntary organizations, commonly known as NGOs, has been recognized as indispensable in the process of development. Besides, the state led government sector and market-led private sector, the voluntary sector has evolved as a viable third sector. In India, NGOs have now a days, been a positive influence in the areas of health, education, human rights, environment protection with different degrees of funding from various sources. Even NGOs are now involved in the policy making decisions of International organizations like United Nations (U.N.), World Bank etc. To be specific, since 1994, the Government of India as a policy has decided to extensively involve voluntary organizations in the development of the social sector. Even the policy document issued by the Planning Commission of India has emphasized on independence of the voluntary organizations while strengthening the governance system to address the current debate on their transparency and accountability.

How do NGOs work?

With increasing globalization, liberalization and de-regulation, the international forces have influenced the economic and social forces at the national and local levels thus resulting in an increasing development and powerlessness of the people particularly, among the poor and marginalized sections of the society. Here comes in the role of Non-Governmental Organizations (NGOs), to emerge as a viable institutional framework generally recognized as voluntary sector, to serve as catalyst for development and change. The voluntary sector has evolved as a viable “third-sector” in the third world next to the government and private sectors and the NGOs with their participatory approach, people’s mobilizing capacity, closeness to grass roots and better insights into the needs of the people have emerged as alternative development agents rather that sector has become an effective means of the process of empowerment. As the economy becomes global and market oriented, the state has been shrinking in the functions and resources and unable to meet the growing social/welfare and developmental challenges. On the other hand, the profit motivated private enterprises, though expanding rapidly, however is little concerned with the social developmental considerations and rural development. Therefore, neither the state-led nor the market-led model of development is adequate in achieving the developmental goals. Hence, the role of the third sector, i.e., the voluntary sector, assumes special significance and it gains wide recognition nationally and internationally. However, the growing national and international level recognition and increasing

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dimension of funding has been leading to mushrooming growth of voluntary organizations. In fact, such galloping growth has again been leading to diminishing faster their strength and eroding away the virtues and qualities of voluntary actions. Moreover, NGOs have now changed their focus from the traditional relief, rehabilitation, charity and welfare activities to move towards developmental endeavours. To be specific, the overdependence of NGOs on the government for financial and technical assistance has greatly affected the transparency and autonomy of those organizations and that's why need for existence and effectiveness of governance mechanism in the form of a system of checks and balances to monitor and manage the functioning and performance of the NGOs has been seriously felt now. Since, effective governance is the key towards achieving the objective of building strong and sustainable social sector and truly, an organization with effective governance will be like rubber band elastic to its circumstances and needs, and an organization without an effective governance is like a balloon as it will burst as it gets more resources.

Need for Governance

Governance is universally applicable and all encompassing. Profitability is not a driver for good governance rather it is a bye product. Having said this, it does not mean profit is not important.

As regards the governance of not for profit organization, the governance challenge is the best possible utilization of resources balancing the conflicting interests of stakeholders which is similar to governance challenge of 'for profit' organizations, institutions, government and so on.

A recent study commissioned by the Government of India reveals that India possibly has the largest number of active non-government, not-for-profit voluntary organisations in the world. The number of such entities, accounted for till 2009, stood at 3.3 million, which is one NGO for less than 400 Indians. NGOs are highly diverse and include local, national, regional, and international groups with various missions dedicated to environmental protection, sustainable development, poverty alleviation, support during natural disasters and other issues. Around the world these organizations have been gaining visibility, recognition and legitimacy in the eyes of governments, international organizations and agencies, the media and the general public.

The activities of Non-Profit Institutions are funded by various sources such as grants, donations and offerings, interest, dividend, membership subscription and so on.

NGO, as is evident from previous discussions rely a lot on public support for their functioning. Consequently, as long as they benefit directly or indirectly from any kind of public support, they are expected to demonstrate a high degree of accountability to their surrounding community. This community includes members, beneficiaries, donors, the government and other stakeholders or constituencies.

Role of NGO in Governance

Non-governmental organizations (NGOs) are now recognized as key third sector actors on the landscapes of development, human rights, humanitarian action, environment, and many other areas of public action. NGOs are best-known for two different, but often interrelated, types of activity – the delivery of services to people in need, and the organization of policy advocacy, and public campaigns in pursuit of social transformation. NGOs are also active in a wide range of other specialized roles such as democracy building, conflict resolution, human rights work,

cultural preservation, environmental activism, policy analysis, research, and information provision.

The work undertaken by NGOs is wide-ranging but NGO roles can be usefully analyzed as having three main components: implementer, catalyst, and partner. The implementer role is concerned with the mobilization of resources to provide goods and services to people who need them. Service delivery is carried out by NGOs across a wide range of fields such as healthcare, microfinance, agricultural extension, emergency relief, and human rights. This role has increased as NGOs have been increasingly “contracted” by governments and donors with governance reform and privatization policies to carry out specific tasks in return for payment; it has also become more prominent as NGOs are increasingly responding to man-made emergencies or natural disasters with humanitarian assistance.

The catalyst role can be defined as an NGO’s ability to inspire, facilitate or contribute to improved thinking and action to promote social transformation. This effort may be directed towards individuals or groups in local communities, or among other actors in development such as government, business or donors. It may include grassroots organizing and group formation, gender and empowerment work, lobbying and advocacy work, and attempts to influence wider policy processes through innovation, and policy entrepreneurship.

The role of partner reflects the growing trend for NGOs to work with government, donors and the private sector on joint activities, such as providing specific inputs within a broader multiagency program or project, or undertaking socially responsible business initiatives. It also includes activities that take place among NGOs and with communities such as “capacity building” work which seeks to develop and strengthen capabilities. The current policy rhetoric of “partnership” seeks to bring NGOs into mutually beneficial relationships with these other sectors.

Impact of Companies Act, 2013

The Companies Act, 2013 mandatorily provides for CSR (Corporate Social Responsibility) activities for a certain class of companies. This cannot be achieved by a corporate alone. The kind of niche skills and network provided by an NGO will now come in handy of these corporate who are now bounded by law to spend a part of their profit on CSR activities. All these factors along with the growing size and importance of NGOs in the Indian economy is leading both central and state governments to impose, or rather think about imposing governance related legislations and regulations on NGOs which includes consistent management, cohesive policies, guidance, processes and right decision for a given area of responsibility, optimum utilisation of resources in a manner that is transparent, accountable and responsive to people's needs. The number of governance issues relating to NGOs includes Board/management structure of NGOs and the accountability, optimum utilisation of funds collected, execution of policies etc. Foundations and other funders of NGOs also are considering governance practices in their grant-making processes. Being aware of legal requirements and governance best practices not only helps to reduce the risk of personal liability as a Committee member, but can make the difference between an organization that is effective in accomplishing its mission and one that is not.

Conclusion

With the growing size and dimensions of the Non –profit sector it is imperative for NGOs and the government to institutionalize reforms and controls to ensure governance. The New Companies Act mandatorily provides for CSR activities for some class of companies. It will definitely increase the role of NGOs; as the companies had to spend some portion of profit mandatorily on CSR activities. The companies may directly not able to spend such amount or unable to make presence in those areas or unable to work effectively. The activities which may be covered under the provisions are related with LAD Plan (Local Area Development Plan). The companies had to spend on the affected areas first. The priority areas spending may be done with the help of NGOs working in those areas or through some community development programmes, the most effective way to spend.

In such cases, the company may require the certification on spending of such amount by the NGO on such LAD plan. The certification may also be required at the moment of preparation of annual accounts which is going to be signed by the Professionals, especially Practicing Company Secretaries.

The role of governance professionals in this sector is consequently gaining ground. In the near future, we see the evolution of a whole set of new governance professionals geared up especially for this segment of organizations. Since here, the organizations manage more of public trust than finance, any violation of integrity can be highly detrimental to the interests of those who really need humanitarian assistance. The role of Company Secretaries is widening day by day. The step started from a clerk is reaching the professional acme as Governance Professional; the governance of Corporate, NGOs and Government. The Company Secretaries are shining their path for a prosperous future.

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CONTINUING PROFESSIONAL EDUCATION FOR GOVERNANCE PROFESSIONALS

CS Jai Prakash Agarwal*

We are living in a dynamic world. Business environment is full of uncertainties and changes and to work in pace with the changes in the business environment, it is necessary for a corporate professional to be well versed with the contemporary development in the business environment. In view of this, it becomes necessary for the corporate professional to keep themselves updated about various verticals of business environment. The business environment of an organisation has various verticals which we may list as under :

Political

Economic

Social

Technological

Legal

Environmental

In order to serve an organisation with full efficiency and result orientation, a corporate professional needs to get updated about changes in each verticals as listed above. Various professionals' bodies have introduced the concept of Continuing Professional Development /Continuing Professional Education Program in their curriculum so as to make their members remain professionally competent and achieve their true potential.

To understand the imperative of Continuing Professional Education (CPE), we will now discuss the meaning of CPE, its need and objective, its advantages and limitations. We will also discuss the CPE requirement under the Company Secretaries Act, 1982 and its importance for Company Secretaries as a Governance Professional.

What is Continuing Professional Education?

Continuing professional development (CPD) or Continuing professional education (CPE) is the means by which people maintain their knowledge and skills related to their professional lives.

CPE is required for all professionals and most of the professional bodies have included the CPE requirement for renewing the license required to render the professional services.

Need of Continuing Professional Education

Strong Continuing Professional Education System is the backbone for the success of a professional. In order to keep its members versatile and competent, professional bodies are making all efforts. The need of CPE may be understood with the following examples :

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1. Regular changes in the Business environment

Since laws are made by the government/regulators/society for the common interests of public at large and with the concurrent changes and development in the societal needs, lawmakers make the new laws and change the existing laws. In order to serve the society /its customers it becomes necessary for the professionals to be aware about the change happening in the legal environment and this mandates the CPE.

2. Changes in Technology

The rate of change in technology is very high. In some cases, the technology which came yesterday becomes obsolete tomorrow. In order to cope with the great pace of changes in technological environment, it is necessary for the professionals to be aware about the technological changes happening, so here the need of continuing professional education arises and CPE may play a very crucial role in making the professional remain competent and updated about the new technologies.

3. To be eligible to render the Professional Services

Various professional bodies in the world have mandated the CPE for renewing the license of their members. So in order to render the professional services, it becomes necessary for the professional to engage in CPE activities.

Objectives of Continuing Professional Education

1. To Constantly upgrade professional competence and skills
2. To improve the level of confidence in members to meet ever-changing demands on the profession.
3. To make the members adaptable to changes
4. To create the capacity of members to cope up with the changes
5. To serve the society and customers with greater efficiency and flexibility
6. To meet the requirement of various legislations/regulations
7. To make the members aware about the contemporary development and work practices of other members/industries

Types of Continuing Professional Education

Continuing Professional Education has many facets to it. It is generally categorized into two parts

(a) Formal/Structured Continuing Professional Education

(b) Informal/Unstructured Continuing Professional Education

Formal or Structured continuing Professional Education refers to the training which is imparted through structured way of learning i.e. by way of class room sessions, Seminars, Conferences, short term refresher courses.

Informal continuing professional education refers to the learning activity which is not structured and it includes e-learning, web based learning, taking lectures on issues of on temporary development, writing books etc.

Limitations of Continuing Professional Education

Continuing Professional Education (CPE) is must for the professional to execute their duty in meaningful and desired manner. But in most of the cases, professionals treat CPE requirement as a compulsion rather than they are motivated to do it of their own. There are various reasons for provision of CPE requirement has not seen a great success. Few of them are discussed below

- 1. Organisation of Programmes on Old/Obsolete Topics:** In many of the cases, The CPE programme are organized on obsolete and old topics which loses the usefulness of CPE programs and professionals are not motivated to attend such programs
- 2. Too much formalization of Programs:** In many cases, the CPE programs are organized in too formal way which results into waste of time and money and people gets reluctant to attend such programs.
- 3. Lack of awareness about importance of CPE**
- 4. Lack of CPE guidelines implementations by Professional Bodies**
- 5. Lack of Focused Approach:** In most of the cases, the CPE programs are based on the basics of the Topics and it does not give a thorough/specialized knowledge on a particular subject which restricts many people to attend the formal CPE programs.

CPE Requirement for Company Secretaries

As per Guidelines issued by the Institute of Company Secretaries of India, It is mandatory for all members in practice to secure **15 Program Credit Hours (PCH) in a year or 50 Program Credit Hours in a block of 3 years by attendance of approved learning program**. However, no carry forward for excess Program Credit Hours from block of three years to another block of three years will be allowed.

Importance of Continuing Professional Education for Governance Professionals

The governance professional's role is to enforce a compliance framework to safeguard the integrity of the organisation and to promote high standards of ethical behaviour. S/he has a significant role in assisting the board of the organisation to achieve its vision and strategy.

The Governance professionals have a significant impact on the level and quality of the organisation's corporate governance and governance culture and often have a pivotal role in assisting the board to achieve the entity's vision and strategy. The activities of the governance professional encompass legal and regulatory duties and obligations and additional responsibilities assigned by the employer.

There are some qualities of professional that he is responsive, knowledgeable, careful and a good teacher. CPE is necessary for maintaining all above virtues in a professional.

Continuing Professional Education is important for all professionals and Governance Professionals are not different on this front. In order to cater the requirement of board and to ensure that the organisation is managed in a best governed manner, it is important for the governance professional to be aware about the varied practices, or board and the contemporary development happening in business environment. Continuing Professional education may play an important role in fulfilling this need of corporate governance professional.

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COMPTROLLER AND AUDITOR GENERAL OF INDIA: A TOUCHSTONE OF DEMOCRATIC GOVERNANCE

CS DISHA KANT*

Introduction

Democracy, and democratic governance in particular, means that human rights and fundamental freedoms are respected, promoted and fulfilled, allowing them to live with dignity. People have a say in decisions that affect their lives and can hold decision-makers to account, based on inclusive and fair rules, institutions and practices that govern social interactions. Democratic governance feeds into economic and social policies that are responsive to people's needs and aspirations that aim at eradicating poverty and expanding the choices for the people, and that respect the needs of future generations. In essence, democratic governance is the process of creating and sustaining an environment for inclusive and responsive political processes and settlements.

The link between democracy and human rights is captured in article 21(3) of the Universal Declaration of Human Rights, which states:

“The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

In the 1992 report entitled “Governance and Development”, the World Bank set out its definition of good governance. This term is defined as “the manner in which power is exercised in the management of a country's economic and social resources for development”. The important constituents of good governance are that it is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assumes that the true democracy happens wherein people speak about their needs, wants and desires. Democratic governance is also responsive to the present and future needs of society. In simple terms "Democratic Governance" means: the process of decision-making and the process by which decisions are implemented (or not implemented). Governance is all pervasive, it isn't restricted to the any particular regime rather it derives its root from democracy.

India is the world's largest democracy. India attained independence on 15th August 1947. Various speeches made at the historic moment reflected the vision of the leaders, as those serving the nation and humanity.

The paramount feature of Indian independence was a foresighted collated vision of governance which was pillared on characteristics of democracy i.e. Justice, Liberty, equality and fraternity. The 'Constitution of India' is the sovereign will of the people of India. It defines the governance parameters for the country's welfare and true inclusive economic growth and development. The role of governance is an integral component of any country's growth and development, which India derives from 395 Articles and 12 schedules of the Constitution.

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A Constitutional Authority

The famous Tryst with Destiny speech by first Prime Minister, Pandit Jawaharlal Nehru, recognised that freedom and power bring responsibility and that it would be necessary to strive to fulfill the pledges made.

The birth of the 'welfare state' restructured the way the state discharged its duties. It rooted itself on the foundation that the state would be used as an instrument for the socio-economic generation of its people. After mushrooming into a welfare state, its activities have increased manifold requiring better controlling mechanisms for proficient administration. The office of the Comptroller and Auditor General (hereinafter 'CAG') is one such mechanism. In democratic governance, audit is meant to keep an eye on the spending of the executive and ensure parliamentary control over the receipts and expenditure by the government. It is a process through which CAG ensures transparency and accountability through its reports which highlights the various deficiencies in spending and receiving funds and includes reasons which lead to appropriate decision making.

Originally called the Accountant General to the Government of India in 1858 and later designated as "Auditor General of India" in 1860, the Comptroller General of Accounts in 1866, the Comptroller and Auditor General in 1884, the Auditor General in India in the Government of India Act 1919 and the Auditor General of India under the Government of India Act 1935, he was entrusted with the responsibility for the accounting and audit of the Government of India and eleven provincial governments and performed his duties through the Indian Audit and Accounts Department.

All governmental organs and institutions owe their origin to the Constitution and derive their powers from its provisions. When the Constitution of India was promulgated on 26 January 1950, the CAG of India was established as Supreme Audit Institution of India. The Constitution provided for the appointment of a Comptroller and Auditor General of India who will keep watch on the finances and accounts of the Union and the States. He shall be appointed by the president by warrant under his hand and seal. To ensure impartiality, he is debarred from further office under the Government of India or of any state. As regards security of tenure his status is that of judge of the Supreme Court. It shall be his duty to see that no part of the revenues of India or of any of the states is used for purposes and on the items without due authority of the concerned legislature. His reports shall be laid before Parliament or the State Legislature, as the case may be.

The importance of CAG is easily understood by the following words of

Dr. B.R. Ambedkar: "I am of the opinion that this dignitary or officer (C&AG) is probably the most important officer of the Constitution of India. He is the one man who is going to see that the expenses voted by parliament are not exceeded, or varied from what has been laid down by Parliament in what is called appropriation Act. If this functionary is to carry out the duties- and his duties, I submit are far more important than the duties than the duties of the Judiciary."

CAG derives its powers from The Constitution of India (Article 148-152) and The CAG's (Duties, Powers and Conditions of Service) Act, 1971 for compiling the accounts of the Union and of each State from the initial and subsidiary account rendered to the audit. Both these legislations

give a certain responsibility to the CAG to guard the national treasure and ensure accountability in public financial administration. It allows CAG to create an environment of good accounting system which serves as a means to good governance.

Under the Constitution, the CAG has been given an independent status, equivalent to that of a Supreme Court judge, so that he/she can work without fear or favour. The CAG's responsibility is to see that money voted by Parliament is spent according to its wishes and with due regard to wisdom, faithfulness and economy and a high degree of probity is maintained by public officials while handling state money and property.

In accordance with Article 151 of the Constitution, the Reports of the Comptroller and Auditor General of India relating to the Accounts of the Union are submitted to the President, who causes them to be laid before each House of the Parliament. As per the present convention, the Audit Reports, after approval by the Comptroller and Auditor General of India, are sent to the Secretary to the Government of India, Ministry of Finance, Department of Economic Affairs who co-ordinates their submission to the President and presentation in the Parliament.

In exercise of the mandate provided under the Constitution of India, and the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971, the Comptroller and Auditor General undertakes audits which can broadly be classified as 'Financial', 'Compliance' and 'Performance' audits. The primary purpose of the financial audit is to verify whether the financial statements (accounts of the Government) are properly prepared, complete in all respects and are presented with adequate disclosures. The Compliance audit examines the transactions relating to expenditure, receipts, assets and liabilities of the Government to ascertain whether the provisions of the Constitution, the applicable laws, rules, regulations and various orders and instructions issued by the competent authority are being complied with. The Performance audit is an independent assessment of the extent to which any organisation, programme or scheme operates economically, efficiently and effectively. The results of financial audit are included in the report on 'Accounts of the Union'. The reports on Performance and Compliance audits are presented in several separate volumes.

Comptroller General : Governance General

In July 2004 in USA General Accounting Office (GAO) of the USA was re-designated as the Government Accountability Office the then Comptroller General of the United States Mr. David M. Walker commented *"Most of the agency's work involves program evaluations, policy analyses, and legal opinions and decisions on a broad range of government programs and activities both at home and abroad. The scope of GAO's work today includes virtually everything the federal government is doing or thinking about doing anywhere in the world."* He further added *"At today's GAO, measuring the government's performance and holding it accountable for results is central to who we are and what we do. We continue to believe that the public deserves the facts on all aspects of government operations—from spending to policy making."*

Indian genre is adapting to a re-energized set of governance model, where the citizenry seeks a dialogue with government and like to participate in decision making. They are seeking transparency in policy formulation and a new moral and ethical framework for sustainable governance. The citizens of India demand their voice to be heard. A true democracy shall happen only when they form a part of participatory democracy and not representative

democracy. This beckons the constitutional machinery to shift their governance approach towards transparent, accountable and responsible mechanism which indeed meets the challenges and demands of the society.

Former CAG Mr. Vinod Rai in his speech on Social Obligation of Public Auditors at Harvard Kennedy School USA had put forth the paradigm shift in the objective and approach of public auditing? He said that

“Should we as public auditors limit our role to placing Reports in parliament or go beyond that and seek to sensitize public opinion on our audit observations, especially so in social sector audits such as Rural Health, Primary Education, Water Pollution, Environment, Drinking water etc.

We have reacted positively to this paradigm shift and have introduced a threefold change. Firstly, we now premise our audits on the firm belief that we are as much engaged in the business of upgrading governance as any other agency in the administration. We do not subscribe to the WE - THEY concept and hold ourselves to be on the same side of the table as the executive. Our audits have undergone a culture change. We now engage in positive reporting. Hence, from being a bunch of fault finders who are often wiser by hindsight, we now recognise and report good practices that we observe during audit.

Secondly, to ensure a mere widespread dissemination of our audit observations - both positive and negative - we convert the salient observations in our Reports into small booklets which are well indexed and facilitate easy understanding. We have been distributing these pamphlets, which we refer to as "Noddy" books, to the media, colleges, citizen's groups, non government organizations and the like. This is being undertaken in the firm belief that an awakened citizenry, once sensitized about the inadequacy of government departments, would exert pressure on these departments and maintain a vigilante thereby ensuring better delivery of government services.

Thirdly, in our quest for a deeper insight and a more widespread coverage of social sector issues we have wholeheartedly supported the concept of social audit. We recognise that our own core competence is limited to conducting audit. At times, we may not have adequate in-depth knowledge of areas where government schemes are being implemented on the ground. We thus engage with credible citizen's groups which are working in that area to avail of their local knowledge for a better appreciation of the efficiency in the implementation of government schemes. This has given us a better outreach, and provided those agencies, with a more credible voice in their legislatures. We even give prominent coverage, in the media, of our intent to conduct audits in specific places and sectors and invite suggestions as well as information about these areas. This has evoked a very positive response.”

Good Governance Intervention and Challenges Ahead

Auditing refers to examination and verification of statement of accounts and other supporting documents, but with the changing societal endeavours and demands, economic value of money expended is much worth understanding. Approach to auditing should be so as to promote analysis of actual reach of money expended for the social good.

Public audit is probably the most powerful instrument of 'good governance'. The auditing of government and public entities has a positive impact on trust in society. It focuses the minds of the custodians of the public purse to use public resources effectively, as they know that after audit scrutiny, the public will be aware of their actions. Once the citizens are sensitised about such findings, they get empowered to hold the custodian of the public purse accountable. In a parliamentary democracy, it is critical that the citizens of a country are able to hold their representative accountable.

An important ingredient of this accountability cycle is an independent and credible Supreme Audit Institution capable of scrutinising the use of public resources in a sustainable manner. CAG plays a pivotal role through its independent auditors to bring transparency and accountability by unveiling any kind of discrepancies. CAG is a mechanism which can bring democracy and accountability in our country. We have recently witnessed CAG playing a crucial role in drawing attention of awakened citizenry towards the rising corruption, crony capitalism and other environmental issues in the economy. The scams of second generation spectrum and coal allocation were prominently brought in the limelight by the Supreme Audit Institution.

As a repercussion to CAG reports in the recent past with respect to the loss on 2G spectrum the then Union Telecom Minister had said on the amount calculated that the figures were "utterly erroneous and without any basis". Such disparaging statement amounts to constitutional impropriety, they demoralize the ethical standards and hurt sentiments of citizenry.

One of the serious shortcoming is the selection process of CAG, the manner in which the comptroller and auditor general is chosen at present is not such as to ensure the selection of an outstandingly able person of great independence and integrity. There is need for an open, objective and credible selection process. The current system of selection – the criteria, the procedures – for the selection of this high constitutional functionary is absolutely under cover. The processes are entirely internal to the government machinery; no one outside has any knowledge of what criteria are applied, how names are shortlisted, and how a final selection is made.

The recent appointment of CAG was questioned by public interest litigations in the Delhi High Court, the petitioners thereby sought a direction to the Centre to "frame a transparent selection procedure based on definite criteria and constitute a broad-based non-partisan selection committee, which after calling for applications and nominations would recommend the most suitable person for appointment as CAG".

Conclusion

CAG plays a unique role in achieving the ideals of good governance. The institutional mechanism cannot wipe out corruption but can build an efficient system of accountability of utilization of public money.

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ETHICS IN GOVERNANCE PROFESSIONALS

CS Nishita Singhal*

Introduction

“A professional’s ethical standards reflect the social, legal, economic, political and cultural norms of a society at a given time. As norms and values and circumstances change, ethics rules must change as well.”

As the companies evolve, the expectations of stakeholders change with the company. This is truer in today’s globalised world. Today, the stakeholders of the company like shareholders, clients, staff, suppliers, and government regulators treat governance and ethics as a more important factor in their decision-making. There is growing awareness of the impact of ethics on all areas of a business.

Recent economic downturn and financial crisis, failure of large conglomerates like Enron because of fraud, financial scams in companies like that in case of Satyam Computer etc. have raised sharp focus on issues relating to Ethics & Corporate Governance. The major reasons for corporate failures have been “Greed”. Organisations and people are trying to achieve their goals at the cost of others. It is difficult to achieve growth and also be ethical in this competitive environment but not impossible. The moot point is how companies and people can achieve their objectives and at the same time keep a control on their behaviour. It is here that Business Ethics & Corporate Governance need to be focused on.

It is a well known fact that management plays a vital role in shaping the future of any organization as the optimum utilization of all resources hinges upon the efficacy of the management. Organisations are managed by Policies, Guidelines and Systems which are ultimately implemented by the people. Therefore the acts and actions of people in the organisation affect the overall working. More than ever, today's governance professionals are more concerned with leadership and management. They provide vital support to senior management and are directly involved in many important decisions. As key business decision makers, they must be proficient in regulatory regimes, compliance requirements, and governance mechanisms to ensure lawful and effective corporate behaviour and operations. Along with these, an understanding of ethics and governance is essential to those in leadership roles, and to those who support their leaders. Ethics and governance is a core component of the knowledge and skill base of today's governance professionals.

Ethics

Ethics is concerned with an individual's moral judgements about right and wrong. Ethics separate, good and bad, right and wrong, fair and unfair, moral and immoral and proper and improper human action. The word ethics is derived from the Greek word “ethos”, which means "character," and from the Latin word “mores”, which means "customs."

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Ethics is also known as moral philosophy. It is a branch of philosophy that involves systematizing, defending and recommending concepts of right and wrong conduct. Ethics relates to what is good or bad, having to do with moral duty and obligation. In general, it is seen as a set of principles which guides human behaviour. Ethics can also be in the form of guidelines for conduct expected in the workplace. In professional terms, ethics can take the form of a standard of conduct. However, ethics concerns more than just behaviour. It reflects human moral attitudes, more specifically, rules of behaviour and their justifications. In short, ethics means a code of conduct. It tells a person how to behave with another person.

According to Dr. Richard Paul and Dr. Linda Elder of the Foundation for Critical Thinking, "*most people confuse ethics with behaving in accordance with social conventions, religious beliefs and the law*".

Paul and Elder define ethics as "*a set of concepts and principles that guide us in determining what behaviour helps or harms sentient creatures*".

Thus we can conclude that ethics consists of two things. First, ethics refers to well based standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues. Ethics, for, example, refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander, and fraud. Ethical standards also include those that enjoin the virtues of honesty, compassion, and loyalty. And ethical standards include standards relating to rights, such as the right to life, the right to freedom from injury, and the right to privacy. Such standards are adequate standards of thinking because they are supported by consistent and well-founded reasons. Secondly, ethics refers to the study and development of one's ethical standards. In other words, ethics are standards or rules you set for yourself that you use to guide your efforts do what is right and wrong, or what you should do. For example, if a friend asks you to copy your homework, you must choose whether or not you will tell the teacher.

Ethics in Business

Business ethics means to conduct business with a human touch in order to give welfare to the society. Every business must follow ethical practices for the betterment of all stakeholders. A business is said to be ethical if it follows ethical and moral practices in regular conduct of business like giving regular supply of good quality goods and services at reasonable prices to their consumers, avoiding unfair trade practices like adulteration, promoting misleading advertisements, cheating in weights and measures, black marketing, etc. Business must give fair wages and provide good working conditions to their workers. They must not exploit the workers. They must encourage competition in the market. They must protect the interest of small businessmen. They must avoid unfair competition. They must avoid monopolies. They must pay all their taxes regularly to the government etc.

According to Andrew Crane, "*Business ethics is the study of business situations, activities, and decisions where issues of right and wrong are addressed*."

According to Raymond C. Baumhart, "*The ethics of business is the ethics of responsibility. The business man must promise that he will not harm knowingly*."

What does being Ethical Mean?

Being ethical involves the following:

- Upholding the highest standard of behaviour as set out at the workplace
- Adopting fair and impartial attitudes while dealing with the public
- Abiding to your professional and organisational Code of Ethics
- Not indulging into any corrupt act or malpractice
- Respecting your colleagues and fellow workers
- Working in public interest always
- Striving to promote an environment of tolerance and openness

Benefits of Being Ethical in Business

“Ethics help to eliminate the financial and business risks a company is exposed to due to unclean business negotiation and practices.”

Decisions taken within an organisation may be made by individuals or groups, but whoever makes them is influenced by the culture of the company. The decision to behave ethically is a moral one; employees must decide what they think is the right course of action. Ethical behaviour and corporate social responsibility can bring significant benefits to a business. For example, they may:

- attract customers to the firm's products, thereby boosting sales and profits
- make employees want to stay with the business, reduce labour turnover and therefore increase productivity
- attract more employees wanting to work for the business, reduce recruitment costs and enable the company to get the most talented employees
- attract investors and keep the company's share price high, thereby protecting the business from takeover

Unethical behaviour and a lack of corporate social responsibility may damage a firm's reputation and make it less appealing to stakeholders.

Ethical Principles and Insights for an Organisation

- 1) Ethical Issues are “Often Strategic Issues in Disguise”.
- 2) If the ethical operative is money, ethical trouble will be unavoidable. Consider practicing and “preaching” an ethical operative that puts the interests of your stakeholders first.
- 3) Recognize that your employees face ethical dilemmas often. Provide policy and support to help minimize confusion about organizational expectations.
- 4) Ethical compromise often has compelling short-term benefits but always has long-term consequences (either personal or organizational).
- 5) Do unto others as you would have them do unto you.
- 6) Deliberate ethical violators should be fired to send a message to employees and external stakeholders that your organization does not condone such behaviour.

- 7) Prompt and full disclosure should characterize communications with internal and external stakeholders.
- 8) Compliance with the law will not ensure ethical behaviour. More ethical competitors may win over your customers, etc.
- 9) Respect your own conscience and the consciences of your subordinates.
- 10) Regard whistle blowing. It is the responsibility of every employee to protect organizational and societal interests.

Ethical Dilemma

Whenever one has to make a decision where the actions will impact someone else, one faces an ethical dilemma. The decision is ethical because you must decide on your obligation and it's a dilemma because there is more than one option to choose from. An ethical dilemma is a complex situation that often involves an apparent mental conflict between moral imperatives, in which to obey one would result in transgressing another. It is a situation which is neither white nor black and it makes decision-making complex. This is also called an ethical paradox. An ethical dilemma is a situation where:

- The right course of action is not known
- One has difficulty doing what is considered as right
- People are confronted with opposing values and compelling loyalties
- The wrong choice is very tempting
- One is attracted by private gains to abuse public or private office

Dealing with Ethical Dilemma - Theories

Dealing with ethical dilemmas is often very complex. It is difficult to choose the right course of action. Choosing the right course of action depends on the ability to evaluate complex, ambiguous and incomplete facts, and the skill to implement ethical decisions effectively. To deal with these types of grey situations philosophers, religious teachers and other thinkers have shaped various guidelines and models to ease decision-making process. There are five different approaches to deal with moral issues.

The Utilitarian Approach

"Of any two actions, the most ethical one will produce the greatest balance of benefits over harm."

Utilitarianism was conceived in the 19th century by Jeremy Bentham and John Stuart Mill to help legislators determine which laws were morally best. This approach focuses on the consequences that actions or policies have on the well being ("utility") of all persons directly or indirectly affected by the action or policy. According to this approach, the ethical action is the one that provides the greatest good for the greatest number. To analyze an issue using the utilitarian approach-

- Identify the various courses of actions available

- Identify who will be affected by each action and what benefits or harms will be derived by each
- Finally, choose the action that will produce the greatest benefits and the least harm.

The Rights Approach

“An action or policy is morally right only if those persons affected by the decision are not used merely as instruments for advancing some goal, but are fully informed and treated only as they freely and knowingly consented to be treated.”

The second important approach to ethics has its roots in the philosophy of the 18th century thinker Immanuel Kant and others like him who focused on the individual’s right to choose for her or himself. According to these philosophers, what makes human beings different from mere things is that people have dignity based on their ability to choose freely what they will do with their lives, and they have a fundamental moral right to have these choices respected. In deciding whether an action is moral or immoral using this approach, one must ask, does the action respect the moral rights of everyone? Actions are wrong to the extent they violate the rights of individuals; the more serious the violation, the more wrongful the action.

The Fairness or Justice Approach

“Treat people the same unless there are morally relevant differences between them.”

The fairness or justice approach to ethics has its roots in the teachings of the ancient Greek philosopher Aristotle who said that “equals should be treated equally and unequals unequally”. The approach of fairness requires consistency in the way people are treated. The focus is on how fairly or unfairly your actions distribute benefits and burdens among the members of a group. This approach asks what is fair for all stakeholders, or people who have common interest in the outcome. It opposes both favoritism and discrimination as unjust and wrong. Favoritism gives benefits to some people without a justifiable reason for singling them out; discrimination imposes burdens on people who are no different from those on whom the burdens are not imposed.

The Common Good Approach

“What is ethical is what advances the common good.”

The common good is a notion that originated more than 2000 years ago in the writings of Plato, Aristotle, and Cicero. More recently, contemporary ethicist John Rawls defined the common good as “certain general conditions that are.... equally to everyone’s advantage.” This approach to ethics assumes a society comprising individuals whose own good is inextricably linked to the good of the community. Community members are bound by the pursuit of common values and goals. In this approach, focus is on ensuring that the social policies, social customs, institutions, and environments on which people depend are beneficial to all. Examples of “goods” common to all include affordable health care, effective public safety, peace among nations, a just legal system, and an unpolluted environment.

The Virtue Approach

“What is ethical is what develops moral virtues in us and our communities.”

The virtue approach to ethics assumes that there are certain ideals, which provide for the development of humanity. Virtues are attitudes or a character trait that enables people to be and to act in ways that develop their highest potential. They enable to pursue the ideals we have adopted. Honesty, courage, compassion, generosity, fidelity, integrity, fairness, self-control, and prudence are all examples of virtues. Virtues are like habits that once acquired they become the characteristic of a person. Moreover, a person who has developed virtues will be naturally disposed to act in ways consistent with moral principles. The virtuous person is the ethical person. In dealing with an ethical problem using the virtue approach, one must ask, what kind of person he should be. What will promote the development of character within him and his community?

Ethical Problem Solving Paradigm

There is no scientific method to solve an ethical problem as each person may weigh the ethical arguments differently. There is no automatic solution to moral problems. But a systematic approach can clarify complex the situations and help us to come to an answer that can be the best ethical decision in that circumstances. The following method may help to analyzing ethical dilemmas and reach to the best possible solution of the given problem.

1. Define the Problem. What is the ethical dilemma?
2. Gather the Necessary Facts.
3. List Possible Alternative Solutions.
4. Analyze the Consequences of each Alternative.
5. Recommend a Plan of Action.

Some of the types of Ethical Dilemma and strategy to manage them are given in the table below.

Type of Dilemma	Issue	Strategy to manage
<i>The Dilemma of Previous Choice</i>	<i>A compelling opportunity comes along that is ethical of itself. However, to avail this opportunity, one has to renege on a previous commitment.</i>	<i>Recognize your commitment to your original party. Explain to them that you need to re-negotiate the deal if you hope to continue doing business with them in the future. Make sure that they understand that you intend to keep your original commitment, and that you value the business relationship and hope that it will continue.</i>
<i>The Dilemma of Knowledge Power</i>	<i>Because of your expertise, position or reputation, stakeholders look to you as a source of accurate, authoritative</i>	<i>You know far more about the products you sell than your customers do. Respect your conscience and their</i>

	<i>information. While you may have no legal fiduciary relationship, some stakeholders are placing their trust in what you say. By withholding information or carefully choosing your words, you can create an inaccurate expectation or false impression to the detriment of those who trusted you.</i>	<i>ignorance. Use your own judgment in evaluating your company's sales literature. View yourself as your customer's assistant in making the best choice considering their interests.</i>
<i>The Dilemma of Subordination</i>	<i>Your superior asks you to do something that you think is wrong.</i>	<i>Explain your concern to your supervisor. Recognize differences in conscience. Make sure that organizational interests are protected. Some organizations are unscrupulous to the point where you will not be able to work for them.</i>
<i>The Dilemma of Responsibility</i>	<i>When you have done something wrong, either deliberately or accidentally, or when a project/product, etc. fails to perform to standard, do you try to hide the incident, or do you come out with the problem?</i>	<i>Prompt and full disclosure should characterize communications with internal and external stakeholders. Organization structure will usually guide you to the person to whom disclosure should be made.</i>
<i>The Dilemma of Authority</i>	<i>Parcelling out rewards and punishments in an equitable way.</i>	<i>Set clear guidelines for both rewards and punishments. Be sure not to show favoritism in applying these rules. Rewards are always too small and punishments too large when administered on an ad hoc basis.</i>
<i>The Dilemma of a Flawed System</i>	<i>Refusing to participate in a system at all because the system is imperfect (e.g. legal, tax, customs clearance).</i>	<i>The biggest danger here is that management begins to model the enticing "rules don't apply to me" behavior. This attitude will infect the entire organization in due time. Work within the system, and press for system change. Also, the company is liable for actions taken outside of the system regardless of whether management likes the system</i>
<i>The Dilemma</i>	<i>When you encounter someone inside</i>	<i>Recognize that their conscience is</i>

<i>of Values Conflict</i>	<i>or outside your organization who contends against your plans, style, etc., do you sabotage their character or do you contend on grounds of moral principle, business judgment, and hard data (note: your adversary may be principled or personal in his/her contentions against you).</i>	<i>different on certain matters. Do not engage in character sabotage, etc. Listen to see if there is some nugget of truth in their argument that you should heed. Not everyone has to agree with you. Communicate respect for the other person. Defend organizational values.</i>
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Conceptual Framework to Resolve Ethical Dilemma

The “conceptual framework” approach to resolving ethical dilemmas focuses on safeguarding the fundamental principles of:

- integrity,
- objectivity,
- professional competence and due care,
- confidentiality, and
- professional behaviour.

In order to safeguard these principles, it is important to be alert of the situations that may threaten these fundamental principles. Identified threats should be evaluated and managed, to ensure that they are either eliminated or reduced to an acceptable level. When resolving an ethical conflict, consider carefully whether other parties could or should be involved in discussions and, if appropriate, how the board should be approached. A board may be approached via the secretary or the chairman. The professionals may also seek advice from their professional body or obtain independent legal advice. The actions in response to the situation and the advice obtained should be well documented for future references. In many situations, the perception of a reasonable and informed third party may be obtained to resolve the issue.

Case Studies

Case Study I – Proper Governance Process is not being Followed

Background of the Case

You are a company secretary of a public sector body, and a member of the organisation’s finance committee. The committee is currently discussing the tender process for the procurement of the improved staff catering facility. The director of finance has suggested that the normal tender route be waived in this instance and the project awarded on a single tender basis. The finance committee has agreed that there are practical benefits in awarding the work to the previous contractor, who has a good history of completing capital projects for the organisation.

If the tender process is waived, it will mean that the improvements to the catering facility can be commenced early. It is likely this could result in cost savings to the catering project, because the

contractor's equipment will not have to be removed and the required workers can remain on site. The director of finance has also suggested that it is possible to benchmark costs to ensure that the agreed contract price is in line with current market prices. Initial discussions have already taken place with the contractor, who has explained that substantial cost savings would be achieved if this project was awarded to them. They have also provisionally agreed to undertake the works. There are other existing standing orders and standing financial instructions which require a formal tender process to be fulfilled for projects of this size.

Issue involved

You are concerned that the organisation is openly ignoring the governance arrangements that are in place without providing a robust basis for doing so. Moreover you believe that the director of finance should not recommend these proposals to the advisory board. But what can you do as a governance professional of the organisation.

Keep in mind key fundamental principles

- *Integrity*: Whatever action you decide to take, are you able to demonstrate that you are being fair and honest towards all parties concerned?
- *Objectivity*: Can you demonstrate objectivity in your actions? Does the potential breach of the organisation's governance documents require you to refer the matter to a higher level? You should not allow your objectivity to be threatened by close relationships with other members of the finance committee. Neither should you allow yourself to feel intimidated by advisory board members or other interested parties.
- *Professional competence and due care*: This is a sensitive matter so it is important that any action you take is careful and considered. Do you have the knowledge and experience to decide on a course of action, or do you need to take advice?
- *Professional behaviour*: You should endeavour to ensure that the organisation acts in accordance with relevant regulations, and that you act in compliance with your obligations and responsibilities.

Make following considerations

- *Identify relevant facts*: Is there an established procedure for overriding the tender process? As a company secretary you are required to hold a governance role which involves taking an overview of the operation of the organisation. In this instance, you have been made aware of the issues and need to determine the appropriate action to take.
- *Identify affected parties*: The affected parties are you, the other members of the finance committee and the other advisory board members who have specific responsibility for the governance arrangements, including the CEO and the director of finance. You should also consider the contractor, who may or may not have been promised the work without following the tender process, and other parties who might not be given the opportunity to tender.
- *Who should be involved in the resolution*: You should ensure that both the finance committee and the advisory board are involved in the decision. The internal auditor may also need to be made aware.

Possible course of action to be taken

- As a governance professional in the organisation, it is your responsibility to raise your concerns at the committee meeting so that the other members are fully aware of your views on this matter. If the committee does not consider your view, you should ensure that, when the matter is referred to the advisory board for decision, you make your advisory board colleagues aware of your concerns. This may include highlighting the failure to comply with the organisation's governance arrangements and the potential risks faced by the organisation if it pursues this proposed course of action.
- However, before voicing your concerns, you should exercise due care in obtaining sufficient information to be able to meet your responsibilities. You should establish, by making enquiries, whether any procedures exist for situations where it is proposed to waive the formal tender process.
- At all times, you should remember your obligations and responsibilities. You are required to act in the best interests of stakeholders. This often demands the exercise of professional judgement. Whilst you need to safeguard the principle of objectivity, you should also be aware that insisting on following established internal procedures may sometimes impede the operations of the organisation.
- If, having gathered the necessary information, you have determined it necessary to disclose your concerns to the finance committee and then the advisory board, and if you believe that the advisory board will not give due consideration to your concerns, you could raise them with the internal auditor.
- You should consider taking legal advice. You should document any discussions you have and the bases for the decisions you make.

Case Study II - Confidentiality when Bidding for a Contract

Background of the Case

You have recently become the Company Secretary of Company B, a company which provides catering services to the public sector. Your previous employer was large public sector Organisation A.

One of Company B's major contracts is with Organisation A. The contract is now up for renewal, and Company B is preparing a competitive bid for this contract. You have been asked to be part of the team responsible for bidding for this contract, but you are concerned that you might breach confidentiality if you accept this assignment. You also suspect that your knowledge and experience of Organisation A were seen as good reasons for appointing you to the position at Company B.

Issue involved

You do not want to let your new employer down. The loss of such a major contract would have a significant effect on the financial performance of Company B and its performance-related bonus scheme for management.

Keep in mind key fundamental principles

- *Objectivity:* Can you safeguard against the significant self-interest threat which arises from Company B's performance-related bonus scheme?
- *Confidentiality:* If you accept this assignment, can you ensure that you do not use confidential information relating to your previous employer to your advantage or to the advantage of your current employer?
- *Professional behaviour:* What can you do to safeguard your reputation and the reputation of your employer and your profession?

Make following considerations

- *Identify relevant facts:* Your previous employment with Organisation A has provided you with information which may be of value to Company B. You must consider code of ethics, applicable laws and regulations, your current and previous contracts of employment, and your employer's policies and procedures. A self-interest threat arises because of the impact that losing Organisation A's contract would have on Company B's financial performance and reward policy. You may also be feeling that you would like to impress your new employer and help to make a successful bid for the renewal of the contract.
- *Identify affected parties:* Key affected parties are you, your line manager and the board. Other employees in the company may be affected due to the financial implications of the contract not being renewed.
- *Who should be involved in the resolution:* Your line manager, other relevant staff and, if necessary, the board should be involved.

Possible course of action to be taken

- The principle of confidentiality prohibits the use of confidential information acquired as a result of your previous employment for your advantage or that of your current employer. While you have a responsibility to advance the legitimate aims of your employing organisation, this should not extend to a breach of confidentiality.
- In this case, you (because of Company B's performance-related bonus) and Company B stand to benefit from the confidential information about how bids are assessed at Organisation A. The principle would not be breached if you were in possession of information that was in the public domain, or if you were simply to use experience gained in your previous employment, so long as you do not use confidential knowledge that you acquired as a result of that employment.
- You should discuss the situation and your obligations with your manager in the first instance, and ask for your involvement in the preparation of the contract bid to be limited. For example, you may be able to contribute to aspects of the bid that do not require you to refer to confidential knowledge about your previous employment. If your manager fails to understand the conflict that you are facing, you should request that you both discuss the matter with a director or other member of staff. During these discussions, you should refer to the company's ethical code.

- If there are no other formal channels available, you should make the board aware of your dilemma. If necessary, you must refuse to take part in the bid without necessary safeguards being implemented. Ultimately, disassociating yourself from Company B may be the only solution. However, before taking such a step, you should seek legal advice on your employment rights and responsibilities.
- You should document, in detail, the steps that you take in resolving your dilemma, in case your ethical judgement is challenged in the future. Looking at this issue from Company B's perspective, it may be appropriate to suggest to your manager that a policy on conflicts of interest be developed and that the remuneration and bonus policy be reviewed in light of this.

Growing Expectations from Governance Professionals

“Governance and leadership are the yin and the yang of successful organisations. If you have leadership without governance you risk tyranny, fraud and personal fiefdoms. If you have governance without leadership you risk atrophy, bureaucracy and indifference.” - Mark Goyder

The expectations from governance professionals are increasing in today's competitive corporate world. They are expected to assist corporate in developing a governance culture that complies with the law, regulations, and community expectations and reflects contemporary good governance practices. In addition they are expected to promote good governance and ethics in the organisation. A good governance professional in addition to doing his regular jobs and duties should set a good ethical example in the organisation, ensure protection for staff who raise ethical concerns, support integration of ethical values into board and senior management decision-making, help establish a code of ethics, act as an informal mentor for colleagues, support assessment of ethical performance or adherence to code of ethics, act as an official mentor for colleagues, support the inclusion of ethical performance within performance appraisals, support the inclusion of ethics as a subject in staff training, help establish an ethics hotline or whistle-blowing policy, act as an official listener for employees' ethical concerns at work and support the appointment of an ethics officer if required.

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SHAREHOLDERS' RIGHTS AND INVESTOR PROTECTION UNDER THE COMPANIES ACT, 2013

CS Krishan Paul Dutt & Mahesh Kumar Airan *

Shareholders' Democracy

Shareholder democracy is the ability of shareholders to influence board of directors through the exercise of voting rights associated with share ownership. This allows shareholders to elect directors, vote on governance matters and approve significant transactions. It is an important element that enhances investor confidence in the securities regulatory regime.

There is growing acknowledgement in developed countries that the processes of shareholder democracy need attention, particularly since both regulators and institutional shareholders are placing substantial wagers on shareholder votes as an incentive for better and more robust corporate governance.

In India, in May, 2005, the Dr. JJ Irani Committee in its Report on Company Law had recommended that balance has to be struck between the rule of the majority and the rights of the minority and also observed that: *"The fundamental principle defining operation of shareholders democracy is that the rule of majority shall prevail. However, it is also necessary to ensure that this power of the majority is placed within reasonable bounds and does not result in oppression of the minority and mis-management of the company. The minority interests, therefore, have to be given a voice to make their opinions known at the decision making levels. The law should provide for such a mechanism."*

Rights of a shareholder

Rights of any shareholder in any company generally depend on the provisions of the Companies Act, company's articles of association, the terms of issue of shares (which are usually in the articles, but sometimes are in a resolution) and shareholders' agreement. Main rights of shareholder are: (i) attending general meeting and vote; (ii) sharing profits of the company; (iii) receiving final distribution on winding up; (iv) receiving a copy of the company's annual accounts; and (v) seeing that the company is running lawfully. Out of the above, "seeing that the company is running lawfully", obeying the law of the land and behaving like a disciplined corporate citizen is gaining more importance these days due to some scams in the corporate world.

Investor Protection

Investor Protection aims to protect the investors from being deceived or being put to loss by the companies. The term "investors" not only means shareholders but also includes depositors, debenture-holders, other security holders and creditors. They are collectively termed as "stakeholders".

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Shareholder Activism and Shareholder Protection around the World

Shareholders activism is very much essential for good governance of companies. In developed countries like the US, shareholders are exerting a lot of pressure upon the boards of directors of companies to follow good corporate governance practices to respect and protect their rights and interest. Moreover, they take interest in corporate affairs, are organized and assert their rights in meetings through shareholders associations. They file class action suits for recovery of damages in cases where managements of companies defrauded investors. Though, shareholder activism is almost non-existent in India, yet recently, Ministry of Corporate Affairs (MCA) and SEBI are trying to boost it to improve confidence and awareness among investors.

In December 2007, the Centre for Business Research, University of Cambridge, had released a publication on “*Shareholder Protection Around the World*”. Following are some of the observations from this publication:-

(i) In most countries shareholder protection has improved between 1995 and 2005. However, there appears to be an upper limit which countries do not exceed; (ii) Most developed countries perform better than developing countries in protecting shareholders. However, in recent years developing countries are catching up with the developed world; (iii) In most countries, shareholder protection has improved in the last years; and (iv) Shareholder protection in common law countries is relatively similar.

Shareholder Rights and Investor Protection under the Companies Act, 2013

The Companies Act, 2013 received the assent of the Hon'able President of India on 29th August, 2013 and was notified in the Gazette of India on 30th August, 2013. The legislation enacts a new framework that will redefine India's corporate governance norms, grants shareholders/investors greater powers to defend their rights and ensures protection of minority shareholders. The new law regulating India Inc. strengthens shareholder rights and investor protection and incorporates several specific measures to empower rights of shareholders including small shareholders.

Apart from the above mentioned rights of the shareholders, certain new rights and investor protection measures have been introduced under the new law. This Article is an attempt to highlight mainly the newly inserted provisions in the Companies Act, 2013 regarding shareholder rights and investor protection and how investor protection strengthens the fiber of shareholder democracy.

1. Class Action Suits

Origin of Class Action

A class action suit is a lawsuit where a large group of people collectively bring a claim to court. The term “class action” owes its origin in the US law which is used to describe as *sui generis* area of litigation. While Indian law recognizes the concept of a representative suit, it has not, as opposed to the law in US, used the term or phrase class action to describe a *sui generis* area of litigation. In India, a representative suit may be instituted under the Civil Procedure Code, 1908 for the benefit of, or on behalf of, the interested parties. A similar concept has also been evolved by the Courts in India in form of Public Interest Litigations and Social Interest Litigations.

Class Action is a well defined area of litigation in the U.S. The relevant provision for a class action is detailed under Rule 23 of the US Federal Rules of Civil Procedure. U.S. class action litigation can broadly be categorized into two different groups:

- a) Securities Class Action—instituted by shareholders involving violation of securities, regulations, accounting, fraud, etc.
- b) Consumer Class Action or Employee Class Action—instituted by a large number of consumers who suffer losses due to some illegal claims made by the companies, or those may claims against illegal debt collection practices, unfair credit reporting, product liability, etc.

Shareholder class action in other countries

US-style class action does not exactly apply to Europe. On a generic basis, European jurisdictions allow class action to be pursued only by consumer associations rather than by individuals. This system is considered decisively superior than the US system, as it prevents entrepreneurial pursuits by law firms. Outside USA, Australia is a country where securities class litigation is widely prevalent.

Class actions suits in India

Need for class action suits was felt in India in recent past years. The concept of a class action by shareholders was also recommended, by the Dr. J.J. Irani Committee Report, which suggested that representative action may be initiated by one shareholder on behalf of one or more of shareholders, on the premise that they would all have the same *locus standi* to initiate an action against an erring company.

Further in January 2009, chairperson of Satyam Computer Services Ltd. admitted to fraud. Since ADRs of Satyam were listed at the New York Stock Exchange, US investors who held its ADRs filed several class action suits against the company, its managing director and members of the Board.

However Indian investors suffered the most even though the fraud had happened in India. For the same company and same case, investors in the US had compensation but Indian investors did not get anything due to no similar provision in the Companies Act, 1956.

This *lacuna* has been sought to be addressed by the legislature while drafting of the Companies Act, 2013 and introducing the provision of class action by way of Section 245. Introduced for the first time in India, class action suits would empower investors to sue a company for oppression and mismanagement and claim damages. This is a key weapon for individual shareholders to take collective action against errant companies and acts as a deterrent for carrying out fraud.

Shareholders' associations may take legal action against promoters and management through class action suits. Salient features of the provisions in the new Act relating to class action are:-

- Specified number of member(s), depositor(s) or any class of them, may, if they are of the opinion that the management or control of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the National Company Law Tribunal (NCLT) on behalf of members or depositors.

- Shareholders could directly approach the NCLT to seek relief on various issues and, *inter alia*, seek damages against company, its directors, auditors or advisors who have knowingly assisted in wrongdoings.
- Where members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.
- Order passed by the NCLT shall be binding on the company and all its members, depositors and auditors including audit firm or expert or consultant or advisor or any other person associated with the company. Non-compliance with directions and the orders of the NCLT would attract stringent penalties and imprisonment.
- In order to prevent frivolous litigations against the company and its personnel, several safeguards have been built into the law.

2. Other Investor Protection Measures

Developing countries especially India is trying fast to catch up with the developed world in introducing novel investor protection measures in their Company Law. Some of the changes introduced by the Companies Act, 2013, specifically intended to support shareholders in general; minority shareholders; depositors and other stakeholders are summarized as below:

- The new Act recognizes an interesting concept of entrenchment. Essentially, the provisions allow for certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions (such as obtaining a 100% consent) greater than those prescribed under the Act. This provision is a welcome protection to the minority shareholders and would be of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures. [Section 5 (3)]
- Company may send notice of a general meeting to shareholders in electronic form. [Section 101(1)]
- Any document, record, minutes, register kept by the company may be inspected by shareholders in electronic form. [Section 120]
- To encourage wider participation of shareholders at General Meetings, Central Government may prescribe class of companies in which members may cast their vote by electronic means. [Section 108]
- Fraudulent inducement of persons to invest money is punishable with imprisonment upto 10 years and with fine which shall not be less than 3 times the amount involved in fraud. It will help in curbing a major source of corporate delinquency. (Section 36)
- A suit may be filed by a person who is affected by any misleading statement or the inclusion or omission of any matter in Prospectus or who has invested money by fraudulent inducement. (Section 37)

- Section 38 provides severe punishment for fraud for making applications in fictitious names for securities, making multiple applications to company in different names for acquiring securities or inducing company to allot, transfer or register securities in a fictitious name. Where a person gets convicted, court may order disgorgement of gain/seizure/disposal of securities in his possession. Amount received through disgorgement or disposal of securities to be credited to Investor Education and Protection Fund (IEPF).
- IEPF shall be utilized for:
 - (i) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the NCLT;
 - (ii) distribution of disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person as per court order. [Section 125 (3)]
- Claim of an investor over a dividend not claimed for more than a period of 7 years and after its transfer to IEPF, shall not be extinguished. Refund to investor even after 7 years is now being allowed out of IEPF. [Section 125(3)(proviso) & 125 (4)]
- *Inter-se* shareholders' arrangements on transferability of securities have been recognised. Proviso to section 58 (2) provides that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract. The debate as to whether any restrictions can be imposed on transferability of shares in a public company has been laid to rest by the new Act by explicitly upholding the enforceability of such contracts. It would now be possible to contractually agree on terms such as right of first refusal, right of first offer, tag along, call option, put option, etc. in shareholder agreements/investment agreements, in case of a public company as well. These terms would now be binding on the investors. This is a welcome change for the investment community.
- Acceptance of deposits has been made subject compliance of stringent conditions in order to protect the depositors. Under Section 73, a company may accept deposits from its members subject to:-
 - (i) passing of resolution in a general meeting;
 - (ii) issue of circular to members including therein a statement showing financial position of company, credit ratings, total number of depositors and amount due towards deposits in respect of any previous deposits and other prescribed details;
 - (iii) filing a copy of circular along with such statement with the registrar within 30 days before the date of issue of circular;
 - (iv) providing deposit insurance;
 - (v) certification by the company that it has not defaulted in the repayment of deposits;

(vi) provision of security in respect of deposit and interest and creation of charge on company's properties and assets;

(vii) deposit of an amount of not less than 15% of deposits maturing during a financial year in deposit repayment reserve account.

- Stringent fine and punishment has been provided in case a company fails to repay deposit or accepts deposits with intent to defraud depositors or for any fraudulent purpose. Officer of company responsible for acceptance of such deposit shall be personally responsible without any limitation of liability. (Section 75)
- Suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of failure of the company to repay deposits. (Section 75)
- Acceptance of deposits from public shall be subject to a more stringent regime as indicated below:
 - (i) Company must have the prescribed amount of net worth or turnover;
 - (ii) Obtaining rating every year during tenure of deposits (including net worth, liquidity and ability to pay deposits on due date) from recognised credit rating agency to ensure adequate safety;
 - (iii) Acceptance of secured deposits shall be subject to creation of charge on company's assets of an amount not less than the amount of deposits accepted in favour of deposit holders. (Section 76)
- For good governance and investor protection, the new Act, advocates price determination by a registered valuer for any preferential allotment of equity [Section 62 (1)(c)]. Fair valuation works as a means of safeguarding minority interests.
- Some provisions on mergers bring in benefits for all investor classes, including minority investors as under:
 - (i) providing minority shareholders with a compulsory option to exit in case of a merger of a listed company with an unlisted company;
 - (ii) where a person or group of persons become shareholders with 90% or more stake in a target company (listed or unlisted), then they shall notify the target company of their intention to acquire the balance stake held by the minority shareholders. Pricing for such deal shall be carried out by a registered valuer;
 - (iii) minority shareholders of up to 10% will have the dissenters' right and can ask the majority to buy them out completely.
- Minority, represented by specified number of members or members holding requisite percentage of equity capital is entitled to approach NCLT for protection of their interests. NCLT is empowered to order a number of remedial measures for regulation of the conduct of company's affairs. [Section 241 and 242]

- Norms for raising money from public have been tightened. Insiders trading and forward dealing in securities of company by directors or key managerial personnel have been prohibited by treating such activities as criminal offence. (Sections 194 & 195)
- The new Act lays down better disclosure requirements in financial statements/other documents to investors as under:-
 - (i) source of promoters' contribution to be disclosed in prospectus;
 - (ii) listed company to disclose in Board's report, the ratio of remuneration of each director to median employee's remuneration;
 - (iii) specific disclosure regarding effect of merger on creditors, key managerial personnel, promoters and non-promoter shareholders to be made along with notice of the meeting.
- Where the combined membership of shareholders, debenture holders, deposit holders and any other security holders is more than 1000 at any time during financial year; company shall constitute a Stakeholders Relationship Committee to consider and resolve grievances of security holders.[Section 178(5) & (6)]
- A company after raising money from public through prospectus & still having any unutilised amount out of money so raised, shall change its objects for which it raised money only after passing a special resolution & giving dissenting shareholders exit opportunity by promoters & shareholders having control. [Section 13 (8)]
- In case of a proposal to vary terms of contracts or objects referred in prospectus, dissenting shareholders shall be given an exit offer by promoters or controlling shareholders. [Section 27(2)]
- NCLT may provide for exit offer to dissenting shareholders in case of compromise or arrangement. [Section 230]
- Every listed public company shall have at least 1/3rd of its total directors as independent directors and Central Government may prescribe minimum number of independent directors in case of any class of public companies. Constitution of Board having independent directors will go a long way in the protection of the interest of small shareholders. [Section 149 (4)]

Although the Companies Act, 2013 contains various new investor protection measures, following provisions need reconsideration:-

- Minimum thresholds (holding of at least 10 % of shareholding or having outstanding debt amounting to not less than 5 % of the total outstanding debt) have been prescribed for raising objections to scheme of compromise or arrangement by minority shareholders or creditors. This provision has been included to limit frivolous litigations by few small shareholders or creditors. Such provision needs revision so that it does not adversely affect genuine claims. [Section 230(4)(proviso)]

- In case of listed company, appointment of small shareholders director has not been made mandatory. Listed company may have one director elected by small shareholders in prescribed manner. "Small shareholders" means a shareholder holding shares of nominal value of not more than Rs. 20,000 or a prescribed sum. Listed companies may or may not appoint such directors. [Section 151]

Conclusion

Recognising the importance of shareholder rights and investor protection, the Companies Act, 2013 introduces some important changes to the company law regime in India and has plugged many loopholes. It upholds shareholders democracy and investor protection in many ways. A significant development has been the inclusion pertaining to 'Class Action Suit' (Section 245) to strengthen the concept of shareholders democracy.

The Act has also introduced a path-breaking reform of suit (Section 37) by any person or group of persons or any association of persons affected by any misleading statement or due to inclusion or omission of any matter in a company's prospectus. The proposal to grant recognition to shareholders associations is indeed welcome. However, if the Government seriously believes in ushering in shareholder democracy, it should encourage formation of recognized shareholders' associations (on the lines of SEBI) on healthy lines and provide suitable training for them through institutions like ICSI or Stock Exchanges for proper pursuit of class action suits. IEPF may be utilized for this purpose. This will help in promotion of co-ordinated activities of shareholders who are found scattered all over India. At the same time, shareholders/depositors must refrain from filing vexatious class action suits with an ulterior motive to harass companies.

The existing provisions have been recast to ensure that the claim of an investor over a dividend not claimed for more than 7 years is not extinguished. The idea, aimed at safeguarding the interests of minority shareholders, would require the government to make statutory changes in the administration of IEPF. However, appointment of small shareholders directors for listed companies should have been made mandatory for protection of small shareholders.

As the global financial crisis started in 2008 is not yet over completely, it is the duty of Government to protect the interest of investors. *Countries with strong investor protection laws have more stable markets and attract more capital.* The new law rightly puts premium on protection of investors' rights. Some sections argued that investor protection being the primary responsibility of SEBI, the IEPF should reside with it only. Rejecting this argument, the Ministry Corporate Affairs has rightly contended that investor protection was related to the corporate governance initiatives of the government and was necessary for safeguarding the interests of investors.

Although the Companies Act, 2013 provides a comprehensive review of the Companies Act, 1956 to achieve the desired reform, it must however be emphasised that any amount of legal reforms will not, by themselves, yield the desired results in practice, unless the law is implemented with sincerity, dedication and a spirit of social service. These, however, require the following which depend partly on the law and partly on the system of personal and social/patriotic values. It is therefore, absolutely necessary to reshape and reconsider the whole

set up and its implementation in the interest of keeping pace with time and especially in the context of shareholder democracy.

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FOREIGN CONTRIBUTION IN VOLUNTARY SECTOR & ROLE OF COMPANY SECRETARY

Chittaranjan Pal*

“The simplest acts of kindness are by far more powerful than a thousand heads bowing in prayer.”

- **Mahatma Gandhi**

Introduction

The Indian society has a well-established tradition of philanthropy. All philanthropic activities were undertaken by individual or through the voluntary sector. To encourage, enable and empower an independent, creative and effective voluntary sector, with diversity in form and function, so that it can contribute to the social, cultural and economic advancement of the people and uphold the legacy of philanthropy. This article highlights some issues how professionals like Company Secretaries help the voluntary sector create an enabling effective environment and legitimately mobilize necessary financial resources from abroad.

The voluntary sector has contributed significantly to promoting art, commerce, science, religion, charity and to finding innovative solutions to poverty, deprivation, discrimination and exclusion, health, disaster prevention and management, and social integration through means such as awareness raising, social mobilization, service delivery, training, research, and advocacy. The voluntary sector has been serving as an effective non-political link between the people and the Government.

Registration of Voluntary Organizations

Non-Profit / Voluntary Organisations in our country operate on a wide variety of issues covering almost all aspects of socio-economic development and polity. There are separate laws under which Societies, Trusts, charitable institutions, religious endowments and Waqf etc. can be set up.

Society

The Societies Registration Act, 1860 is the law under which Societies of different hues are registered in India.

Trust

Trust is a special form of organisation which emerges out of a will. The will maker exclusively transfers the ownership of a property to be used for a particular purpose. If the purpose is to benefit particular individuals, it becomes a Private Trust and if it concerns some purpose of the common public or the community at

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large, it is called a Public Trust. The first law on Trusts came into force in India in 1882 known as the Indian Trusts Act, 1882

Non-Profit Companies (Section 25 of the Companies Act, 1956)

Section 25 of the Companies Act, 1956 provides for a mechanism through which an Association can be registered as a Company with a limited liability, if such association is formed for promoting commerce, art, science, religion or any other useful object and intends to apply its profits/income in promoting its objects. The objective of this provision is to provide corporate personality to such Associations but at the same time exempting them from some of the cumbersome legal requirements.

An Association registered under the above provision shall enjoy all the privileges and would be subject to all the obligations of limited companies. However, these entities will be exempted from such of the provisions of the Companies Act as notified by the Union Government under the provisions of Section 25(6) of the Act. The existing limited companies can also be transformed to a non-profit company under Section 25(3). The companies registered under this provision are subject to such conditions and regulations as the Government thinks fit and on being directed, they would be required to insert such conditions in their memoranda. Their memoranda can not be altered without the prior approval of the Union Government.

Non-Profit Companies (Section 8 of the Companies Act, 2013)

Section 8 of the Companies Act, 2013 deals with formation of companies with charitable objects, etc. It provides that where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company—

- has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
- intends to apply its profits, if any, or other income in promoting its objects; and
- intends to prohibit the payment of any dividend to its members, the Central Government may, by licence issued in such manner as may be prescribed, and on such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word “Limited”, or as the case may be, the words “Private Limited”, and thereupon the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under this section.

The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies. A company registered under this section shall

amalgamate only with another company registered under this section and having similar objects.

Foreign Contribution (Regulation) Act

An organization seeking foreign funding must be registered under the Foreign Contribution (Regulation) Act. The FCRA, 2010 contains stringent provisions in order to prevent mis-utilisation of the foreign contribution received by the associations. The prime objective of the Act is to regulate the acceptance and utilization of foreign contribution and foreign hospitality by persons and associations working in the important areas of national life. The focus of the Act is to ensure that the foreign contribution and foreign hospitality is not utilized to affect or influence electoral politics, public servants, judges and other people working in the important areas of national life like journalists, printers and publishers of newspapers, etc. The Act also seeks to regulate flow of foreign funds to voluntary organizations with the objective of preventing any possible diversion of such funds towards activities detrimental to the national interest and to ensure that individuals and organizations may function in a manner consistent with the values of the sovereign democratic republic.

Sources of Foreign Funding

Foreign source includes -

- (i) the Government of any foreign country or territory and any agency of such Government;
- (ii) any international agency, not being the United Nations or any of its specialized agencies, the World Bank, International Monetary Fund or such agency as the Central Government may, by notification, specify in this behalf;
- (iii) a foreign company;
- (iv) a corporation, not being a foreign company, incorporated in a foreign country or territory;
- (v) a multi-national corporation;

A corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation –

- has a subsidiary or branch or place of business in two or more countries or territories; or
- carries on business, or otherwise operates, in two or more countries or territories.

(vi) a company within the meaning of the Companies Act, 1956, and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:-

- the Government of a foreign country or territory;
- the citizens of a foreign country or territory;
- corporation incorporated in a foreign country or territory;

- trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;
- foreign company:

(vii) a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;

(viii) a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;

(ix) a society, club or other association of individuals formed or registered outside India;

(x) a citizen of a foreign country.

Foreign Contribution

Foreign contribution means the donation, delivery or transfer made by any foreign source,—

- (i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;
- (ii) of any currency, whether Indian or foreign;
- (iii) of any security as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in clause (o) of section 2 of the Foreign Exchange Management Act, 1999.

A donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

The interest accrued on the foreign contribution deposited in any bank or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.

Any amount received, by any person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign.

Check List for Associations for Receive Foreign Contribution under FCRA

- Organizations seeking foreign contributions for definite cultural, social, economic, educational or religious programmes may either obtain registration or prior permission to receive foreign contribution from Ministry of Home Affairs by

making application in the prescribed format and furnishing details of the activities and audited accounts.

- The association is registered under the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956
- The registration is granted only to such association which has proven track record of functioning in the chosen field of work during last three years and after registration, such organization is free to receive foreign contribution from any foreign source for its stated objectives.
- Registration is granted only after thorough security vetting of the activities and antecedents of the organization and office bearers thereof. However, such organizations which are newly established and do not have proven track record of functioning may also receive foreign contribution for specific activities, for a specific purpose and from a specific source after seeking project based prior permission (PP) from the Ministry of Home Affairs.
- Every certificate of registration granted under FCRA, 2010 shall be valid for a period of five years from the date of its issue. Every certificate of registration shall have to be renewed.
- An association granted prior permission or registration under the Foreign Contribution (Regulation) Act, 2010 should receive the foreign contribution in the same exclusive designated Bank Account mentioned in the order granting prior permission or registration. This account number would be the same as has been intimated by the organisation in their application for prior permission/registration. Deposit of any local fund in this bank account is not allowed. One or more accounts in one or more scheduled banks may be opened for utilizing the foreign contribution provided that no funds other than foreign contribution shall be received or deposited in such account or accounts.
- Foreign contribution can not be mixed with local funds being handled by the organisation.
- An association granted prior permission or registration is required to carry out the activities, for which foreign contribution is received, in India only and the amount should not be utilised for purposes other than for which it is received.
- Any fixed asset acquired out of the foreign contribution and any article received in kind from the foreign source should be in the name of the association and not in the name of any individual in the association.
- Not more than 50% of the foreign contribution shall be defrayed to meet administrative expenses of the association. What constitutes 'administrative expenses' has been defined in Rule 5 of the Foreign Contribution (Regulation) Rules, 2011 (FCRR, 2011).
- Any foreign contribution or any income arising out of it shall not be used for speculative business. What constitutes 'speculative business' has been defined in Rule 4 of FCRR, 2011.
- An association granted prior permission or registration should maintain a separate set of accounts and records, exclusively for foreign contribution received and utilised.

- Every report submitted shall be duly certified by a chartered accountant.
- The accounting statements shall have to be preserved by the NGO/association for a period of six years.
- Even if no FC is received during a year, a 'Nil' return is required to be filed with the Ministry of Home Affairs within the prescribed time limit.
- Associations/NGOs granted registration or prior permission, which have received foreign contribution in excess of one crore rupees, or equivalent thereto, in a financial year, shall place the summary data on receipts and utilisation of the foreign contribution pertaining to the year of receipt as well as for one year thereafter in the public domain.
- No FC should be transferred to an association which has not obtained either prior permission or registration under FCRA or to any person or association, prohibited under FCRA from receiving any FC.
- Change of name, address, registration, nature of activities or aims and objectives of an association should be intimated to the Ministry of Home Affairs within 30 days of effecting the change, alongwith the documentary evidence effecting the change.
- Prior permission of Ministry of Home Affairs should be obtained for replacing 50% or more of the office bearers.
- Prior permission of Ministry of Home Affairs should be obtained for changing bank account for valid and convincing reasons.

The illustrative programs permitted to be carried out by associations having different nature are indicated below:

1. Educational

- Construction and maintenance of school/college.
- Construction and running of hostel for poor students.
- Grant of stipend/Scholarship/assistance in cash and kind to poor/deserving children.
- Purchase and supply of educational material-books, notebooks etc.
- Conducting adult literacy programs.
- Conducting Research.
- Education/Schools for the mentally challenged.
- Non-formal education projects/coaching classes.
- Any other activities related to the above.

2. Economic

Following activities (Not being commercial or profit making activities)

- Micro-finance projects, including setting up banking co-operative and self-help groups.

- Self-sustaining income generation projects/Schemes.
- Agricultural activity.
- Rural Development.
- Animal husbandry projects.
- Setting up and running handicraft centre/cottage and khadi industry/social forestry projects.
- Vocational training, tailoring, motor repairs, computers etc.
- Any other activities related to the above, not being commercial activities.

3. *Social*

- Construction/Running of Hospital/dispensary/clinic.
- Construction of community halls etc.
- Construction and Management of old age home.
- Welfare of the aged widows.
- Construction and Management of Orphanage.
- Welfare of the orphans.
- Construction and Management of dharamshala /shelter.
- Holding of free medical/health/family welfare/immunisation camps.
- Supply of free medicine, and medical aids, including hearing aids, visual aids, family planning aids etc.
- Provision of aids such as Tricycles, callipers etc. to the handicapped.
- Treatment/Rehabilitation of drug addicts.
- Welfare/Empowerment of women.
- Welfare of children.
- Provision of free clothing/food/to the poor. Needy and destitute.
- Relief/Rehabilitation of victims of natural calamities.
- Help to the victims of riots/other disturbances.
- Digging of bore wells.
- Sanitation including community toilets etc.
- Awareness camp/Seminar/workshop/meeting/conference.
- Providing free legal aid/Running legal aid centre.
- Holding sports meet.

- Awareness about Acquired Immune Deficiency Syndrome (AIDS)/Treatment and rehabilitation of persons affected by AIDS.
- Welfare of the physically and mentally challenged.
- Welfare of the Schedules Castes.
- Welfare of the Scheduled Tribes.
- Welfare of the Backward Classes.
- Environmental programs.
- Survey for Socio-economic and other welfare programs.
- Preservation & maintenance of Wild Life.
- Preservation of Natural Resources.
- Awareness against social evils.
- Rehabilitation of victims of heinous crimes.
- Rehabilitation of beggars, bootleggers, child labour etc.
- Creating awareness of Government schemes & Law to general public.
- Any other activities related to the above.

4. Cultural

- Celebration of national events (Independence / Republic day / festivals).
- Theatre/Films etc.
- Maintenance of places of historical and cultural importance.
- Preservation of ancient/tribal art forms.
- Preservation & promotion of Cultural Heritage & Literature of India.
- Cultural shows.
- Any other activities related to the above.

5. Religious

- Celebrations of religious functions/festivals etc.
- Construction/repair/maintenance of places of worship, religious schools.
- Education of priests and preachers; (dissemination of the message of good will etc. from their holy books).
- Publication and distribution of religious books/ literature.
- Maintenance of priests / preachers / other religious functionaries.
- Any other activities related to the above.

Role of Company Secretaries

Since the Foreign Contribution (Regulation) Act, 2010 (FCRA, 2010) is national security legislation; associations are required to exercise extreme care and caution in dealing with foreign contribution from the time of its receipt to its final utilization.

As the Company Secretary knowledgeable governance professional and well equipped in compliance management in various laws like Companies Act, 1956, FEMA, 1999, Societies Registration Act, 1860 , the Indian Trusts Act, 1882, FCRA, 2010 and the Foreign Contribution (Regulation) Rules, 2011. Company Secretary can provide proper guidance to the Companies, associations, Trusts who are either applying for grant of prior permission / registration or who have been granted prior permission / registration under FCRA, 2010.

Company Secretaries create an enabling environment for Voluntary Organisations that stimulates their enterprise and effectiveness, and safeguards their autonomy and to enable them to legitimately mobilize necessary financial resources from India and abroad. Company Secretaries also help Voluntary Organisations to explore alternative paradigms of development to challenge social, economic and political forces that may work against public interest and to find new ways to combat poverty, deprivation and other social problems.