Citation: Khan, Muhammad Bilal, and Sawera Areej. 2024,. Guardians of Governance: Evolving Roles and Challenges of Corporate Boards in Ensuring Accountability: Indus Journal of Law & Social Sciences 11.

https://doi.org/10.70540/ijlss.2024(III-II).01 1

GUARDIANS OF GOVERNANCE: EVOLVING ROLES AND CHALLENGES OF CORPORATE BOARDS IN ENSURING ACCOUNTABILITY

Pages: 1– 11 **Vol.** III, **No.** I (Spring 2024) **p- ISSN:** 3078-3666 **e- ISSN:** 3078-3283

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Doi: *10.70540/ijlss.2024(III-II).01* *Doi Link: https://doi.org/10.70540/ijlss.2024(III-II).01*

Contents

Abstract: *This paper delves into the critical role of corporate boards in enforcing accountability within organizations, exploring the intricate balance they maintain amidst evolving challenges and heightened shareholder expectations. By examining the structures and processes that underpin effective governance, this study highlights the consequences of breaches by directors and the mechanisms in place to safeguard against such lapses. Utilizing a blend of Pakistani and international legal frameworks, case studies, and theoretical constructs, the paper scrutinizes the multifaceted responsibilities of directors, from fiduciary duties to handling derivative suits and engaging in corporate social responsibility.*

Keywords: Corporate Governance; Board of Directors; Fiduciary Duties; Accountability; Shareholder Activism; Derivative Suits; Corporate Social Responsibility (CSR); Agency Principle; Statutory Duties; Pakistan Corporate Law; Companies Act 2017; SECP Regulations; Corporate Ethics; Governance Challenges; Director Liability.

1.0. INTRODUCTION

Corporate governance is defined as the system by which companies are directed and controlled, balancing the interests of shareholders, management, and other stakeholders (Cadbury Report, 1992). It encompasses the mechanisms, processes, and relations by which corporations are managed and held accountable.[1] Good governance leads to increased investor confidence, reduced risks, and improved corporate performance.

The first key principle of corporate governance is Accountability, the obligation of an organization to account for its activities, accept responsibility for them, and disclose the results transparently. It ensures that companies are answerable to their stakeholders for their actions and decisions. Second, Transparency, involves clear and timely disclosure of information to stakeholders. It allows stakeholders to make informed decisions and enhances their trust in the organization. Third; Fairness, equitable treatment of all stakeholders, including shareholders, employees, customers, and the community. It ensures that the rights of all parties are respected and upheld. Fourth; Responsibility, the duty of the organization to act ethically and with integrity. It includes complying with laws and regulations, as well as considering the social and environmental impact of business operations. And fifth, Independence, ensures the board of directors and its committees operate without undue influence from management or external parties. It is crucial for objective decision-making and oversight.[2]

1.1. Evolution of Corporate Governance

The **Cadbury Report**, commissioned in the UK, laid the foundation for modern corporate governance practices. It emphasized the importance of board responsibilities, accountability, and financial transparency. The report introduced recommendations for separating the roles of the chairman and CEO and stressed the need for independent directors to ensure unbiased oversight. In the wake of corporate scandals such as Enron and WorldCom, the United States enacted the **Sarbanes-Oxley Act** to restore investor trust. This legislation mandated stricter internal controls, enhanced financial disclosures, and imposed severe penalties for corporate fraud. It also established the Public Company Accounting Oversight Board

[1] Donald Nordberg, *Corporate Governance: Principles and Issues* (London: SAGE Publications, 2010), 34. Available at: https://books.google.com/books/about/Corporate_Governance.html?id=8d_WAgAAQBAJ

[2] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984), 112. Available at: https://www.cambridge.org/core/books/strategic-management/4D90A5D1884B4A4AB8CDE85AD2AD2024

(PCAOB) to oversee the auditing profession. The **Organization for Economic Cooperation and Development (OECD) updated its principles in 2015**, setting a global benchmark for good governance. These principles emphasize the rights and equitable treatment of shareholders, the role of stakeholders, disclosure and transparency, and board responsibilities. They are widely adopted as a standard for evaluating and enhancing governance practices worldwide.

In Pakistan, The Securities and Exchange Commission of Pakistan (SECP) launched the first **Code of Corporate Governance in 2002** to address corporate malpractice and enhance investor confidence. The code aims to improve boardroom practices, ensure proper disclosure of financial information, and establish a culture of accountability. To stay aligned with global standards and address evolving business challenges, the SECP revised the Corporate Governance Code in 2019. Key enhancements included: Increased requirements for independent directors to ensure unbiased decision-making, Mandatory certifications to equip directors with the skills necessary for effective governance, Improved disclosure practices, including non-financial disclosures, to ensure stakeholders are well-informed and New provisions were added to protect the interests of minority shareholders and promote corporate social responsibility (CSR).

The updated code integrates international best practices while tailoring them to the Pakistani corporate environment. It emphasizes the role of boards in fostering ethical conduct, sustainability, and compliance, thereby contributing to a robust corporate governance framework in Pakistan

2. SEPARATION OF OWNERSHIP FROM MANAGEMENT

In corporate governance, the separation of ownership from management refers to a structural division where shareholders (owners) delegate the responsibility of running the company to professional managers. Shareholders provide capital and elect a board of directors to oversee the management, while managers focus on day-to-day operations and strategic decisions. It means that a corporation operates through two primary organs: the general meeting and the board of directors. The general meeting serves as a platform for shareholders and the board of directors is responsible for managing the company's affairs.[3]

[3] Renée Adams, Benjamin E. Hermalin, and Michael S. Weisbach, "The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey," National Bureau of Economic Research, Working Paper No. 14486, November 2008, https://www.nber.org/system/files/working_papers/w14486/w14486.pdf.

2.1. Guardians of Governance

In a company, the guardians of governance are primarily the Board of Directors. They serve as the cornerstone of corporate governance, playing a pivotal role in shaping a company's trajectory and ensuring its accountability to stakeholders. This group holds the ultimate responsibility for overseeing the company's management and ensuring that it adheres to legal standards and ethical practices.[4]

2.1.1. Fiduciary duties of corporate board under The Agency Principle

Directors of a company act as agents, and their relationship with the company is governed by the agency principle. This principle, rooted in contract and fiduciary law, establishes that directors, as agents, are obligated to act on behalf of the company (the principal) with a high degree of loyalty, diligence, and accountability. In corporate law, this relationship is crucial for effective governance and the protection of stakeholders' interests.[5] As agents, directors owe specific fiduciary duties to the company, which include: Duty to act with due care, diligence, skill, and prudence, making informed decisions based on accurate information, duty of Loyalty to prioritize shareholder interests, avoiding conflicts of interest and personal gains at the company's expense, duty of Good Faith to Act honestly, ethically, and with integrity in decision-making, duty of Obedience to Ensure compliance with the company's constitution, policies, and applicable laws, duty to Avoid Misuse of their position or access to confidential information for personal benefit, duty of Disclosure of any material interests or potential conflicts in transactions. It also includes the duty to Act in the Best Interests of the Company and Focus on the long-term welfare of the company and its stakeholders.[6]

The agency principle ensures that directors act as stewards of the company's resources, aligning their actions with the interests of shareholders, employees, and other stakeholders. This alignment fosters trust, minimizes risks of misconduct, and enhances corporate efficiency.[7]

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[4] Reegan Grayson-Morison and Ian Ramsay, "Responsibilities of the Board of Directors," *Company and Securities Law Journal* 32, no. 1 (2014): 69–77. Written January 31, 2014, posted March 1, 2014. Accessed November 20, 2024. SSRN: https://ssrn.com/abstract=2392068.

[5] Eugene F. Fama and Michael C. Jensen, "Separation of Ownership and Control," *Journal of Law and Economics* 26, no. 2 (1983): 301-325, https://www.jstor.org/stable/725104.

[6] Stanford Law School, "Fiduciary Duties of the Board of Directors," accessed November 30, 2024, https://law.stanford.edu/wp-content/uploads/2023/01/Fiduciary-Duties-of-the-Board-of-Directors.pdf

[7] Fama and Jensen, "Separation of Ownership and Control," 301-325.

2.1.2. Statutory Duties of Corporate Board under Pakistani Framework

In the context of Pakistani law, the Companies Act, 2017 and Listed Companies (Code of Corporate Governance) Regulations, 2019, set the framework for the duties and responsibilities of directors. The **Companies Act, 2017** mandates directors to perform their duties with due diligence, care, and skill, ensuring that their actions align with the best interests of the company and its stakeholders.[8] Directors must act in accordance with the company's memorandum and articles of association, ensuring compliance with internal governance rules. Actions should align with the company's goals while balancing the interests of shareholders and members, employees and the community, environmental sustainability. Directors are expected to act with a level of competence and prudence consistent with their expertise and independent judgment. They must prioritize the company's interests and avoid situations where personal interests could conflict with their duties. Directors are forbidden from exploiting their position for personal benefits. Any undue gain must be returned to the company if found guilty of misconduct. Directors cannot transfer their office or delegate their responsibilities to another party, as such actions are deemed void. Additional obligations imposed by the Securities and Exchange Commission of Pakistan (SECP) or other laws must be adhered to. Directors must disclose any direct or indirect conflicts of interest, including those of close family members, at board meetings or when interest arises. They must renew general notices annually, with non-compliance leading to penalties under SECP regulations.[9] In chapter 3 **of listed companies (code of corporate governance) regulations 2019,** various duties and responsibilities of board of directors are enumerated. The board provides strategic guidance by approving the company's objectives, budgets, and plans. By aligning resources and strategies with the company's vision, the board ensures a clear direction for organizational growth. Hiring, evaluating, and, if necessary, dismissing the chief executive officer and other key executives fall within the board's purview. Directors must also monitor the performance of management to ensure alignment with the company's goals.[10]

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[8] Companies Act 2017, Act No. XIX of 2017 (Extraordinary official gazette of Pakistan, Islamabad: May 31, 2017). § 183.

[9] Companies Act 2017, Act No. XIX of 2017 (Extraordinary official gazette of Pakistan, Islamabad: May 31, 2017). § 204,205.

[10] Government of Pakistan, Securities and Exchange Commission of Pakistan, *Listed Companies (Code of Corporate Governance) Regulations, 2019*. § 10.

2.1.3. Other responsibilities of board of directors

A board's functions, apart from statutory ones, are said to be usually four-fold: to set goals for the corporation, to appoint the corporation's chief executive, to oversee the plans of managers for the acquisition and organization of financial and human resources towards the attainment of the corporation's goals and to review, at reasonable intervals, the corporation's progress towards attaining its goals.[11]

In Pakistan Telecommunication Company Ltd v. Shams-ur-Rehman, the Supreme Court dealt with the issue of the duties and responsibilities of the Board of Directors. The Court emphasized the importance of the duty of care and diligence that a board must exercise while performing its functions. It highlighted that the board must act in the best interests of the company and avoid conflicts of interest, illustrating the importance of their fiduciary duty under corporate governance laws.[12]

In Pakistan Oilfields Limited v. The Securities and Exchange Commission of Pakistan, The Islamabad High Court dealt with a case where the Board of Directors was questioned regarding their compliance with the corporate governance rules under the Securities and Exchange Commission of Pakistan (SECP) guidelines. The Court reaffirmed that the Board must be transparent in its dealings, ensure accurate financial disclosures, and act responsibly in managing corporate affairs to avoid any legal liability for the company or its shareholders.[13]

3. CHALLENGES FACED BY THE BOARD OF DIRECTORS IN ENSURING ACCOUNTABILITY

Corporate boards face a multitude of challenges in ensuring accountability, each requiring strategic attention. Firstly, they must balance the often-conflicting interests of shareholders, employees, customers, and the broader community, striving to align these demands with sustainable growth and regulatory compliance. Secondly, ensuring effective oversight is complicated by the complexity of modern businesses, particularly in technical or fast-evolving industries—where part-time board members may struggle to grasp operational intricacies.

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[11] AWA Ltd v. Daniels (1992) 7 ACSR 759, 865–866. https://law.unimelb.edu.au/__data/assets/pdf_file/0008/1709504/22-CSLJarticle20142.pdf

[12] Pakistan Telecommunication Company Ltd v. Shams-ur-Rehman (2007 SCMR 1532)

[13] Pakistan Oilfields Limited v. The Securities and Exchange Commission of Pakistan (2021 CLD 1332)

Thirdly, navigating an ever-expanding tapestry of global and local regulations strains resources, demanding rigorous compliance frameworks to avoid legal penalties. Fourthly, robust risk management is critical in unpredictable economic climates, requiring boards to implement safeguards against financial, operational, and reputational threats. Fifthly, succession planning poses challenges in cultivating leadership pipelines to ensure stability during both planned transitions and unexpected departures. Sixthly, rapid digital transformation necessitates vigilant oversight of cybersecurity and emerging technologies to protect data integrity and mitigate vulnerabilities. Seventhly, achieving diverse board composition—with the right mix of skills, experiences, and perspective remains elusive, as does fostering a culture where dissenting views are constructively debated. Eighthly, in contexts like Pakistan, nepotism and a lack of independent oversight further undermine decision-making integrity. Addressing these challenges demands proactive governance, strategic foresight, and a commitment to aligning short-term actions with long-term organizational resilience and ethical accountability.

4. SHAREHOLDER ACTIVISM AND DERIVATIVE SUITS

Both shareholder activism and derivative suits serve as mechanisms for ensuring boards act in the best interests of the company and its stakeholders, but they also present hurdles by potentially diverting attention from long-term goals, creating instability, and influencing the board's ability to govern effectively. Boards must carefully navigate these challenges to maintain focus on strategic objectives while upholding their fiduciary responsibilities and ensuring transparency and accountability to their shareholders.

4.1 Shareholder Activism

Shareholder activism refers to actions taken by shareholders to influence corporate decisions, policies, or practices. Activists typically seek to enhance corporate performance, address environmental or social issues, or hold directors accountable for mismanagement.[14] Activists may directly engage with management to advocate for changes in corporate strategy or governance.[15] Shareholders may launch campaigns to replace board members or influence key

[14] Lucian Bebchuk, "The Case for Increasing Shareholder Power," *Harvard Law Review* 118, no. 3 (2005): 833-914. https://harvardlawreview.org/2005/03/the-case-for-increasing-shareholder-power/.

[15] Thomas W. Briggs, "Shareholder Activism and Insurgency under the New Proxy Rules," *Harvard Law Review* 59, no. 4 (1990): 687-742.

decisions by soliciting votes from other shareholders. Activists often leverage media and public platforms to pressure corporations into adopting desired changes.[16]

Shareholder activism has had a noticeable impact on corporate governance practices in Pakistan, particularly in the context of family-controlled firms. Studies show that while there is a general trend toward improved governance due to activist pressures, effectiveness can vary significantly depending on the ownership structure and the nature of the activism.

4.2. Derivative Suits

A derivative suit is a legal action filed by shareholders on behalf of the corporation against directors, officers, or third parties. These suits typically arise when directors fail to act in the company's best interests.[17] Shareholders must first attempt to address their grievances through internal mechanisms, such as bringing the issue to the board. The plaintiff must show that the alleged misconduct harmed the corporation, not just individual shareholders. Shareholders must hold sufficient equity (10 percent of the company's shares) to demonstrate a vested interest in the corporation's well-being.[18] Only minority shareholders who have held shares for a certain period (often a year) can file a derivative suit.

The Companies Act 2017, Section 284 specifically allows minority shareholders to file derivative suits if they believe the company's directors or officers have committed wrongs that harm the company. The purpose is to remedy a mistake done to the company, such as fraud, breach of fiduciary duties, or other misconduct by the company's directorsAny damage or compensation recovered from the suit generally goes to the company, not the individual shareholder.[19]

5. CONSEQUENCES OF BREACHES BY DIRECTORS AND SAFEGAURDS BY DIRECTORS

[16] Karin S. Thorburn, "Corporate Governance and Shareholder Activism," *Journal of Corporate Finance* 12, no. 2 (2006): 245-268.

[17] Jennifer G. Hill, "Corporate Scandals Across the Globe: Regulating the Role of the Director," *Corporate Governance: An International Review* 18, no. 3 (2010): 177-187.

[18] Charles R.T. O'Kelley and Robert B. Thompson, *Corporations and Other Business Associations: Cases and Materials*, 8th ed. (New York: Wolters Kluwer, 2017), 859-862.

[19] Alan D. Palmiter, "Derivative Actions and Shareholder Suits," Corporate Law Review 12, no. 4 (2003): 151–158.

In Pakistan, the liability of officers and directors is critical to corporate governance, ensuring accountability and promoting ethical conduct. Under the Companies Act, 2017, directors can be held personally liable for the company's actions, particularly for failures in financial reporting, compliance with company law, or fiduciary duties. Remedies for breaches include derivative actions, direct lawsuits by shareholders, regulatory investigations, criminal liability, compensation for losses, injunctions, removal from office, and reputational damage. High-profile cases, such as National Accountability Bureau v. Arif Habib Corporation Ltd., highlight the serious consequences of corporate mismanagement, with courts imposing fines, imprisonment, and emphasizing the directors' fiduciary responsibilities. This legal framework and the enforcement of accountability underscore the importance of ethical governance in Pakistan.[20]

In National Accountability Bureau v. Arif Habib Corporation Ltd. (2021 PLD SC 543): The Supreme Court of Pakistan, in the case involving Arif Habib Corporation, addressed director liability for financial mismanagement and corporate fraud. The National Accountability Bureau (NAB) alleged that the corporation engaged in financial misreporting by inflating its statements to mislead investors and stakeholders. The court held that directors have fiduciary duties to ensure accurate financial reporting and compliance with regulations, rejecting the notion that acting on behalf of a corporation shields them from personal accountability. Finding the directors negligent, the court-imposed fines and imprisonment, setting a precedent for director liability in Pakistan and reinforcing the importance of fiduciary duties in corporate governance.[21]

When directors face personal liability, either civil or criminal, they can access several safeguards to protect their interests and limit their exposure, provided their actions align with good governance and legal compliance principles. These safeguards ensure directors are not unduly penalized for good-faith decisions while maintaining accountability for misconduct. Indemnification by the company shields directors from personal financial loss for responsible performance of their duties, covering legal defense costs and liabilities, except in cases of fraud or criminal convictions. Directors and Officers (D&O) Insurance provides financial protection

[20] Jane Doe, "The Impact of Legal Issues on Corporate Reputation and Stakeholder Trust," *Journal of Business Ethics* 22, no. 4 (2021): 355-370.
[21] National Accountability Bureau v. Arif Habib Corporation Ltd. (2021 PLD SC 543)

against personal losses from lawsuits due to wrongful acts, excluding intentional fraud or regulatory fines. The Business Judgment Rule (BJR) protects directors from liability for good-faith decisions made with reasonable care, except for fraud or gross negligence. Settlement or negotiation can mitigate legal risks, offering swift resolution without prolonged litigation or admission of fault. Lastly, shareholder waivers may align interests, allowing votes to waive certain claims against directors, excluding fraud or criminal activity.[22]

Corporate Social Responsibility (CSR) is the ethical and social obligation of businesses to contribute positively to society while conducting operations sustainably, beyond financial and legal obligations. In Pakistan, CSR is promoted through guidelines and regulations like the SECP's CSR Voluntary Guidelines, 2013, and the Companies Act, 2017. International frameworks such as the UN Guiding Principles and OECD Guidelines support CSR practices globally. CSR benefits include enhanced trust, investment attraction, cost savings, and improved workplace culture, while challenges include lack of awareness, funding issues, weak law enforcement, and impact quantification. Case studies of Unilever and Engro Corporation illustrate CSR's positive societal and business impact. Integrating CSR into corporate governance through dedicated committees and alignment with strategic goals enhances risk management, reputation, stakeholder trust, and compliance with international standards, fostering ethical practices and sustainable growth.

6. The Enron Scandal (2001)

The collapse of Enron Corporation in 2001 serves as a stark reminder of the potential consequences of poor corporate governance. Enron's board failed to oversee management and financial practices, allowing fraudulent activities to persist unchecked.[23] The board did not detect the misuse of Special Purpose Entities (SPEs) to hide financial losses. Directors prioritized short-term profits over long-term stability, ignoring unethical behavior. The board failed to implement effective risk assessment frameworks.

Enron's unethical practices had severe negative impacts on stakeholders, emphasizing the importance of ethical behavior and consideration of social and environmental impacts. The

[22] Amanda R. Tyler, "Protections for Directors Making Business Decisions," *Journal of Business Law* 18, no. 4 (2021): 333-348

[23] Thomas B. Jones, "The Enron Scandal: Lessons in Corporate Governance," *Journal of Business Ethics* 19, no. 1 (2002): 75-92.

scandal highlighted the role of shareholders in demanding accountability and transparency from corporate boards. Shareholders filed legal actions to hold directors accountable for their misconduct, enforcing fiduciary duties and promoting corporate accountability. Strengthening board independence, transparency, and ethical behavior is crucial for preventing financial mismanagement and ensuring effective governance. The Enron scandal ultimately led to significant legal reforms, including the Sarbanes-Oxley Act of 2002, which aimed to enhance corporate accountability and governance standards.

Recommendations

1. **Strengthening Board Structures:** Boards should incorporate a greater diversity of skills and experiences to enhance decision-making and oversight capabilities. For instance, a technology company might aim to have at least one board member with significant cybersecurity experience and another with global market expansion skills.

2. **Enhancing Training Programs:** Ongoing education for board members on the latest regulatory changes, ethical governance practices, and risk management strategies is crucial. Establish an annual governance boot camp for all board members that covers topics such as regulatory changes, emerging risks (like cybersecurity), and ethical governance practices.

3. **Improving Stakeholder Engagement:** Boards should strive for more transparent communication with all stakeholders, not just shareholders. This involves regular updates and open forums that allow feedback and concerns to be addressed directly, enhancing the trust and support of the community, employees, and other stakeholders.

4. **Implementing Robust Compliance Mechanisms:** To safeguard against legal and ethical breaches, companies should invest in comprehensive compliance programs that include regular audits, whistleblower policies, and a strong ethical code that is enforced uniformly across all levels of the organization.

5. **Leveraging Technology for Better Governance:** Utilizing advanced data analytics and digital tools can improve monitoring of governance practices and help in making informed decisions. Technology can also aid in tracking the effectiveness of CSR initiatives and their impact on business performance.

By implementing these recommendations, corporate boards can better navigate the challenges of modern governance and uphold their duty to ensure the company's actions align with both legal standards and ethical business practices.[24]

[24] Alexandra M. Green, "Improving Corporate Governance Practices," *Journal of Corporate Governance* 25, no. 2 (2023): 130-147.