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Legal Developments in the context of Company Law, in particular Directors' Duties in the Era of Managerialism: A Case study of US, England, France, and Pakistan

Abstract

In comparative legal scholarship, particularly comparative corporate law, the major studies are directed towards comparing the current legal provisions, while legal developments of these provisions are sporadically investigated. Still where such an attempt has been made, the arguments therein are rarely substantiated with any descriptive analysis of statutory laws. This article analyses, in historical perspective, the substantive legal provisions of different jurisdictions in the period 1910-1980. After conducting a detailed study of the developments of company laws in these countries, it is argued that socio-economic factors coupled with political ideologies at national and international level, are the prime reasons for the legislation of company law. These factors are common irrespective of legal family the country under study belongs to.

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

Introduction.

In recent years, much attention has been devoted to the current issues of comparative corporate law such as impact of shareholders' activism on board decisions or shareholders' litigations for the enforcement of their rights etc. However, the legal developments surrounding these issues, especially in comparative perspective, are completely missing in legal discourse. This article discusses comparative legal developments of company law, in particular directors' duties, in 20th century. For this study, four leading jurisdictions namely US (Delaware), England, France and Pakistan have been chosen to figure out the factors which were underpinning these developments across these jurisdictions. These four jurisdictions belong to both civil and common legal system-a widely known split of jurisdiction in term of their legal traditions and normative values. while countries chosen have advance legal regimes from respective legal families. By including countries from both civil and common legal families, it is intended to show that there were hardly any differences in these countries as far as the factors influencing corporate law developments are concerned. The various legislations and case laws of era are substantially consulted to support the thesis of this work. The research primarily centres upon director's duties as well as the changing concept of company in modern history which roughly expands over last two centuries. This period can be further divided into three phases that correspond to the shift in the understanding of the concept of company. The first phase roughly expands from mid-19th century to first decade of 20th century, the second from 2nd decade to 8th decade of 20th century while the last phase starts from 1980 and continues.[1] This article deals with second phase that is also referred to as *era of managerialism.*[2]

I. Conceptualisation of Company in 20th Century

This phase of director's duties *vis-à-vis* the concept of company law commenced from second decade of 20th century and lasts almost by the end of 1980s-the era is also referred to as era of managerialism. Concurrently, the separate legal personality of company was recognised globally, that is to say company should be conceived distinct from its shareholders. Post industrial revolution[3]produced technical men who, while functioning as directors/managers, started exerting their influence on the operations of the companies. Additionally, the politico-economic factors both at national and international level, continued to impact both company concept as well as director's duties. Because of separation of ownership and control on the company,[4] the company assumed the concept of an asset; an asset that was separate from shareholders, and invited directors to pursue the sole purpose of securing and furthering it. The company skinned itself off from the shades of partnership, and the relationship of directors and shareholders as partners of firm faded away. The following paragraphs will discover the emergence and effects of various legal developments in countries under studies.

A. *England*

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The famous English case, *Percival v Wright,*[5]is referred to as seminal case regarding shaping of director's duties i.e. director owed duties to company only and not to individual shareholders. The case relates to an action brought by shareholders to set aside a sale of company's undertaking. The company was a private one and shareholders approached secretary of the company to sell their shares. As per the company's bylaws, firstly, shares of the company could not be sold on stock market, and secondly, prior approval of board of directors would be required for such share sale transaction. Shareholders accepted share price offered by the directors of the company while chairman of the company was simultaneously in negotiations with another party to sell the whole undertaking at a higher price, the bid, however, was not materialised.

The information of this subsequent sale was not disclosed to shareholders. Counsel for plaintiff taking the traditional view contended that company should be understood as a "sum of shares" that at law belongs to company but in equity to shareholders. He emphasised to resemble shareholders with partners of a firm.[6] He tried to show the intimate traditional relationship between shareholders and company that was prevalent in the 19th century.

The counsel for defence, relying on famous English case *Salomon v A Salomon & Co. Ltd*[7], contended that company is a separate legal personality distinct from shareholders and court agreed with defence lawyer. The judge sought to show that directors are trustee of the money and property of the company; trustee of the assets of the company. He relied on previous judgments[8] where directors were held in the position of trustee of assets of the company and not that of the shareholders. Hence, duties of directors are owed to assets of the company.

In this case we find a shift of director's duties. The old pro-dividend duty to shareholders gives way to the concept of company as separate asset where company would become distinct from shareholders. Nevertheless, such position may be modified where company is owned by few shareholders who are simultaneously running it or have inside business information wherein company would resemble more to firm.

In 1925 the Board of Trade[9] appointed a committee under the chairmanship of Wilfeild Greene K.C. which submitted its report the next year. The committee reviewed existing company acts and made some recommendations which were incorporated in Companies Act 1929.[10] Regarding duties of directors, both committee and Act took a scrupulous stance and did not propose any major addition that might discourage persons from sitting on boards.[11]

Moreover, the practise of fraudulent trading was criminalised. A controlling person of the company would hold floating charge and, when company reached near liquidation, fill his security on goods obtained on credit. Thereafter, he would appoint a receiver who would appropriate the sale proceeds to him. Such frauds were made liable to prison and even, with the leave of the court, disqualification for five years to hold company's office.[12] The committee showed reservation over share purchase practise by company and recommended its prohibition which was implemented in section 45 of the Act.

To further review and amend company law, the Cohen Committee was commissioned in 1943 which presented its report in 1945. The recommendations were enacted in Companies Act 1947[13] and were later incorporated in Companies Consolidating Act 1948[14]. The report took an interventionist approach by demanding more disclosure of company document to the public.

On recommendation, every company ought to have at least one director u/s 176 of 1948 Act. Public company should also have at least a secretary. The age cap of 70 years was also placed on director's office. The committee recommended complete prohibition of loan to director, so the1948 Act prohibited u/s 190.[15] Similarly, the practice of extending tax free remuneration to directors was criticised and prohibited u/s 189 of the Act. Any such remuneration to directors, even managing directors, should be subject to disclosure.

Regarding conflict of interest contract, the previous act provided for disclosure of such contract in the meeting of board. The committee recommended, and incorporated in Act[16], a minor addition that where notice of such interest is given to directors, the same should be reasonably brought and considered by the board. The shareholders were empowered, for the first time, to remove any director even if he had any employment contract with the company.[17]

Next report for company amendment came in 1962 known as Jenkins Committee which partly helped in the enactment of Companies Act 1967.[18] The later Act incorporated, however, some of the committee's recommendations. The contemporary propositions that duties of director be codified were rejected by the committee and instead it went for some basic principles relating to fiduciary duties of director towards company.

It was recommended and made unlawful for a director to "*deal in options*" since he would be in the knowledge of internal information of the company which were not in the easy approach of common investor.[19] Similarly, a director having shares or debentures in company or its associated companies shall have to make disclosure of any such interest.[20]

The Companies Act 1976[21] provided that such a disclosure shall be made within five days (previously fourteen days) after acquisition of shares/interests.[22]

The Companies Act 1980[23] incorporated certain recommendation of previous Jenkins Committee. Its redefined companies and narrowed the definition of public companies by providing minimum capital requirement not previously provided.[24]Where a company is public, the fact thereof should have been inserted in MOA.[25] For the protection of creditor the Second Directive of EU on Company Law was also implemented.[26] The Act gave discretion to board to consider the interest of employees independent of the interest of the shareholder as was previously required.[27] The conflict of interest transactions were further broaden, thus service contract between company and directors exceeding five year was required to be approved by shareholders.[28]

B. *Delaware*[29]

Delaware State, in this period, introduced and developed what is popularly known as *Business Judgement Rule,* the major reason why the legislature and courts are blamed to be director friendly. In simple words this rule shows court's restraint from unnecessary indulgence into business affair of the company. Such restraints come from at least three reasons: firstly, corporate statute gave immense powers to director regarding decision making of the company; secondly, courts are not business experts and they would not like to second guess the decision of the director; thirdly, court's unnecessary interference may discourage directors from taking entrepreneurial risks.

This does not, however, mean that courts happily agreed to such restraints. After promulgation of 1899 Act, we find courts proactively evaluating director's decision on equitable basis. In *Martin v D B Martin Co.,*[30] one of the recent cases after 1899 Act, Chancery Court held "*It is well settled that a court of equity may disregard formalities and break through the shell of fictions in order to prevent, or undo fraud.* **...**".

Legislature, in response to court's decisions, came forward to clarify the powers of directors and management. The DGCL 1899 left it opened to the certificate of incorporation regarding powers and functions of corporation, directors or stockholders; thus, the power to sell assets of company by director even authorised by ¾ of stockholders[31]were suspiciously seen by the courts.[32]The legislature responded through 1917 Act[33]and amended the corporation law. It was provided that directors might sell all or substantially all corporate assets if they are so authorised by majority of the issued and outstanding stockholders having voting powers. Such authorisation, however, must have been granted in meeting called for that purpose. Therefore, legislature increased director's power in a well-defined way.[34]

Through another amendment in 1927[35], the legislature granted more powers to corporate directors and management at the cost of shareholders. The board of directors could, if expressly stated in certificate of incorporation, issue stock of any type or kind, par value or without par value, with full or limited or without voting powers, and with other rights, preferences, qualifications or restriction.[36] The board was enabled to change the nature of stock depending upon the need of the market, thus accumulating more powers. In another amendment of 1929[37] corporation could create and issue options to purchase stock that can be of unlimited duration and the board of directors was authorised to fix terms for the exercise of such options.[38]

In a series of court decisions, it was held that board of directors didn't have power to board appoint director on newly created directorship although it might fill temporary vacancy till the next meeting of the company. Such power of increasing directors by creating new directorship rested with stockholders and not with directors.[39] Legislature, through an amendment in 1949[40], extended such powers to board regarding appointment of newly created directorship subject, however, anything contrary in the certificate of incorporation or bylaws of the company.[41]

The next important change in Delaware corporate law took place in 1967, a major overhauling since the DGCL 1899. The amendment was not introduced by traditional way whereby Delaware Bar would suggest its recommendation. Rather this time legislature enacted special committee that was created by special act.[42] The committee chaired by Clarence A. Southerland completed its task in a period spanning more than three years and finally law became effective in 1967.[43] Besides substantive provisions affecting board of directors, the new law also brought changes in provisions regarding close corporations, merger and stock rights.

The most significant topic before Revision Committee was the indemnity of directors and officers and, indirectly facilitating directors to exert their influence on company's affairs. Not only did the Act provided indemnity to director and officer for civil, criminal as well administrative actions, but also give presumption of innocence in his favour if he acts in good faith and in the interest of corporation.[44] However, a standard of conduct was expected of directors to avail this indemnity and latter was to be determined by any of the followings:

1) by a quorum of majority voters of disinterested directors or
2) by independent legal counsels if no such quorum available of disinterested directors so directs or

3) by the stockholders.[45]

Such indemnity could be granted not only in suits brought by third party but also in derivative suits brought by shareholders on behalf of corporation.[46]

The Act also introduced the provision regarding interested transaction between director and company. Previously, the common law would determine the effects interested transactions of director might have. The Act also lessened the harshness of case law regarding such transaction, for example court restrained interested directors from decisions wherein these transactions were to be authorised. Under the new amendments, such transactions would not be *per se* void or voidable if any interested director has financial interest or took part in the decision under three circumstance; firstly, that material facts concerning such contract or transaction are known and authorised in good faith by the majority of disinterested directors; secondly, that material facts are disclosed to stockholders having voting right and authorised in good faith by shareholder's majority; and thirdly, that such transaction or contract is fair at the time of authorisation or ratification by board, shareholder etc.[47]

Through another amendment in 1969[48] the board was further empowered to fix remuneration of directors unless prohibited by the certificate of incorporation or bylaws of the corporation. In addition, the Act provided that board or its committee might hold its meeting though telephone conferencing if all participants could hear each other subject, however, to any contrary restriction imposed by the certificate of incorporation or bylaws.[49] The minimum number of three directors for any company was also relaxed and a company might have only one director.[50]

The frequent mergers of corporation raised the question of indemnification of directors and officers of merged corporations. Thus, through 1970 amendment a new subsection was added in which the corporation was defined to include "*all constituent corporations absorbed in a consolidation or merger as well as the resulting or surviving corporation*".[51]

C. *France*

At the advent of last century, French business and corporations had been expanding and undergoing in what is known as second industrial revolution era. The vast labour force in industry, influenced by the rise of communist theory, had given way to workers' right. The Law of 1917[52] provided that a public company might add in its bylaws the participation of shares of working class. The provision however was optional. Such share would be the collective property of all workers both employees and labour. In that case, the representative of working class would be selected by shareholders but from amongst the representatives of working class. The number of such representatives might depend upon total capital distribution, but there ought to be at least one representative of workers if board consisted of three directors.[53] The word *board of directors* appeared for the first time in this law.

The Law of 1940[54] was promulgated during WWII when France was occupied and controlled by Nazis. It had the effects of more concentrated governance of the companies. The limit on the number of board members was placed, hence there must be at least three and at most twelve members on the board.[55] The law for the first time tried to bifurcate the functions of direction and control. The president of the board should perform the functions of general direction of the company or he might delegate such functions to any manager provided, however, that president should be responsible for the actions of delegated manager. Such function, however, could not be given to any member of the board.[56]

Major reforms and restatement of the law of 1867, *la grande loi*, came after almost a century in 1966.[57]The Act made two important attempts, firstly, to clear some problems of the previous law and, secondly, to create an optional method of corporate management by providing two-tier boards which was inspired from the German system. A public company, like traditional manner, continued to have a board of directors elected and removed by the shareholders.[58] Corporate employee might be elevated to board of directors if he remained such an employee for more than two years. Their number, however, should not exceed one third of total directors.[59]

The board might, under the law, appoint a president from amongst its midst and law gave him the responsibility of managing the corporation. The terms of his employment and compensation are fixed by the board.[60] The law, however, failed to further clearly articulate the status and powers of the president, and previous obscurity continued in the law.

1966 law, however, attempted to solve the control and management problem. Besides providing traditional single board, law gave options to businesses to opt for two tier-board of public companies.[61] In the latter case, shareholders appoint a supervisory board which then appoints board of management.[62] There could be one manager if capital of the company doesn't exceed 250,000 Franc, while maximum number of managers should not be more than five. They may be removed by shareholders upon the recommendation of supervisor board.[63] The management board managed the company while supervisory board oversaw the functions of the board. Management board should quarterly report to supervisory board and certain action couldn't be taken except with the prior approval of the supervisory board.[64] On the other hand supervisory board should consist of member between three and twelve and they must possess certain shares.[65]

The CEO (*Président Directeur General)* possessed immense powers in the management of the company. He assumed the functions of both direction and control of the company, as against Anglo-Saxon board where board may be presided over by a Chairman while general management was run by CEO. Thus, law concentrated powers in this office of CEO. Under the Law of 1967[66], CEO was entrusted with all powers not expressly given either to shareholder or to board of directors. Thus, he enjoyed wider residue powers.[67]

1966 Law dealt with other important aspects of company's law. The voting rights attached to stock were made proportionate to the paid shares in capital subject to certain exception as well.[68] Company couldn't buy its own shares except in the event of reduction of capital due to losses. Disclosure requirements of the company data were made tougher. The law provided the provisions of merger and acquisition of companies. The acts done by the board of directors were held binding only internally and not externally, so third party is not bound by the acts of directors if such act are beyond social object of the company.

The Law of 1970[69] came up with share options for company employees. It added certain articles in 1966 law. The law authorised board or management to issue share options for the employees of companies. Under the law an extraordinary general meeting, on the report of board or management and after considering auditor's report, might authorise either board or management to issue what is known as stock options[70] to company's employees. Board or management may fix the time within which such right could be exercised by the employees but such period must not exceed five years. The terms and conditions of these right shares could be determined by either board or management.[71] Similarly, such options are exercisable within a period of five years.[72] The management of the company would benefit from these provisions by ascribing such right to themselves; an important move for management at the cost of shareholders.

D. Pakistan

India remained British colony and continued looking to England for legal developments. Companies Act 1913[73] was almost verbatim reproduction of the English Companies (Consolidation) Act 1908. It had also consolidated earlier companies acts in India. However, it failed to mull over the peculiar commercial and trade environment of India as for instance the management agency[74] that was still flourishing. The Act was not that much satisfactory and, hence, went through many amendments. The much-needed provisions regarding prospectus were included in the Act. Regarding directors, however, the Act remained silent, therefore an amendment in 1914[75] made certain important additions in this respect.

The 1914 Act provided, for the first time in India, the legal minimum limit of numbers of directors. Every company, except private company, must have at least two directors.[76] Directors were authorised to fill any vacancy on the board but such newly appointed director would retire on the retiring date of previous director.[77] Likewise, the Act added new section on the conflict of interest of the directors. An interested director was made obliged to disclose his interest in the meeting of the board in which any interested contract was put for consideration. The modalities of disclosure, however, were rather ambiguous leaving room for director to easily manipulate the situation. A general prior notice that director is interested in any specified firm or company should be considered sufficient notice for any subsequent interested transaction with such company.[78] Director was also restrained to vote (in his capacity as director only) in interested transactions.[79]

Certain disclosures on agency management houses were also required to be made. Where an agent or manager of a company, other than a private company, enters into a contract on behalf of company, the terms of contract as well as name of the parties should be disclosed. Details of such contract were to be filed with the company and placed next meeting of board of directors.[80]

Next big amendments to Indian Companies Law took place in the year 1936.[81] The Act partly followed the then English Act 1929 and partly focused on minimising the abuse of management agencies. The Act defined, for the first time, the terms like manager, managing agent as well as a private company.[82] A public company should have at least three directors and 2/3rd of directors should retire by rotation.[83] Sections 86(A) to (H) were inserted covering certain aspect of directors. Thus, an undischarged bankrupt couldn't work as director and liable to fine in case of violation.[84] Likewise a director or manager was prohibited from assigning his office to any person except if so approved by company in general meeting.[85]

Company was prohibited from extending loans to director, exempting, however, a private and banking company.[86] Certain important transactions by director with company were not to be concluded except with the consent of directors.[87] The amendment also provided for an automatic vacation of director's office in circumstance enumerated therein.[88]

The office of managing agents continued attracting criticism in India. The Act diminished their role, though not abolished completely, by adding twelve new sections. The term of a managing agent was fixed 20 years and upon the completion of such term the agent was entitled to claim charge on company assets for his liability. The matter relating to disqualification for managing agents, remuneration, and prohibition of advancement of loans were, for the first time, provided in Indian legislation.[89] The managing agents were restrained from issuing company's debenture and, except with the director's approval, to invest in company's fund. Similarly, the agency houses were restrained from engaging in any business that competes with company's business.[90]

If any director is employed by its company as its auditor, any provision, whether incorporated in the articles of the company or in any agreement therewith, for exempting the director as auditor "from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void."[91] More generally, under section 235, this was the duty of director to not commit mismanagement, negligence, misfeasance or breach of trust.[92]In *Province of West Pakistan v. Mushtaq Ahmad Gurmani*, it was held that directors can be questioned, for powers conferred on them by memorandum or articles of association, on the ground of fraud, negligence or breach of trust. Under section 235, director could be compelled to "contribute to the assets of the company by way of compensation in respect of any misapplication, retainer, misfeasance or breach of trust as the case may be."[93]To recover this money from delinquent director, the High Court had power to follow the property whether it had existed at the name of the director or any other person holding it as ostensible owner.[94]

Even the legal heirs of the deceased directors could be impleaded in proceedings under this section. In Jhelum Transport Company Ltd v Mirza Fazal Haq and 9 others[95] Court held that nature of proceeding u/s 196 and 235 regarding misfeasance are civil in nature and thus impleading legal heirs of ex-directors. Thus, in certain situation, liability of directors doesn't end with his life.

It is to note that the liability of director emerging under section 235 was based on the principle that "a person who has caused loss to the company by an act amounting to breach of trust should make good the loss as provision of S. 235 is not intended to punish a man who has been found guilty of misfeasance." Hence the intent of this section being the recovery of loss from director for the benefit of creditors and shareholders, where the shareholders had had sufficient benefits and sufficient funds were available to quench the claims of creditors, no ground would be left to hold ex-directors responsible for the sums.[96] However, in *Bhai Azizur Rehman and others v. Ghafur Textile Mills Ltd*.[97]it was held that for a petition against a director's malpractice, misfeasance and breach of trust to be maintainable under section 235 to 237, a petition for winding up of company should already be pending.

In the year 1947, Pakistan arose as an independent state on the world map. All the existing laws immediately before independence were to continue with necessary adoption.[98]Later, verbal alteration in sections of laws in Pakistan were made by adoption law.[99] Hence, Companies Act 1913 became enforceable in Pakistan. For further reforms, a commission, under the chairmanship of I.I. Chundigar, was appointed by government in 1959. Chundigar died so the commission was reconstituted under chairmanship of Sharifuddin Peerzada. The commission had the following terms of reference; i) To examine the provisions of Companies Act 1913 to make companies more attractive; ii) to assess the relative degree of control of the shareholders and the management as well as abolishment or otherwise of the managing agency; iii) to consider and recommend modification of the Act that may further safeguard interests of shareholders and public; iv) To suggest measures to popularizing joint stock system of business in Pakistan; v) to suggest modification of the Act for inviting foreign capital, association of indigenous and foreign capital and to regulated foreign companies; vi) To consider the existing powers of Registrar of companies.

The commission completed its work in ten months and submitted report in 1961 which was partly implemented in Social Era of Zulfiqar Ali Bhutto[100] and partly in the Companies Ordinance 1984.

The Bhutto regime came into power with popular social slogan of *roti, kaprh, aur makaan*[101]and a socialist era started which nationalised the economy. In the wake of nationalisation major industries were brought under government control obtaining more than fifty percent shares as well as control of the management of acquired companies. Through an order, the Federal government was authorised to acquire, in the public interest, whole or part share ownership of the business.[102]

In the Bhutto's regime, at last, the managing agency system was outlawed in 1972.[103] Any director appointed by managing agent on the board of directors was to cease forthwith and board was to appoint another Chief Executive Officer to assume the function of managing agents.[104] The Order also fixed the minimum number of director; three for private and seven for public company.[105] In order to better ensure minority shareholder's representation on board, a system of cumulative voting of director was introduced. Likewise, the term of office of a director was fixed three years and in case of any causal vacancy, directors were empowered to appoint new director on the board.[106]

In the pursuit of socialist agenda, Bhutto also introduces various laws for the protection and welfare of workers and employees of companies. The Companies Profits (workers' participation) Act 1968[107] mandated large companies that meeting the threshold provided therein to maintain a separate fund for the welfare of its workers. If company fails to maintain such fund, every director of the company might be held liable for penalty.[108]

In the year 1979[109], government brought few changes in company law but as regards directors 'conduct, it proved colossal as newly introduced section 153-C became ground for litigation against delinquent directors in later years. The section was very broad in its scope whereby any member of the company or Federal Government may approach court against any officer of the company if matters of the company were being run in unlawful or fraudulent manner, oppressive to members or prejudicial to public interest. The word public interest provides ample room to fix liability of those who are at the helm of company affairs. Thus, withholding of funds of shareholder or investor without issuing of *right share* was held to be matter of public interest.[110] Similarly non-maintenance of members' registers and transfer of share was held to be matter of public interest.[111]

At the end of 70's Bhutto was overthrown by Military regime of Zia Ul Haq and socialism era also withered away with his downfall. The new state policy tended toward liberation of economy and opening of market to foreign investors.

CONCLUSION

In this period company law didn't cease to have been influenced from both internal and external factors. Two World Wars devastated Europe and affected Nations came up with more vigour to build up their economies. The economic activity accelerated and economic policies reflected in the developments of company law. At the same time the political context at international level with emphasis on ideological tendencies in the form of capitalism and communism left visible marks on the company law.

The economic expansion of last century is also attributed to industrial and technological developments. The technical hands acquired importance. Within big American business, the multidivisional structure[112] gave ways to more powerful managers who would lead one division of the company. Simultaneously, management had become a subject more than some secretarial skills. In 1914 Harvard University was offering courses on corporate finance, marketing and business policies.

At the same time the theory of separation of ownership and control assumed high importance in all countries under studies. The famous Berle & Means analysis of American corporations in the post-depression era directly affected the subsequent legislation in USA. In their empirical study, in *The Modern Corporation and Private Ownership*[113], they concluded that business had underwent a shift of control through some sort of evolution. It shifted from 'majority control' to 'control through legal device' to 'minority control' to the final evolution of 'managerial control'. This theory remained dominant in subsequent years aligning however to the political ideologies of any state.

The relation between labour and management had also strengthened, partly because the post-World War economic development so required and partly the communist ideology had been gaining popularity. In America government remained ally and policemen for businesses but in Western Europe including France, the government nationalised main businesses.[114] The working class was considered while making legislation on company law.

The social democracies both in England and France diverted the government policies toward social ends of the corporation. The responsive government made policies that aligned with the people's will especially rising power of working class. Although, worker succeeded in share participation of French companies in 1917, English workers could, through political pressure, keep the pluralist company law. Since such social movement was somehow absent in USA, the capitalist approach favouring shareholders interest dominated. In Pakistan, social agenda of Bhutto's government in 70's resulted in nationalization of main business.

The managers however assumed more powers as they would treat company as an asset distinct from shareholders. Legislature in England overturned Jenkins committee's proposition for codifying director's duties. In Delaware, where court tried to limit director's power, legislature made laws to undo those limitations. Resultantly the Business Judgment Rule was established in the state whereby court put restriction upon itself. The Rule also endorses the company as assets approach because court recognized director's discretion in making business decision of the company-an entity separate from shareholders.

The conflict of internet transactions remained the topic of concerns for both legislature and judiciary. The complete ban to such transaction was not encouraged in any jurisdiction, rather some sort of limitations was imposed particularly the disclosure of interest in company. In England notice of any transaction wherein director had interest should be brought into the knowledge of board, and the later must take that into account. Case law, in addition, included the element of good faith in such transactions. Although each case law had its own peculiarities, what was expected of a director was the personal gain he obtained out of such transaction. If he took that interest at the cost of company, he would be responsible but not so responsible if he did it in good faith and with proper disclosure.

The Delaware State took almost same approach regarding conflict of interest transactions. Any such transaction is not void if he has brought material facts into the knowledge of board and later authorise it, or brought into the knowledge and authorised by shareholders or such a transaction was fair at the time of authorisation.

French law under article 40 of 1867 law required the prior approval of shareholders for any transactions or contract where director would be interested. Jurisprudence, however, showed laxity to such transaction if approved by shareholders posteriorly. The difficulty however remained that how to call a general meeting every time. Resultantly law of 1943[115]authorised board of directors for considering such transaction and subsequently approved by shareholder in the general meeting. 1967 Act prohibited interested directors to take part for voting on such transaction and where they participated as such, their votes were not counted for majority purposes. Section 147 of the Act provided an interesting and clear addition where if any such contract is against the interest of the company, it could be annulled.

Pakistan followed English approach; firstly, it was English Law that was largely applicable in pre-independence Pakistan and, secondly, it looked to English law for inspiration in post-impudence era.

Hence, all jurisdictions provided for disclosure of any interested transaction ensuring that such transaction might not be contrary to the interest of the company.

Thus, it is concluded that during this *era of managerialism,* company law naturally remained under the influence of internal politico-economic ideologies of a country while the later was not immune from the external ideological tendencies at international level. Such influence is visible in all jurisdictions under study irrespective of distinction of legal families. Resultantly, both company law and director's duties directed towards achieving those policy objectives. The powerful director/managers could better accomplish the national policies of the era. However excessive assertiveness of managers/directors for over half a century forced legal scholars to find other ways to ward off these abuses in corporate world. Thus, post-1980's era, under the influence of free market and liberal economy, brought new approach to company law and director's duties that calls for a separate article.

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[1] See Lorraine Talbot, *Critical Company Law 1&2* (1st edn, Routlege-Cavendish 2007).

[2] Era of managerialism denotes to the period of power and influence of managers of companies.

[3] Second industrial revolution refers to rapid industrialization in the period from1870s to 1914.

[4]Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property (Rev edn, The Macmillan Company, New York 1962).*

[5]*Percival v Wright*, [1902] 2 Ch 401 (hereafter *Percival v Wright*).

[6] Berle and Means (n 4) 424.

[7] The seminal case of 1897 wherein Mr Salomon registered his successful business as a private company naming himself and his family members as shareholders. Furthermore, he acquired debentures of the company with floating charges on company's assets. Due to economic downturn, company lost ground and went into liquidation. Being secured creditor, Mr. Salomon appropriated to himself company's assets. Other creditors of the company reached court claiming that Mr. Salomon used company name to defraud creditor and other shareholders were merely nominees. Two lower courts decided in favour of creditors but House of Lord unanimously favoured Mr Salomon and recognized separated legal personality of the company. The case firmly established the concept of company under 1862 English Companies Act.

[8] *Great Eastern Ry. Co. v Tuner* **[**1909] AC 109 (hereafter *Great Eastern v Tuner*); In re forest of Dear Coal Mining Co. (1878) 10 Ch.D. 450; In Lands Allotment Co. [1894] 1 Ch 616.
[9] Board of Trade was a sixteen-member's body of British Government and dealt with matters relating to patents, trademarks, company regulations, labour etc.
[10] 19 & 20 Geo. V, c. 23 (hereafter 1929 Act).
[11] Greene Committee Report 1925 [46].
[12] 1929 Act (n 10) s 275.
[13] Companies Act 1947 10 & 11 Geo. VI, c. 47 (hereafter 1947 Act).
[14] Companies Act 1947 11 & 12 Geo. VI, c. 38 (hereafter 1948 Act).
[15] In support of their stance, the committee argued that if a director has sufficient security to obtain loan from any other lender, then what is the need to get a load from company. Likewise, if director don't so possess such loan security, he had no reason to demand a debt from company by means of exercising his influence. Cohen Committee Report 1945 para 94.
[16] 1948 Act (n 14) s 199.
[17] Ibid, 184.
[18] 1967 CHAPTER 81(hereafter 1967 Act).
[19] Ibid, s 25.
[20] Ibid, s 27.
[21] *Companies Act 1976* CHAPTER 69 (hereafter 1976 Act).
[22] Ibid, s 24.
[23] *Companies Act 1980*, CHAPTER 22 (hereafter 1980 Act).
[24] Ibid, s 3 (2), 4(2).
[25] Ibid, s 2 (2).
[26] Ibid, part III.
[27] Ibid, s 46.
[28]I bid, s 47.
[29] Delaware is US state famous for its corporate law and corporate decisions. Its significance can be gauged from the fact that more than 50% of US listed companies are registered here.
[30] *Martin v D B Martin Co* 10 Del. Ch. 211 (1913) (hereafter *Martin v Martin*).
[31] Stockholder is term used in the US for shareholders.
[32] *Butter v Keystone Copper Co.*, 10 Del. Ch. 371(1915) (hereafter *Butter v Keystone*).
[33] 29 Del. Laws Ch. 113 Corporations (1917) (hereafter Ch. 113 1917).
[34] Ibid, s 17.
[35], 35 Del. Laws Ch. 85 Corporations (1927) (hereafter Ch. 85 1927).
[36] Ibid, s 7.
[37] 36 Del. Laws Ch. 135 Corporations (1929) (hereafter Ch. 135 1929).
[38] Ibid, s 6.
[39] *Automatic Steel Prods Inc. v. Johnston* 31 Del. Ch. 469(1949) (hereafter *Automatic Steel v Johnston*); and *Gow v Consolidated Coppermines Corporation* 19 Del. Ch. 172 (1933) (hereafter *Gow v Consolidated Coppermines*).
[40] 47 Del. Laws. Ch. 136 Corporations (1949) (hereafter Ch. 136 1949).
[41] Ibid, s. 4.
[42] 54 Del. Laws Ch. 218 Corporations (1963) (hereafter Ch. 218 1963).
[43] 56 Del. Laws Ch. 50 Corporations (1967) (hereafter Ch. 50 1967).
[44] Ibid, s 145(a).
[45] Ibid, s145 (d).
[46] Much of the debate of Revision Committee rested upon the right of indemnification for derivative suits. See S. Samuel Arsht & Walter K. Stapleton, '*Delaware's New General Corporation Law: Substantive Change*' [1967] 23 BUSINESS LAWYER (ABA) 75.
[47] 56 Del. Laws Ch. 50 Corporations (1967) s. 144 (hereafter Ch. 50 1967).
[48] 57 Del Laws Ch. 148 Corporations (1969) (hereafter Ch. 148 1969).

[49] Ibid, s 6.
[50] Ibid, s 5.
[51] 57 Del Laws Ch. 421 Corporations (1970) s. 2 (hereafter Ch.421 1970).
[52] Law of 26th April 1917 on Public Companies having employee's participation (hereafter 1917 Law).
[53] Ibid, art 78.
[54] Law of 16 November 1940 on Public Companies.
[55] Ibid, art 1.
[56] Ibid, art 2.
[57] Law n° 537 of 24 July 1966 on Commercial Companies (hereinafter 1966 Law).
[58] Ibid, art 91, 92.
[59] Ibid, art 93.
[60] Ibid, art 110.
[61] The legislator debated on this issue as to whether two-tier-board should be obligatory or optional. Supporters were of the view that it will improve board efficiency with the separation of control and direction. Others contended that such rapid reform may put business community in difficulty. See Jean-Jacques Caussain & Michel Germain, Le Directoire Et Le Conseil De Surveillance De La Societe Anonyme (Litec) (2002).
[62] 1966 Law, art 120.
[63] Ibid, art 121.
[64] Ibid, art 128.
[65] Ibid, art 129, 130.
[66] Law n° 66-559 of 12 July 1967 on Commercial Companies (hereafter 1967 Law).
[67] Ibid, art 23.
[68] 1966 Law art 173 .
[69] Law n° 70-1322 of 3rd January 1970 (hereafter 1970 Law).
[70] Stock option in US or Share options in Europe refers to incentives given to directors. It's a kind of privilege for directors with an option to either buy or sell certain shares of company at a predetermined fixed price, director would opt these share if share price is going up or refuse to opt if share price is not profiting.
[71] Ibid, art 208-1.
[72] Ibid, art 208-7.
[73] Indian Companies Act 1913, Act No. VII of 1913 (hereafter Companies Act 1913).
[74] Certain servants of East India Company (EIC) were also running their independent trading business. When EIC restrained them from independent trading, they resigned from company job and went for their own private business. The organizational structure used for these independent businesses was called *agency house*. These agency houses dealt with almost all businesses of the time and due to European superiority in capital and skill, assumed a substantial part of foreign trade. For further details see Dr Tauseef Iqbal, 'Legal Developments in the context of company law, in particular Directors' duties: A case study of US, England, France and Pakistan' in Bahria Journal of Law and Social Policy 2014 3(1) accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117959.
[75] Indian Companies (amendment) Act, 1914, Act XI of 1914 (hereafter Companies Act 1914).
[76] Ibid, s 83A.
[77] Ibid, s 83B.
[78] Ibid, s 91A.
[79] Ibid s 91B.
[80] Ibid, s 91D.
[81] Indian Companies (amendment) Act, 1936A, Act XXII of 1936 (hereafter Companies Act 1936).
[82] According to section 2(13) a private company is defined as a company providing in its article 1) restricting the rights to transfer the shares if any 2) limiting numbers of member to 50 and 3) not to

offer share/debentures to public. Similarly, u/s 2(13) (A) a public company is a company which is not a private company.

[83] Indian Companies (amendment) Act, 1936 s. 38, 39.

[84] Ibid, s 86 (A).

[85] Ibid, s 86 (B).

[86] Ibid, s 86 (D).

[87] Ibid, s 86 (F).

[88] Ibid, s 86 (I), the circumstances include where director didn't possess required shareholding, consecutive absence from board meeting for three months, declaration as unsound by competent court etc.

[89] Ibid, s 87 (A) to (D).

[90] Ibid, s87 (F)(G).

[91] Companies Act 1913, s 86 C.

[92] Ibid, s 235: Powers of Court to assess damages against delinquent directors, etc.
Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retention become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the liquidator, or of any creditor or contributory [made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer,] examine into the conduct of the promotor, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.

[93] *Province of West Pakistan v Mushtaq Ahmad Gurmani and others* (PLD 1965 (W.P) Karachi 110) (hereafter *Province of West Pakistan v Mushtaq*).

[94] *Khondker Faizur Rahman v Official Liquidator, Southern Bank Ltd. (In Liquidation) and Others* (PLD 1970 Dacca 211) (hereafter *Faizur Rehman v Southern Bank*).

[96] *Official Liquidator, the New Jhelum Transport Company Ltd. (In Liquidation), Jhelum v Mirza Faazal Haq and others* (PLD 1987 Lahore 618) (hereafter *Official Liquidator v Mirza*).

[97]*Bhai AzizurRehman and others v Ghafur Textile Mills Ltd.*, (1987 CLC 577) (hereafter *Bhai AzizurRehman v Ghafur Textile*).

[98] Indian Independence Act 1947, s 18(3) (hereafter Indian Independence Act 1947).

[99] Adoption of Central Acts and Ordinances Order, 1949.

[100] Zulfiqar Ali Bhutto was the 9th prime minister of Pakistan who founded his political party *Pakistan People Party.* He was a famous political leader who governed Pakistan in 70s. His government was toppled by Zia Ul Haq, military chief, and executed in a murder case.

[101] These are Urdu words (Pakistan National Language) that means bread, clothes and housing respectively. The slogan attracted general masses and Bhutto won elections and came to power.

[102] Economic Reforms Order, 1972, s. 7B and 7F (hereafter ERO 1972).

[103] The Companies (Managing Agency and Election of Directors) Order, 1972 (hereafter Companies Order 1972).

[104] Ibid, s 4

[105] Ibid, s 8

[106] Ibid, s 10 and 11.

[107] Companies' Profits (workers' participation) Act 1968, Act No XII of 1968 (hereafter Companies' Profits Act 1968).

[108] Ibid, s 5.

[109] The Companies (amendment) Ordinance, 1979; Ordinance LVII of 1979 (hereafter Companies Ordinance 1979).
[110] *Ali Aslam Malik, Chief Executive v SECP* (2017 CLD 1395) (hereafter *Ali v SECP*).
[111] *Sardar Khan Niazi v Barex Lahore Ltd* (2005 CLD 1670) (hereafter *Sardar v Barex*).
[112] Multidivisional structure/organization of company refers to delegating operational autonomy to different divisions of a company while retaining strategic planning at centre.
[113] Berle and Means (n 4).
[114] John Micklethwait & Adrian Wooldridge, *The company: a short history of a revolutionary idea 115* (Modern Library) (2003).
[115] Law of 4 March 1943 on Joint Stock Companies.