CORPORATE GOVERNANCE AND THE LIABILITY OF CORPORATE DIRECTORS: THE CASE OF RWANDA

CORPORATE GOVERNANCE EN DE AANSPRAKELIJKHEID VAN BESTUURDERS VAN VENNOOTSCHAPPEN: HET GEVAL RWANDA

(met een samenvatting in het Nederlands)

Proefschrift

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Didas Muganga KAYIHURA

geboren op 28 august 1974
te Mityana, Uganda

Promotor: Prof.dr. A.F.M. Dorresteijn

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Doctoral Evaluation Committee

Promoter and advising member:

Prof. A.F.M. Adriaan Dorresteijn, Professor of International Corporate Law at Faculty of Law, Economics and Governance, Utrecht University, The Netherlands

Other members:

Prof. Jan Bernd Huizink, Professor of Private Law at The Free University of Amsterdam, The Netherlands

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Prof. Dr. G. Henk Addink , Professor of Administrative law and Good Governance, Institute of Cconstitutional and Administrative law, Utrecht University, The Netherlands.

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Daniel Muthua

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DEDICATION

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LIST OF ABBREVIATIONS AND ACRONYMES

APRM: Africa Peer Review Mechanism
BACAR: *Banque Continentale Africaine*
BCDI: Bank of Commerce Development and Industry
BLR: Bralirwa
BNR: National Bank of Rwanda
BoD: Board of Directors
BoK: Bank of Kigali
CEO: Chief Executive Officer
CESTRAR: Trade Union Centre for Workers of Rwanda
CID: Criminals Investigations Department
CMA: Capital Markets Authority
CMAC: Capital Markets Advisory Council
Co.: Company
CS: Company Secretary
CSOs: Civil Society Organisations
CVL: Crystal Ventures Limited
EC: Executive Chairman
ECGI: European Corporate Governance Institute
EDPRS: Economic Development and Poverty Reduction Strategy
EDs: Executive Directors
FDI: Foreign Direct Investment
GA: General Assembly
ICGU: Institute of Corporate Governance of Uganda
ICPAR: Institute of Chartered Public Accountants of Rwanda
JGA: Joint Governance Assessment
KCB: Kenya Commercial Bank
LLPs: Limited Liability Partnerships
Ltd: Limited
MD: Managing Director
MFIs: Micro-Finance Institutions
MINICOM: Ministry of Trade and Industry
MoU: Memorandum of Understanding
NEDs: Non-Executive Directors
NEPAD: New Partnership for Africa's Development
NISR: National Institute of Statistics of Rwanda
NMG: Nations Media Group

No. : Number
NPPA: National Public Procurements Authority
OAG: Office of the Auditor General
OECD: Organisation for Economic Cooperation and Development
OG: Official Gazette
Op. Cit: Opere Citato
ORG/RGO: Office of the Registrar General
ORTPN: Rwanda Office of Tourism and National Parks
OTC: Over the Counter
PDG: *President Directeur Generale*
PSF: Private Sector Federation
RAMA: *La Rwandaise d'Assurance Maladie*
RCA: Rwanda Cooperatives Agency
RCRSA: Rwanda Commercial Registration Services Agency
RDB: Rwanda Development Board
REMA: Rwanda Environment Management Authority
RGAC: Rwanda Governance Advisory Council
RGB: Rwanda Governance Board
RIEPA: Rwanda Investments and Exports Promotions Agency
RIG: Rwanda Investment Group
RITA: Rwanda Information and Technology Agency
RNP: Rwanda National Police
RRA: Rwanda Revenue Authority
RSE: Rwanda Stock Exchange
RSSB: Rwanda Social Security Board
RURA: Rwanda Utilities and Regulatory Agency
SA: *Societe Anonyme*
SACCO: Savings And Credit Cooperative
SARL: *Societe a Responsabilite Limite*
SCA: *Societe en Commandite par Actions*
SCS: *Societe en Commandite Simple*
SMEs: Small and Medium Entreprises
SNC: *Societe en Nom Collectif*
SOEs: State Owned Enterprises
SPSS: Statistical Package for Social Sciences
SSRN: Social Sciences Research Network
UDL: Ultimate Developers Limited
USL: Uchimi Supermarkets Limited
Vol.: Volume

CONTENTS

GENERAL INTRODUCTION

0.1. General introduction to the topic and why the case study

Corporate governance is an important and critical issue for the prosperity of any company whether big, medium or even small. Recent years have seen an upsurge in international attention towards corporate governance practices largely due to concerns about the behaviour of business managers of some corporations and the well-publicized proliferation of corporate scandals[1] around the globe since the last two decades or so. McCahery and Vermeulen[2] note that corporate governance has become a priority not only for international and national policy-makers and lawmakers, but also for performance-oriented companies wishing to attract investors.

To some economies like the United States of America (USA), corporate governance has gone beyond being just a concept or a terminology and has reached a level of even becoming a movement.[3]In less developed economies on the other hand, corporate governance reforms are just taking root and such move has not necessarily come about as a result of their (less developed economies) own will or eventual consequences[4] as it has been in developed or developing economies. Sometimes, reforms are a response to the international donor community's or investors' pressure that compel them to adopt to the corporate governance models developed in the west, with limited or no modifications at all[5], if they want to benefit from their donations or attract Foreign Direct

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[1] Majority of the publicized ones are American Corporations such as *Enron*, *WorldCom*, etc but it does not necessarily mean that they are the only ones with such scandals. Such scandals are almost everywhere, in each and every country. We can also note for example; The Italian Palmalat, The *BBCI*, *British & Commonwealth*, *Maxwell, Mirror Group*, and *Polly Peck* in the UK; or *Metallgesellschaft*, *Holzmann*, and *Bayerische Hypo-und Vereinsbank* in Germany and many other examples can be drawn from other economies around the world. The only difference is in the magnitude, publicity, or put in short, how effectively, the media performed or trumpeted the scandals! See also: Keynote address by Dr MadhavMehra at the ASEAN Round Table 2004 organised by Singapore's prestigious Institute of South East Asian Studies. Available at: http://www.wcfcg.net/doublestandards.htm.

[2] Joseph A., McCahery and Erik P.M Vermeulen, Corporate Governance of Non-listed companies, Oxford University Press Inc., New York, 2008, at pg. 6.

[3] Daniel Fischel coined the term in the early 1980s: Daniel R. Fischel, The Corporate Governance Movement, 35*VAND. L. REV.* 1259 (1982). For the history on the Corporate Governance Movement, see also; Cheffins, Brian R., The Corporate Governance Movement, Banks and the Financial Crisis (January 1, 2014). European Corporate Governance Institute (ECGI) - Law Working Paper No. 232/2014; University of Cambridge Faculty of Law Research Paper No. 56/2013. Available at SSRN: http://ssrn.com/abstract=2365738 or http://dx.doi.org/10.2139/ssrn.2365738

[4]The struggle between the Owners and Controllers of the Business (Company).

[5] Mathew Tsamenyi, Shahzad Uddin (2009), Introduction to corporate governance in less developed and emerging economies, in Mathew Tsamenyi, Shahzad Uddin (ed.) *Corporate Governance in Less*

Investment (FDI)[6]. Corporate governance is of particular concern in less developed economies where the influx of international investor capital and foreign aid is essential to economic stability and growth[7], even though not with similar propensity compared to the developed economies with big multinational companies. Some African states including Rwanda have acknowledged the significant loss of opportunities due to little regard to good corporate governance practices and have decided to dedicate themselves to reshaping their commitment to corporate governance as one of the driving pillars of their development agenda[8].

It is worth noting that, although corporate governance is more complex in large listed companies - where the stockholders are many, from different places, and often do not know each other - it is also quite important for small companies or put generally, the unlisted ones[9], which dominate in the least developed countries including Rwanda. Many of these least developed countries, which are struggling with their fragile economies and the rampant corruption practices do not have stock markets where their companies can publicly trade their shares. Even those with stock markets, they are still struggling for their survival due to inexistent or ineffective regulatory or implementing institutions and infrastructure for corporate governance. Rwanda, with its minimized corruption rate and comparably responsive regulatory institutions, offers a good example but still, the Rwanda Stock Exchange (RSE) is still too much at its infancy[10] for

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Developed and Emerging Economies (Research in Accounting in Emerging Economies, Volume 8), Emerald Group Publishing Limited, pp.1-11.

[6]**FDI** is defined as cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the direct investor on the management of the enterprise. Ownership of at least 10% of the voting power, representing the influence by the investor, is the basic criterion used, Foreign Direct Investment – OECD Library: www.oecd-ilibrary.org/sites/factbook-2013-en/04/02/.../index.html?... , accessed on 13/04/2015.

[7] Vaughn, M., Lori Verstegen Ryan, 'Corporate Governance in South Africa: A bellwether for the continent?, *Corporate Governance: An International Review, Vol. 14, Issue 5*, September 2006, p.504.

[8] This is why the New Partnership for Africa's Development (NEPAD)'s Heads of State decided in October 2001 (when the Heads of States and Governments Implementations Committee (HSGIC) on the project finalized the policy framework) to include corporate governance as one of the four thematic areas subject to review under the African Peer Review Mechanism (the APRM). The APRM is a unique mechanism under which 26 African leaders including that of Rwanda agreed to submit their respective countries and themselves to review introspectively by their compatriots and review Africa-wide by their peers in selected areas of governance. The selected areas are (i) political governance and democracy, (ii) economic governance and management, (iii) socio-economic development, and (iv) Corporate governance.

[9] Joseph A. McCahery and Erik P.M. Vermeulen, '*Corporate Governance of Non-listed Companies'*, Oxford University Press, 2008 at p.201. Note that, non-listed companies have high powered incentives to voluntarily comply with corporate governance provisions even when they have no intentions to list.

[10] Although the Rwanda Stock Exchange (RSE) had incorporated earlier in 2005 as a limited liability company with objectives of carrying out stock market operations, its first operations were on 31[st] January,

the state to have a significant authority over the conduct of listed companies, especially because it is still encouraging many more other companies to at least list with it.

Commenting on the UK's corporate governance and acknowledging its gravity in big companies compared to small ones, Charkham observed: "Although the principles of corporate governance apply to the corner shop as well as to the ICI in the UK, the way in which it will give effect to them will differ according to its size and complexity, and whether its shares are privately held or quoted on stock exchange."[11]He further noted that:

> "Every country wants the firms that operate within its borders to flourish and grow in such a way as to provide employment, wealth, and satisfaction, not only to improve standards of living materially but also to enhance social cohesion. These aspirations cannot be met unless those firms are competitive internationally in a sustained way, and it is this medium - and long-term perspective that makes good corporate governance so vital."[12]

He noted that this has made corporate governance to be an attractive subject on both sides of Atlantic in the past years. It is this usefulness and all-life touching of a corporation to the entire community that makes corporate governance an issue of everybody's concern.

The quotation above emphasizes the enhancement of social cohesion and sustainability, which are furthered by a company that embraces good corporate governance practices. Whether big or small, in a developed economy or in a developing economy, the vitality of embracing corporate governance is self-evident. Although the quotation's intention was for the firms to be internationally competitive, the intention of this research is not to be overambitious for the comparably small companies in Rwanda – having regard also to the existing socio-economic climate – and require them to compete with others on the international arena, but rather to see whether they are even well positioned to promote social cohesion and sustainability through proper corporate governance practices.

It is obvious that widespread shareholding practically renders it impossible for the owners to manage the company themselves and so they have to appoint their

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2011.

[11] CHARKHAM, J.P., *Keeping Good Company: a study of Corporate Governance in Five Countries*, Oxford, Clarendon Press, 1994, p.260.

[12] CHARKHAM, J. P., *Ibid*.

representatives with whom control over the management is ensured on behalf of all shareholders and the company. With this, the agency problems ensues, and thus, the birth of corporate governance.[13]

Corporate governance has emerged to be among the most attractive subjects in recent years to quite a number of professionals including corporate lawyers, managers, economists, environmentalists and financial experts. Corporate governance crosscuts a number of disciplines and areas including but not limited to economics, management, finance, trade law, environmental law, social and employment laws and company law. It surpasses the traditional principal / agent relationship between the investors (shareholders), who are the *owners* of the corporation commonly referred to in Anglo-Saxon world as *principals* on the one hand, and its directors and managers referred to as *agents* on the other hand, to whom powers are delegated for the daily running of the business. As such, corporate governance is evidently a wide subject that cannot easily as a whole be thoroughly discussed or investigated in this work. I shall therefore limit my research to issues mainly concerning the corporate directors and their awareness of their duties and individual liabilities whether statutory or those implied and inferred either from the common usages or from case law.

Corporate governance, as Cadbury once stated, is concerned with holding the balance between economic and social goals and between individual and communal goals.[14] Cadbury's definition reckons on the 'stewardship' and its accountability which will dominate our extensive discussion in chapter 4 (on the duties and the liabilities of company directors). According to Cadbury:

"Corporate Governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The 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"[15]

From this quotation of Cadbury's forward in the World Bank report, we note important elements - alignment of divergent interests of different individuals and groups, that is, bringing the interests of individuals, corporations, and society together for social and economic development not only for a corporation but also for the society at large.

[13] The agency problem (s) and the origin of corporate governance shall be developed later in chapter three (3).
[14] Sir Adrian Cadbury in 'Global Corporate Governance Forum', *World Bank,[2000]*.
[15] Ibid.

Corporate governance practices vary from country to country mainly due to the divergence in the socio-economic, political as well as the legal and regulatory environment existing in a particular country. As many authors have conceded, developing nations for example, are “known to have different political and economic environments from those of the developed nations. They usually suffer from state ownership of companies, weak legal and judiciary system, weak institutions, limited human resources capabilities, and closed/family companies”.[16]

Still, these problems cannot be generalized to fit each country’s situation. A particular study of each country would reveal its own particular situation mainly rooted in its socio-economic, political and legal history.

Rwanda has aggressively embarked on its policies for revamping and re-energizing its private sector through putting in place various legal and institutional frameworks. Laws have been promulgated and others revised, institutions for investment promotion like the Rwanda Development Board (RDB) have been instituted. As a consequence, many companies, both local and international, have been incorporated. The RDB through the Office of the Registrar General (ORG) registers thousands of companies each year. But how can this development, investment and prosperity through the private sector be sustained? How can investors, shareholders be encouraged to invest even more? How can the general public be assured of a responsible stewardship to their resources? Under Rwandan Company Law, like in many other company laws, the company’s business direction and administration is entrusted with the company directors[17]. But how much are these stewards aware of their stewardship role and what it entails? It is submitted in this study that sustainability and responsible stewardship can only be achieved through an informed and accountable management whose ultimate goal would be to embrace the good corporate governance practices for the betterment of the corporation, but also of society at large, failure of which, the development and sustainability sought cannot be achieved. However, for these stewards to be held accountable for fully performing their duties, they need to be empowered through training, education, facilitations and exposure (in relation to their duties) so that they can operate from an informed perspective.

[16] Mensah, S. (2002). “Corporate Governance in Ghana: Issues and Challenges.” Paper presented at *African Capital Markets Conference*, December; Young, M., Peng, M., Ahlstrom, D., Bruton, G., and Jiang, Y. (2008) “Corporate Governance in Emerging Economies: A Review of the Principal-Principal Perspective.” *Journal of Management Studies*, Vol. 45(1) pp 196-220 (all quoted in: Khaled Dahawy, *Developing Nations and Corporate Governance: The story of Egypt*).

[17] See art.169 of the Rwanda company Law No. 07/2009 of 27/04/2009 relating to Companies as published in the Official Gazette No. 17bis of 27/04/2009

0.2. Focal research question (s) and why the interest?

In Rwanda, since early 2000 or even slightly before, corporate scandals both in *big* companies like commercial banks[18] as well as in small and medium enterprises[19]were at the order of the day. It is alleged for example that due to corruption scandals, the lack of good practices amongst microfinance institutions (MFIs) and the poor management of funds, nine microfinance institutions were closed by the end of June 2006[20]. Company directors and officers have been deliberately hiding under, or were unknowingly covered by the corporate entity structure to carry out all sorts of abuse. Recently however, all stakeholders - shareholders especially the minority ones, creditors, regulators[21] and legislators[22] have expressed their interest in not allowing directors any more chances to continue hiding behind the corporate veil. Litigation in this field is expected to become more and more prevalent. Besides, the conduct or negligence of both executive and non-executive directors in their boardrooms worries other corporate constituents. Corporate policies are poorly designed and attended to, which has far reaching consequences to all corporate constituents including the shareholders. To limit abuses by directors, the Rwandan legislator has, through various laws, provided for directors' duties and where necessary, liability for violation of these duties. These duties and liabilities are however scattered across numerous laws and it is supposed that the concerned directors might not even be aware of what they are, where they are found, and whether they may actually incur personal liability when carrying out their corporate duties. Liability as a consequence of mismanagement and unaccountability is no doubt part of corporate governance. Emphasizing on liability in relation to good corporate governance is paramount since the rampant scandals show that the formation of some corporations may otherwise be for nothing else but a creation of a device through which unscrupulous individuals or negligent stewards may freely escape debts and other liabilities under a corporate cover.

[18] For example, the cases of Bank of Commerce, Development and Industry (BCDI) and *Banque Continentale Africaine* (BACAR).

[19]Especially with Microfinances institutions.

[20] See; Microfinance Transparency, Rwanda Country Survey report.Available at http://www.mftransparency.org/wp-content/uploads/2012/05/MFT-RPT-105-EN-Country-Survey-Rwanda.pdf (accessed on 29/4/2015).

[21] This led to the Central Bank (BNR) passing the corporate governance regulations for financial institutions.

[22] The new Company Law (2009 as amended to date) that puts much emphasis on corporate governance and compliance.

Our central questions for this research are therefore:

(i) *What are the duties of directors according to Rwanda's corporate governance norms?*
(ii) *To what extent are company directors liable under Rwandan law?*
(iii)*Do company directors, appointed as such, understand the extent of the duties a director owes to the company itself, its shareholders, its creditors, as well as the community at large under Rwandan law and the liabilities that may arise when these duties are violated?*

0.3. Rationale for and aim of this research

It should be noted that, although there is a vast amount of literature on corporate governance in general relating to the developed world, little has been recorded for the least developed countries. Even the little that has been written on this subject is characterized by a tendency to generalize issues. Yet, corporate governance analysis requires an individual country's scrutiny by considering the compounding factors leading to the particular system of governance adopted[23]. Particularly, there is no recorded literature on how generally directors' and officers' awareness of their duties and possible liabilities may be addressed. Some economies have their organized way of recruitment, induction, and continuous training of directors, while others have taken the directors' knowledge of their duties and consequently liabilities for granted, apparently on the presumption that they have the requisite knowledge and skills or on the common but rough adage that *'ignorance of Law is no excuse'*. This is the case in Rwanda. We submit that such knowledge and awareness deficiency may lead to unintentional inefficiency of the directors' performance of their functions and so, since a corporate governance analysis must be made against the background of each jurisdiction's particular development, social, economic, legal and political fabric, a study of Rwanda's particularities is necessary.

In general, directors may be appointed either from among their peers (shareholders) or from outside to represent the 'owners' in the management of the company. They are hired and are remunerated for their services to the company as either experts or as people knowledgeable to advance company interests. However, corporate failures

[23] Babic V., Corporate Governance Problems in Transitional Economies, p.1. Available at: http://www.afic.am/CG/CGProblemsInTransitionEconomies.pdf Accessed on 30/11/2011.

continue to proliferate [24] despite this selection of managers and the exorbitant remunerations those managers sometimes earn. Some have attributed these failures to the traditional little commitment of stewards towards their master's property. As Adam Smith put it as far back as 1776:

"The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company."[25]

But one would wonder whether this may be considered to be the sole and uniform cause of all failures of corporate management worldwide? And would there be other particular causes for corporate failures in Rwanda? How could these other causes, if any, be avoided?

From the general principal/agency problems follow the individual director's liabilities as some corporate failures are attributed to directors' failures to accomplish their duties and that may lead to liabilities of the failing directors. Nowadays, the protection (corporate veil) that directors have been enjoying for centuries is, as mentioned above, diminishing since many company laws including that of Rwanda, categorically provide for cases in which the insulation in the form of the corporate veil shall be ignored or penetrated[26] in order for the justice arm to reach the individual director or all directors jointly and severally.[27] One wonders whether such strict laws especially for personal liabilities for directors suffice to guarantee the solution of Rwanda's particular corporate governance problems.

Considering the way company directors in Rwanda - whether for big companies or SMEs - are appointed, the way they function, their level of knowledge of relevant laws

[24] See for example a list, though not exhaustive of those failures at: https://en.wikipedia.org/wiki/List_of_corporate_collapses_and_scandals, accessed on 15/2/2016!
[25] Adam Smith; *The of Wealth of Nations*, Book 5, Ch. 1.3.1.2, 5th edit., London, 1776. Available at: http://www.onlineliterature.com/adam_smith/wealth_nations/33/
[26] Different expressions have been used to mean this penetration through the corporate veil. The Americans say '*piercing the corporate veil*' whereas the English, with their politeness say '*lifting the corporate veil*'.
[27] Gary Slapper and Steve Tombs, Corporate Crime, Pearson Longman, Longman Criminology Series, 1999, p.31.

and the acquaintances with their specific business knowledge, it seems that the majority, if not all of them, simply take up their office uninformed of what awaits them in terms of duties and related liabilities. Coupled to this is that the directors' duties and liabilities are scattered across different laws, to the extent that both the directors and those who seek to be compensated for the directors' damaging actions will find them difficult to locate. The assumption here is that Rwanda's typical corporate governance issues may be caused by, in the first place, the way directors are selected and appointed and the low level of knowledge and understanding of their business as directors. In other words, if directors were to be objectively selected on the basis of, for example, competences and track records most if not all governance issues in the majority of companies in Rwanda would be addressed.

Sustainability[28] is also central in looking at corporate governance especially in developing countries. It is quite settled that the increase of Foreign Direct Investments (FDI) in any of the developing countries follows the confidence that the host country captures from foreign business players. As Rued-Sabater[29] noted, the role of a broad range of corporate governance and business practice issues is likely to be a decisive determinant of destination of Foreign Direct Investment flows. This is why we have in recent years witnessed major legal and regulatory reviews in domestic laws in many developing economies[30] in order to level the ground for a conducive business

[28] Sustainability is used here in relation to Foreign Direct Investment to mean that where foreigners have got little trust in how the existing business environment including ethical standards and behaviors of business managers (directors) is, and how predictable it may be viewed for tomorrow and the days after, it may be hard for them to consider investing in that particular country. For example, The World Bank's Doing Business ranking which is often used as a significant indicator for a conducive business environment has the following as some of the criteria assessed:

- Procedures for starting business
- Procedures for obtaining / acquiring a construction permit
- How labour laws are friendly or not to investment
- Property rights (whether individuals, including foreigners may have rights on property or not)
- Loan processes / getting credit in that country
- Investors' protection laws
- Taxes and their procedures
- Possibilities for trading across borders
- Contract enforcements
- Corporate governance principles and their application
- Shareholder protections
- Closing of business procedures, among others. It is the directors that often apply these laws and processes. Where their ethical or knowledge and skills are questionable, sustainability of businesses in that particular system (country) is as well questionable.

[29] Rued-Sabater, E. (2000), Corporate Governance: And the Bargaining Power of Developing Countries to Attract Foreign Investment. Corporate Governance: An International Review, 8:117-124.doi:1111/1467-8683.00189.

[30] Rwanda has for example since 2007 reviewed or promulgated more than 12 laws in that regard. These

environment. Countries have been trying hard to improve on the World Bank's Doing Business ranking, especially within the East African region.

Even in such great push for reforms, I observed that some company directors in Rwanda still behave as though they do not match the pace of the developments because they still manage companies as they would manage their unincorporated family businesses. In addition to this, some directors are ignorant of what is taking place in the companies on which they sit as board members. As Frederick Dwight noted a long time ago;

"*What might be called the amateur aspect of a directorship has probably increased greatly during recent years. By this is meant the idea that such a position is an avocation, a luxury, a compliment paid to a successful business or professional man, something like the bestowal of an honorary degree. And amid the great variety of other considerations that prevail, many have little or nothing to do with the management of the company's affairs*"[31].

Although the above quotation from Dwight was in reference to the US system in early 1900s, it applies to the Rwanda of today. Thus it becomes imperative to research in depth whether the extent of duties and liabilities attached to the company's directorship in Rwanda are really known to directors so appointed.

Legal provisions within the framework of the current Rwandan Company Law (2009) in comparison with the previous law (1988) have addressed various corporate governance issues. Controlling abuses by directors have been sought by restricting share dealings[32], introducing obligations to disclose[33], instituting (for the first time under Rwandan law) the standard of care, diligence and honesty[34] and liability of company directors and officers.[35] What is not addressed however is for example, defining when and how the corporate directors shall be performing for and on behalf of the corporation

include the company law, contract law, Insolvency law, the competition law, Labour law, Intellectual Property Law, Arbitration and conciliation in commercial matters law, Mortgage Law, among others.

31 Frederick Dwight, 'Liability of Corporate Directors', The Yale Law Journal, Vol. 17, No.1 (Nov., 1907), pp. 33 – 42. Available at: http://www.jstor.org/stable/785836?origin=JSTOR-pdf [Accessed on 04/11/2011]

32 Art. 201 of the Law No. 07/2009 of 27/04/2009 relating to Companies as published in the Official Gazette No. 17bis of 27/04/2009.

33 Arts. 199 - 200

34 Arts. 211

35 Arts. 212, 214, 218, and others.

or not. When and how the corporate veil may be lifted under Rwandan law shall be analysed in this study.

Further, Rwanda is becoming a member of the hybrid system that is not purely civil as it used to be and not purely common law, and therefore it subscribes to neither stakeholder nor shareholder approaches of corporate governance. On the contrary, it has tried to embrace good practices from both systems. This undoubtedly means that a code of corporate ethics shall be promulgated soon to incorporate such best practices from both systems into one harmonised code[36]. To which model of approach this code shall subscribe: the shareholder approach or the stakeholder approach? This becomes paramount because The model of corporate governance determines who the principal residual claimants of the corporate affairs are, and would either extend or limit the directors' duties and liabilities accruing there from. Through the corporate governance model chosen, one would be able to tell what is or should be the ultimate purpose of the corporation, and thus, the goals that the directors are required or permitted to pursue. And from such a model, one may assess to whom the corporate directors are answerable. Are they answerable to shareholders alone? Or are they answerable to other stakeholders as well?

Taking into account the above, it is evident that there is a need for an analysis of what is required from corporate directors according to Rwandan standards of good corporate governance. Therefore, in addition to the central research questions also the following questions will be answered by this study:

- What is the corporate governance model that is applied in Rwanda?
- To what extent may a company director or any other officer in that position be held personally liable for his fault and to what extent may he, despite his actions, legally hide behind the corporate form under Rwandan law;
- Who has the capacity to institute a claim against the wrongdoing director?
- Does the company always have to bear the liabilities of its directors even when they fail to do what ought to be done by any reasonable person of their (directors') qualification, position and status;
- Do company directors recognize the extent of their duties and the consequent liabilities that are attached to these duties in case of violation under Rwandan Law?

[36] A draft corporate governance policy framework aiming to coming up with a harmonized code of corporate governance and best practices was discussed in a validation workshop at Hotel Lemigo, Kigali, on 26/November/2014, championed by the Office of the Registrar General (ORG) from the Rwanda Development Board (RDB).

This work shall basically examine Rwandan laws but since the Rwandan Legal system cannot stand in isolation from the external influences, a leaf shall be borrowed from other systems. In doing this however, the researcher shall keep in mind that corporate governance has always to be contextualized within a given system – the Rwandan context for our case. Further, throughout this work, the words 'company', 'firm', and 'corporation' shall be used interchangeably to mean the same, and a gender representation 'he', 'him' or 'himself' as used shall always be implying also 'she', 'her' or 'herself' or vice-versa. It should also be noted that, where provisions of Rwandan law are used without any other precisions, it shall be referring to the Rwandan Company Law *No. 07/2009 of 27/04/2009* relating to Companies as published in the *Official Gazette No. 17bis of 27/04/2009* as amended and updated to date. Also to be noted is that the foreign case law referred to in this study are just for reference purposes and may not be construed to mean that they are in any way binding in Rwanda.

0.4. Research Methodology

The methodological approach to this research has been partly doctrinal[37] and partly empirical or socio-legal in nature. That is, for some parts of the study, the doctrinal analysis through analyzing materials like legal literature, case law (where available), legislation as well as internet materials has been employed while on the other part when investigating whether the directors are aware of their duties and obligations as well as the liabilities, a socio-legal approach has been preferred. In the latter category, the intention has been to do the sampling from different corporate categories, develop the questionnaires to be responded to by different directors, collect the questionnaires, analyze them and present the findings. This was undertaken as a means of determining whether 1) corporate governance is ensured by the directors who recognize the weight and legal implications of what they are called for and whether 2) in case of breach of their duties, the extent of their personal, joint and several liability is clear to them.

A mixture of "doctrinal" and "socio – legal" methods was found appropriate for this particular study since the responses to our research questions could neither be found in books of law, codes, law articles or journals, nor could they be found in any of the

[37] Hutchinson, *Researching and Writing in Law*, (2nd edn), Pyrmont, NSW: Lawbook Co., 2006, pg.7-8, 19: Doctrinal research is the research that '*is library-based, forcusing on a reading and analysis of primary [such as the legislation and caselaw] and secondary materials [such as legal dictionaries, textbooks, journal articles, case digests and legal encyclopeadias];* Hutchinson defines Doctrinal research as the *'Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development'(pg.7).* Also quoted in:Mike McConville and Wing Hong Chui, *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, pg. 47.

domestic or foreign legislations. An interdisciplinary or socio-legal approach was therefore preferred because, as McConville and Hong Chui[38] put it;

'Interdisciplinary or socio-legal research broadens legal discourse in terms of its theoretical and conceptual framework which guide the direction of the studies and its specific research methodologies are able to generate empirical evidence to answer research questions'.

Even though there were some provisions in some laws in Rwanda regarding directors' liability and the implied awareness[39] of the provisions by the directors, there was a need to investigate and understand the real gap between the 'law in books' and the 'law in action'. The method used for the survey and its findings shall be explained further in chapter five (5) of this work.

0.5. The Scope and subdivision of this study

This work is divided into six chapters. They are preceded by a general introduction to the topic which elaborates on the research questions, the interests for the choice of the topic, the intended outcomes and their benefits, the structure, as well as the methodology that has been used during our study. **Chapter One** then discusses what is generally understood by a corporation and thereby introduces the concepts of a corporation and corporate entity and the contractual theories and how they relate to corporate governance. In the same chapter, the two features of the corporate form – the limited liability and the separation of ownership from management and how they influence and impact on corporate governance are discussed. **Chapter Two** shall elaborate on the corporate landscape in Rwanda and it is in this chapter that issues of the powers accruing from incorporation, the different categorizations of corporations in Rwanda as well as the corporate structures and ownerships are discussed. Board structures and composition are dealt with and how the control power is distributed among the three major corporate organs - that is; the general assembly, the board of directors, and the executive management. In **Chapter Three,** corporate governance in general and the Rwandan context in particular are discussed. The agency problem(s), the different approaches of corporate governance, and the situation of Rwanda shall be briefly discussed too. **Chapter Four** shall discuss the duties and liabilities of company directors under Rwandan Law and shall be categorized into liabilities under general company law, civil law, tax law, environmental law, labour law and criminal law. **Chapter Five** reports on the empirical study and finally, **Chapter Six** contains a conclusion and some recommendations.

[38] M. McConville and Wing Hong Chui (eds), *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, p.5.

[39] Basing on the general principle of "*ignorance of law is no excuse*" – "*Nul n'est censer ignorer la Lois"*!

CHAPTER ONE: THE CORPORATE CONTEXT AND FUNCTIONING

1.1. General overview and theories of a corporation

A corporation[40], according to some authors[41] and as a matter of fact, has emerged to be an invention of great achievement mainly due to its advantages like the ability to raise capital for investment and the liquidity that share ownership provides, free transfer of shares, perpetual existence and limited liability. This business form has spread throughout the world to both developed and developing economies. Corporations have become popular, powerful, and dominant institutions and, as Haslinda and Valentine note, have reached to every corner of the globe in various sizes, capabilities and influences.[42] According to Armour, Hansmann and Kraakman[43], a corporation's definition has to be related to its (company's) core characteristics which are: (1) its legal personality, (2) limited liability, (3) transferable shares, (4) centralised management under a board structure, and (5) share ownership by contributors of capital[44]. Although such criteria of defining a corporation would sound to be more appropriate to big corporations like those in the developed economies, we contend that it is equally

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[40] Under Rwandan law, the concepts: 'Corporation' and 'company' have two different and somewhat, confusing meanings (Art. 2 paragraph 12 defines a company as "a corporate body composed of one or more persons for making profits; whereas Art. 2 paragraph 16 defines a corporation as:

"*a body corporate, including a foreign company or any other body corporate incorporated outside Rwanda, or a partnership formed or incorporated or existing in Rwanda or elsewhere but does not include:*

a) A statutory corporation;
b) A sole proprietorship;
c) A registered cooperative society;
d) A trade union or;
e) A registered organization.").

However, for the purposes of this work, the two terms shall be used interchangeably to mean the same. Though the company is briefly defined as indicated above, throughout this work, a company shall be understood as a distinct moral person, created by law from the will of its promoters, in order to carry out the business activity(ies) it was created for. This definition for the corporation is found to be generic and it ignores the strict meaning of the term 'business'! Worth noting is that under Rwandan Law, some companies may be created (incorporated) for business but not for making profits. Nevertheless, our concern throughout this work is for only those profit oriented corporations.

[41] Norman Barry, 'The Theory of the Corporation', *Ideas on Liberty*, March, 2003. Available at: http://www.fee.org/pdf/the-freeman/feat5.pdf . (Accessed on 13/02/2012).

[42] Haslinda Abdullah and Benedict Valentine, 'Fundamental and Ethics theories of Corporate Governance', Middle Eastern Finance and Economics (Issue 4), EuroJournal Publishing, Inc. 2009, at 88. Available at: http://www.eurojournals.com/mefe_4_07.pdf (accessed on 21/02/2012).

[43] John Armour, Henry Hansmann, and ReinierKraakman, 'what is a corporation', in: Kraakman, R., et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach,* 2nd Edition, Oxford University Press, 2009, p.5.

[44] These characteristics' discussion shall be developed further towards the end of this chapter.

applicable to all others, including small companies, like those in Rwanda, with an exception to those that are unlimited when it comes to the liability of their shareholders. A corporation is however such a complex form of business that has attracted discussions in a bid to ascertain what it is, in which context it appears and how it functions. The major debates are those from the law and economics scholars on whether and in what form a corporation can be sufficiently explained. The debate has especially heightened today in light of the prevalent business scandals which are highly associated with the corporate form of business.[45] Two dominant but conflicting theories exist; the 'entity theory' mainly advanced by legal scholars and the 'nexus of contract' or the 'contractual' theory[46] of the corporation that is mainly advanced by economists[47]. Other theories which are closely related to, although sometimes conflict with, the above two are: the 'grant theory', the 'personality theory', the 'natural entity theory', the 'real entity theory'[48] and others.

Whereas the debate and discussion of such theories is healthy and enriching for a deeper understanding of the corporation concept, the intention of this part of the work is not to deepen the discussion on the different theories or to suggest a different theory altogether, but to show how both the 'entity theory' or personality theory' as well as 'the contractual theory' or the 'nexus of the contracts theory' become interesting in as far as the corporate functioning and governance in general and the role of corporate directors and officers as part of that governance in particular, are concerned. The corporation whether as an entity or as a nexus of contracts, cannot function by itself – soulless as it is, but through its agents – the directors and officers. This chapter labours to link the two theories by showing how they relate to our topic of study – corporate governance and liability of corporate directors.

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[45] Norman Barry, Op.cit.

[46] There is enormous literature about this theory but some of the major early contributors include: Coase, 'The nature of the Firm' *4 Economica, 386* (1937); Fama& Jensen, 'Separation of Ownership and Control' *26 J. Law & Econ., 233* (1983); Baysinger & Butler, 'The role of Corporate Law in the theory of the Firm'. *28 J. Law & Econ. 179* (1985); Klein, Crwford & Alchian, 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process', *21 J. Law & Econ. 297* (1978); Cheung, 'The Contractual nature of the Firm', *26 J. Law & Econ. 1* (1983); Jensen & Meckling, 'The theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure', *3 J. Fin. & Econ. 305* (1976); Alchian &Demsetz, 'Production, Information Costs and Economic Organisation', *63 Am. Econ.Rev. 777* (1972).

[47] John Armour, Henry Hansmann, and Reinier Kraakman, op.cit, note 43.

[48] Ron Harris, 'The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business, *63 WASH. & LEE L. REV. 1421,* 1424-25 (2006) [This discusses the normative qualities of 'real entity' theory]. For further discussion especially on the 'personality theory', the 'entity theory', and the 'real entity theory' see, Arthur Machen, 'Corporate personality', (1911), *Harvard Law Review*, Vol. 24, No. 4 (parts 1 & 2). Available online at: http://rci.rutgers.edu/tripmcc/phil/Machen_v_dewey-corporate_personhoo.pdf Accessed on 9/2/2012.

In the following sections, the two dominant theories as mentioned above shall be discussed starting with the entity theory and followed by the contractual or the nexus of contracts theory. The limited liability concept and the separation of ownership and control or management as major features of the corporation, shall also be discussed. The chapter concludes by showing that in as far as corporate governance is concerned, what matters most is not which theory dominates the other, but rather, how the entity or the aggregate of contracts are managed to the benefit of both the members who own the shares in that corporation, and to those other constituents including those with contracts and others who in one way or the other are affected by the operations of this corporation.

1.1.1. The entity theory of the corporation

A corporation or a company is a form of a business organization incorporated initially for specific objectives to be achieved by those responsible for its formation[49] although these objectives become company objectives after its incorporation. Features that distinguish it from other business organisations include the flexibility in transfer of shares from one shareholder to the other[50], the separation of ownership of shareholders from the management of the corporation and perpetual existence. Historically, the entity concept was not meant for business purposes but rather, for political or church orientations. In the context of England for example, Conard notes that:

"The wedding of the entity concept with the business practice of a joint stock company came about, at least in England, in a peculiar way. When the East India Company was chartered in 1601, the Royal Act provided that it should be a body corporate"....The term implied that the company would possess the legal capacities [of] municipal and religious bodies. It was not until sixty-odd years later, when the East India Company adopted the structure of a business corporation, with fixed capital and negotiable shares, that the legal [entity] conception of a corporation was united with the financial structure of a modern business corporation".[51]

[49] L.H.Leigh et al., *Northey and Leigh's Introduction to Company Law*, 2nd Edit, Butterworths, London, 1981, p.8.
[50] Henry Butler, 'The Contractual Theory of the Corporation', *Geo. Mason U.L.Rev. Vol.11:4* at 108.
[51] Conard, Alfred F., *Corporations in Perspective*, Foundation Press, Mineola, New York, 1976, p. 131.

Conard referred to the modern corporation as a legal entity with a "bundle of rights, duties, powers, and immunities, distinct from those of any member or combination of members"[52] thus making it stand by itself in pursuit of its objects of creation.

Since then, in England like elsewhere in the world, the entity theory equally applies to corporations as business organisations.[53] It has dominated at least since early 19th Century to date.[54] A corporation acquires the entity status through satisfying the set of requirements for the corporation's registration.[55] After registration or incorporation, a corporation becomes 'a legal person or entity' capable of performing all activities as a natural person would perform. This process qualifies a corporation as an intangible legal entity – the entity without a body or a soul.[56]Corporations are "legal persons" entitled to do things individuals cannot, particularly when it comes to matters of financial management and legal accountability as businesses.

In *Gas lighting improvement Co. Ltd v. Commissioners of Inland Revenue [1923] AC 723*, Lord Summer summarised what a company means legally where he held that:

"Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case, the capital of the shareholders. Assuming of course, that the company is duly formed and is not a sham (of which there is no suggestion here), the idea that the company is mere machinery for effecting the purposes of shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts"[57].

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[52]Conard, Ibid. p. 126.

[53] See in the USA for example; David Millon, 'Theories of the Corporation', 1990 *Duke L.J.* 201 1990, P.216.

[54] The corporation as a distinct legal entity, separate from its shareholders was also the position of Dodd in his article "For whom Are Corporate Managers Trustees?". See, Dodd, 'For whom Are Corporate Managers Trustees?', 45 *Harv. L. REV*. 1145 (1932).

[55] Art. 3 of the Law No. 07/2009 of 27/04/2009 relating to Companies as published in the Official Gazette No. 17bis of 27/04/2009 states that: *"Une ou plusieurs personnes peuvent créer une société en mettent ensemble les biens, les services, en vue d'une activité commerciale qui est attestée par le remplissage d'un document y relative ou qui se fait conformément à la présente loi. Cela se fait par le remplissage d'un formulaire se trouvant en annexe I de la présente loi."*

[56] Machen A., 'Corporate Personality' (1911), *Harvard Law Review*, Vol. 24, No. 4 (part 1). Available online at: http://rci.rutgers.edu/tripmcc/phil/Machen_v_dewey-corporate_personhoo.pdf Accessed on 9/2/2012.

[57]*Gas lighting improvement Co. Ltd v. Commissioners of Inland Revenue [1923] AC 723*, pgs 740 -741. This case is quoted by almost all authors on separate personality or on corporate personality in general. See Grantham R., Rickett C., *Corporate Personality in the 20th Century*, Hart Publishing, 1998 at 76; French D., Mayson S., & Ryan C., *Mayson, French & Ryan on Company Law*, Oxford University Press,

Etymologically, according to the Oxford English Dictionary, the word 'corporation' derives from the Latin word *corpus* (itself meaning body), representing a 'body of people', that is, a group of people *authorized* to act as an individual. It is a legal designation given to a company recognized as an *entity* in its own right, independent of its directors and founders.[58] This *fictive* or *fictitious* 'person' therefore has a *de jure* independence from the persons composing it and thus, its extent, personality, rights, status, capacity and scope are determined by the law of the place where it is incorporated / registered. The entity status makes a corporation to be an artificial person, separate from its members, which can sue and be sued. The fulfilment of its registration requirements may be equated to the maturity of a child in her mother's womb, ready to be born and the issuing of the certificate for incorporation is the certification of its birth. From where it is born, it acquires the nationality and all its identification requirements.

Three things therefore may be deduced from the above; **i)** that a corporation is a creation of the law, **ii)** that it exists upon authorisation by the state and **iii)** that it is a fictitious person or entity but recognised as such just for it to accomplish the objectives of its creation. These deductions are discussed hereunder for a somewhat deeper understanding of the arguments for a corporation as an entity in its own right.

1.1.1.1. A Corporation as a creation of the law

It is clear that a corporation cannot be referred to as a corporation before it goes through the established procedures in a particular jurisdiction. Where such procedures are followed and satisfied, the distinct personality and entity form is granted. Under Rwandan law, a company acquires the legal entity status by incorporating / registration under the companies' law and filing the prescribed form of incorporation.[59] Upon incorporation, such entity is regarded by the law as a person[60] and it can own property and be party to contracts just like any other person would.[61] However, corporations are *legal entities*. And, by this, it is intended to distinguish them from natural persons. They are simply made persons by operation of the law. Where the Registrar General of

30th Edition, 2013; Lower M., Employee participation in Governance: Legal and ethical analysis, Cambridge University Press, 2010 and others.

[58] Corporation, www.securitiesfraudfyi.com/securities fraud glossary.html, (accessed on 14/02/2012)

[59] Law No. 07/2009 of 27/04/2009, Art. 3.

[60] Geoffrey Morse, Charlesworth's Company Law, 17th Edition, Sweet & Maxwell, 2005, p.2.

[61] Ibid. Under Rwandan Law in regards to a company's status and capacity upon registration, see arts. 18 & 32 of the 2009 Company Law.

Companies is satisfied with the filings for incorporation of the company, a registration certificate shall be issued[62]. Art. 18 of the Rwandan companies law states that:

"A company registered under this Law shall be a company with a separate legal status and with the name by which it is registered and continues to exist until it is removed from the register of companies".

It implies that only those companies that have gone through and have satisfied the prescribed procedures can legally stand and function as companies in Rwanda[63].

The separate existence of the company means that the membership or shareholders may keep changing through share transfers, but this will leave the company unaffected.[64] Regarding the corporation as an entity to mean a separate legal person, Arthur Machen[65] argues that;

"*There are two distinct propositions, (1) that a corporation is an entity distinct from the sum of the members that compose it, and (2) that this entity is a person. The propositions are often confused; but they are properly quite distinct from one another. For example, one who denies that a corporation is really a person, or who accepts that proposition merely as a figurative statement or fiction of law, is not at all bound by logical consistency to deny the reality of a corporation as an entity distinct from the sum of the members*".

Machen's argument is shared with other authors like in *De Vareilles-Sommieres* in "*Les Personnes Morales*"[66]. This author tries to articulate on the distinction between a corporation as an entity which differs from a corporation as a person. It should be highlighted though that, as discussed before, often the two are considered together since a corporation cannot stand by itself as an entity without having legal personality.

[62] Art. 16 of the Rwandan Company Law No. 07/2009 of 27/04/2009.

[63] Any 'company' that operates but which has not gone through the incorporation process as prescribed by the law is not a legal entity or person and so, cannot be recognised as such by the law. With such way of operating, it would mean that there isn't any distinction between the so- called 'company' and the persons acting for it or those who use its name. There wouldn't either be a distinction with other business forms like 'sole proprietorships', the 'partnerships' and others.

[64] Brenda Hannigan, *Company Law*, 2nd Edition, Oxford University Press, Oxford, 2009, p.14

[65] Arthur Machen, 'Corporate Personality', *Harvard Law Review*, Vol. 24, No. 4 (1911) 3.

[66] The author in sec. 232 says "*Remarquons tout d'abord que; s'il était vrai que l'association fut quelque chose d'autres que ses membres, s'il était vrai que le tout fut quelque chose plus que les associes, il ne s'en suivrait nullement que cette chose, ce tout fut une personne. Où est le lien entre ses deux idées: les associes forment un tout; ce tout est une personne? Il a un abime entre elles. …Pour le combler, il faudrait y jeter majeure avec ses preuves: un tout compose de différents individus d'un certain ordre est toujours lui-même un individu de même ordre*."

In other words, a corporation is considered an entity distinct from its members, and is capable of owning property and to enter into contracts with other persons, can hire and fire employees, can sue and be sued, etc., only because it has legal personality. To this one may add the limited liability concept, a feature common to companies. This will however be discussed later in this chapter.

The "personification" of the corporation goes further to deny its ownership to the shareholders. Being a person of its own, it cannot be owned by, say, shareholders. Shareholders, as their name goes, own just shares and the rights that follow such ownership but they are not owning the corporation itself.[67] Otherwise, there would not be any logic in limiting the liability of shareholders and directors of such a company. The most popular case to illustrate the distinction of the company from its members is the UK's *Salomon v Salomon & Co Ltd.*[68] In this case, Mr. Salomon who owned a shoe manufacturing business sold this business to a company he had set up for the purpose under the Companies Act 1862 where the formalities for incorporation were fulfilled and the members (shareholders) of the new formed company were Salomon, his wife and their five children.[69]

As a consideration for the sale of business, Mr. Salomon received fully paid-up shares and debentures to the total value of 10.000 pounds which he assigned to another party. In effect, the debentures meant that Mr. Salomon, and subsequently, the assignee were creditors of the company with the first claim should the company fall to liquidation, as indeed it did. The company fell insolvent and it was incapable of meeting the full claim of its primary claimants leave alone all other creditors – the unsecured creditors. The liquidator attempted to hold Mr. Salomon liable for the unpaid debts of the company since, he (liquidator) argued that the whole transaction was a fraud to the company's creditors from which Mr. Salomon should not benefit and that the company was simply his agent and so, should instead indemnify the company and its creditors.

The court at first instance agreed that the company was merely an agent of Mr. Salomon and therefore, Mr. Salomon as the principal, was liable for the debts of his agent – the company. Salomon appealed against the decision but the appeal was rejected saying that the whole process of the formation of the company and the issuing of debentures was a mere scheme to allow Salomon to carry on the business in the

[67] LoizosHeracleous and LuhLuhLan, 'Agency Theory, Institutional Sensitivity, and Inductive Reasoning: Towards a legal perspective', *Jounal of Management Studies 49:*1 January 2012.
[68] *Salomon v Salomon & Co. Ltd*, [1897] AC 22, HL.
[69] The minimum members required by then, under the 1862 Companies Act were 7 members and so, with him, the wife and the five children, the number was met.

name of the company with limited liability contrary to the true intent and meaning of the Companies Act 1862. When he further appealed, the House of Lords reversed the decisions of the lower courts by confirming that there was nothing wrong with the transaction. In their ruling, Lord Macnaghten noted that when a memorandum is duly signed and registered, a body corporate is formed and it cannot lose that status by issuing the bulk of the shares to one person.[70] He went further to say that:

" *The Company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the law*".

In the same case, Lord Halsbury noted that;

"It seems to me impossible to dispute that once a company is legally incorporated, it must be treated like any other independent person with its rights and responsibilities appropriate to itself. …"

The quotations from the House of Lords' ruling clearly affirm the separate entity and personality theories. However Dejnožka[71] in his book manuscript on "Corporate Entity" philosophically challenges the theory where he brings in the legal concept of "piercing the corporate veil". He argues that when a judicial decision of piercing the corporate veil is applied, there is nothing to be found underneath the corporate veil than the individual members of that company. To him, this would mean that a corporation is nothing than a fiction. In a relevant part he says:

"The legal phrase "piercing the corporate veil," which is a colorful way to describe a judicial decision to treat a corporation as a fiction and make human individuals responsible for some wrongdoing, seems to suggest that no corporation is really an entity to begin with. The suggestion is that when we pierce the veil, we find nothing but individual humans. This it may seem that corporate entity is the fiction and corporate fiction is the reality."[72]

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[70] [1897] AC 22 at 52, HL.

[71] Jan Dejnožka, Corporate Entity, Book Manuscript (October 8, 2007), available at: http://www.members.tripod.com/~Jan_Dejnozka/corporate_entity_book.pdf (Accessed on 16/02/2012).

[72] Jan Dejnožka, Ibid, p.3-4.

On the other hand, Machen[73] suggests that a corporation cannot be both artificial and imaginary or fictitious at the same time. What is artificial is at least real and not imaginary. His arguments are in support of the reality of the corporate entity and personhood although he contends that the corporation is a bundle of various individuals who decide to come together to form that other person that is recognized but not created by the law. The recognition enables the corporation to act and function as a distinct entity from the group composing it. In other words, he argues that, the corporation is not simply created by law out of nothing. It is the will of a group of people acting together which receives the blessing of the law to allow the group to function legally as an entity distinct from the individuals that promoted it.

Even though the 'aggregate theorists' like Dejnožkawould prefer to take a corporation to be merely a collective name of its members, from a legal point of view the a corporation is a legal person distinct from its members[74].

It is shown above that the concept of the corporation encourages continuous debate as to whether it is truly an entity, whether it is real or fictitious, whether it is natural or artificial, whether it is created by the state or not, whether it is a person or not, etc.[75] The purpose of this section is not to indulge into discussion on all these issues. It shall therefore be taken that the corporation is a body corporate, a legal person notwithstanding the legal and philosophical discourse on the essence of this phenomenon.

1.1.1.2. Authorisation/ creation by the state

Having argued for the corporation as a creation of the law, the next question is then which law and who authorises it? We have come to the conclusion that corporations are legal entities because the law allows them to exist and the law enables them to perform their functions for which they were created. It follows that there must be an authority that decide on whether such law is applied. It is argued that corporations operate under some kind of politically granted licence which has to be earned.[76]Henry Butler[77] too, argues that the entity theory of a corporation supports state intervention on the ground that the state creates the corporation by granting the charter to it. Without this charter,

[73] Machen A., Op.cit., p.2
[74] Muhammad ZubairAbbasi, 'Legal Analysis of Agency Theory: An inquiry into the nature of a corporation', *Emerald International Journal of Law and Management, Vol. 51 No.6, 2009*, pp.401-420.
[75] See, Machen, Ibid. P.3.
[76] Norman Barry, Op. cit., note 37.
[77] Henry Butler, Op. cit. at 100

from the entity theory perspective, the corporation would not have a claim to exist. This can be differently argued from the contractual theory perspective as we shall see later.

Brudney[78] argues that the evolution of the legal theory of the corporation stems from the vision of a "concession" granted by the state as a special privilege, originally to do public good but later also as a privilege to a contract between private parties. Although the state intervention and control has lessened as years went by, it does not rule out the fact that corporations are even today authorized by states. Brudney adds that those who are opposed to the state authorisation and control of a corporation, that is, those in favour of the "nexus-of-contracts", aim to "freeing managers from the constraints which even the 'private' conception of the corporation imposed on management for the benefit of stockholders by way of judicially fashioned fiduciary principles. Yet, courts during the twentieth century have substantially eroded those constraints …." He affirms that the "rhetoric of contract serves to obscure that erosion, and to complete the process of legitimating the substantial discretion which corporate management has, both to shirk in its performance and to divert corporate assets to its own benefit at investors' expense."[79]

David Millon notes that from early years of the 19th century in the US, "the corporate entity was considered artificial, in the sense that the corporation owed its existence to the positive law of the state rather than to the private initiative of individual incorporators. This idea was most clearly evident in the practice of requiring a special act of the state legislature for each instance of incorporation".[80] The issuing of special charters to corporations later changed and was replaced by general incorporation laws. This simplified the process to simply filling out the forms for filing and complying with standard requirements as we see it today in almost all jurisdictions of the world, Rwanda included. But even still, as Millon concedes, "the requirement of a state-granted charter continued to reinforce the idea that corporations (in contrast to unincorporated business associations such as general partnerships) were artificial creations of the state".[81]

Through incorporation, the state confers privileges of incorporation not necessarily to the benefit of the incorporators only but also to promote the general welfare of society at large. A corporation distinguishes itself from unincorporated business organisations by

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[78]Victor Brudney, 'Corporate Governance, Agency Costs, and the Rhetoric of Contract', *Columbian Law Review*, Vol.85, No.7, (November 1985), at 1409.
[79] Victor Brudney, Ibid.
[80]David Millon, 'Theories of the Corporation', 1990 *Duke L.J.* 201 1990, P.206.
[81] David Millon, Ibid.

acquiring from the state the authorisation to benefit from these incorporation privileges, one of these being the benefit of limited liability of incorporators and shareholders. [82]

By way of conclusion we contend that the evolution of corporate laws, especially relating to incorporation requirements, for every particular jurisdiction shall inevitably be related to and dependent on its socio-economic and political situation. In Rwanda for example, restrictions and formalities to incorporate a business were mitigated when the state wanted to discourage its citizens from carrying on informal businesses and instead become active partakers in the implementation of its (Rwanda's) vision 2020 and EDPRS I and later EDPRS II which both take the private sector as the epitome for development,[83].

1.1.1.3. A corporation as a fiction

To say that a corporation is fictitious would be rather another way of denying its reality and personality. But as discussed above, in all jurisdictions around the globe, corporations do exist and function. Corporate nominalists who have a lot in common with the Neoclassical economists believe, however, that corporations are nothing but simply legal fictions which serve as nexus for a set of contracting relationships among individuals[84]. Yet, when something is a fiction, then, it is not real, and it does not exist! Some proponents of the fiction theory of a corporation[85] confuse it with the concession theory where they base their arguments on the jurisprudential qualifications of a corporation like the one of Chief Justice John Marshall (1819) who stated that;

"A corporation is an artificial being, invisible, intangible and existing only in contemplation of the law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[86]

[82] Other privileges include; the limited liability of members, the separation of ownership from control, the flexibility in share transfers from one shareholder to the other, the existence (life) that is not limited to the life of the incorporators or owners, the distinct personality from the owners.
[83] For example, issues of having each business registered through a court sanction was removed, having Articles of association (*statut*) as a prerequisite for incorporation was dropped and instead made it optional, the obligation of being at least more than one person for a company to be registered was changed and today, even a single-man company is legally accepted, etc.
[84] Michael C.Jansen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency costs and Ownership Structures', 3 Journal of Financial Economics, 305, 310, (1976).
[85] Phillips, Michael J.: 'Reappraising The Real Entity Theory of the Corporation', *21 Florida State University Law Review, 1061.*
[86] In: *Dartmouth College v. Woodward, 17 US 518* [1819].

However, in the same attempt by Chief Justice Marshall to define what a corporation is, he reckons on its personhood and affirms at least that a corporation is a creature, even though, by law. The fiction theory separates the system of Law from the actual world of society and locates the corporate personality strictly within the system of law. Von Savigny, the principal proponent and advocate of the fiction theory considered a legal person as being an artificial subject admitted by means of a pure fiction. In his study of the Roman Law of Persons as Subjects of Juridical Relations, Savigny noted that there were various persons. He noted that Human beings are naturally persons with legal capacity although such capacity would be wholly or partially limited for example with the case of minors and those who are mentally impaired or those who, by the laws of the land, have been denied the full exercise of that human capacity. He also learnt that there were other non-natural or artificial beings, among them, the corporation. Regarding the corporation, Von Savigny noted that its essential quality consists in that;

"the subject of the rights does not exist in the individual members thereof, not even in the members taken collectively, but in the ideal whole."[87]

The fiction theory of corporation is one of the oldest approaches in defining the corporation's personality. It claims that the corporation is nothing more than a collection of individuals and that the language of corporations is little more than the useful shorthand referring to a complex set of individual rights and obligations[88]. However, as Machen[89] notes, the definitions of a corporation are self-contradicting. They say, a corporation is a fictitious, artificial person, composed of natural persons, created by the state, existing only in contemplation of the law, invisible, soulless and immortal. The contradiction is that a corporation cannot be created by the state and in turn, become a fiction! It cannot be both artificial and imaginary or fictitious. Again, not all real things are necessarily visible.

Convinced of a corporation being a person rather than being a subject of rights or a fiction as Von Savigny adduces, Machen believes that the essence of the juristic personality does not lie in the possession of rights but in subjection to liabilities because not all things that have rights are persons[90].

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[87] Works of Savigny In: Arthur Machen, 'Corporate Personality', *Harvard Law Review, Vol. 24, No.4, 1911* (Taken from the translation of the second book of Savigny's systems of modern Roman law, translated by W. H. Rattigan, Wildy& Sons, 1884, p.181).

[88] Oman, Nathan B., "Corporations and Autonomy Theories of Contract: A critique of the New Lex Mercatoria" (2005). *Faculty Publications*. Paper 233, p.115. See also; Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068 (1994).

[89] Arthur Machen, 'Corporate Personality', *Harvard Law Review, Vol. 24, No.4,* 1911, p.2

[90] There are various classes of rights that are not attributable based on personhood for example, the

1.1.2. The contractual or the nexus of contracts theory

The contractual theory of a corporation is an economists' invention where economists generally consider a 'firm' as a nexus of contracts entered into by shareholders, managers, employees, and others[91]. A corporation to them is in essence a set of contracts among the firm's participants[92] and, the articles of incorporation provide the basic contractual relationships.[93] This ignores though, that in some jurisdictions, articles of incorporation are not a prerequisite for incorporation – the case of Rwanda[94]. It should be noted however that, whereas economists often use a 'firm' to be equated to a legal term 'corporation', the two do not necessarily mean the same[95]. Economists use the term 'firm' to mean any form of business enterprise that may include sole proprietorships, partnerships, joint ventures and even corporations[96]. Yet, to a lawyer, a corporation is an entity, a form of business structure with distinct features from all others. To the legal world therefore, a corporation cannot be taken lightly to be equated with other business forms like it appears to economists when they refer to the term 'Firm'.

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animal rights, environmental protection rights, etc., which even though they are rights, they are not attributed to the personality but rather to the being.

[91] Muhammad ZubairAbassi, 'Lagal Analysis of Agency Theory: An analysis into the Nature of a Corporation', *Emerald International Journal of Law and Management, Vol. 51 No.6, 2009*, p. 401-420.

[92] Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1963-64, (1994); O. Williamson, The Economic Institutions of Capitalism, NewYork: The Free Press, 1985 (availabale at: http://www.sp.uconn.edu/~langlois/Williamson%20(1985),%20chapter%201.pdf; Alchian&Demsetz, 'Production, Information cost, and Economic Organisation', *62 Am. Econ. Rev. 777* (1972); Baysinger& Butler, 'The role of Corporate Law in the Theory of the Firm', *28 J. Law. Econ. 179* (1985) (Available online at: http://www.rwi.uzh.ch/lehreforschung/alphabetisch/weberr/archiv/FS08/unterlagen/unterlagenLE/aufsaetze/TheRoleofCorporateLawintheTheoryoftheFirm.pdf); Cheung, 'The contractual nature of the Firm', *26 J. Law & Econ. 1* (1983) p. 1-26 (Available at: http://www.sfu.ca/~wainwrig/Econ400/Cheung-Nature-of-firm.pdf); Coase, 'The Nature of the Firm', *4 Economica 386* (1937); Fama& Jansen, 'Separation of Ownership and Control', *26 J. Law & Econ. 233* (1983); Jensen &Meckling, 'Theory of the Firm; Managerial Behavior, Agency Costs, and Ownership structures', *3 J. Fin. Econ. 305* (1976); ReinierKraakman et al., *The Anatomy of Corporate Law: A comparative and Functional Approach,* 2nd edit., Oxford University Press, Oxford, 2009, p.6.

[93]Phillips, ibid, 1070 – 73.

[94] Articles of Association or Incorporation are optional under Rwandan Company Law. See, Art. 54 of the Law No. 07/2009 of 27/04/2009 relating to companies as amended and updated to date. Under the same law, a one man company is allowed which means, the foundation of a contractual theory based on the contract between the founding shareholders is baseless in this context.

[95] For the purposes of our discussion under this work however, the two terms shall be used interchangeably to mean the same.

[96]Birds, J. and Boyle, A.J., *Boyle and Bird's company law*, Jordans, Bristol, 2007.

Coming back to the contractual theory, the economists look at a corporation (or a 'Firm' for that matter) not as an independent being of its own but as a web, a combination of elements, and these elements are the different contracts amongst the managers, the employees, suppliers, consumers and so forth. They assume that almost all relations as established in company law can be realized through or by means of contracts. The legal nature and the procedure it takes for a corporation to be born are for the greater part ignored by this thesis. Although the main intention of this section or even the chapter in general is not to generate a different argument, I will, for the purposes of supporting the legal theory on the nature of a corporation, challenge the economic theory on two grounds; 1) The consequences of a business' incorporation, and 2) the power of the corporation to contract with all others, including the managers of the same corporation.

1.2. The Consequences of business incorporation

Unlike what the economists understand from a corporation [97], the legal world is convinced that a corporation refers to an artificial but legal entity which, right from the date of its incorporation, it is a separate person and is authorized to perform all acts that any other person can perform including the engagement to contract with other persons. Katsuhito [98] while analyzing the nature of the business corporation noted that, the serious mistake is to equate the generic term 'Firm'[99] to a 'corporation'. He argued that;

"once a firm is incorporated and becomes a business corporation, its ownership structure undergoes a fundamental change. … There is thus, a fundamental difference in legal structure between a firm that is incorporated and one that is not. And yet, there is little evidence of economists - or even of legal scholars – taking heed of this difference in their analysis of business corporations".

It should be noted that different countries or states have different requirements for a company's incorporation or registration. In Rwanda for example, art. 3 of the Company Law[100] as amended and complemented by art.1 of the 2010 amendment[101] clearly defines a company as a legal entity. But the provision goes further to show that a contractual arrangement between shareholders in order to establish a company is no

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[97]Baysinger& BUTLER, op. cit (The Corporation is a nexus of contracts).
[98]Katsuhito Iwai, 'The Nature of the Business Corporation: Its Legal Structure and Economic Functions', *The Japanese Economic Review, Vol. 53, No. 3*, September 2002.
[99] Here to mean the incorporated and un incorporated firms together.
[100] Law No. 07/2009 of 27/04/2009 relating to Companies.
[101] Law N° 14/2010 of 07/05/2010 modifying and complementing Law N° 07/2009 of 27/04/2009 relating to companies, *Official Gazette n° special of 14/05/2010.*

longer required, neither is it a prerequisite any longer to have the articles of association to incorporate a business. A one-man company is permitted by law in Rwanda and the articles of association are optional. The same law in its art. 32 authorises a duly incorporated company to undertake any business activity, carry out any act, and enter into any transaction that is consistent to its object of formation. A collection or a set of contracts cannot have such powers, and even if one would accord them to that set, how would such powers be implemented? How would a general contract be allowed to contract? And, in which capacity would it transact?

To answer these questions, Katsuhito takes us back to the introductory parts of any economics textbook where the relationship between person and things is clarified. He notes that, persons are *subjects* of property rights, and things are *objects* of property rights. Persons own things, and things are owned by persons.[102] Such rights are normally exercised by individuals. But where there are several individuals who want to do business together it will require all of them to be present, to append their signatures as a testimony of their assent for such undertaking. The same would be the case if they want to terminate such undertaking! This becomes too cumbersome for business transactions and the transaction costs become too high. Katsuhito argues that a corporation now comes in as a solution. Once incorporated, the law endows a corporation with the same powers an individual or a group of individuals would have to do things that are necessary to carry out any business activity.

"A corporation is able to act as an independent holder of property rights and to form contractual relations with others, not because inside shareholders will it to be so, but because, and in so far as, the outside parties recognize it to be so. Such social recognition is indispensable for a corporation, and what the law does is to formalize and reinforce this social recognition in the form of a legal personality. … In order for a corporation to serve as one of the parties in a contractual relation, it has to be recognized by others as the holder of the ultimate rights over some real assets and as the bearer of the ultimate duties associated with their use, independently of its constituent members. A mere nexus of contracts can never enter into a contractual relation even as a figment of a legal fiction, simply because it cannot locate the ultimate subject of rights and duties when an event not specified in contracts takes place"[103].

In addition, as a consequence of the business' incorporation, a number of factors shall ensue which actually, are the main features or characteristics of a company. The main

[102] Katsuhito I., Op. cit., note 83, at 246.
[103] Ibid.

ones as some authors[104] believe will be that; 1) there will be limited liability of shareholders, 2) there will be the centralized management of the business, 3) perpetual life of that business shall be guaranteed, and 4) shares shall be freely transferred. Economists and legal scholars may not necessarily have a consensus on this but it is the reality and is the consequence of this business form – the corporation. We may not expound much on each of these features of a corporation but certainly, we will have to come back to some of them in the subsequent subsection (s). All such features cannot fit with the economists' nexus of contracts theory, which, according to Lynn[105], can only fit with corner shops or small businesses.

1.2.1. 'Limited Liability' concept of a corporation

As a matter of fact, whereas everyone who is financially able would be willing to invest in a given business as a shareholder, no one would be willing to risk all his belongings to such venture. Yet, in most other business forms, except in corporations and some partnerships such as the newly introduced Anglo-American Limited Liability Partnership (LLP), any business commitment would, in principle, also imply a personal commitment and of course, attachment of all personal belongings to such venture. This is the case with the sole trader (UK) or Sole proprietorship (US) and the general partnership forms of businesses. Under Rwandan Law, when one invests in a limited liability company, his/her commitment and consequently, liability if any, shall be limited to his/her investment in that company.[106] Limited liability therefore refers to the concept that shareholders of a corporation ordinarily are not liable for the corporation's obligations and debits[107]. Members or shareholders therefore enjoy the benefits of incorporation as the company shall be doing its business – indirectly on their (shareholders) behalf though, but without their direct intervention. Even when it comes to liabilities, shareholders are shielded and it will be the company to respond.

[104] Lynn A. Stout, 'On the Nature of Corporations', *Deakin Law Review, (2004) Vol. 9 No. 2,* 775 – 789; Robert C. Clark, *Corporate Law*, Little, Brown, 1986.
[105]Lynn, ibid.
[106] Art. 137 of the Law on Companies provide that; "A shareholder shall not be liable for an obligation of the company by reason only of being a shareholder. The liability of a shareholder shall be limited to:
1° any amount unpaid on a share held by the shareholder;
2° any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable;
3° any liability expressly provided for in the constitution of the company;
See also the definition given in art. 2(22) of the Law No. 07/2009 of 27/04/2009 relating to companies; "limited company": a company whose liability is limited by shares or by guarantee or a company whose liability is limited both by shares and guarantee;
[107]Andrew A. Schwartz, 'The perpetual Corporation', *The George Washington Law Review, Vol. 80 No 3* 2012, 768-9.

As Kraakman, Hansmann, and Armour put it, limited liability has today become a nearly universal feature of the corporate form of business.[108]In case of liability of the company, the creditors' quest of payment by the company shall be confined to the company's assets and would not in any way extend to reach the shareholders' personal assets. The separate legal personality as elucidated earlier, facilitates this limited liability and makes it easier to distinguish company property from those of its members (shareholders). This is what Hansmann, Kraakman, and Squire[109] referred to as the 'entity shielding' of a corporation. The same understanding will be found in the UK's Insolvency Act 1986, section 74(2) (d) which provides on what happens when a company is wound up. It states that;

"In the case of a company limited by shares, no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or a future member".

It should be noted however that Rwandan Law allows the incorporation of an unlimited company, a definition of which is "a company formed on the principle of having no limit placed on the liability of its shareholders"[110]. In such a case, there is no distinction with regard to liability between the shareholder as an individual, and the business itself. Worth noting is that this provision has remained just as a provision in the law but without application. For there are no examples of such type of companies in Rwanda that have opted to register as unlimited companies. This is due to the far awaited privileges that flow with incorporation as a limited liability company - that is, not getting exposed to personal liability while doing business.

The limited liability concept facilitates entrepreneurial activity and risk-taking since what would have been feared of personal financial risks, backfiring of business decisions and exposure to loss of personal assets, is shielded by the corporation. Economists will argue that under the limited liability form the business risks would shift from the shareholders to creditors. Cheffins[111] argue that limited liability helps to distribute risk away from poor risk bearers in favour of those who are better positioned to deal with the

[108]Kraakman, R., Hansmann, H., and Armour, J., 'What is Corporate Law?' In: Reinier Kraakman *et al*., *The Anatomy of Corporate Law: A comparative and Functional Approach,* 2nd edit., Oxford University Press, Oxford, 2009, p.9.

[109] H. Hansmann, R. Kraakman, and R. Squire, 'Law and the Rise of the Firm' (2006) 11 Harvard Law Review 1333.

[110] Art. 2(33) of Rwandan Law on companies.

[111] B. Cheffins, Company Law: Theory Structure and Operation, (OUP, 1997), 502.

consequences. In other words, limited liability insulates poor risk bearers and exposes those who are better positioned to absorb the losses involved, if any.

1.2.2. Centralized Management

Generally, in a corporate structure, the shareholders are less directly involved in the day-to-day running of the business affairs of the company. Rather, such management is left to a small group of professional actors – the directors and officers of the company. The shareholders' role in the company's management may however be indirectly exhibited through the election into office of the directors. For a corporation to run its activities, many engagements with its employees, suppliers, customers, creditors, the regulators and tax authorities is paramount. This cannot be carried out by all the shareholders and so, the corporate benefit of the centralized management comes into play. The centralized management here therefore describes a corporate structure in which the *owners*[112] of the corporation *own* it, but the control of its management is left centralized to the board of directors who, as Schwartz[113] notes, themselves may delegate the day-to-day decision-making to executives and their subordinates. In this corporate structure, the executive and board level of management becomes responsible for the decision making on behalf of the corporation, but also indirectly, on behalf of numerous shareholders. Katsuhito[114] notes that, a corporation without such managers (directors and officers) would cease to exist as a corporation. He argues that:

"even if the corporation has a fully-fledged personality in the system of law, it is in reality a mere abstract entity, incapable of performing any act except through the flesh-and-blood human beings. As a result, corporate law requires of a corporation to have a board of directors as the ultimate holder of power to act in the name of the corporation".[115]

The discretionary powers of management the board gets partly from the appointing body but also from the law allows it to even take decisions on how a corporation's

[112] As economists prefer to call them (shareholders). As discussed earlier however, the legal terms are either 'members', 'shareholders', or 'stockholders'.
[113] Andrew A. Schwartz, 'The Perpetual Corporation', *The George Washington Law Review, Vol. 80 No 3* 2012, at 770.
[114] Katsuhito, I, Op.cit, at 257.
[115] Art. 169 of the Rwandan Company Law states that "The business and affairs of a company shall be managed by, or under the direction or supervision of the Board of Directors. The Board shall have all the powers necessary for managing, and for directing and supervising the management of the business and affairs of the company".

earnings are spent. The centralized management and how the corporation functions shall be developed further in another chapter (Chapter three) on corporate governance. This said however, such characteristics refer generally to huge corporations and it would not necessarily be the same with small and privately held companies (sometimes referred to as 'quasi-partnerships') or even to family held companies. The majority of these are governed by their owners and thus, it becomes a little bit difficult to distinguish their private or family property from the property of a company. Even when they have outside managers, they work only as mouthpieces for the owners of the company and thus, leave the owners to be the *de facto* managers still.

Whereas the ownership structures and control in most developing countries especially in the East Asian countries is family dominated[116], the situation would not be qualified as entirely the same in the Rwandan context. Notwithstanding the fact that there are some small family dominated companies, the majority of companies in Rwanda are privately held, not necessarily by family members, but by a limited number of shareholders who own the majority stakes and ensure the control of the company. In such companies, issues of corporate governance are rarely discussed at a company level and can only be raised during the loan acquisition processes in case the lending entities so insist[117]. More about the structures and control of companies in Rwanda shall be developed in the following chapter (Chapter two on Corporate Landscape in Rwanda).

1.2.3. Perpetual life and free transferability of shares

When talking about the perpetual life and easy transferability of shares in a corporation, one is comparing it to other forms of business structures like the sole trader (proprietor) and partnerships. In sole trading for example, when the sole trader dies, or leaves the business, it is, in principle, an automatic death of the business as well. In general partnerships too, when one out of the three partners wishes to retire from the partnership, it will mean the end of that partnership even when the remaining two partners would be willing to continue with the partnership. In the latter case, the partnership shall be dissolved and the remaining partners will have an option to create

[116]Claessens, Stijn, Djankov, Simeon and Lang, Larry H.P., 'The Separation of Ownership and Control in East Asian Corporations' (November 23, 1999). Available at SSRN: http://ssrn.com/abstract=206448 or http://dx.doi.org/10.2139/ssrn.206448.

[117] Often, lending institutions like banks prefer to give loans that have a clear management and corporate governance structures which guarantees, at least to some extent, the life, wellbeing and continuity of that company which in turn makes it capable of servicing the loan once it is given.

another partnership. In a corporate setting on the other hand it is a free entry and exit in public corporations, and a relatively free entry and in principle, total freedom to exit in closely held and private corporations.

A corporation has an indefinite legal existence and can only be terminated in limited circumstances[118]. Summarily, as Bainbridge notes, a corporation's existence may be terminated by: "1) A voluntary dissolution requiring recommendation of the board of directors and approval by the majority of shareholders; 2) mergers with another corporation; 3) insolvency in a bankruptcy proceeding, or 4) a judicial decree, which requires that there be a deadlock or oppressive behaviour by the corporation's controlling shareholders".[119] These are summarily the most important exceptions where a corporation's life would be brought to an end. Otherwise, the perpetual life is the principle. Blackstone in his *commentaries* described a corporation as "a person that never dies"[120].

As regards to the transferability of shares in a corporation, once shares have been issued[121] by a public corporation, the acquirer becomes free to alienate them in any way he finds fitting and consistent with the corporation's statutes and law. Thus, the secondary market for listed companies is thereby created for any willing investor to acquire ownership in that corporation[122]. Klein notes however, that such freedoms are typical to publicly traded corporations since, more often, the closely held corporation's shares would be subjected to restrictions[123]. These restrictions are very typical to most Rwandan company statutes (Articles of Association / Shareholders' Agreements) in which, a common 'first call option'[124] or the 'pre-emptive rights'[125] provision to the

[118] These cases include for example where a company had been registered as a limited life company (Art. 11 of the Rwandan company law); Art. 354: "A company shall be removed from the register of companies when a notice, signed by the Registrar General states that the company is removed from the register"; Art. 355 gives the reasons for which a company is removed from a register of companies as where : "1° the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar General issues a certificate of amalgamation; 2° the Registrar General is satisfied that the company has ceased to carry on business". **See also**, Andrew A. Schwartz, Op.cit; Stephen M. Bainbridge, *Corporate Law*, 2nd Edit., Foundation Press, 2008.
[119]Stephen M. Bainbridge, ibid.
[120] William Blackstone, *Commentaries*, Oceana Publishing Inc., 1967, at 468. Also cited by Stephen M. Bainbridge, *supra* note 97, at 773.
[121]Whether by sell, donation, reward or otherwise.
[122] William A. Klein et al., *Business Organization and Finance: Legal and Economic Principles*, 11th Edit., Foundation Press, NewYork, 2010, at 146.
[123]Ibid., 109.
[124] Such an option gives the existing shareholders to be considered first to buy the shares of the outgoing shareholder before any outsider knows about their sale. With such practice, the dispersing of share ownership is impeded because it is restricted and it keeps rotating among the existing shareholders alone.

existing shareholders is often not missed out. It should be noted however that, even in closely held corporations like the ones common in Rwanda, the default rule remains free alienability[126]. Free transferability of shares implies that shareholders would be free to sell their shares at any time, by themselves or through their agents, on internet or through capital markets' agents, all without any restrictions or permissions sought from the corporation or from co-shareholders. This is one of the ultimate intentions of the corporate form of business. In other words, the corporate form of business accords to the shareholders the property rights in the value of their shares. The shareholders are therefore free to enjoy all the prerogatives embedded in a property right – The *usus*, *fructus*, and *abusus*.

Besides free entry and exit of shareholders, another advantage associated to free alienability or transferability of shares but which is common with publicly trading corporations is that the probability for the selling shareholder to getting good offers is higher than in restricted - closely held corporations (private company) or in any other form of business. The assumption here is that there might be a kind of competition from various contenders or *bidders* for the same shares. It is also argued that free transferability of shares ensures 'liquidity' for shareholders and it allows them to make easy adjustments for their investments by moving along with the changing market conditions and demands. For example, it will be easier for an investor to move from one business sector to the other or from the company he/she thinks is having poor governance systems thus putting his/her investments at risk, to a properly governed company by simply, exchanging his/her shareholding from one company to the other.

1.2.4. The power / authority to contract

Among the inherent authority and power that a corporation acquires from incorporation is its power to enter into binding contracts. Legislations in various countries allow for the companies to freely carry out business of their choice provided that they remain in the ambits of their incorporation i.e., within the limits of the company's registration objectives.[127]

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[125] The preemptive right is the right belonging to existing shareholders of a corporation to avoid involuntary dilution of their ownership stake by giving them the chance to buy a proportional interest of any future issuance of common stock. http://beginnersinvest.about.com/od/stocksoptionswarrants/f/preemptive.htm

[126] Id.

[127] Here, we note that there is a clear distinction between the company's 'object', i.e., what the company is incorporated for; and the company's 'power' – the different ways, mechanisms, through which, the company may reach those objectives for which it was created.

The "nexus of contracts" remains a contract! Even the contracterians themselves acknowledge that with their nexus of contracts theory, the state is nevertheless required to accord to such nexus the legal personality. Where they remain as contracts, they would not be accorded the rights and authority to enjoy other rights, neither can they be given for example under Rwandan Law, the "full capacity to carry on or undertake any business or activity, do any act, or enter into any transactions….."[128] Enjoyment of such rights, at least under Rwandan law, is only in the province of a person, the subject of rights, duties and obligations.

It is interesting to note here that, the directors, officers and staff in general, even those through which the company functions, also contract with the company before acquiring the powers to represent it in its activities and transactions. The Managing Directors (MDs) or the Chief Executive Officers (CEOs) and those others below them, have to enter into agreement with the company, yet they are the ones whose minds are used in the day-to-day running of the company's affairs. They all have as a duty, to act in the best interest of the company. But where the company official or staff committed or engaged the company outside or beyond the company's interests, the company may not escape the commitments by simply asserting the fact that it was not in its interest[129]. This is based on the assumption that its agent, judged the transaction to be in the company's interest. So, the capacity, the power of a company may even go beyond, sometimes, the interests of the company.

[128] Art. 32 of the Law No. 07/2009 of 27/04/2009 relating to companies

[129] Art. 33 of the Rwandan Company Law provides that:

" …. Where articles of association of a company provides for any restriction on the business or activities in which the company may engage: 1° the capacity and powers of the company shall not be affected by that restriction; 2° no act of the company and no contract or other obligation entered into by the company and no transfer of property to or by the company is invalid by reason only that it was done in contravention of that restriction. The capacity of the company to do an act shall not be affected by the fact that the act is not, or would not be, in the best interest of a company".

1.3. Conclusion of the chapter

To sum up this chapter, whether a corporation is taken to be an entity of its own with all the decorative features of a corporation or taken to be the 'nexus of contracts', a meeting point for all connected contracts of managers, employees, customers, creditors and so forth, it is of great interest to note that one thing unites these theories. That is that the company is an entity in its own right and that it has a management and control separate from its ownership. A factor that interests our study here is that, whatever corporate theory is chosen as the point of view, the worry with the stewardship of this corporation still holds.

In all corporate theories some of which have been highlighted above, for the corporate functioning and its governance the role of the corporate directors and officers remains quite significant. Shareholders will either voluntarily, or by the order of the law, delegate some of their powers to be vested in a small *qualified* group of people for the management of their investments. A corporation's creation/ incorporation, whether regarded as an entity or as a 'nexus of contracts' cannot function by itself, but rather, through its human agents – the corporate directors and officers. To whom they will be serving or to whom they will be accountable, are other questions that shall be addressed in the following chapters.

From the analysis of the wording of the Rwandan company law, it is clear that it considers a company as a separate 'entity' distinct from others, be it the shareholders or managers. The 'nexus of contracts' theory is therefore not catered for under Rwandan law, not to mean that the law underestimates the importance of these various contracts that are entered into in a corporate context.

What interested us in this chapter was simply:

(1) to briefly explore on what a corporation/company is through exploring the various theories and to show that by whatever theory, a corporation shall always as accorded by law, have unusual powers considering its immortal nature, but shall never implement such powers except through mortal beings, the directors, who are the centre of our discussion in this work and,

(2) That by being a distinct moral person or entity (or that group or set of contracts) in principle, a corporation/company is accountable for whatever is accomplished in the name of that entity. So, in as long as those mortal beings (directors) who physically

appear on behalf of the company act in the name and for the interest of the company, these mortal beings (the directors) in principle, cannot be held personally liable for their deeds or misdeeds. However, like any other legal principle, this corporate veil cannot escape some exceptions. Such exceptions include, but they are not limited to, where directors would go *ultra vires* their powers conferred upon them either by the statute or by the individual company's by-laws. More about such exceptions shall be discussed later in Chapter Four of this work that deals with the duties and liabilities of company directors.

1.4. Recommendation for Rwanda

As we have earlier discussed in this chapter, it is concluded that the concepts and terms 'company' and 'corporation' which ought to be meaning the same are quite confusing as defined in the Company Law 2009. They deserve an elucidation in a bid to clarify them for easy application and use by practitioners and academics. The legislator therefore has a task of reviewing the law by making it fit for the purpose that was intended. On the definition of the 'company' for example, it appears according to the provisions of art. 2 (12) that the non-for-profit companies that are actually recognised by the same law are not catered for in the definition and thus, cannot be considered as companies. Again, by matching the same definition (of company) with that of a corporation (art.2 (16)), the reader may assume that a foreign entity is left outside the scope of definition of a company and can only be invoked when defining a corporation.

The following chapter (Chapter two) takes us through into Rwandan corporate landscape in which we shall be looking at how a corporation is incorporated and at the legal framework that empowers it to carry out the different objectives of its incorporation.

CHAPTER TWO: CORPORATE GOVERNANCE LANDSCAPE / FRAMEWORK IN RWANDA

2.1. General introduction

This chapter helps us to get introduced to both the legal as well as the institutional framework on the regulation and governance of companies in Rwanda. Under this chapter, it shall be noted that, due to the circumstances the country went through in our recent history in as far as the corporate governance of especially the banks and insurance companies is concerned, they seem to be more strictly regulated than a few others that are listed on the Rwanda Stock Exchange (RSE). It is not surprising though, since corporate governance in every system is shaped by its specific experiences, circumstances and the available institutions and infrastructure.

The chapter starts by summarizing the brief legal and historical background of the corporate institution as a business form or structure in Rwanda by analysing the law precedent to the current 2009 Company Law. We then look at the innovations brought about not only by the enactment of the 2009 Law but also by specific laws establishing some specific institutions and their roles for the better implementation of this (2009) Law and by other laws relating to good corporate governance. Notable ones among the institutions to be analysed are: the Rwanda Development Board's Office of the Registrar General (ORG) which is charged with the birth, follow-up (nurturing) of the company, and to the company's struggling life where need be, facilitating its recovery or death. Equally to assess is the role of the Central Bank which regulates and controls the governance of financial institutions like Banks and Insurance Companies. The roles of the Capital Markets Authority (CMA) and the Rwanda Stock Exchange (RSE) shall also be analysed.

This approach intends to show how corporate governance is a cross cutting concept. It cannot be enforced or implemented by just a single institution due to the great impact its (corporate governance's) failure would have on the entire community. Self-regulation of companies may play a role but only when all corporate players especially directors and shareholders are literate enough regarding the corporate functioning and activities. I also argue that Rwanda's corporate governance system cannot only be viewed from the stock market's perspective since corporate representation on the market is not significant enough but rather, it should be viewed from the whole spectrum of corporate standings.

2.2. Legal, regulatory and institutional landscape

Should Corporate Governance practices be implemented through Self-regulation or public enforcement?

The Rwandan corporate legal framework is not of long history but it clearly shows a tremendous need for evolution especially in the recent years. Policy makers as well as legislators show a clear determination to improve the corporate legal and regulatory framework thus making Rwanda a favourable environment for the local businesses and an attractive destination for the international business community. This was exemplified by the immediate 2010 amendment that followed the publication of the 2009 Company Law in Rwanda, the simplification of procedures for starting a business in Rwanda, the Rwanda Development Board (RDB) facilitations available for both local and foreign investors in the form of a one-stop centre for any business incorporation, etc. Strong implementing and enforcement institutions have also been put in place. But where has Rwanda come from to arrive where it is today?

2.2.1. A historical perspective

The Rwandan formal corporate landscape or framework is not as old as it would be in many other countries around the world. The written law that was introduced by Rwanda's colonisers [130], especially the Belgians, subjected it mainly to its home legislations[131], implemented through what they had administratively called 'the greater Congo – Belge'[132] with its headquarters at Leopoldville, now Kinshasa[133]. It should be noted that, although the greater Congo- Belge was composed of three formerly different states, it was considered as one with all peoples governed by the same laws and transferring human capital from one place to another. Many Rwandans and Burundians

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[130] Rwanda was first colonized by Germans under the German East Africa following the 1890 Brussels Conference.

[131] But even these legislations from their home countries were not imported entirely as they were back home, but just brought only a few provisions that suited their protracted agenda in that particular colony.

[132] The Greater Congo-Belge or the Greater Belgian Congo included what later became Zaire (now The Democratic Republic of the Congo), Ruanda (now Rwanda) and Urundi (now Burundi). Ruanda (Rwanda) and Urundi (Burundi) were later awarded to the Belgians as a recognition for the *Force Publique*(Belgian Army in the Congo- Belge)'s participation leading to the victory over the Germans in German East Africa.(Tanzania, then, Tanganyika).

[133] Leopoldville was later named Kinshasa by Joseph Desire Mobutu in 1966 following the 'Congolese authenticity' drive he had introduced and that saw many colonial names of cities changed (Elisabethville to Lubumbashi and Stanleyville to Kisangani).

were taken to Congo where there were strong Belgian mining companies, and although not equally distributed, the economy was also considered to be one.

Figure 1: *Rwandan workers at the Kisanga-mine, Katanga, c. 1920* (Kisanga copper-mine in Katanga, Belgian Congo, photo taken in late 1920s).http://en.wikipedia.org/wiki/Belgian_Congo

All colonial Laws and Royal Decrees from Bruxelles were published in the Official Royal Journals of the Congo-Belge in Leopoldville. In Rwanda for example, the first specific domestic law to elaborate on the company's formation, functioning and procedures for its business and its dissolution was passed in 1988[134]. It is not surprising though because, many business organisations that were really having the form and structure of a company were mostly state owned companies[135].They were established by a special law which provides for the entire life of that company and consequently, there was no urgency in having a general law on companies. Besides, the colonial masters together with the Catholic Church highly dominated by the Belgians and the French were still dominating in all government spheres and thus, had all the interests to protect their domain. It should be noted that although the 1988 law was a domestic law, it had a lot in common with the French and/or Belgian company laws, with the exception that whereas the later had grown / evolved either due to some legislative amendments or through the judicial processes – by creating legal precedents, the Rwandan one was stagnant with

[134]*Loi No. 06/1988 du 12 Février 1988 portant sur l'Organisation des Sociétés Commerciales (Journal Officiel No. 7, 1988-04-01, pp.437-497)*.
[135] It should be noted that, under the 1988 Company Law, a public company referred to that company that belong to the state or state institutions. The Perception is quite different in today's 2009 Law where a public company refers to that whose shares can be or are traded publicly on stock markets as opposed to the private companies that are not allowed to publicly trade their shares.

only slight and minor amendments[136]. Due to the wide legal reforms that have swept the country since 2000, the 1988 law was repealed by the 2009 Law on Companies[137]. The 2009 Law on Companies was modified and complemented immediately in the following year, by the 2010 amendment[138].

The two Company Laws; the 1988 and that of 2009 vary on a number of principles. For example, whereas that of 1988 was more leaning to Civil Law traditions, the 2009 Law has a lot to share with the Common Law World. To be more precise, whereas the 1988 Law was like a transplant of the French Company Law with a limited French Law provisions left out, the 2009 Law bears a lot in common with the 2006 UK's Companies Act instead. The 2009 law shows a different mind-set especially on what a company is and on the different types of companies as well as putting more emphasis on corporate governance principles of transparency, disclosures and accountability.

2.2.2. The Company Concept and organization under the 1988 Company Law regime

As mentioned already, the 1988 law on companies was organized in a similar way just like French company law by that time. By its definition, a company was conceived from a contractual perspective and thus, impliedly, excluded a one-man company. The definition in its article 1reads:

"La société est une personne morale instituée par un contrat réunissant plusieurs personnes qui conviennent de mettre en commun des valeurs, des biens ou de l'industrie en vue d'en partager les bénéfices ou les économies ou pertes qui pourront en résulter."

In other words, only two or more people would start a company but not less. There was, for some specific forms of companies, even a minimum number of shareholders below which it was not allowed to have the company incorporated under that form. However,

[136] For example, the *Loi No. 391/1988 du 27 Octobre, 1988 Complétant la loi No. 06/1988 du 12 Fevrier, 1988 portant Organisation des Sociétés Commerciales (Journal Officiel 1988-12-01, No. 23BIS, pp. 1653 – 1655) ou des articles 17bis, ter, quater et quinquies sont ajoute à la Loi No. 06/1988 et concernent le dépôt des actes de sociétés commerciales et les obligations en résultant.* This was later followed by anothermodifyinglaw « *Loi No. 52/2006 du 12 Decembre 2006 modifiant la loi No. 06/1988du 12 Fevrier, 1988 portant Organisation des Sociétés Commerciales (Journal Officiel 2006-12-15, No. 24, pp.57-59).*

[137] Art. 386 of the Law N°. 07/2009 of 27/04/2009 relating to companies provides that "All previous legal provisions inconsistent with this Law are hereby repealed"; Official Gazette N°17bis of 27/04/2009.

[138] Law No. 14/2010 of 07/05/2010 Modifying and Complementing Law No. 07/2009 of 27/04/2009 relating to Companies; *Official Gazette n° special of 14/05/2010.*

because there was no restriction on who would be shareholders in terms of age, people used to abuse it by registering the whole family say, of seven people, including a two year old baby as shareholders and would have his company registered, beating the handicap of the required number of shareholders.

2.2.2.1. Scope of the 1988 law

Even though this law was popularly known as the law regulating companies, it had a somewhat wider scope of coverage than on company law alone. For example, the same law regulated other business associations that were not supposed to have the legal personality status. These were for exemple ; *les associations momentanées et les associations en participation.*It should be noted that, among the companies under the jurisdiction of the 1988 Law were *les societies en nom collectif* which would be comparable to the general partnerships under the English Law. These forms of business organisations are not part of the 2009 Law but are yet to be catered for by a distinct law on partnerships (still yet to be passed).

Another important thing to note about the scope of the 1988 law on companies is that it also covered the insolvency and insolvency procedures[139] (Arts 51 - 67). This was particularly due to the fact that there was no distinct law on insolvency at the time[140].

2.2.2.2. Formation of a company and the role of the Court Clerk

Under the 1988 Law, for a company to be incorporated, the application with all the required documentation had to be deposited at the registry of the Court of first Instance[141] that has jurisdiction in the area where the applicant resided. The same procedure would be required for any modifications on the company[142] for example, regarding the head office, management and legal representatives, capital, on mergers and acquisitions, etc. Upon fulfilment of the documentation required, a company certificate (*registre du commerce*) would then be issued and it was on this certificate

[139] The 1988 Law on commercial establishments applied in insolvency procedures together with the Decree of 12 December 1925 relating to prevention of insolvency and the Decree of 27 July 1934 relating to commercial insolvency.
[140] The law provided however that, cooperatives were to be governed by a separate law on cooperatives.
[141]*Loi No. 36/91 du 5 Aout, 1991 relative au Registre du Commerce (Journal Officiel, 1991, p.1150), art.1.*
[142] Art. 19 of *"Loi No. 06/1988 du 12 Fevrier 1988 portant organization des societies commercial".*

that the company activities would be recorded[143]. The same procedure of filing with the Court's registry was followed where there was; 1) death or resignation by any one of the members, 2) nomination, death, resignation of any of the legal representatives, 3) any resolution to the dissolution of a company, the liquidation process and its closure as well as the powers of the liquidators, and 4) any judicial decision mentioning about the dissolution of the company or the nullity of the constituting provisions as well as all the modifying provisions. In short, even though the Court Clerks had no specific training[144] to enable them to have the ability to render such services, they were obliged to handling all such issues regarding company registrations and certifications.
The law provided for a detailed format with items of what cannot be missed out in the articles (art.115 for the SARL)[145]. It should be noted that under this law (1988), a unitary *statut,* just like it was in the French system[146], sufficed as for both the articles and the memorandum of association under the present (2009) law.

The registration at the Court's registry (greffe) had to be followed by the publication of the details of this company in the Official Gazette within 3 months following its registration[147]. However, the importance of the Court's registry in the life of a company is emphasised by the fact that it did not stop on the authentication of the company's registry but it also had to keep and maintain the files for all the companies operating within that particular court's jurisdiction. The Court registry too had powers to write off a company for reasons provided for by the law[148].

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[143] The format of the Company Certificate or trade licence, so to say, had to be determined by the Ministerial Order (*A.M. nº 17/MINICOM/91 du 17.9.1991 (J.O., 1991, p. 1630)*). Only what is stipulated and recorded as the commercial activities would be allowed to be exercised in the commercial practice (art. 3 stipulated in a relevant part that … *nul ne peut exercer une autre activité commerciale que celles mentionnées au registre de commerce*.).
[144] The best and most senior ones among them were just High School graduates without any specific training to empower them for the tasks.
[145] *L'acte constitutif mentionne :*
1° la désignation précise des fondateurs ; 2° le nom de la société ; 3° le siège social et les sièges d'exploitation ; 4° l'objet ; 5° le montant du capital ; 6° le nombre du capital ; 7° les apports de chaque fondateur et le nombre de parts qui lui sont attribuées ; 8° la spécification précise de chaque apport en nature, les charges qui le grèvent, la valeur qui lui est attribuée et le mode d'évaluation prévu à l'article 148 ; ainsi que s'il s'agit d'immeubles, les mutations à titre onéreux dont ils ont fait l'objet pendant les cinq dernières années ; 9° les modalités de répartition des bénéfices ; 10° le mode de désignation et le nombre des organes chargés de l'administration et du contrôle de la société ; 11° les règles relatives à la tenue des assemblées générales ; 12° la durée de la société ; 13° le début et la fin de chaque exercice ; 14° le montant, au moins approximatif, des frais de constitution.
[146] Yves Guyon, *Les Sociétés: Aménagements statutaires et conventions entre associes, 3^{e} édit., L.G.D.J (Librairie Générale de Droit et de la Jurisprudence)*, Paris, 1997, pg. 31.
[147] Art. 17, Ibid.
[148] Art. 14 of the *Loi No. 36/91 du 5 Aout, 1991 relative au Registre du Commerce (Journal Officiel, 1991, p.1150)*, where it provides that:
Il pourra y avoir lieu à radiation de l'immatriculation ou de l'inscription :

2.2.2.3. Different forms of companies under the 1988 Company Law

There were five different forms of companies under the 1988 law and these were:

The General partnerships (*Les sociétés en nom collectif - SNC*), the Simple Limited Partnership (*les sociétés en commandite simple - SCS*), Limited Partnership with shares (*Société en commandite par action - SCA*) the limited liability companies (*Sociétés a responsabilité limite - SARL*), and the Public Limited Company (*Société Anonyme - SA*). This typically represented the same categorisation as in the French and Belgian civilian systems albeit with slight differences. Whereas establishing a company in form of the first three categories (as a General Partnership, the simple limited partnership and the limited partnership with shares) was not restricted, establishing a company that is either a Limited liability company or a Public limited company was highly conditioned. The choice of the form either permitted or prohibited from carrying on certain businesses. For example, a company that is a SARL, could not be allowed to engage into insurance business, banking, savings or emitting public securities. The minimum capital for a SARL was set at 500,000Frw and the maximum number of shareholders was 50. Where shareholders went beyond 50 members, it would automatically call for a switch to another form (Société Anonyme).

A company in the form of a *Société Anonyme* (SA) on the other hand, would either incorporate as privately (closely) held limited liability company[149] or as a public limited company that may call for subscriptions from the public for savings. The minimum number of shareholders had to be 7 and the minimum capital was 100 Million Rwandan Francs in case of private and 200 Million Rwandan Francs in case of public invitations for savings. Just like for the SARL, the standard list of requirements in SA statutes were provided for in art. 150[150]. Where it is registered as a public company, the first

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1) si l'immatriculation est relative à une personne physique qui se trouve dans l'un des cas prévus à l'article 8;

2) l'immatriculation est relative à une personne morale dont un des associés à responsabilité illimitée se trouve également dans le cas prévu à l'article 8, 2º;

3) l'immatriculation ou l'inscription a été obtenue en violation des dispositions de la présente loi.

[149] Such companies, even though they could be registered as SA probably due to their capital or to the sector of business that is strictly meant for SA Companies (like those dealing in Finance or Insurance), they would remain privately held by certain shareholders and their share transfers would be very limited.

[150] *L'acte constitutif mentionne :*

1° La désignation précise des fondateurs ; 2° Le nom de la société ; 3° Le siège social et les sièges d'exploitation de la société ; 4° L'objet ; 5° Le montant du capital souscrit ; 6° Le montant du capital libéré ; 7° Pour chaque catégorie d'actions, le nombre, leur valeur nominale ou proportionnelle, leur nature et les droit qui y sont attachés ; 8° Les apports de chaque fondateur et le nombre d'actions qui lui sont attribuées ; 9° La spécification précise de chaque apport en nature, les charges qui le grèvent, la valeur qui lui est attribuée et le mode d'évaluation, ainsi que, s'il s'agit d'immeubles, les mutations à titre signatories or members who make the public call shall be considered to be the founding members and this makes them carry more responsibilities than the other members.

2.2.2.4. Governance of the company and the liability of company directors / managers under the 1988 law

Just like any company law would provide, the 1988 company law acknowledged that a company cannot function but through its agents that are clearly named or appointed by the shareholders. The law allowed the two tier system (i.e., the ordinary Board and the supervisory Board) where the members so wished and, further, had to have the *commissaires aux comptes* (auditors) alongside the directors. A company was free however, to have one Board and the *commissaires aux comptes* without having the supervisory Board in place.

Generally, directors would not be held liable for any fault committed in the course of their (agents) duties as directors except where they have gone beyond their duties (art.13)[151]. The law provided for the company's liability for the directors' acts and not for the directors themselves in any way. Activities carried out pre-incorporation had to be adopted in the first general meeting of the company shareholders and thus, the company takes over all, including the liabilities so incurred if any. Where there were liabilities incurred pre-incorporation but not adopted after the company's registration, then directors would either personally or jointly be held liable depending on the specific liability (art.14). It is also worth noting that in both an SARL and an SA form, the Board members could be physical or moral persons[152] (art.189). This would in turn complicate the follow-up on liability especially where the Board member would be another moral person (an entity) since 1) criminal liability was, and is up to now, not possible for moral persons under Rwandan law, 2) under Rwandan law, a moral person cannot be held for tax liability for another company[153].

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onéreux dont ils ont fait l'objet pendant les cinq dernières années ; 10° Les modalités de répartition des bénéfices ; 11° Le mode de désignation et le nombre des organes chargés de l'administration et du contrôle de la société ; 12° Les règles relatives à la tenue des assemblées générales ; 13° La durée de la société ; 14° Le début et la fin de chaque exercice ; 15° Le montant, au moins approximatif, des frais de constitution ; 16° La cause et la nature des avantages particuliers attribués aux fondateurs.

[151] Art. 13 provided that:

La société agit par l'intermédiaire de ses représentants.
Elle est tenue des conséquences dommageables des délits commis par ses représentants dans l'exercice de leur fonction.

[152] Moral persons can no longer form part of the Board under the current law (2009)!

[153] A company could however be sued for its own tax default but not for the default of another company even when this company had served or was still serving on that Board.

In addition, whereas the law was silent on the size of the Board of other forms of companies, it stipulated for a minimum of 3 and a maximum of 12 members.

On a general management level, the role of the general assembly was emphasised especially in regard to important issues that would affect the company especially for example, in relation to major modifications [154]. For such important deliberations, decisions had to be taken by a majority of 4/5 provided that ¾ of the share capital was represented for the first meeting, and ½ for the second. The law imposed certain duties to directors for their better and independent performance. Such duties included for example, the duty to disclose in case of any personal interests or any other interest other than for the company that a director would have in the course of dispensing his duties as a manager of the company affairs (arts. 134, 136 & 199). In case of breach of such duties, the law provided for joint and several liability of directors / managers (arts. 137 and 200 for SARL and SA respectively). The liability here would be founded on the agency theory, and agency repercussions as provided for under the civil code.

2.2.2.5. Institutional framework under the 1988 law regime

The corporate landscape before the 2009 Law was for the greater part laid down in the 1988 law and, to a lesser extent, in regulations from the Central Bank (BNR) which ensured and still holds the overall supervisory duties (legal and regulatory compliance) for all banking and non-banking financial institutions. The Central Bank supervised and ensured the compliance of banks and other financial institutions and on certain occasions, specific laws relating to banking would take precedence over the 1988 law relating to the establishment of commercial enterprises. For example, even though the 1988 law governed the procedures on liquidation of companies, it could not apply to banks since, article 107 (Legal provisions non applicable to the liquidation of bank) stipulated that, *"provisions regarding bankruptcy, such as those set forth in the Decree*

[154] *Sont réputé essentielle les modifications qui portent sur :*
1° l'objet de la société ;
2° le transfert du siège social à l'étranger ;
3° la transformation de la société ;
4° la fusion de la société ;
5° la scission de la société ;
5° la scission de la société;
6° l'introduction de restrictions à la libre négocialité des titres.
7° l'émission d'obligation convertible des action ;
8° tout autre élément auquel l'acte constitutif a attribué un caractère essentiel
Lorsque le vote porte sur une modification essentielle, le conseil établit un rapport justificatif, l'annonce dans l'ordre du jour, le communique à tous les actionnaires porteurs de titres nominatifs et à ceux qui en font la demande, et le sommet à l'assemblée extraordinaire.

of 27/07/1934, and liquidation, as set out in law n°06/1988 of 12/02/1988 concerning the organization of commercial enterprises, shall not apply to the liquidation of banks".

The Ministry of Commerce and Industries was charged with overseeing and formulating trade policies and sometimes regulations for the better implementation of the law. Little would it however, influence the operations of the court's registry especially as regards its services for business establishments because it was the Ministry of Justice (supervising ministry) under which courts were operating. So, the dichotomy of the court registry was confusion in itself to the business community in Rwanda at that time.

Courts as indicated before played a primordial role both during the incorporation phase and in ensuring the custodial role by keeping the files for each company as well as any amendments thereto. The courts too acted as the enforcement institution for contractual obligations and provisions in a company's articles and memorandum of associations. However, after the 1994 genocide against the Tutsis, the country had a different vision especially in regards to its economy and how it could be revamped, i.e., through a strong and thriving private sector. But would these institutions as noted above and their modus operandi (way of operation) serve to the achievement of the country's vision?

2.2.3. The 2009 Law Concept of a company and its governance – a different mind-set

The repealing of the 1988 Law on the establishment of commercial enterprises was seen by some as timely and by others as though it had been long overdue. There are a number of factors that led to the policy, orientation and the current ontology of the company law as we see it in Rwanda. First, the 2009 company law came at the time when the government's priority was to have an economy that is led by the private sector – or, as it is commonly put, an economy that is 'private sector driven'. This could only be made possible by opening the space for, and facilitating the birth and creation of many new businesses, and by putting in place the nurturing environment for these companies[155]. These ambitions could not be achieved with the legal and institutional framework at that time. According to the World Bank's Doing Business reports[156], the 2009 Company Law:

[155] This was emphasized in many Government Development Policy Documents like the EDPRS (Economic Development and Poverty Reduction Strategy 2008 – 2012), p.111; The Vision 2020, and others.
[156] Doing Business Report summary (2005 - 2013) available online at:

"… introduced several concepts into Rwanda's corporate legal system for the first time: minority shareholder rights, regulation of conflicts of interest, extensive corporate disclosure and directors' duties. The new law introduced rules requiring approval by the board of directors for related-party transactions representing less than 5% of the company's assets and by shareholders for those representing more than 5%. The law strengthened the director liability regime for breach of fiduciary duties and for related-party transactions that harm the company. And it increased corporate transparency by improving disclosure requirements and minority shareholders' access to corporate information".

2.2.3.1. The Concept of a company under 2009 law

Unlike in the 1988 law that conceived a company as a contract between two or more people …, the 2009 in its spirit of promoting business introduced the concept of a one-man company – sole proprietorship as a company[157]. Besides, Article 3 of Law n°07/2009 of 27/04/2009 relating to companies as modified and complemented by art. 1 of Law n° 14/2010 of 07/05/2010 provides that:

"One or more persons may form a company by subscribing their names to a memorandum of association in compliance with requirements of this Law in respect of registration of companies."[158]

Consequently, it clearly permitted individuals to register companies and thus, removing the precondition of being more than one in order to be able to establish a company. In addition, even articles of association / statute which was a precondition for incorporation under the 1988 Law regime was no longer required. We note however that for articles being a condition was understandable on the basis that where there are two or more people, there need be an elaboration and agreement on how they will be running their business.

http://www.doingbusiness.org/-/media/GIAWB/Doing%20Business/Documents/Annualreports/English/DB-Windows Internet Explorer.accessed on 13/04/2014.

[157] Art. 2 (24) of the Law n° 07/2009 of 27/04/2009 relating to Companies provides the definition of a sole proprietorship as:
"private company in which the only shareholder is also the sole director of the company".

[158] Law n° 14/2010 of 07/05/2010 modifying and complementing Law n° 07/2009 of 27/04/2009 relating to Companies, *Official Gazette n° special* of 14/05/2010.

Further, the distinction between a private company and a public company as the two categories of companies was no longer based on whether there is government ownership or private ownership, but rather, on whether or not, the company is able to trade its shares publicly. The 2009 law imposes many restrictions upon the private company[159] but this does not mean that the public one is not restricted. When it comes to listing, the requirements and standards are high for public companies that intend to list and it does not stop on approval for listing but the standards apply as long as it is trading its shares publicly. The new law (2009) introduced new types of companies in addition to those limited by shares and unlimited companies which were already familiar with the 1988 law. The newly introduced were those limited by guarantee[160] and the ones limited by both shares and by guarantee[161]. These two types extend the liability of either shareholders or guarantors or both up to the individual commitments depending on the type (form) of the company incorporated, but only in case of it fails. Whereas it requires a certain amount of capital for a start of a company limited or unlimited by shares to guarantee its operations and their repercussions, starting a company limited by guarantee does not necessarily require capital deposit apart from the pledge of a certain amount to be paid in case of its insolvency.

2.2.3.2. Scope of the Law and the company's incorporation procedures

Unlike the 1988 Law that even covered partnerships and insolvency procedures, the 2009 law is only limited to companies, their registration and the consequential matters. The law excludes cooperatives [162], partnerships [163] as well as the insolvency procedures[164] as these have to be governed by their specific laws. However, as shall be discussed later, the 2009 Law is quite detailed and it covers the whole life of a company

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[159] Art. 6 of the 2009 law mentioned above.

[160] Art. 2(13) of Company Law defines a "company limited by guarantee" as a company formed on the principle of having the liability of its members limited by its constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up.

[161] Art. 8., Ibid. It should be noted however that this type of a company, being a new form in Rwanda, is not yet popular and very few of this kind have been registered in that regard.

[162] Cooperatives are governed by the Law No. 50/2007 of 18/09/2007 determining the establishment, organization and functioning of Cooperative organisations in Rwanda. This came into force after abrogating the Law No. 31/1988 of October 12, 1988 organising Cooperative organisations. The supervision of Cooperatives is ensured by both the Rwanda Cooperatives Agency as per the Law No. 16/2008 of 11/06/2008 establishing Rwanda Cooperatives Agency (RCA) and determining its responsibilities, organization and functioning on one hand; and the Central Bank (BNR), where the Cooperatives deal with Finances like the SACCOs (MFIs).

[163] Partnership law is not yet in place but following the initiatives from the private sector and the Ministry of commerce and industries, stakeholders are being engaged in pre-drafting workshops.

[164] Insolvency proceedings are governed by the Law No.12/2009 of 26/05/2009 relating to commercial recovery and settling of issues arising from insolvency; *Official Gazette No. Special of 26/05/2009*.

from the name reservation, incorporation, management and their disclosures, shareholder rights, auditing and finance, the reporting procedures, board of directors and their liabilities, just to mention but just a few.

At the regulatory level, the company supervisory and monitoring procedures are highly centralized to the Registrar General's Office right from the name reservation – that is, before the incorporation procedure begins up until closure (voluntary) of the company or to the filing for insolvency and the liquidation procedures. For example, before the 2010 amendment, Article 40 of the 2009 Law provided that:

"Those who wish to form a company or those who wish to change the name of the company shall send an application thereof to the Registrar General. Such application shall have to comply with the format attached as Appendix III".

It was later amended and complemented by art.3 of the 2010 Law which stipulates that:

Article 40 of Law n°07/2009 of 27/04/2009 relating to companies is modified and complemented as follows:

"Any application for a name reservation for those who wish to form a company or those who wish to change the name of the company shall be lodged in the form prescribed by the Registrar General."

As shall be discussed in the subsequent section (2.2.3.3.1), the same office (office of the Registrar General) is in charge of company registration, receiving and keeping copies of company's data and information (art. 336), receives filing for the audited annual accounts, is in charge of initiating insolvency proceedings in case of a company's failure, to mention but a few.

2.2.3.3. Institutional framework for business prosperity

With such a vision for a private sector led economy there had to be strong institutions established to drive it forward. These institutions had to be designed in a way that would allow easy collaboration amongst themselves and in so doing; they had to be minimized so that they would maximize their output. It is in this spirit that a one- stop- Centre institution like the Rwanda Development Board (RDB)[165], a combination of formerly scattered institutions including Rwanda Investment and Exports Promotions Agency (RIEPA), Rwanda's Office of Tourism and National Parks (ORTPN), Rwanda Information and Technology Agency (RITA), among others, was instituted for policy implementation and facilitation. A new office of the Registrar General within RDB was created and thus, relieved courts and the then newly created agency – The Rwanda Commercial Registration Services Agency (RCRSA) from the business administration duties they were handling before. This institutional framework was put in place to ease doing business by reducing formalities and time wasting while going from one institution to the other. One of the established institution's (RDB's) prime assignment was to push for the legal framework that would allow the vision to turn into reality.

Thus, through RDB's efforts and those of various stakeholders with a prime objective to ease doing business in Rwanda, the new 2009 Company Law was promulgated and as a result, incorporation of businesses became easier. One year later, the results were remarkable. The World Bank's Doing Business Report for 2010 noted that, just between 2008 and 2009 after the passing of the law, the time spent in the process of starting a business was reduced from 14 days to just 3 days, and the procedures one had to go through in the same process of starting a business were reduced from 8 to just 2!

It should be recalled that an institution such as the RDB was lacking during the regime of the 1988 company law. As mentioned before it was hard for a court registry to be at the same time tasked with the duties of registering, filing, supervising, and enforcing the activities of a business or a company, while at the same time, providing justice to those in need of it, which is the primary function of a court. Important to note also is that under the 1988 law, too soft as it was on management behaviour, coupled with the weak institutional framework, corporate governance was at stake. Therefore, this had to be addressed not only by the legal framework like repealing of the 1988 law but also, by revamping the institutional framework to enable the implementation of the new laws and by ensuring maximum protection of investors.

Under the 2009 law and other specific laws and regulations as we shall discuss later, the supervisory and / or regulatory institutions are also mandated with the power to monitor private companies. "Monitoring" here is taken to be one of the ways how managers have been confined to operating in the best interests of the company in general and of the shareholders in particular. From the agency theory perspective,

[165] www.rdb.rw ; Rwanda Development Board is a one stop center where an investor irrespective of the size of investment can have all necessary information and facilitation it deserves. Among its branches is the Registrar General of Companies' office, the Tourism department, SMEs, ICT, etc. More about the Institutional framework shall be discussed further in the following sub-chapter.

"monitoring" is not only limited to observing or stipulating for the management behaviour, but rather, being proactive to even investigating and sanctioning any deviations from the desired behaviour[166].

2.2.3.3.1 The Office of the Registrar General (ORG): An Administrator, Supervisor and Monitor

The discussion under this subsection shall not be limited to the specific roles of the Registrar General in relation to the corporate governance in particular, but we shall be looking generally on the central role of this office (ORG) in the entire life of the company. The discussion is intended to show that the office is assumedly overloaded with tasks yet with limited capacity to accomplish any of the tasks including those relating to corporate governance.

Created in 2008 as a division of the investments promotion and implementations department within the Rwanda Development Board (RDB), the role of the Office of the Registrar General is primordial in the life of a company. It was formerly known as Rwanda Commercial Registration Services Agency (RCRSA) that had been created by the Law in 2007[167]. Some of RCRSA responsibilities[168] were quite identical to the

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[166] Johan Adrianus Otten, "Origin of the Executive Pay and Corporate Governance reform codes: Essays on Institutional approach to corporate governance", *PhD Thesis*, Faculty of Law, Economics and Governance, Utrecht University, 2007, Pg. 14. Available at: http://dspace.library.uu.nl/bitstream/handle/1874/21196/full.pdf?sequence=6 (Accessed on 30/04/2014).

[167] Law n° 32/2007 of 30/07/2007 establishing the Rwanda Commercial Registration of Services Agency (RCRSA), *Official Gazetten° 21* of 01/11/2007.

[168] Art. 4 of the Law Law n° 32/2007 of 30/07/2007 mentioned above provided that:

The main responsibilities of RCRSA are the following:

1° to register in accordance with Laws, trading companies and societies, secured transactions, intellectual property rights and rights to initiate and halt business activities;

2° to maintain registers, data and all records of the Agency;

3° to publicize all the information relating to business registration;

4° to examine, on a regular basis, that the laws that need to be implemented by the Agency are improved and respected;

5° to monitor and ensure the publication of business documents required by the law to be published in the Official Gazette;

6° to design training, information and sensitization programs for economic operators on organs and regulations that govern them as provided for by the law on which the Agency bases in its operations;

7° to carry out research in matters relating to RCRSA responsibilities and publicize the findings;

8° to ensure monitoring and control of the implementation of laws that govern the business registration operations;

9° to issue instructions within the framework of implementing and facilitating the respect of laws relating to the registration of business laws;

10° to advise the Government on matters relating to the registration provided for by item One of this Article;

11° to establish relations and to collaborate with other regional and international agencies carrying out similar responsibilities.

present day responsibilities of the ORG. The responsibilities of the ORG range from implementing and developing (reviewing) the laws that have to do with business in general and especially those relating to, among others: companies, secured transactions, commercial recovery and settling of issues arising from insolvency. Furthermore, the ORG monitors and supervises activities relating to commercial recovery, maintaining corporate registers, data and all corporate records as submitted to the office, and avails to the public the information relating to companies. Important to note too is that this office is charged with designing training, information and sensitization programs for economic operators on regulations that govern them as provided for by the commercial laws. The Registrar General is also empowered to issue instructions as the law provides[169]. The Office of the Registrar General, as shall be discussed hereunder, plays a significant role in as regards the good governance of corporations in Rwanda.

It should be noted that, unlike during the 1988 law regime, it is today compulsory to register every company with the Office of the Registrar General[170]. So, the office of the Registrar General is involved even before the company is formed in an exercise of the name reservation up until the dissolution and the aftermaths of the dissolution of a company. Different Laws [171] empower this office with many responsibilities. The Registrar General receives the request / application to reserve the name for a prospective company or business[172]. It should be noted that the ORG reserves the right to reject the name on various reasons[173] as provided for by the law. However, in all circumstances, the applicant has to be informed about the outcome of his/her request[174]. The same would apply when someone wants to change the name of a company[175]. It has to be noted that, when filling out the company's incorporation forms, names and all identification details of all directors have to be indicated and, for the first

[169] The case in point is the Instruction of the Registrar General No. 01/2010/ORG of 12/04/ 2010 Relating to the Form and Content of a Prospectus, *Official Gazette no33 of 16/08/2010.*
[170] Art. 4 of Law No. 07/2009 of 27/04/2009 relating to Companies.
[171] Company Laws, Insolvency Laws, Secured transactions Law, and to mention just a few of them.
[172] Art. 36 & 40 ibid.
[173] Art. 41 provides:
"The Registrar General shall not reserve a name forwarded by those wishing to form or change the name : 1° which, or the use of which, would contravene any Law; 2° that is identical or almost identical to a name that the Registrar General has already reserved under this Law or which belongs to another company ; 3° that is confusing; 4° that goes against good morals".
[174] Art. 42.
[175]Art.45, 52 & 53.

time under Rwandan law, directors have to submit to the ORG, a written consent to being directors to that company[176].

It is worth noting that even when a name is accepted and incorporation is completed, the RG reserves the right to withdraw the name and request the applicant to change the name[177]. The worst situation would even be to order for de-registration of the company especially where such a company was registered out of fraud. This was the case in *Buddies Production v Buddies TV* where the former appealed to the RG to de-register the latter because the owner of *Buddies TV*, also a co-shareholder in Buddies Production fraudulently and out of bad faith against his co-shareholders registered *Buddies TV* for the same business (TV adverts) and primarily, to take over businesses from Buddies Production. The appeal was granted and *Buddies TV* was de-registered.

Needless to mention is that the RG registers or incorporates companies or businesses that fulfil the stipulated requirements[178], keeps the files and updates them with all the amendments filed with that office[179], [180]. Worth noting here is that, while it was compulsory under the 1988 Law regime to file the statutes (Articles of Association) of the company for it to be registered, such articles are under the 2009 law as amended to date an optional choice of shareholders. The law provides that, where shareholders choose not to have the articles of association, the law applies entirely[181]as though it is

[176] Art. 177 of Law No. 07/2009 of 27/04/2009 relating to companies, *OG N°17bis of 27/04/2009* provides that:
"A person shall not be appointed as a director of a company unless that person has consented in writing to be a director and certified that he/she is not disqualified from being appointed or holding office as a director of a company".
[177] Art. 48 states that: *"Where the Registrar General decides that a company should not have been registered under a name, he/she provides the company with a written notice stating the grounds for that decision. He or she shall also request the company to change the name within thirty (30) days after the date on which the notice is served".*
[178] Art.16 provides that:
"Where the Registrar General is satisfied that the application for registration of a company complies with this law, upon payment of the prescribed fee, he/she shall:
1) *Enter the particulars of a company to the register;*
2) *Assign a particular number to the company as its number; and,*
3) *Issue a certificate of incorporation in a prescribed form".*
[179] Art. 62 for example stipulates that: "*Within fifteen (15) days after a company adopts, alters or revokes its articles of association, as the case may be, the Board of Directors shall cause a notice to be delivered to the Registrar General for registration*".
[180] Art. 78 on conversion of shares provides that: *"Any existing company may at any time, convert any class of shares of the company into shares of no par value provided that seventy five per cent (75%) of shareholders vote for the resolution. Notice of the terms of the conversion is given to the Registrar General for registration within fourteen (14) days of the approval of the conversion".*
[181] Art. 55 provides that: *"Where a company does not have articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in this Law. Where a company has articles of association, the rights,*

the shareholders' articles of association. Of course, the memorandum of association which is a form describing the company, its shares (issued and non-issued) and their structures, its management (its managing director and other directors) and any other important information about the company has to mandatorily be filled out and filed with the RG office. The law ensures that the Registrar General's office is kept abreast about important changes that take place within the company, for example, in its administration, shareholding, the nature and number of its shares[182], the change of its headquarters, change in object, and others. The RG notes and approves also the categorization of the company so registered and grants exemption to use "Ltd" to some companies when appropriate.[183]Under Rwandan law it is compulsory to use "Ltd" as an abbreviation for "limited" for all companies whose liability is limited, whether by share, by guarantee or by both. Otherwise, it will be assumed that the company is an unlimited liability company. Exceptions can only be granted by the Office of the Registrar General upon satisfaction of what is provided for by the law in art. 38[184].

The RG may also issue various instructions. For example, according to art. 69, the RG may prescribe through an instruction, the form and content of a prospectus. Also, a copy of such prospectus is retained by the Registrar General's Office and filed in that

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powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in this Law except to the extent that they are restricted, limited or modified by the constitution of the company in accordance with this Law".

[182] For example, where the company has changed its shares of the share capital, art. 87 says:

"Within fifteen (15) days of the issue of shares under this Law, the company shall:

1° give notice to the Registrar General certifying:

a) the number of shares issued;

b) the amount of the consideration for which the shares have been issued, its value as determined by the Board of Directors;

c) the amount of the company's share capital following the issue of the shares;

2° deliver to the Registrar General a copy of any terms of issue approved".

The same obligation is provided for in art. 90:

"Where a company has altered its share capital, it shall within fifteen (15) days of the date of the alteration file a notice to that effect with the Registrar General. Such a notice shall include particulars with respect to the classes of shares affected".

[183] Art. 38.

[184] According to art. 38 of Law No. 07/2009 of 27/04/2009 relating to Companies, such dispensation to use the abbreviation "Ltd" may be granted where: "Where it is proved to the satisfaction of the Registrar General that an entity about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity or any other useful object, and intends to apply its profits or other income in promoting its objectives, and to prohibit the payment of any dividend to its members, the Registrar General may direct that the entity be registered as a limited company , without the addition of the abbreviation "Ltd" to its name.

The Registrar General may take such a decision for a company which has already been registered if he/she is satisfied that the company complies with the conditions prescribed in the preceding paragraph.

On registration, the Company shall, enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the abbreviation "Ltd" as any part of its name and sending lists of members, directors and managers to the Registrar General".

particular company's file as one of its important documents that would impact on its status. Important to bear in mind here is that, even though he/she is the one who prescribes the form and content of the prospectus, he/she assumes no responsibility to whatever is published therein[185].

The RG also has the powers to declare a company, upon satisfaction that the conditions set out by the law have been met, to be an authorized mutual fund and in such a case, so long as it remains so, he/she may go ahead to exempt it from applying provisions relating to prospectuses[186]. Within the RG's powers, she/he issues an Order that specifies and governs how General Meetings (GA) of shareholders of a company may be conducted except where the articles of association of a particular company provided otherwise[187]. Worth to remind is that Rwandan Law does not oblige every company to necessarily have a constitution or Articles of Association. This Order by the Registrar General therefore is very important especially to such companies that do not have their specific constitutions. For those that have constitutions and provide for such procedure however, theirs shall be preferred to what is provided for in the Registrar's Order.

In relation to companies that deal in debentures, the Office of the Registrar General issues directives relating to[188]:

a) The qualification, appointment and removal of a debenture holder's representative;
b) The naming of a successor to a debenture holders' representative;
c) The matters to be set out in the agency deed;
d) The powers of the debenture holders' representative;
e) The right of the debenture holders' representative to obtain information from the borrowing company;
f) The duties of the debenture holders' representative;
g) In the payment of the loans or deposits where the purpose stated in a prospectus issued in relation to debentures is not achieved;
h) The release of the debenture holders' representative.

In the provisions of Art. 164 of the Company law, where a company decides to issue debentures but prefer to secure their payments through mortgages or the floating

[185] Art. 69 (4).
[186] Art. 71.
[187] Art. 155.
[188] Art. 159.

charges[189], their inscription cannot be valid unless it is kept with the relevant register. In such a case, the law also requires the company to file to the Office of the Registrar General, with a statement of the particulars of securities within 30 days following the date on which that security was provided. The particulars that have to be submitted in a statement are as follows: a) the date of its (security's) provision; b) the amount secured by the charge; c) a description sufficient to identify the property charged; d)the name of the person entitled to the charge[190]. This also comes in as to emphasize the Office of the Registrar General's statutory involvement in the supervision and regulation of company's transactions to avoid any abuses, which is to the benefit of the general public.

In as regards the management of companies, the Office of RG's role is equally significant. It does not necessarily replace the shareholders in for instance appointing the directors or instituting their modus operandi, but where they do not exercise their rights or where that exercise is likely to cause harm to the public, the Office is compelled to intervene in order to protect public interest in that being – the company. For example, where it is a one-man company who doubles as the sole company director, the Law obliges him/her to, within a period of six (6) months, file with the Registrar General a written notice stating the person who will replace him / her in case he/she dies. Such a notice shall state the full name, residential address and occupation of the person nominated and shall be accompanied by the consent to act in writing signed by that person[191]. In the same vein, where the sole owner who is also the director dies and the heirs (if they are there) or the curator refuse to replace him, the same Office (RG) will, within 30 days, have to request the Court to appoint a fit and proper person to act as a replacement until the heirs or the Curator appoints the new Director[192].

Also, in its role as the custodian of all official documents of companies[193], and in exercise of its mandate as a regulatory supervisor of companies and to ensure that the company as an institution or a body that holds a lot for a whole spectrum of

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[189] A **'Floating Charge'** is a common law concept which is not so commonly used in the civilian jurisdictions including Rwanda. However, according to the English Encyclopedia, it generally means a form of security granted to a creditor over general assets of a company which may change from time to time in the normal course of business (e.g. stock). The company can continue to use the assets in its business until an event of default occurs and the charge crystallize (specifying a given property for a charge).
(http://www.encyclo.co.uk/define/Floating%20charge) Accessed on 14/04/2014.

[190] Art. 166.

[191] Art. 183.

[192] Art. 185.

[193] Art. 235.

stakeholders is in proper hands of management, the RG Office has to receive all disclosures relating to the changes in the management of the company with the full details on the description of any member of the Board coming in[194]. In the context of the 2009 Law and its 2010 amendment, management concept extends to include also those other officers of the company like the Company Secretary[195] whose duties[196] may to a certain extent, influence the workings of the Company. For that reason therefore, Art. 220 of the 2009 Law obliges the Company to notify the RG Office about the appointment of the Company Secretary and to provide the particulars of the appointee to the same office. Likewise, whenever there is a change of officer in that office, such changes have to be notified to the Registrar General. It has to be noted that, only small private companies are exempted from having a Company Secretary[197] and so, all others must have someone who ensures the duties under his office as stipulated by the Law. Under the same article as mentioned above, it is provided that the office of the Company Secretary cannot be left vacant for more than three (3) consecutive months and the Office of the Registrar General has to be notified within Thirty (30) days upon the resignation or firing of that officer.

Also, it is mandatory that every year open, in a General Meeting, an auditor for the Company in that particular starting year has to be appointed. Where that is not done, the Office of the Registrar General shall within one month starting from the date the General Assembly sat and an auditor was not appointed, intervene to cause the

[194] Art. 187 provides among others that: "The Board of Directors shall disclose the following to or cause it to be registered by the Registrar General within 30 days;

1) A replacement of any of the members of the Board of Directors;
2) Any change of name, address or any other details about a member of the Board of Directors…"

[195] Company Secretary position in company management was first introduced in Rwandan Company Law in 2009 but erroneously presented as "Company Employee". It was later to be changed in the 2010 amendment's art. 11 to mean "Company Secretary". The same article provides for the duties of a Company Secretary.

[196]The duties of the Company Secretary as stipulated by art. 11 of the 2010 amendment to the 2009 Company Law amendment are:
1° to advise members of the Board of Directors on their responsibilities and powers;
2° to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and submission of all company documents required by the law to relevant organs as well as consequences due to the failure to comply with such regulations;
3° to ensure that minutes of the meetings of shareholders or the Board of Directors are well prepared and that registers provided for by the articles of association are accurately kept;
4° to make sure annual balance sheet and other types of required documents are submitted to the Registrar General as provided for by this Law;
5° to ensure that copies of annual balance sheet and activity reports are transmitted to relevant destinations in accordance with this Law and to any person as provided by the law".

[197] Art. 11 of the Law N° 14/2010 of 07/05/2010 modifying and complementing Law N° 07/2009 of 27/04/2009 relating to Companies in Rwanda, *Official Gazette n° special of 14/05/2010.*

company to appoint that auditor within 30 days[198]. The Law does not however, go further to define how this may be achieved or even what would happen in case the Company continues to stay without an auditor even after the RG's request to address that. Most probable is that he/she will have to file in Court for an order in that regard in which, sanctions for failure shall have also to be sought from Court against the defaulting Company.

To ensure that the financial soundness of every company is kept on track by the Office of Registrar General, companies with the exception of only small ones[199], are obliged to file with this office the audit reports for every audited period together with the corresponding financial statements[200]. This enables the Registrar General to keep abreast the good or ill-health of each and every company and where need be, may call for her/his intervention to rescue the company in case of difficulties or intervene for the sake of the creditors and file a case with the Court for a commencement of an insolvency proceeding. This is what happened in the case *Rcom 0175/11/TC/Nyge* (*Registrar General v Rwandatel Ltd*)where, thanks to information sharing from another regulator – Rwanda Utilities Regulatory Authority (RURA) which regulates Telecommunications service provider companies, and relying on the financial statements that had been filed with RG's Office, a case was filed in Court for an insolvency proceeding against *Rwandatel* and the Court ruled in favour of the claimant and consequently, appointed, as had been requested by the claimant (RG), an administrator and mandated him with some tasks to perform and report back to the court in a prescribed time, with an opinion for the way forward for the company – *Rwandatel*. The administrator had to report whether there were any possibilities of *Rwandatel* business to recover as it was or as a last resort, to be liquidated. His opinion finally was for the later.

The above power to investigate or inspect the health of a company can be out of the RG Office's own initiative[201] or may be influenced by the application (s) from any other

[198] Art. 238 of the 2009 Law.
[199] Art. 259: Small private companies are only required to provide a financial summary of their statements too, to the Registrar General for filing.
[200] Arts. 253 and 258 of the 2009 Company Law. Art. 258 provides that:
Every company, other than a small private company, shall ensure that, within thirty (30) days after the financial statements of the company and any group financial statements are required to be signed, copies of those statements together with a copy of the auditor's report on those statements are filed with the Registrar General for registration.
[201] Art. 277 of the 2009 Company Law provides that:
The Registrar General may :
1° in the case of a company having a share capital, on the application of:
a) one shareholder or a group of shareholders holding at least one-tenth (1/10) of the issued shares;
b) debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures;

concerned party like a shareholder or a creditor[202] or may, as the law permits, follow an instruction from a higher authority especially from the Minister having Companies under his/her attributions. Art. 274 of the Company Law for example provides for the circumstances where a mandatory investigations into the business of a company may be initiated by the Minister by issuing an instruction to the RG to carry out that investigation. Article (274) reads:

"Where the Minister in charge of companies is satisfied that:

1° for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of a company should be investigated;

2° it is in the public interest that the affairs of a company should be investigated;

3° in the case of a foreign company, the appropriate authority of another country had requested that an investigation be made under this article in respect of the company;

He/she shall issue the instructions to the Registrar General as to investigating into the business of a local company or of a foreign company having its branch in Rwanda".

In such a situation where mandatory investigations into the business of the company's business has been commissioned, the RG then, at her/his office's cost[203], appoints the expert inspector[204] and prescribes the terms of reference for the expert assignment of investigating the business. The report is then, in the format provided by the RG Office, prepared and submitted to the Registrar General.

This therefore shows that, even though there is a specialized agency / office for the regulation and supervision of companies, for the benefit of the general public, the ministry that oversees that office is also to a certain extent, still indirectly but closely

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2° in the case of a company limited by guarantee, on the application of not less than one-fifth (1/5) in number of the persons on the share register;
3° where he/she considers that the appointment of an inspector is necessary to safeguard the interests of shareholders or debenture shareholders or is necessary in the public interest, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture agency deed, the conduct of the debenture holders' representative, and to make a report on his/her investigation in such form and manner as the Registrar General may direct.

[202] Where it is an application from any other person who directly has an interest in having that investigation carried out by the Registrar General's Office, the applicant shall be required to avail 1) concrete evidences that would convince the RG Office to commission for such an investigations; but 2) the applicant must also avail the guarantee – in terms of money, that the RG will judge sufficient to be the cost of the expert that shall have been appointed to carry out the investigations. (Art. 278 of the 2009 Company Law).

[203] Art. 276 of the 2009 Company Law.

[204] Art. 275 of the 2009 Company Law.

involved in the day to day follow up of the companies performances and for the business in general.

Despite all the above roles however, this research realised that the RGO is quite understaffed to accomplish them. The monitoring of the companies' health for example would require the services of the RGO to be decentralised to at least every province, if not to the district level to ensure its effective services outreach.

2.2.3.3.2 The Central Bank (BNR)[205]

Even though the Office of the Registrar General at RDB has got the general role of registering and supervising as well as monitoring all the companies in general, the National Bank of Rwanda (BNR) has the specific mandate to supervise and control those companies within the financial sector[206]. It is the regulatory and supervisory authority for the banking and micro-finance systems[207], non-banking financial institutions like insurance and insurance brokerage companies, pension schemes and others in the same industry[208]. It does so in order to achieve its two principle objectives: The first objective being *to maintain financial system stability with a view to encouraging and promoting the development of the productive resources of Rwanda.*

The second objective is to promote the access to finance whilst strengthening a stable and sound financial system. This objective is achieved through the following activities;

• *Licensing of banks, insurers, pensions schemes, microfinance institutions, forex bureaus, and credit reference bureaus.*

• *Strengthening the supervisory legal framework including both onsite and offsite surveillance tools for banks, insurers, pensions schemes, microfinance institutions, forex bureaus and credit reference bureaus to ensure that they comply with all the relevant laws, regulations, directives, guidelines and prudential benchmarks.*

[205] BNR is a special hybrid company (with special legal status) that is not purely public institution per se, nor is it a commercial company in the strict sense of the term even though, it is allowed to carry out some business activities just like any other private commercial Bank would do. See art. 3 of the Law N° 55/2007 of 30/11/2007 Governing the Central Bank of Rwanda. It does not have to go through the registration procedure just like other companies do but at the same time, enjoys so many other privileges of private companies that public institutions do not.
[206] Law N° 55/2007 of 30/11/2007 governing the Central Bank of Rwanda (BNR), art. 53.
[207] Art. 65 of Law N° 55/2007 of 30/11/2007 governing the Central Bank of Rwanda (BNR). With this power, it therefore issues the regulatory instruments in form of regulations, directives and decisions concerning the relevant institutions.
[208] See BNR Website at: http://www.bnr.rw

• *Adoption of a Risk Based Supervision framework[209].*

In addition to their registrations by the RG Office, financial institutions shall have to be licensed [210], supervised and controlled by BNR through issuing of regulations, instructions / directives and guidelines the breach of which shall attract sanctions that may include suspension or even termination of the license to operate (operating license) in that specific industry[211].

BNR has issued a number of regulatory instruments so far to banks[212], insurance companies[213], Micro Finance Institutions (MFIs)[214] in relation to both internal and external controls.

The Central Bank is highly involved in determining the composition through screening and subsequently, approving the team making up the Board of Directors[215], whether for Banks, Insurance and Insurance Brokerage companies, as well as for the Microfinance organizations[216]. This is where exactly; the Central Bank will apply its "fit-and-proper"[217]

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[209] See BNR Website.

[210] Art. 4 of the Law N° 007/2008 of 08/04/2008 Concerning Organization of Banking in Rwanda provides that:

"No person or entity may engage in banking activity within the territory of the Republic of Rwanda without being licensed by the Central Bank. No person or entity may, without being licensed as a bank, claim the status of bank or banker, or use in any language, in its corporate name, trade name, signage or advertising, the terms "bank," "banker," or any other term evoking any banking operation".

[211] See for example, Regulation No. 03/2008 on licensing conditions of the Banks.

[212] BNR Regulations for the Banking industry include Regulation No. 04/2011 on Business Continuity Management (*Official Gazette n° 14 of 04/04/2011*); Regulation N° 06/2008 on Corporate Governance of Banks (*Official Gazette n° 02 of 10/01/2011*); Regulation N° 04/2008 on Insider Lending of Banks (*Official Gazette n° 02 of 10/01/2011*); Regulation N° 05/2008 on Credit Concentration and Large Exposure (*Official Gazette n° 02 of 10/01/2011*); Regulation No. 09/2011 on Major Investment of Banks (*Official Gazette nº 29 0f 18/07/2011*); Regulation N°11/2011 on Minimum Internal Control and Audit Standards in Banks (*Official Gazette n° 30 bis 0f 25/07/2011*); and many other directives and decisions taken by BNR that have to be enforceable to the relevant institutions.

[213] BNR Regulations for Insurance industry so far include: Regulation Nº07/2009 of 29/07/2009 on Corporate Governance Requirements for Insurance Business (*Official Gazette n°35 0f 30/08/2010*); Regulation No. 04/2009 on accreditation and other requirements for external auditors of Banks, Insurers and Insurance Brokers (*Official Gazette No. 39 of 27/09/2010*); Regulation Nº06/2009 of 29/07/2009 on Licensing Requirements and other Requirements for Insurance Intermediaries (*Official Gazette n°36bis of 06/09/2010*); Regulation N° 14/2011 Relating to Mergers and Acquisitions of Insurance Companies (*Official Gazette n0 50 bis of 12/12/2011*); and many other directives and decisions in regard to insurance industry that are taken by BNR and that have to be implemented by all players in that industry.

[214] See for example Regulation N° 02/2009 on the organization of Microfinance activity (available on http://41.74.165.238:8081/docs/publicnotices/Regulation%20Microfinance.pdf , www.bnr.rw). This regulation sets out the conditions and the application procedures for a Microfinance institution to be licensed (See Article 6 of the Regulation).

[215] Art. 29 of the Law N° 007/2008 of 08/04/2008 Concerning Organization of Banking in Rwanda confers the powers to the Central Bank to approve on the appointment of Directors of the Bank as well as the duty to prepare the procedures for their appointment and dismissal.

[216] Art. 21 of the Law No. 40/2008 of 26/08/2008 establishing Micro finance activities, *O. G N°13 of*

condition to assess the appropriateness of any candidate. In most cases, the laws that govern each business specifically attribute the powers of regulation and supervision expressly to the Central Bank[218]. Thus, for the purposes of safeguarding people's deposits and guaranteeing the financial sector stability, institutions within this sector are required to make periodic reports[219] to the Central Bank and in turn, it often carries out periodic or surprise audits and controls.[220] Following the Central Bank's audit reports, where it is found out that the responsible managers have in any way infringed the provisions of the relevant Law or rules governing its application, the regulator has the authority to sanction the liable persons according to the degree of the corresponding seriousness of the infringement[221]. For a Bank's non-observance of the law or the regulations thereto related, several disciplinary sanctions have been provided for by the law as to include 1° written warning; 2° written reprimand; 3° suspension of all assistance from the Central Bank; 4° prohibition from conducting certain operations, or other limitations on the exercise of banking; 5° withdrawal of the designation of accredited intermediary; 6° withdrawal of accreditation[222].

2.2.3.3.3 Rwanda Utilities Regulatory Agency (RURA)

The Rwanda Utilities Regulatory Agency (RURA) is another regulator and supervisor of both public and private sector companies in specified sectors of communication (Information and Communications Technology) and media, transport (aerial, road and water) as well as in energy, water and sanitation sectors. These companies are strictly

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30/03/2009 provides that:
"The members of the Board of Directors of a micro finance institution or an organization operating on its behalf, as well as the members of management who shall be honest, must receive prior approval from the Central Bank before any activities are exercised by the institutions".

[217] Even though this concept is not properly developed under Rwandan Law, one would relate such category of people (fit-and-proper) to the opposite of those that are referred to in Articles 30 & 31 of the Law No. 007/2008 of 08/04/2008 Concerning Organization of Banking in Rwanda. People who are convicted of such offenses as enumerated in both Arts. 30 & 31 are impliedly, not-fit-and –proper to manage a Bank or any Financial Institution.

[218] For example, Art. 110 of the Law No. 40/2008 of 26/08/2008 establishing Micro finance activities, *O. G N°13 of 30/03/2009,* provides for the powers of the Central Bank to issue instructions relevant to Micro finance institutions and their activities.

[219] Art. 62 of the Law N° 007/2008 of 08/04/2008 Concerning Organization of Banking in Rwanda provides for who shall be receiving such reports where it provides, in a relevant part that:
"The results of inspections conducted by the Central Bank shall be reported to the Board of Directors and a copy thereof sent to the management of the inspected bank. Such results may also be forwarded to external auditors" …

[220] As was revealed in an interview between the researcher and Faith Batamuriza, cluster manager, banking supervision, at BNR.

[221] See, For example Art. 52 of Law No. 40/2008 of 26/08/2008 establishing Micro finance activities, O. *G N°13 of 30/03/2009* (http://41.74.165.238:8081/docs/publicnotices/Microfinance_Regulation.pdf, www.bnr.rw).

[222] Art. 65 of Law N° 007/2008 of 08/04/2008 Concerning Organization of Banking in Rwanda.

controlled and supervised by RURA due to their high impact on the lives not only of those investing in such sectors, but also for the entire Rwandan community and the economy at large. The law sets the responsibilities[223] of this institution as to:

1° ensure that certain utilities provide goods and services throughout the country to meet reasonable demands and needs of all natural persons and organizations;

2° ensure that all utility suppliers have adequate means to finance their activities;

3° continually promote the interest of users and potential users of the goods and services provided by utilities so that there is effective competition and protection of users from abuses of monopoly positions is ensured where certain public utility sectors have a monopoly over the market.

4° facilitate and encourage private sector participation in investments in public utilities;

5° ensure compliance by public utilities with the laws governing their activities.

RURA issues regulations[224] and guidelines[225] to ensure the long-term conservation of scarce national utility resources in the public interest.

Among the competences of the Agency is the power to sanction any institution under its supervision for the violation of the regulations governing public utilities[226]. Besides, specific laws of each supervised sector provides for additional responsibilities of the regulator (RURA)[227]. The interdependence and collaboration among regulators is

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[223] Art. 5 of Law N°39/2001 of 13/09/2001 establishing an Agency for Public Utilities, as amended and updated to date (http://www.mhc.gov.rw/fileadmin/templates/PdfDocuments/Laws/RURA_Law.pdf , www.mhc.gov.rw).

[224] For instance, the Regulations on SIM Cards registration issued by RURA on 16/01/2013; the 2011 Regulations on promotions by Telecommunications operators.

[225] For example, the September 4th, 2009 Guidelines issued by RURA for Internet resources management and allocation in general and .rw domain in particular.

[226] Art. 6 of the Law N°39/2001 of 13/09/2001 establishing an Agency for Public Utilities, as amended and updated to date.

[227] For example, Art. 3 of the 2001 Telecommunications Law (Law No. 44/2001 of 30/11/2001 Governing Telecommunications) adds that the Regulator shall:
1° ensure that telecommunications networks and telecommunications services are provided throughout the Republic to meet all reasonable demands and needs of natural persons and organizations;
2° promote the interests of users and potential users of telecommunications services, whether they be natural persons or organizations, in respect of the price, quality and variety of telecommunications networks and services in the Republic;
3° ensure that all providers of telecommunications networks and telecommunications services have adequate means to finance the provision of such networks and services;
4° maintain and promote effective competition in the provision of telecommunications services throughout the Republic in the interests of those wishing to use such services;
5° facilitate and encourage private sector participation in telecommunications investment;

paramount since the findings of one regulator during the exercise of its duties may inform or signal to the other for its investigation or follow-up. This was the case in *Rcom 0175/11/TC/Nyge (Registrar General v Rwandatel Ltd)* discussed earlier, where, before even the RG Office could critically analyse the submitted financial statements of *Rwandatel Ltd*, RURA had technically proved that it (*Rwandatel*) was already a going concern and that its situation necessitated authority's intervention.

2.2.3.3.4 The Capital Markets Authority (CMA)[228] and the Rwanda Stock Exchange (RSE)[229]

Another influential and regulatory authority especially in relation to corporate governance is the Capital Markets Authority (CMA). In our discussion hereunder though, the role of CMA shall be discussed together with that of Rwanda Stock Exchange (RSE). Being a private company, the role of the RSE in influencing good corporate governance is limited to listed companies. The RSE stimulates companies to improve management standards and efficiency so as to satisfy the demands of the stakeholders and thus attracting more finances from the general public through the capital market. Ensuring good corporate governance is thus among the major roles of the RSE[230]. RSE came in place replacing the "Rwanda Over The Counter (OTC) Exchange" that had been in operation since January 2008[231], with only two companies

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6° ensure compliance with the provisions of this law;

7° have due regard to the security of the Republic and national defense when carrying out its work when this is required;

8° do anything reasonably incidental to the objectives of the Regulatory Board as set out in this Article.

Art. 4 of the Media Law N°02/2013 of 08/02/2013 Regulating Media; *Official Gazette nº 10 of 11 March 2013*) that reviewed Law nº 22/2009 of 12/08/2009 on the media provides that:

"The daily functioning of media and the conduct of journalists shall be regulated by the Media Self-Regulatory Body.

However, the national utilities statutory regulator shall also carry out the regulation of audio, audio-visual media and internet.

…".

[228] Established by Law N°11/2011 of 18/05/2011 Establishing the Capital Markets Authority (CMA) and Determining its Mission, Powers, Organization and Functioning, *Official Gazette n° Special of 09/06/2011.*

[229] RSE was incorporated on 7th October 2005 as a dormant private limited liability company with the objective of carrying out stock market operations in future because there was no such business then. Its membership (April 2014) however, include the Government and some Government institutions (Rwanda Social Security Board (RSSB), *Banque Rwandaise de Developpement* (BRD)) although with minimum shareholding. The majority shareholding is dominated by the Stock Brokerage companies. See, www.rse.rw

[230] The roles of RSE include: Raising capital for businesses; mobilizing savings for investments, corporate governance; government capital-raising for development projects by borrowing money from the public through the Stock Market using its bonds; and that the Capital Market may be used as a barometer for the economic situation of the country.

[231] See article "Rwanda Stock Exchange opens with brewery IPO", The *African Capital Markets News* newspaper, February 14th, 2011, by Tom Minney. Accessed online (http://www.africancapitalmarketsnews.com/900/rwanda-stock-exchange-opens-with-brewery-ipo/) on

(Kenya Commercial Bank – KCB, and the Nations Media Group - NMG[232]) both of which were foreign[233]. As of May 2014 when this chapter of the study was concluded, the market had only 5 listed companies including the latest market entrant – Uchumi Supermarket Ltd (codenamed USL at the market) cross-listing from Kenya[234]. The Table below shows the listed companies on RSE.

Equity listings on RSE as of May, 2014

	SYMBOL	COMPANY	NOTES	
1	BLR	Bralirwa	Brewing, Bottling	Rwandan
2	KCB	Kenya Commercial Bank Group	Banking, Finance	Kenyan
3	NMG	Nations Media Group	Publishing, printing, broadcasting, Television	Kenyan
4	BOK	Bank of Kigali	Banking, Finance	Rwandan
5	USL	Uchumi Supermarket	Supermarkets	Kenyan

Source: RSE Website (www.rse.rw) and Wikipedia: http://en.wikipedia.org/wiki/Rwanda_Stock_Exchange

The Stock Market (RSE) also trades in bonds both public (treasury bonds) and private (Corporate bonds) as shown below in the table.

Bond listings on RSE as of April 2014

S/N	ISIN CODE	ISSUER	MATURITY	FACE VALUE (FRW)	COUPON RATE
1	RW000A1GWE23	Government	5years	2.5 Billion	11.25%

02/05/2014.

[232] KCB listed with the ROTC Market on 18th June 2009 while NMG listed on 2nd November 2010.

[233] Both Kenya Commercial Bank (KCB) and The Nations Media Group (NMG) are Kenyan Companies.

[234] Others are Bralirwa Ltd (BLR), Bank of Kigali (BOK) both being local companies; Kenya Commercial Bank (KCB) and Nation Media Group (NMG) being Kenyans too, that have cross-listed with Rwanda Stock Exchange (RSE).

		of Rwanda			Fixed
2	RW000A1VE4S9	Government of Rwanda	3 years	12.5 Billion	11.475% Fixed
3	RW000A1GQRS7	Government of Rwanda	1 year	3.5 Billion	11% Fixed
4	RW000A1GQRL2	I & M Bank	10 years	1 Billion	FXD 1/2010+1%

Source: RSE Website: www.rse.rw (April 2014).

The CMA on the other hand, like the Central Bank in regard to financial institutions or RURA on Telecom and other utilities companies, is mainly charged with supervision and control of the Capital Markets business industry. These roles include the licensing of companies that wish to trade in securities, issuing of instructions and relevant regulations[235]. Its establishment followed the 2007 Prime Ministerial Order establishing what was then called Rwanda Capital Markets Advisory Council (CMAC), later to become the Capital Markets Authority (CMA)[236]. It is majorly there to enforce and implement those laws[237] that have to do with good corporate governance of the Capital Markets business and specifically, the implementation of the Capital Markets Law[238] which defines which type of companies have to be allowed to trade their shares on the capital markets. Besides monitoring and supervising the Capital Market – RSE, CMA also supervises others that deal in capital markets or securities business whether as individuals or as companies including the stock brokers. The CMA has as a task licensing the brokers but also where need be, suspending or even, revoking or withdrawing their licenses to trade[239]

[235] For instance, the CMA has so far passed the following regulations:
Regulation Nº. 01 on Capital Markets (Licensing Requirements), 2012 - *Official Gazette nº 26bis of 25/06/2012;* Regulation Nº14 on Real Estate Investment Trusts - *Official Gazette nº 34bis of 26/08/2013;* Regulation N°. 03 on Capital Markets (Cross Border Introductions), 2012 - *Official Gazette n° 27bis of 02/07/2012;* Capital Market Regulation Nº. 11 Establishing the Compensation Scheme in Rwanda - *Official Gazette n°53 bis of 31/12/2012;* Regulation N°16 on Asset Backed Securities - *Official Gazette n° 35bis of 02/09/2013*, among others.

[236] Law N°. 11/2011 of 18/05/2011 establishing the Capital Market Authority (CMA) and determining its Mission, Powers, Organization and Functioning. www.cma.rw/.

[237] Law N° 40/2011 of 20/09/2011 Regulating Collective Investment Schemes in Rwanda, *Official Gazette n° Special of 15/11/2011*; Law No20/2013 of 25/03/2013 Regulating the Creation of Trusts and Trustees, *Official Gazette nº 25 of 24/06/2013*; Law N° 26/2010 of 28/05/2010 Governing the Holding and Circulation of Securities, *Official Gazette n° Special of 28/05/2010*.

[238] Law N°01/2011 of 10/02/2011 regulating Capital Market in Rwanda, *Official Gazette n° 13bis 0f 28/03/2011.*

[239] Art. 9 of Law N°01/2011 of 10/02/2011 Regulating Capital Market in Rwanda, *Official Gazette n° 13bis 0f 28/03/2011* provides that:
The Authority may at any time withdraw or suspend any license or approval granted if it establishes that:
1° the licensed or approved person is not *a fit and proper* person to carry out the capital market business

2.3. Conclusion

As noted above, the general company law together with other laws specific to certain domains is elaborate on how regulatory institutions may intervene to monitor and supervise the operations of both public and private companies in Rwanda. Streamlining the ethical behaviour of corporate managers can either be done by an active body of shareholders or consumers or by government institutions established for that purpose. It is assumed that since collective action of shareholders or for consumers is not readily available and exercised in Rwanda mainly because of the low level of corporate business understanding, strict regulatory interventions thus become inevitable and justified. Such regulators stand in place of the passive shareholders and stakeholders and also for the protection of the public interest[240] in the business.

It is noted however that the roles of the Registrar General's Office are enormous and to some extent, not practical. Besides being taken by the public as a formality, it appears rather difficult for such an office with its limited number of staff, as earlier mentioned (under 2.2.3.3.1), to effectively supervise and monitor all companies registering each day, alongside other duties such as those relating to commercial recoveries, mortgage registrations and intellectual property. The office ensures to the full satisfaction of the beneficiaries in as far as the management of the registration/incorporation procedures are concerned but is limited in regard to the corporate governance supervisory roles even though the law as earlier discussed empowers it to do so. The possible way for the office to handle other rather cumbersome tasks would be to decentralize its services to at least provincial levels. This would however require the government to triple the RGO's resources (financial, human and material). The Central Bank and RURA on the other hand are found effective in implementing their supervisory role mainly because of the limited number of companies supervised but also due to the fact that they are dealing with a special type of companies which makes the regulators' life easier. In short, it has been found out that self-regulation of companies in Rwanda is yet to be

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which he/she is engaged in or applying for;
2° subject to the provisions of point 1º of this Article, the licensed or approved person has violated any provision of this Law or any regulations made under it or have furnished the Authority with false, inaccurate or misleading information.
The suspension of a license or authorization shall be for a specified period or shall end with a remedy to its cause. A person shall not be considered as a licensed or approved person during the period of suspension of his/her license or authorization. On request by the concerned person and where the Authority considers it is justifiable, the Authority may withdraw any decision made under this Article.

[240] I mention 'public interest' because even where shareholders may voluntarily ignore to strictly supervise and monitor their company's management, regulators would not stand watching and avoiding to intervene because the effects of a company's mismanagement shall reach further than the shareholders themselves.

witnessed and that strict public regulatory interventions shall have to be emphasized for as long as the private sector has not keenly empowered itself to be able to embrace self-regulation.

2.4. Corporate control and management

This section discusses corporate control both from within (inside control and management) and the corporate control forces that do not necessarily come from within i.e, the external controls / forces. In a healthy economy, the two forces complement each other for the benefit of shareholders and the community as a whole. We shall try to show how each would contribute to the company's corporate governance.

2.4.1 Inside control mechanisms

Under the inside control mechanisms, we shall look at the role(s) of shareholders, internal auditors, compliance departments (where they are distinct from the audit departments), the role of the board of directors, management and employees.

2.4.1.1 The role of shareholders

The role of shareholders in the management and control of a corporation cannot be underrated. Whereas it is a common practice that shareholders will delegate their management powers to a selected number of people composing the Board of Directors, the law on companies, and often the articles of association for those that have them[241], will preserve some decisions to be solely in the province of shareholders. Such may include for example, the selection/voting for board members[242], adoption or amending the articles of association and certain major transactions[243]. These residual powers as they are often referred to, can be exercised through either an ordinary resolution taken

[241]Articles of Association are optional under Rwandan Company Law.

[242] Art. 167 of Law N°07/2009 of 27/04/2009 Relating to Companies provides in a relevant part that: "Any member of the Board of Directors shall be appointed by the annual meeting of shareholders…".

[243] Art. 142 of the Law N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009 provides in relation to special resolutions that:
The shareholders exercise a power to: 1° adopt articles of association , if it has , to alter or to revoke them ; 2° approve a major transaction; 3° approve an amalgamation of the company; 4° put the company into liquidation; Such power shall be exercised by special resolution. A special resolution shall only be rescinded by a special resolution. …

in an ordinary meeting or a special resolution of the General Assembly (GA) of shareholders. It enables shareholders to exert some authority to control the company's affairs in addition to what the Board does with the shareholders' delegated powers. Shareholders can as well review and control management behaviour[244]. The general assembly of shareholders is meant to take high level decisions for the company. The powers that would otherwise be exercised by the company shareholders are delegated to the board of directors. These said however, does not elude to mean that this involvement by shareholders has extinguished the agency problems in Rwanda. The disparity between shareholders' knowledge and that of the Executive management of the Company regarding company affairs remains significant and more, in favour of the Executive management.

2.4.1.2. The role of management

Rwandan Company Law does not categorize management into Executive Management and the Outside / non-Executive management. Article 167 of the Company Law shows the obligation for the directors to work as a team where it says that:

"…Members of the Board of Directors shall act in a collegial administration and shall be of a sufficient number provided for in article of association for the Board's meeting quorum to be attained".

In the same spirit, the law entrusts the management and administration of companies to the board of directors. At the same time, directing and supervision of the company's management is also under the board's authority[245]. The role of the Board and their duties shall be further discussed in the 4th chapter of this work and shall not take much space under this subsection.

Alongside the executive and non-executive members of the board however, the law also mentions officers who, to a certain extent, take or influence the taking of decisions on

[244] Art. 143 *Ibid* provides that:
"The chairperson of any meeting of shareholders shall give the shareholders a reasonable opportunity to discuss and comment on the management of the company. A meeting of shareholders may pass a resolution under this article which makes recommendations to the Board of Directors on matters affecting the management of the company".
[245] Art. 169 of the Law N°07/2009 of 27/04/2009 Relating to Companies provides that:
"The business and affairs of a company shall be managed by, or under the direction or supervision of the Board of Directors. The Board shall have all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company".

the company's behalf. Such officers include but are not limited to the Company Secretary whose duties are elaborated by the law[246] as being:

"1° to advise members of the Board of Directors on their responsibilities and powers;

2° to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and submission of all company documents required by the law to relevant organs as well as consequences due to the failure to comply with such regulations;

3° to ensure that minutes of the meetings of shareholders or the Board of Directors are well prepared and that registers provided for by the articles of association are accurately kept;

4° to make sure annual balance sheet and other types of required documents are submitted to the Registrar General as provided for by this Law;

5° to ensure that copies of annual balance sheet and activity reports are transmitted to relevant destinations in accordance with this Law and to any person as provided by the law"

Martin has noted that the corporate duties of a company secretary in the UK in his position as a compliance officer are to:[247]

- *Maintain statutory registers;*
- *Update registrar of companies on records;*
- *Ensure compliance with the company law*
- *Liaise with the shareholders;*
- *Prepare legally required documentations;*
- *Convene company and Board meetings;*
- *Compile minutes of meetings;*
- *File accounts and annual returns on time;*
- *Carry out Board instructions;*
- *Liaise Stock Exchange/listing requirements/agreements;*
- *Act as Board/Chairman's confidante;*
- *Act as Chief Administrative Officer;*

[246] Art. 11 of the Law N° 14/2010 of 07/05/2010 Modifying and Complementing Law N° 07/2009 of 27/04/2009 Relating to Companies, *Official Gazette n° special of 14/05/2010.*
[247] Martin D., *Corporate Governance: Practical Guidance on accountability requirements*, Thorogood Publishing Ltd, 2006, pg. 27.

- *Preserve and protect company's records, etc.;*
- *Ensure all proper returns are made on time;*
- *Oversee all legal matters;*
- *Protects the positions of the officers;*
- *Ensure legal compliance with:*
    - *a) Company and commercial law;*
    - *b) Health and safety law;*
    - *c) Employment law;*
    - *d) Pensions law (stakeholders), etc.*

Because an important part of the role of a Company Secretary in Rwanda is to further compliance, the duties as mentioned by Martin can be regarded as essential to that role. The Company Secretary also acts as a decentralized registrar's office at his/her particular Company for the purposes of filing company documents[248]. It should be noted however, that neither officers nor Board members can claim for exoneration from liability due to the Company Secretary's failures.

Worth noting is that the law sanctions officers the same way it does with directors for any breach of their duties vis-à-vis the company[249]. And, due to the importance the law attaches to this officer of the company, any appointment, resignation or replacement of this officer has to be notified to the Registrar General, and that his/her (company

[248] Art. 234 indicates the list of documents that have to be kept by the registered office of the Company and these are:
1° the Articles of association;
2° minutes of all meetings and resolutions of shareholders within the last ten (10) years; 3° an interests register for directors;
4° minutes of all meetings and resolutions of directors and directors" committees within the last ten (10) years;
5° certificates given by directors under this Law within the last ten (10) years;
6° the full names and addresses of the current directors;
7° copies of all written communications to all shareholders or all holders of the same class of shares during the last ten (10) years, including annual reports;
8° copies of all financial statements ,for the last ten (10) years completed accounting periods;
9° the accounting records for the last ten (10) years;
10° the shares register;
11° the copies of instruments creating or evidencing charges required to be registered under this Law.
[249] See for example art. 212 of the Law N°07/2009 of 27/04/2009 Relating to Companies which stipulates on the liability for a director or officer who commits a breach of duty. Such duties of company officers are elaborated in the preceding article (Art. 211) in the following words:
"Every officer of a company shall exercise :
1° the powers and discharge the duties of his/her office honestly, in good faith and in the best interests of the company;
2° the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

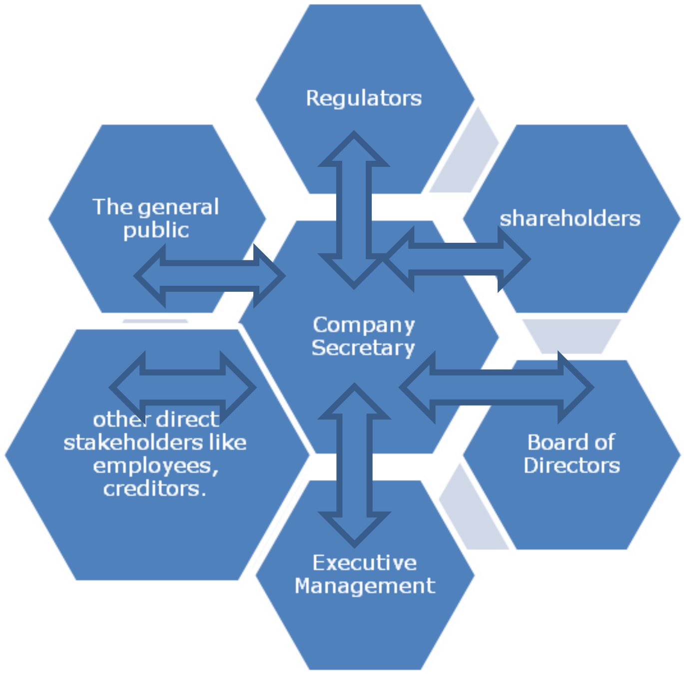
secretary's) office cannot be left vacant for three months consecutively[250]. It should be noted however that, despite it being mandatory to all medium and big companies, only a few *modern*[251] companies have such officers in place.

It is assumed that where a Company Secretary is well in place and professionally functional, corporate governance issues would easily be highlighted in advance to be attended to by relevant organs in the interests of the company. The Company Secretary is the company's principal legal, administrative and compliance officer[252] and is the link between the board and the executive management of the company, and the link between the company and its regulators. The Company Secretary will translate the resolutions from the board to executive management for easy implementation and shall communicate relevant decisions to concerned regulators for either information and/or filing.

The diagram (figure) below shows the central role (link) and relationship between the Company Secretary and the different categories of people on behalf of the company both internal and external.

[250] Art. 220 of the Law N°07/2009 of 27/04/2009 Relating to Companies.
[251] The so-called modern companies are those that are trying to organize them in the fashionable ways of modern companies that have the Company Secretary who organizes for, and reports to the Board and its Committees.
[252] Joanne Cox eds., Business Law, 5th Edit., Oxford University Press, 2012, pg.78

Figure 2: The relationship and central link between the Company Secretary and other stakeholders of the company



Source: Author's Own drawing

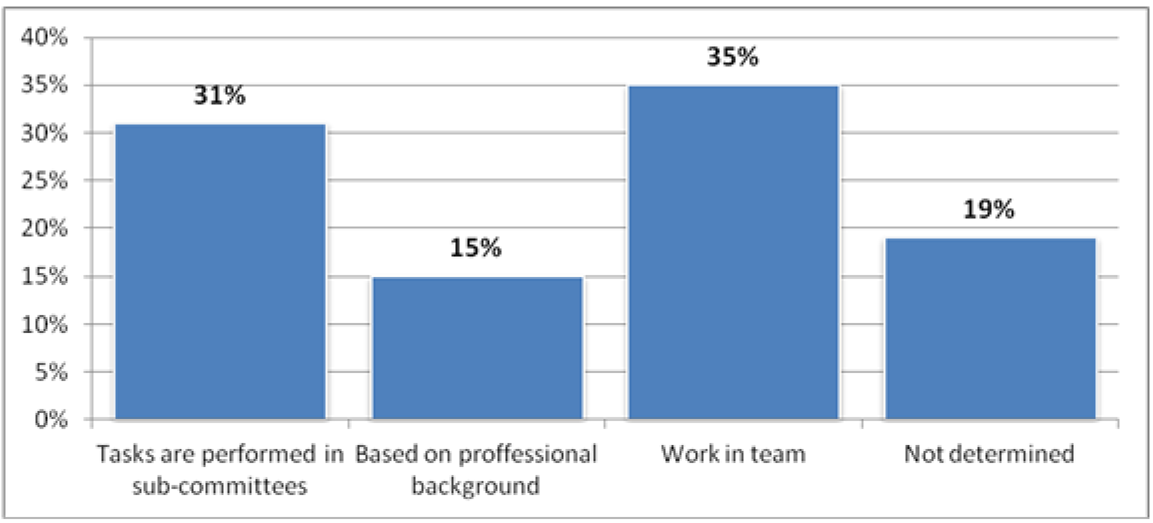
2.4.1.3 The role of internal auditors

Generally, the internal audit[253] and control framework for a given company is made effective and efficient through the internal audit department. It is clear that the overall oversight by the board to internal controls of the company cannot be effective and efficient without having a well-positioned internal audit team. In some companies too, compliance departments are imposed. This is the case with banking and financial institutions in general. However, for other companies, the compliance functions can be combined with the usual internal audit functions. Internal audit helps the board audit committees and the entire board of directors, to closely keep the integral organisation's

[253] Internal Audit has been defined by the International Standards for the Professional Practice of Internal Auditing of the Institute of Internal Auditors (http://www.iia.org.au/aboutIIA/whatisinternalaudit.aspx) as:
"An independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and **governance processes**".

corporate governance framework on track. This will however depend on how the corporate governance framework of a particular company is structured, how the audit department shall be resourced[254] and empowered and on the terms of reference the department or the committee will be operating[255]. The existence of a board audit committee may also reinforce the effectiveness of the internal audit committees due to the close and direct supervision exerted upon it. Not all boards of companies in Rwanda are subdivided into subcommittees. Our survey conducted with Rwandan company directors indicates that only 31% of the total respondents as indicated in the graph (figure) below (on the question: *How are Board tasks distributed amongst the board members?*) confirmed that their Board tasks could be distributed amongst Board committees.

Figure 3: Board tasks distribution



So, where Board tasks are done in a team (as over and above 50% of the respondents confirmed), it will be hard for the Board to be fed with the realistic situation of the company as the internal audit team may then be easily controlled by the executive management. The 2009 Company law seems unconcerned about the Internal Audits of

[254] Art. 10 par.2(d) of BNR Regulation Nº07/2009 of 29/07/2009 on Corporate Governance Requirements for Insurance Business, *Official Gazette n°35 0f 30/08/2010*

[255] The Internal audit Terms of Reference should be giving clarity of, at least among others:

- Strategy and objectives;
- The role and responsibilities within the organization;
- Scope of work;
- Accountability to the audit committee;
- Reporting lines for line management purposes;
- Accessibility to the Board and audit committee; and unfettered access to all information, people and records across the organization.

companies and their role regarding corporate governance as it only provides for external auditors and how they are appointed, remunerated and removed[256]. External auditors are, however, only concerned with one of the issues (finance) affecting the company. The internal auditor's scope of control is broader than just looking at finances. The table below gives a perspective of the two auditors compared.

A comparison between Internal and External Auditors[257]

ASPECT	INTERNAL AUDITOR	EXTERNAL AUDITOR
Mandate	Broad based assurance program set with the Board and Senior Management. This usually includes the adequacy of the company's risk management framework, operational performance of business units, integrity of management reporting and other areas as requested by the Board and Senior Management.	Statutory opinion to shareholders on the accuracy of the company's annual report and financial statements.
Reporting relationships	Primarily responsibility to the board via the audit committee. Works closely with management, with the aim of providing independent insight to the senior management, the CEO and the Board Audit Committee.	Primarily responsibility to shareholders via the audit committee and Chief Financial Officer. Also available for questions by shareholders at the AGM.
Areas of Focus	Organisation wide – all areas, all departments, all functions.	Finance & accounting

[256] A great deal of articles in the 2009 Law on Companies (Arts. 240 - 250) have been dedicated to External Audit and its role but no single provision hints on the internal audit and its functioning!
[257] This table is drawn in reference to what was presented in: "An auditor is an auditor … right?",*The Institute of Internal Auditors of Australia*: http://www.iia.org.au/sf_docs/default-source/about-iia/An_auditor_is_an_auditor_right.pdf?sfvrsn=0 ; accessed on 09/05/2014. Only parts relevant to the Rwandan system are used.

Approach	Sufficient work undertaken to provide insight and given an informed independent view to the Board and Senior Management.	Sufficient work completed to form an opinion on the financial statements.
Independence	Part of the organisation but independent of management - independence is achieved by reporting to the Board (via the Board Audit Committee)	Is external to the organisation.
Risks and Controls	Provides an independent view on the organisation's risk management, risk assessment and governance processes. Reviews the adequacy of control design to ensure that risks are effectively managed, and then tests operation of key controls to ensure they are operating as intended and therefore are effective in managing the company's risk.	Identifies risks and assesses controls over financial reporting and places reliance on controls to the extent practicable. Emphasis is on gaining sufficient audit evidence to conclude that the financial statements present a true and fair view.

Specific Rwandan rules[258]only make it mandatory for board audit committees of some companies, especially the financial institutions [259], to ensure that internal audit departments are well in place and that they are functional and effective.

[258] Regulation Nº07/2009 of 29/07/2009 on Corporate Governance Requirements for Insurance Business, Official Gazette n°35 0f 30/08/2010; Regulation N° 06/2008 on Corporate Governance of Banks, Official Gazette n° 02 of 10/01/2011.

[259] Art. 10 of BNR Regulation Nº07/2009 of 29/07/2009 on Corporate Governance Requirements for Insurance Business, *Official Gazette n°35 0f 30/08/2010* makes it mandatory for financial institutions to have internal audit departments and goes further to show how it should be standing where in a relevant

2.4.1.4. The role of employees

The role of employees in relation to corporate governance is not that significant in Rwanda as it might be in some countries in Europe even though their involvement and participation is, in general, crucial to corporate governance[260]. Some companies do have staff associations (Unions) as the labour law[261] requires but in most cases they are set up either as a formality to fulfill the legal requirement or to settle just minor Labour

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part it provides that:

"It is the responsibility of the board to develop a strong internal control culture within its organization and to establish and maintain an effective internal control system to ensure that:

a. the business of the institution is conducted in a prudent manner in accordance with policies and strategies established by the board;

b. transactions are only entered with appropriate authority;

c. assets are safeguarded;

d. accounting and other records provide complete, accurate, verifiable and timely information;

e. management is able to identify, assess, manage and control the risks of the business and hold sufficient capital for these risks; and

f. All outsourced functions have proper oversight and clear accountability.

It is also the responsibility of the board to set-up an effective internal audit function of a nature and scope appropriate to the business which shall have:

a. unfettered access to all the insurer's business lines and support departments;

b. appropriate independence, including reporting lines to the board or the board audit committee;

c. necessary status within the insurance company to ensure that senior management reacts to and acts upon its recommendation; and

d. sufficient resources and staff that are suitably trained and have relevant experience to understand and evaluate the business they are auditing.

…"

Art. 10 of BNR Regulation N° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02 of 10/01/2011* also makes it a duty of the Board to establish an **effective** Internal Audit department in the Bank where it says:'

"It is the responsibility of the board to set-up an effective internal audit department, staffed with qualified personnel to perform internal audit functions, covering the traditional function of financial audit as well as the function of management audit".

[260] Lower M., *Employee participation in Governance: A legal and ethical analysis*, Cambridge University Press, 2010.

[261] Art. 161 of the *Law No. 13/2009 of 27/5/2009* regulating labour in Rwanda (***O.G. n° special of 27/05/2009***) provides that every firm or company that employs at least ten (10) employees shall have employees representatives elected by his/her peers. The role of these representatives in the firm/company's business is defined as:

1. to inform the employer of individual and collective claims relating to work;

2. to submit to the labour inspectorate any claim or any issue relating to application of the laws; 3. to ensure that laws relating to worker's health and protection against accidents are complied with and advise on compliance;

4. to contribute ideas on the plan for staff compression and criteria to be used due to job shortage or that employer has planned to restructure the functioning of firm;

5. to communicate to the employer all useful suggestions aimed at the firm's better functioning and output improvement.

issues but without a major input and impact in as far as corporate governance of companies is concerned.

2.4.1.5 Outside controls

External control may also have an impact on corporate governance, although not to the same extent as the internal controls. The notable ones to be discussed hereunder are; the role of external auditors, the trade unions, environmental activists and the civil society in general.

2.4.1.6 The role of external Auditors

The position of external auditors whether regarding their appointment or the scope of their work, is well articulated both in the Company Law (Arts. 238 - 252) and in the various regulations[262] for certain business sectors. Principally, external auditors come in to verify whether the finances and accounting procedures are managed in a professional manner and in accordance with both mandatory and any other agreed upon standards. Article 247 of the Company law specifically provides for of the auditor's report among which is the auditor's opinion on whether identified problems could in any way be linked to the management of the company[263].

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[262] Art.25 of the BNR Regulation nº07/2009 of 29/07/2009 on corporate governance requirements for insurance business, *Official Gazette n°35 0f 30/08/2010* mentions about the external auditors and their link to the Board audit committee. The same is provided for in Art. 25 of BNR Regulation N° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02 of 10/01/2011.*

[263] Art. 247 of the Company Law 2009 provides that:

"…

The auditor's report shall state the following:

1° the work done by the auditor;

2° the scope and limitations of the audit;

3° the proof that there is no relationship, no interests and debt which the auditor has in the company; 4° whether the auditor has obtained all information and explanations he/she needed;

5° whether, proper accounting records have been well kept by the company;

6° whether, in the auditor's opinion, the financial statements give a true and fair view of the matters to which they relate, and where they do not, shortcomings are identified;

7° whether, the financial statements comply with the international accounting standards;

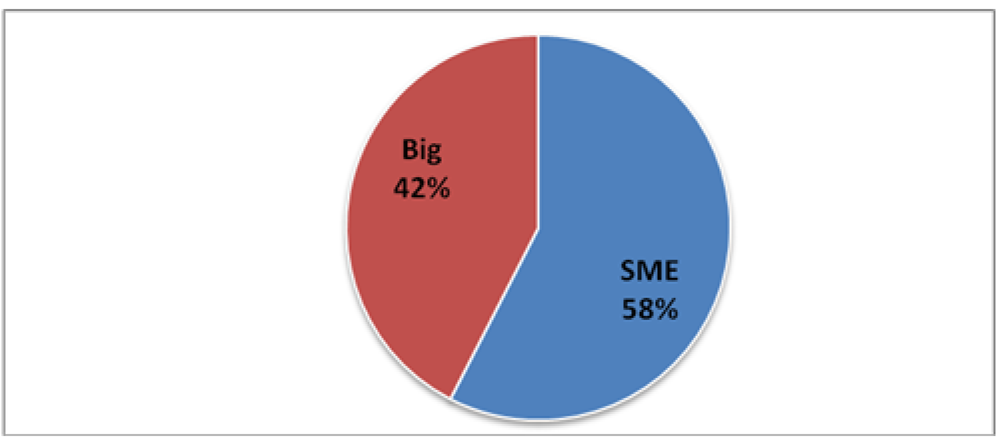
8° the auditor's opinion and problems that are linked with the company's management;

9° the auditor makes recommendations with regard to the identified problems".

2.4.1.7. The role of institutional investors

Institutional investors ordinarily mean "Large organizations (such as banks, finance companies, insurance companies, labour union funds, mutual funds or unit trusts, pension funds, etc.) which have considerable cash reserves that need to be invested."[264] However, in the Rwandan context, I will prefer to define the institutional investors as those huge (in Rwandan context) companies or groups of companies that have mobilized large sums of money that can be invested in other companies in different sectors of the economy. I will not, in any way, relate institutional investors with the Stock Market or trading in Securities as we have noted earlier that participation at the Stock Market by Rwandan Companies is still low. I will instead focus on how these huge companies are carrying out their investments in other companies and how they may possibly influence corporate governance in those other companies. This is because, even though there has not been any official statistics on the composition / categorisation of companies in Rwanda in terms of Small, medium or big, the survey findings in this research have shown that majority (almost 60%) of them would be categorized as SMEs.

Figure 4: Self-categorization of companies by the respondents



Source: Author's Own research

NB, Respondents were free to categorize their companies as either SME, Medium or Big.

[264] Business Dictionary at http://www.businessdictionary.com/definition/institutional-investors.html accessed on 12/05/2014.

Institutions that may be referred to as institutional investors in Rwanda are still few, just like the economy itself is still small as indicated by the number and size of companies (in the chart above). The major institutions or companies include the Rwanda Social Security Board (a Pensions and Health Fund) formerly, Rwanda Social Security Board (RSSB) but which was later in 2011 merged with *La Rwandaise d'Assurance Maladie* (RAMA) to form RSSB. RSSB has invested a lot in the sectors of agriculture, real estates, construction, tourism, factory, education, just to mention a few. In all these sectors, RSSB invests a sizable amount and often nominates a board representative in such companies.

The other that has diversified its investments would be Crystal Ventures (CVL) Ltd which has also widely invested in telecommunications, agro-processing, security services, real estates and civil engineering (construction) services as well as in the Energy sectors. Unlike RSSB that does not directly influence the governance of those corporations invested in, CVL Ltd does effectively influence the governance of corporations where it invests. It becomes easier for CVL Ltd mainly because in most of such companies, it is either the 100% shareholder or at least, is the majority shareholder with just a few exceptions. Currently, CVL Ltd's investments are various, among others, in civil works and concrete products, construction and real estate development, telecommunications, agriculture and agro-processing, aviation charter services and security services, printing and publishing, furniture trading and manufacturing, building materials, media systems, property management and engineering services[265], among others. So, the company democracy rule which determines the voting power by the percentage of a shareholding leads to the result that a company shall be directed to the strategy that the shareholder or the majority shareholder chooses. Other institutional investors but whose investments are not so significant would include: The Rwanda Development Bank (BRD), insurance companies like SONARWA and SORAS, Rwanda Investment Group (RIG), Prime Holdings, Horizons Group Ltd, Imanzi Investment Group Ltd and a few others.

It should be noted however that, apart from CVL and to a lesser extent, the Horizons Group Ltd, the influence of the Institutional investors on the corporate governance whether at companies' level or at the national level is quite limited.

[265] Crystal Ventures (CVL)' Portfolio available at: http://www.crystalventuresltd.com/portfolio , accessed on 14/05/2014.

2.4.1.8. The role of pressure groups – Trade Unions[266], Environmental Activists, and Civil Society

Corporate Governance being a new concept in Rwanda has not yet captured the attention and concern of either Trade Unions or environmental activists. Besides, Trade Unions in Rwanda like the CESTRAR (Trade Union Centre of workers of Rwanda) are not so vibrant in the corporate setting or in the labour industry in general. Environmental issues are tightly monitored by the Government's regulatory authority – Rwanda Environment Management Authority (REMA). However, REMA's influence has not extended to corporate functioning and management apart from ensuring some environment impact assessments for projects to be implemented by various companies. Worth noting however is that some members of Civil Society (CSOs) in Rwanda have started investigating how private companies are managed and how general management behaves. Such CSOs include for example, the Transparency International Rwanda (TI Rwanda) which, in conjunction with the Rwanda Governance Board (RGB) conducted a research on Governance Scorecards among which was the assessment of the corporate governance of private companies[267]. However, it is worth noting that such research carries no significant influence since there is no mechanism or forum through which such or similar research findings would be disseminated to the respective corporate actors.

2.4.1.9. The role of banks and other financing institutions

Banks and financing institutions in Rwanda will often assess the corporate governance of a given company before financing its intended projects[268]. However, such an assessment is often restricted to looking at whether there is a board already established that will ensure that the resources shall not be wasted. After the assessment the loan

[266] Whereas trade unions have already been mentioned under subsection on the role of employees above, we note that as already mentioned, there is a statutory and mandatory requirement to have an employees union at the company level where the company employs at least 10 employees, but this does not stop employees to be members of other general trade unions outside their particular companies. Trade Unions referred to here under this section are those general ones that form part of the civil society organizations.

[267] Rwanda Governance Scorecard 2012; available at http://www.rw.undp.org/content/dam/rwanda/docs/demgov/RW_RGS%202012%20Final%20Report%2006_05.pdf Accessed on 12/05/2014

[268] In an interview conducted with some heads of Credit departments in various banks (with Juvenal Kalema of BRD on 22nd October 2014 and John Ngang of Access Bank on 13th November 2014) it was revealed that among the requirements for corporations to be granted the loans they applied for, a scrutiny on their governance structure is judged important.

will be easily provided. This to some extent has prompted various companies to put up corporate board structures irrespective of their commitment to good corporate governance. Companies will therefore rush to solicit for distinguished personalities with dazzling Curriculum Vitaes and profiles just to impress their financiers. In practice however, such wealth of know-how and experience from those personalities is never benefited from or put to use by these companies and the financing institutions have not done much in assessing whether such boards are effective or functioning at all.

2.5. Self-regulation of companies

Self-regulation implies an imagined situation where companies in Rwanda would be self-controlling in all their activities and processes without or at least with a limited intervention of the central government or any other regulators. Whereas this is an utopia given that nowhere else in the world exists, it has been noted that in Rwanda there is practically no infrastructure that would guarantee a self-regulatory environment. Self-regulation would be possible where companies have sufficient infrastructure, human capacity, vigorous, effective and independent internal control mechanisms and framework in place. Until companies and the private sector as a whole are informed and well equipped with what it takes to have a self-regulatory environment, the regulatory intervention by the government and its institutions remains inevitable. The Rwanda Private Sector Federation (PSF – see 2.4.1 below) acknowledges the weaknesses but is at the same time optimistic that businesses would more efficiently regulate themselves than regulators can and that with the concerted efforts of all businesses, it can be achieved[269]. In the section that follows, I discuss a few examples of the private sector interventions.

2.5.1. The role of the Private Sector Federation (PSF)

The Private Sector Federation (PSF) in Rwanda groups together businesses from different industries and at different levels. Its services include training and development to both well established companies and to start-ups in their respective specific training needs. Besides, it coordinates the advocacy role for the entire business sector and thus links it both to the government and its regulatory agencies but also to foreign investment

[269] Code of Business Ethics and Excellency, Rwanda Private Sector Federation, July, 2009, pg. 4., available at http://www.psf.org.rw/IMG/pdf/business_ethics_en.pdf , accessed on 12/05/2014.

opportunities. In terms of corporate governance, the federation has done its best and has so far published two important codes: The Guiding Code of Corporate Governance[270] and the Code of Business Ethics and Excellency[271] both of which are not mandatory but which companies are persuaded to adopt for their own benefit. In the Code on Business Ethics and Excellency, the PSF goes even further in its preliminary pages to suggest that it would request the National Public Procurements Authority (NPPA) to only shortlist for public tenders those companies that have adopted the code. Due to the small size of the private sector, the primary and major client / market is from the public institutions. This means that if a business does not behave and gets black-listed in public books, it may lead to an automatic failure and even to voluntary closure and winding-up! The same efforts would be employed by the federation in convincing the association of bankers in persuading them not to offer loans to businesses that have ignored the code.

This research was not able to verify to what extent either of these two codes published by the private sector federation has been adopted or whether and to what extent the federation itself has endeavoured to disseminate the contents and the need for the two codes to be adopted by the business community.

2.5.2. The role of Professional organizations

Professional organizations also have some role to play in the welfare of corporations or a specific industry. Often, this is the main reason why such specialised professional bodies are established. Examples include; the Association of Bankers, Association of Insurers, Association of mining companies in Rwanda, Association of exporters, Association of professional accountants (ICPAR) and to a lesser (external) involvement, the Rwanda Bar Association (bringing together all practicing Lawyers in Rwanda). Some of these provide trainings, organize informative and awareness seminars, trainings and peer discussion forums on important issues of policy or governance to their membership while others like accountants and lawyers provide related professional opinions and advices.

The Association of Bankers for example has, though not so often, organized some training sessions within its sector to enhance the knowledge in the Banking industry. They have organized trainings on: Fundamentals in Banking for young professional;

[270] The Guiding Code of Corporate Governance; Private Sector Federation, July 2009, http://www.psf.org.rw/IMG/pdf/corporate_governence_en.pdf , accessed on 12/05/2014
[271] Code of Business Ethics and Excellency, Rwanda Private Sector Federation, July, 2009, pg. 4., available at http://www.psf.org.rw/IMG/pdf/business_ethics_en.pdf , accessed on 12/05/2014.

Finance for non-finance professionals but who are part of the banking team; Corporate Governance and Risk Management for the top managers in banks including the members of the board of directors. If these trainings were frequently held and throughout the professional organisations, there would be a certain guarantee for the effective conduct of business since many issues or challenges businesses are facing would easily be discussed through such forums. However, the membership of these organisations excludes small and medium companies or start-ups which, as seen before, are the actual back-bone of the economy. In any case, these trainings, even if open for participation, are very expensive for small companies to attend. A case in point are the three trainings mentioned above that were organised by the association of bankers which cost 900 USD, 600 USD and 1000 USD respectively excluding transport and accommodation for the training that was to take two days. This therefore requires an intervention at the policy makers' level on how small and medium companies can acquire skills and share experiences at affordable rates.

2.6. Conclusion

From this chapter, we note that Rwanda's economy in the private sector is dominated by small and medium corporations[272] and that their framework depends on the wide web-like formation that mainly involves public laws, regulations and regulators[273]. The legal framework consists of laws, general regulations but also specific ones that regulate specialised areas. In the introductory part of this chapter, we noted that although the company as a business organisation does not have a very long history in Rwanda, the legal framework and the regulatory environment to ensure corporate governance and monitoring is available[274]. Corporate governance in Rwanda is influenced by various interventions both from the public but also from the self-regulatory side. Corporations in Rwanda are bound by various laws and regulations at a central level. In addition to being governed by the general company law, some are even further governed by specific regulations and codes of corporate governance (which are mandatory)[275] depending on their area of business. For Public companies for example, they are bound by the mandatory Stock Exchange listing requirements. On a general note however, companies are advised to adopt the 'Best Practices' provided for by the

[272] Reference is made to the discussion under *2.4.1.7* on the role of institutional investors.
[273] See for example the discussion under *2.2.3.3.1* on the role of the RGO in the functioning and governance of companies in general, as well as that under *2.2.3.3.2* on the role of Central Bank in particular in relation to its supervisory role in regard to the functioning and governance of banks and other financial institutions. Various regulations are issued by a public regulatory agency/institution.
[274] Especially that it was the *raison-d'être* for enacting the 2009 law as discussed under *2.2.3* of this work.
[275] Like those issued for financial institutions (banks and insurance companies) by the Central Bank highlighted under *2.2.3.3.2* above.

Code of Corporate Governance by the Private Sector Federation of Rwanda and the Code of Ethics and Excellence[276].

Professional organizations have also contributed to the shaping of today's corporate image in Rwanda but their activities are still limited and are only enjoyed by big corporations[277]. It is also noted that self-regulation has to be emphasized since; even the public enforcement by regulatory authorities can only be successful where the regulated are well aware of the corporate and economic benefits behind such regulations.

[276] See the discussion under *2.4* on the self-regulation of companies.
[277] See in *2.4.2* above.

CHAPTER THREE: CORPORATE GOVERNANCE IN CONTEXT

3.1. Overview of Corporate Governance

Corporate governance is a relatively new and a wide concept. It has been used differently across various disciplines especially in law and economics[278]. Interestingly though, corporate governance's primordial role in today's human economic welfare and growth is clearly marked irrespective of the discipline. It is judged imperative therefore to elaborate on what the concept means and what it stands for. Under this chapter, the concept shall be defined and the different theories around which the concept is built shall be discussed. Also its application and interpretation in Rwanda and in some other systems like the UK shall be highlighted. Under this chapter too, the role of company directors as agents that ensure corporate governance shall be discussed. The general purpose for this chapter is to discuss the concept as a source for the directors' duties and a basis for directors' self-evaluation on whether in their daily activities of directorship, the basic principle objectives of corporate governance are met. This chapter precedes another chapter (chapter four) that discusses the directors' duties and liabilities.

3.1.1. Corporate Governance defined

Corporate governance has attracted a wide range of definitions from different sources and disciplines. However, as shall be noted below, they all revolve around the issue of 'who should be the beneficiary of the corporate activity' or as is normally put, who shall be the 'residual claimants'[279]. Although the two dominant theories (shareholder value and stakeholder approaches) of corporate governance have rivalled for some time now, convergence of corporate governance practices is more likely today than ever[280]. The complex nature and functioning of a corporation as discussed in chapter one of this work shows that no one, whether the capital provider, the manager, the employee, the consumer or the regulator has the overall control of the company's events. The

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[278] Some like Klaus J. Hopt of the Max Planck Institute and the ECGI has clearly come up to even mention that the concept of "Corporate Governance" is not a Law concept. See Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, The ECGI Law Working Paper No. 170/2011, January 2011.

[279] Who should benefit from what the company does.

[280] Vaughn, M., Lori Verstegen Ryan, 'Corporate Governance in South Africa: A bellwether for the continent?',*Corporate Governance: An International Review, Vol. 14, Issue 5*, September 2006.

interdependence of corporate players has thus called for a convergence of the two former rival approaches in order to have a comprehensive approach that would ensure the sustainability of the corporate form of business that is beneficial to all. Despite this likely convergence however, Nestor and Thompson [281] note that governance arrangements will remain to a certain extent somewhat idiosyncratic to each region, due to varying cultures and history.

3.1.1.1. Some singled out definitions of 'Corporate Governance'

A few definitions have been singled out hereunder, mainly from international organizations and bodies like the World Bank, the OECD and others that are particularly relevant to good corporate governance, but also from some renowned authors in that field both from law and economics.

The term or the concept of "corporate governance" derives from an analogy between the government of nations or states and the governance of corporations[282]. Corporate Governance has had no precise and commonly accepted definition to date and its meaning is mainly due to the point of departure for the one defining it. Each definition has necessarily been influenced by the locally existing agency problems[283], which themselves stem from the socio, cultural as well as legal traditions of different jurisdictions. However, the most dominating and fashionable definition (not necessarily the precise one) as Farrar[284] notes, is that it is the way how corporate institutions are governed and controlled. This definition originates from the popular Sir Adrian Cadbury

[281] Nestor, S. and Thompson, J. K. (2000) Corporate Governance Patterns in OECD Economies: Is Convergence Under Way? Organisation for Economic Co-operation and Development. Available at: http://www.oecd.org/dataoecd/7/10/1931460Pdf (Accessed on 8/04/2013).

[282] Alexander N. Kostyuk et al, *Corporate Governance*, VirtusInterpress, Sumy (Ukraine), 2007.Chap.1

[283] For Varying definitions of Corporate Governance, see for example: J H Farrar, *Corporate Governance: Theories, Principles and Practice* (3rd Ed), Melbourne, Oxford University Press, 2008, pg.1, See also: Farrar, J. H. (2008). "The corporate governance of SMEs and unlisted companies".*New Zealand business law quarterly*, 14(4), 213-230; See also: John H. Farrar. "Corporate Governance and the Judges" *Bond Law Review* 15.1 (2003). Available at: http://works.bepress.com/john_farrar/10; For the conflicting "Agency problems", the discussion is in the following sub-paragraph.

- JOHN C. C, 'Unstable Coalitions: corporate governance as a multiplayer game', in *The battle for corporate control: shareholder rights, stakeholder interests, and managerial responsibilities*, edited by A. W. Sametz, in collaboration with James L. Bicksler, Business One Irwin, Illinois, 1991;
- Definition by the Australian Stock Exchange Corporate Governance Council; Principles of Corporate Governance and Best Practice Recommendations, March 2003;
- The definition as given by: Becht, Marco, Bolton, Patrick and Röell, Ailsa A., in "Corporate Governance and Control" (October 2002). ECGI - Finance Working Paper No. 02/2002. Available at: SSRN: http://ssrn.com/abstract=343461 or doi:10.2139/ssrn.343461

[284] Ibid.

report of 1992[285] in the UK but has been reviewed by Cadbury himself since[286]. Nevertheless, for the purposes of this work, a few other definitions will be presented in order to have a broader view of the concept whether from the Rwandan context or elsewhere in the world.

Jonathan R. Macey[287] notes that corporate governance is a broad descriptive term rather than a normative term and that it describes all the devices, institutions, and mechanisms by which corporations are governed. He argues that, anything and everything that influences the way corporations are managed falls within the scope and meaning of corporate governance. Jonathan sees corporate governance as a promise and he notes that corporate governance is all about reducing all the deviances by corporations (which he refers to as 'bad governance') where deviance is defined as any actions by the management or directors that are at odds with legitimate, investment-backed expectations of investors[288] and so, is all about keeping promises.

From the economic point of view, Mathiesen [2000] finds corporate governance to be "a field in economics that investigates how to secure/motivate efficient management of corporations by the use of incentive mechanisms, such as contracts, organizational designs and legislation. This is often limited to the question of improving the financial performance, for example, how the corporate owners can secure/motivate that the corporate managers will deliver a competitive rate of return."[289] Such a definition is aimed only at how the business (the firm) can best increase its returns to its investors and it leaves out other important issues like corporate social responsibility[290] to the community. In other words, Mathiesen's definition is only limited to the relationship between the corporate owners on the one hand, and the directors and managers on the other, and covers basically how much returns the latter bring to the former. This definition stands for the shareholder approach that shall be discussed later.

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[285] Sir Adrian Cadbury Committee, 1992.

[286] Sir Adrian Cadbury revised his definition (*ibid*) in 2003 when he broadened it by saying:
"In its broadest sense, corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally, to require accountability for the stewardship of these resources."

[287] Jonathan R. Macey, Corporate Governance: Promises Kept promises broken, Princeton University Press, Princeton, New Jersey, 2008, pg. 2.

[288] Ibid., at 1.

[289] http://www.encycogov.com/WhatIsCorpGov.asp

[290] For more about the relationship of corporate social responsibility and corporate governance, see: T. E. Lambooy, Corporate Social Responsibility: Legal and semi-legal frameworks supporting CSR, Kluwer, Deventer, The Netherland, 2010, p. 49.

The above definition is also in agreement with what John C. Coffee, Jr., takes to be a conventional understanding of corporate governance by both law and economics. According to Coffee, corporate governance is always taken to be simply a principal/agent relationship and under this view, shareholders are the principals, and the management are the agents. He notes that, the two (lawyers and economists) conceive corporate governance as basically the study of how legal and market forces combine to enable shareholders to hold management faithful to their interests. In other words, shareholders must hold their agents accountable for their activities.[291] However, whereas the relationship between these two parties or even the accountability principle are not disputed here because it is relevant to the major purpose of this research on the *liability of corporate directors*, the definition remains incomplete as at least the entire team in corporate governance commonly referred to as *stakeholders*, is left outside the gates of the pitch in favour of just a few, considered to be the key players – shareholders and management. Once we recognize that there are at least three essential players in the game (corporate governance) i.e., management, shareholders, and other stakeholders, the simple principal/agent relationship becomes nuanced to bring out the true picture of corporate governance. What underlies Coffee's theory and his definition of corporate governance is the assumption that the equation of corporate governance can only be limited to the principals (shareholders) and agents (the management).

By trying to define corporate governance, the Organization for Economic Co-operation and Development (OECD)[292] broadens the concept and addresses what corporate governance all entails by also including *other stakeholders*[293]. The OECD states that:

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

[291] JOHN C. C, 'Unstable Coalitions: corporate governance as a multiplayer game', in *The battle for corporate control: shareholder rights, stakeholder interests, and managerial responsibilities*, edited by A. W. Sametz, in collaboration with James L. Bicksler, Business One Irwin, Illinois, 1991.

[292] The OECD member countries (as of 22/03/2013) are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. *See,*http://www.oecd.org/about/membersandpartners/ Accessed on 22/03/2013.

[293] I talk of other stakeholders because the shareholders and the management are also part of stakeholders but they are not the only ones. Others like employees, creditors, customers, regulators, etc. are also part of the stakeholders.

structure through which the company objectives are set and the means of attaining those objectives and monitoring performance".[294]

This definition shows the relationships that exist between different participants in a corporate life. It shows the relationships between the company's management, its board, its shareholders and other stakeholders like the employees. It should be noted however that, even though this 'definition' by the OECD broadens the concept, it leaves out some issues and, according to Dorresteijn and De Groot, the concept of corporate governance has many ramifications mainly from the ethical point of view - to mean abstaining from the violation of laws, regulations and moral standards - and corporate social responsibility.[295] The issue of corporate ethics is among the pertinent issues in viewing corporate governance in a broader context. It is the corporate ethics that help to build the corporation's credibility and image. This is achieved only when corporate authorities fulfil their tasks in an ethical and transparent manner which befits accountability principle.

In analysing which qualities will be sought to know which company was well managed and expected to deliver, Matthew Boyle summed it up to the *Fortune magasine's* most admired companies as follows;

"What qualities we will admire most in the years ahead? That is an easy one- in the near term, at least. Thanks to the Enron implosion and the subsequent rash of accounting and corporate governance scandals, the credibility of any corporation is no longer assumed. It must be earned. If you don't lay all your cards on the table, we will assume you are a cheat. It is not enough to have a great brand, dazzling returns, and a charming CEO. Now more than ever, trust is the sine qua none of reputation. There is no mystery about that".[296]

Trust is central in regard to corporate governance where, it is assumed, that these agents – the directors and officers, are simply stewards for individual shareholders, the company itself and the public at large. Sam Owol[297] notes that:

[294] http://www.oecd.org/home

[295] DORRESTEIJN, A. F.M., and De Groot, C., 'Corporate Governance Codes: Origins and perspectives', [2004] 1 European Company law, Kluwer law International, pp. 5-18.

[296] Dean Williams, Williams Savvy & Associates, in an article: *What would you have done?* At http://www.savvypr.com/iabcethicscolumn3.html, accessed on 22/07/2006.

[297] Sam Owol is a Chief Executive Officer of the Institute of Corporate Governance of Uganda. He made the remarks in a ICGU dinner at Serena Hotel in Kampala (see report by Samuel Sanya in The NewVision Magazine, pubished on 06/03/2015 <http://www.newvision.co.ug/news/665556-mutebile-roots-for-corporate governance.html> Accessed on 06/03/2015)

"Leadership in public or private organisations is all about trust. Failure to embrace good corporate governance principles is a statement that the organisation does not subscribe to the values of transparency, accountability, equity and ethical behaviour,"

This trust among the corporate owners, authority and stakeholders in general as mentioned above is what characterizes a good corporate governance system and is realized through having each participant playing a clean game by fulfilling what is expected from him/her and by not exceeding his/her duties and responsibilities or authority. Laws often elaborate on these different roles. What remains to be investigated is to what extent companies strive to empower each of these players to be conversant about his/her role in the game. In our case, we investigate particularly whether the directors are always aware, as they are presumed to be, of what they are called to do according to their duties. Good corporate governance by well-informed directors influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimised.

In defining what corporate governance means, the World Bank has stated that;

"Corporate governance refers to that blend of law, regulation and appropriate voluntary private sector practices which enable the corporation to attract financial and human capital, perform efficiently, and thereby perpetuate itself by generating long-term economic value for its shareholders, while respecting the interests of stakeholders and society as a whole."[298]

It also defines it as the *"(…) structures and processes for the direction and control of companies. Corporate governance concerns the relationships among the management, board of directors, controlling shareholders, minority shareholders and other stakeholders"*[299].

Generally, as Alexandre[300] put it, "The term 'Corporate Governance' is susceptible of both narrow and broad definitions, related to the two perspectives of shareholder- and stakeholder orientation. It therefore revolves around the debate on whether management should run the corporation solely in the interests of shareholders (shareholder perspective) or whether it should take account of other constituencies (stakeholder perspective). "

[298] www.worldbank.org (Jan. 1999); as quoted in: An International Comparison of Corporate Governance models [Doctoral Thesis]; by Gregory Francesco Maassen, 1999, Netherlands.

[299] The World Bank – Report on the Observance of Standards and Codes (ROSC), Corporate Governance, Country Assessment, Indonesia, April 2010. Available at; http://www.worldbank.org/ifa/rosc_cg_idn_2010.pdf

[300] Alexander N. Kostyuk et al., Corporate Governance, VirtusInterpress, Sumy (Ukraine), 2007.

3.1.1.2. Corporate Governance as defined in Rwanda

There is no single source for the definition of corporate governance that can be taken to be the official one in Rwanda. The available definitions have evidently been drawn from different foreign sources, a clear evidence of a system that does not develop from the local policies or from real existing agency problems. Rwandan corporate governance definitions show diverging targets and can be captured from among others: the 2008 Joint Governance Assessment Report (JGA) and from the Central Bank (BNR)'s two directives on corporate governance for financial institutions (banks and insurance companies). In the JGA report that was adopted by the cabinet meeting on 12/9/2008, corporate governance was defined as:

" the rules by which companies are governed in order to protect the interests of investors and other stakeholders, including workers, customers, suppliers, local communities and environmental users."

This definition concurs with what some authors especially the proponents for corporate social responsibility believe to be the good corporate governance. They content that the success of businesses to day in this globalisation context is no longer based solely on what returns businesses have generated but also, it concerns what processes through which such returns have been generated. Issues of integrity, transparency and ethical standards are all central to the contextual understanding of corporate governance[301].

Figure 5: Parties (Stakeholders) to Corporate Governance

[301] T.E. Lambooy, Corporate Social Responsibility, Kluwer, Deventer, The Netherlands, 2010,p. 49.

Source: http://www.indianmba.com/FacultyColumn/FC964/fc964.html

In the JGA report mentioned above, most important aspects and issues of corporate governance in Rwanda were highlighted as being; the disclosures of audited accounts, director liability, adequate oversight by the board of directors, avoidance of anti-competitive behaviour and compliance with legal and regulatory requirements.

The BNR definition in the directive for corporate governance of banks defines corporate governance as;

"…the process and structure used to direct and manage the business and affairs of a banking institution with the objective of ensuring its safety and soundness and enhancing shareholder value. It shall cover the overall environment in which the financial institution operates comprising a system of checks and balances which promotes a healthy balancing of risk and return".[302]

The same Central Bank (BNR) however, provides a different definition in its regulation for corporate governance for insurance companies where it defines corporate governance as;

"…the manner in which the board of directors and senior management oversee the insurance business and encompasses the means by which members of the board and senior management are held accountable and responsible for their actions. It includes corporate discipline, transparency, independence, accountability, responsibility, fairness and social responsibility, timely and accurate disclosure of material information, and compliance with legal and regulatory environment. It covers the overall environment in which the insurance business operates comprising a system of checks and balances which promotes a healthy balancing of risk and return"[303].

Analysing the three definitions from Rwanda, one notices a disharmony and a failure in policy guidance in as far as corporate governance is concerned. For example, whereas the regulation of corporate governance for banks is clearly designed to primarily enhance shareholder value[304], the regulation for corporate governance in the insurance industry brings in issues of corporate social responsibility which, traditionally, are not supposed to feature in a shareholder value premised company. The definition from the

[302] Art. 2 (1) of the BNR regulation n° 06/2008 on Corporate Governance of banks in Rwanda, *Official Gazette n° 02 of 10/01/2011.*
[303] Art. 1 (1) of the BNR regulation Nº.07/2009 of 29/07/2009 on Corporate Governance requirements for Insurance business.
[304] The shareholder value and the stakeholders' value approaches shall be developed later under this chapter.

Joint Governance Assessment (JGA) Report hand is very clearly aligned with the stakeholder value approach where, it is expressly put; stakeholders' interests have to be protected alongside those of investors – shareholders.

3.1.1.3. General Conclusion on the concept of corporate governance

The dominating trend of modern day's definitions of corporate governance is that whatever definition is given, it entails the relationships between different players in a corporation's ownership, control, administration, management and the surrounding environment. Every corporate governance definition today tends to uphold accountability and transparency principles and this same definition has, in the opinion of the author, to relate to the interests of all stakeholders; investors, employees, creditors, clients, and the entire community in regard to the corporation. Where in practice this is enforced, it would be expected that no decisions would be taken by the company to the detriment of any of its stakeholders. In other words, a definition of corporate governance will be complete if it covers a wide range of potential agency problems to the company.

3.2. Agency problems

Agency problem as a concept or a theory was introduced and brought forward by economists. It actually refers to the p*rincipal* – a*gent* relationships within a firm (corporation). In a corporate context, there are basically three agency problems[305]; the first is the investor – management conflict where, the principal, in this case, the investor (shareholder) is dependent on the agent - the manager that is appointed to run the corporation on behalf of the principal. The conflict here arises in the sense that, while the agent (management) is recruited to further the principal's interest in the company, he may use the powers delegated to him in an opportunistic way, not to benefit the principal, but himself instead. Company laws and the articles of association may provide measures of checks and balances within the company's functioning mechanism to curb the agents´ opportunistic behavior.

[305] John Armour, Henry Hansmann, and Reinier Kraakman, ´Agency Problems, Legal Strategies and Enforcement', *Yale Law School, Law , Economics and Public Policy Research Paper No. 388*.; *Harvard Law School, Law and Economics Working Paper No. 644; Oxford University Faculty of Law Research Paper No. 21/2009; European Corporate Governance Institute, Law Working Paper No. 135/2009. Available online at: hptt://ssrn.com/abstract=1436555*

The second agency problem appears between different classes of shareholders – majority and minority issues. Under the company's democratic rules and principles, he who owns most, controls most and, consequently, the majority shareholders shall be the controlling ones, with the implied powers to hire and fire and the setting of strategies and policies for the company, on behalf of the entire shareholding and the company. The problem is that it cannot easily be inferred that the minority shareholders are the principals and that the controlling shareholders are the agents. In addition, whereas there are possible strategies to limit the consequences of the first problem – shareholder/management, similar results are unlikely with the second problem. Most prudent corporate laws would instead suggest the exit mechanisms of minority shareholders but with a prior and fair expropriation by the controlling ones. The third and last agency problem exists between the firm and those others it contracts with – employees, creditors, suppliers, consumers, etc. These contractors too find themselves concerned with the wellbeing of the firm/company. In this case, the company (including its shareholders) is the agent, and the contractors with the company or firm are the principals. The principal's interest here is to avoid the company (with its shareholders) to behave opportunistically at the expense of its principals – the contractors.

3.2.1. Corporate Agency problems in Rwanda

Agency problems in Rwanda just like corporate governance issues in general are new due to Rwanda's specific economic features in the recent past. The country has been characterized by a weak and small private sector and by businesses dominated by the state. The few companies were small and privately held or to a lesser extent family owned. Moreover, until recently, the country did not have a capital market where shares can be traded making and therefore, publicly listed companies were absent[306]. Thus, in such a small economy with such types of companies, it becomes obviously rare to have the issues of shareholders (majority/minority) rights or even the directors´ liability as serious concerns. However, as shown earlier (chapter two), the mind-set and orientations of both the government and the private sector have changed. With a shift to

[306] Rwanda: Joint Governance Assessment Report 2008 as adopted by the Cabinet on 12/09/2008. Also available in PDF format online at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADF-BD-IF-2008-220-EN-RWANDA-JOINT-GOVERNANCE-ASSESSMENT-JGA.PDF. The Joint Governance Assessment is an assessment of governance in Rwanda, undertaken jointly by the Government of Rwanda and the development partners. It is intended to establish a common understanding of governance progress, problems and priorities, and a framework for assessing progress over the coming years on the basis of agreed indicators and benchmarks. The guiding principle has been to provide a basis for joint ownership and constructive discussion in order to improve the quality and usefulness of dialogue around issues of good governance.

a more market – based economy, both the government and the private sector have put more emphasis on the principles of good corporate governance. Currently, one would say that the corporate landscape is dominated by the first and the last agency problems as identified before. That is, the conflict emanating from the management behavior in the firm in relation to the shareholders' interests on the one hand, and on the other, whether the company (and its shareholders) takes the interests of other stakeholders into consideration. This has been inferred from various happenings in corporate sectors of banks[307] or other financial institutions where, following the mismanagement scandals, shareholders and to some extent, stakeholders have been awakened to reposition their respective roles in corporate governance of their companies.

3.2.2. The influence of agency problem (s) to the definition and approach

In general, the prevailing agency issues coupled with the policy objectives for the corporations in each economy orients the definition of corporate governance in that particular economy. Where there is no clear policy guidance for the principle objectives of corporations or where the prevailing agency problems are not so articulated, inconsistencies in the definitions shall be noted. As noted above, such is the case with Rwanda. The inconsistency in the definitions of corporate governance in Rwanda roots from the fact that there haven't been uniform policy guidelines in regards to corporate governance[308]. There hasn't been any critical study of the agency problems and share structures within Rwandan corporations from which policy makers would fetch to design a fashionable guiding code of corporate governance. The dominant definition in an economy will inform to which model such an economy adheres and what a corporation stands for (whether for the shareholder value maximization or for the broader stakeholder value). For example, the first definition of Sir Cadbury's committee fell to the Anglo-American shareholder value approach as opposed to the Continental European stakeholder value approach which advocates for a broader coverage of the main corporate objective – the business' sustainability through balancing the stakeholders' interests.

The two approaches mentioned here (shareholder and stakeholder value) root from the two diverging understanding of the principal objective of the corporation or firm. In the

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[307] Many local banks like the former BACAR (later Finabank and now GTBank), former Bank of Commerce, Development and Investment- BCDI (now Ecobank) were scandalously mismanaged leading to prosecutions of their former leaders and eventual sentencing to serve prison terms.

[308] There is a study on the corporate governance policy and framework that was commissioned by the Rwanda Development Board in 2013 and its draft findings were presented to the stakeholders in a workshop at Lemigo Hotel in November 2014 but it is yet to be officially published at least at the conclusion of this research (May 2015).

Shareholder value approach, a corporation's principal objective is to maximize the profits in the interests of the shareholders who are considered to be the sole residual claimants from the corporation. This is the view for corporations mainly in the Anglo-Saxon world including the UK, US, Australia, Canada, New Zealand, and others. Stakeholder value theory fronted by the continental European countries like France, Germany, The Netherlands and others, on the other hand, provides that the objective of the company is not limited to the shareholders alone, but it is to the general benefit of all those who can be identified as its stakeholders. The directors are not only to manage the company for the betterment of shareholders, but also in the interests of a multitude of stakeholders (including the shareholders)[309] who can affect or be affected by the actions of a company[310].

The two theories (approaches) in corporate governance have been conflicting for more than two decades now, where proponents of each of them trumpet its distinguishing features that make it stand to be the best for the economic efficiency in any economy. Researchers from a cross section of disciplines including Law, Economics, Management, Finance and others have published their findings in regard to the conflict but still, it remains far from being solved. It is noted however that, many scholars are persuaded by the shareholder value theory rather than the stakeholder[311]. Hansmann and Kraakman for example, contend that the triumph of the shareholder primacy model was part of a worldwide convergence towards a unitary vision of corporate purpose premised upon a shareholder-centred ideology.[312] The Shareholder value theory that was slowly capturing the admiration by Continental Europe[313] has however eventually

[309] It is argued here that, directors are requested to balance and put into consideration the interests of stakeholders every time they are to take decisions on behalf of the corporation.

[310] R Edward Freeman, 'A Stakeholder Theory of the Modern Corporation' in Tom L Beauchamp and Norman E. Bowie (eds), Ethical Theory and Business (5th ed., 1997) at 69. It should be noted that the meaning of 'stakeholder' is a matter of some debate. For instance it might be said to encompass groups vital to the success and survival of the company. See, for example, Freeman, 'A Stakeholder Theory of the Modern Corporation' at 31.

[311] Henry Hansmann& Reiner Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439 at 440–441; Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance', Northwestern University Law Review, Vol. 97, Issue 2 (2002-2003), pp. 547-606; at 563. See also, Antoine REBÉRIOUX, 'The end of history in corporate governance? A critical appraisal', *Amsterdam Research Centre for Corporate Governance Regulation, Inaugural Workshop, 17-18 December 2004.Available at: http://arccgor.nl/uploads/File/Reberioux%20Amsterdam%202.pdf*

[312] Henry Hansmann and Reiner Kraakman, Op.cit., at 448.

[313] In Germany for example, some companies had started embracing the concept. Jürgen Schrempp, the former head of Daimler-Benz, adopted the doctrine at the established Stuttgart automaker. This is how he managed to acquire the U.S. car manufacturer Chrysler in 1998. Deutsche Telekom CEO Ron Sommer likewise followed, taking the state-owned enterprise public in 1996. Josef Ackermann, head of

faced a drawback following the recent corporate scandals which were highly blamed on the shareholders' greed[314]or put politely; the shareholders' comfort. Coupled with lack of strict public regulation and control of the corporate management's discretion the repercussions of their (corporations') failure extended further beyond the shareholders. This, as a result, has impacted on a direct shift in favour of the stakeholder value approach.

Blair notes for example that the events of the 1980s and early 1990s broke the American corporate market's complacency[315] and forced the general public to rethink, as the title of her work was, about issues of corporate governance in the Twenty-first century. Acknowledging the shareholder value theory's flaws, UK's "Enlightened shareholder theory" has been brought forward to bridge the gap but not wholly succumbing to the Stakeholder view although there is a lot of resemblance. The Shareholder and Stakeholder theories have been instrumental in shaping both the regulatory and operational frameworks of the company laws and stock markets in their respective jurisdictions.

One would wonder then, what would be the best corporate governance approach in jurisdictions in the less developed world like Rwanda, whose corporate system is dominated by medium and relatively small companies with just a single digit number of them publicly listed? Which of the two models of corporate governance would be fit for such developing economies? Would a mixture of both serve better for such developing economies than adopting either of the two? Each investor, of course, wishes to maximize the value of his/her investments even where it requires a deaf ear to the plight of other stakeholders. So, what does Rwandan law and practice provide or signal to provide in as far as the choice of the corporate governance approach is concerned?

Deutsche Bank did the same and was later to be known as the champion of the Shareholder Value in Germany.

For more on this, see Karl-Heinz Büschemann, The 'Dumbest Idea in the World'Jack Welch, the figurehead of shareholder value, disowns his doctrine – *TheAtlantic Times* at: http://www.atlantic-times.com/archive_detail.php?recordID=1716

[314] As once put by: Marjorie Kelly, *Harvard Business Review*, 2001:

'Stock-Market investors have become, collectively, an extraordinarily unproductive force in business. Indeed, for the last two decades, their contribution to corporations has been literally negative…it's wrong to shovel money out to shareholders in ever larger scoops and force other stakeholders to pay the price'. See also: Gordon Gekko in "Wall street (20th Century Fox 1987) where he noted that: "in the last seven deals that I've involved with, there were 2.5 million stockholders who have made a pretax profit of 12 billion dollars … The point is, ladies and gentleman, that *greed*, for lack of a better word, is good."

[315] Margaret Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century*, Brookings Institution, Washington, 1995, pg.2.

3.3. The Principal Corporate Governance approaches around the world

Under this section, our intention is not to investigate the deep history of, but to elaborate and make known to our reader the distinctions between the Anglo-American (shareholder value) and the Continental European (stakeholder value) corporate governance approaches on one hand, and on the other, assess which approach would befit in Rwandan context given its political and corporate legal history, the existing corporate landscape especially on the ownership structures, and the existing economic level as seen in the preceding chapter (s) and thus, informing our principal objectives of this research on the liability of corporate directors. We shall also briefly discuss the new entrant among the models – the UK's "enlightened shareholder value" which is a kind of a hybrid of the classical shareholder and the stakeholder models. It is of interest because it shows an interesting shift of the UK from the radical shareholder value approach to a hybrid mixture of the two rival theories.

3.3.1. Shareholder Value approach

Shareholder value is a business term or concept sometimes presented as shareholder maximisation approach or shareholder model. In this approach, the success of a company or a corporation is gauged on how much returns it brings to the investor (shareholder) in the shortest time possible. Proponents of Shareholder value approach of corporate governance base their stand from the fact that the principal goal for every commercial corporation is the ultimate maximization of shareholder value. According to this line of argument, the actions of the management should be aimed solely at the interests of the shareholders[316]. The only thing that counts is maximising their (shareholders) profits, for example, through dividends, (share) price gains or proceeds from sales[317].

This means that, at the practical level, both management and the board need to have a working knowledge of how a corporation's financial performance shall translate into shareholder value[318]. Michael Jensen[319] suggests that the long-run value maximization

[316]Berle for example believed that "The managerial powers are held in trust for stockholders as sole beneficiaries of the corporate enterprise" See: Dodd E, 'For whom are Corporate Managers trustees?' (1932) 45 Harv L Rev 1145, 1147.
[317]Stefan Grundmann, *Europäisches Gesellschaftsrecht* (Heidelberg: C.F. Müller, 2004). Also, see article on 'What is corporate governance – a definition' available at:http://www.worker-participation.eu/Company-Law-and-CG/Corporate-Governance/What-is-CG
[318]Bartley J. Madden, 'For Better Corporate Governance, The Shareholder Value Review', *Journal of Applied Corporate Finance, February, 2007.*

is likely to provide a more effective corporate "objective function" than the stakeholder theory. In a relevant part of his study trying to compare the two approaches (shareholder v. stakeholder), he noted that:

…[whereas] value maximization provides corporate managers with a single objective, stakeholder theory directs corporate managers to serve "many masters." And to paraphrase the old adage, when there are many masters, all end up being shortchanged. Without the clarity of mission provided by a single-valued objective function, companies embracing stakeholder theory will experience managerial confusion, conflict, inefficiency, and perhaps even competitive failure. And the same fate is likely to be visited on those companies that use the so-called "Balanced Scorecard" approach—the managerial equivalent of stakeholder theory— as a performance system.

This idea, according to *The Economist magazine*, has dominated American business for the past 25 years, and was spreading rapidly around the world until the financial crisis hit, calling its wisdom into question[320]. According to Roger Martin, the obsession with the shareholder value approach can be traced back in 1976 when the two economists Michael Jensen and William Meckling published an article, *"The theory of the Firm: Managerial behaviour, Agency Costs and Ownership behaviour"* which argued that the owners of the company were getting short shrift from professional managers. Being probably the most cited writing to this day in relation to corporate governance, it highly inspired the business community, especially shareholders in the United States and the United Kingdom, by directing corporate managers to focus mainly on the shareholder value maximisation. Of course it means that such maximisation goes at the expense of other corporate stakeholders.

Others attribute the shareholder value concept's emergence to the former General Electric CEO – Jack Welch's 1981 speech at Pierre Hotel in New York[321]. Some attribute the model to various other factors like corporate policies in US and the UK

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[319] Michael C. Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function," *Journal of Applied Corporate Finance,* vol. 14, no. 3 (Fall, 2001).

[320] 'Shareholders V. Stakeholders', *The Economist Magazine* of April 22nd, 2010. Accessed on 14/1/2012. For the origin of Shareholder value model, see also: William Lazonick and Mary O'Sullivan, 'Maximizing Shareholder Value: a new ideology for corporate governance', *Economy and Society, Volume 29 Number 1, February 2000: 13-35.*

[321] *Karl-Heinz Büschemann*, The 'Dumbest Idea in the World' Jack Welch, the figurehead of shareholder value, disowns his doctrine*, The Atlantic Times,* April 2009. Available at:*http://www.atlantic-times.com/archive_detail.php?recordID=1716*; See also, C .H, Green, 'Jack Welch Renounces Increasing Shareholder Value: Pigs fly', *Trusted Advisor* blog published on Friday, March 13, 2009 (Accessed on 18/1/2012).

such as ‘downsize and distribute’ of the early 1980s that came to replace the ‘retain and reinvest’ that had characterised the 1960s to 1970s as well as to the effects of take-over pressures[322]. Others do also think the idea spread so fast worldwide due to the influence of the book “Creating Shareholder Value”[323] by an the economist Alfred Rappaport. This model has been considered by some to be the most efficient way of drawing financial means from the public into investments since it was seen to be exorbitantly rewarding. It is also taken to be the capitalistic way of corporate governance that has shaped especially the US economy and has nurtured the growth of a number of huge multi-national corporations with origins from the US or elsewhere in the world.

Overall as Syeedum Nisa and Khurshid Anwar Warsi[324] note, proponents for this model will assert that it is generally characterized by large and liquid stock markets, dispersed ownerships, relatively high levels of minority investor protection[325] but also with a predominant role of institutional investors, high product market competition, one-tier board system and more importantly, the performance sensitive executive pay[326].

3.3.2. Criticisms of the shareholder value approach

Critics to this corporate governance model argue as already explained before, that it supposes that the shareholders – financiers of the corporation through their investments are the only residual claimants from the corporation. Issues like employment, environment, business ethics, judged to be crucial for any corporation’s success in this 21st century, they contend, is left unattended to by this model. Some even go further to

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[322] Ines Bouden and NihelChabrak, ‘The IASB and the Shareholder Value priestly cult!’, a presentation at: APIRA 2010 - Sixth Asia Pacific Interdisciplinary Research in Accounting Conference. http://basepub.dauphine.fr/handle/123456789/6742 , See also, William Lazonick and Mary O’Sullivan, ‘Maximising shareholder value: a new ideology for corporate governance’, Economy and Society, Volume 29, Number 1 February 2000: 13-35; Simon Deakin and Ajit Singh, ‘Shareholder value Reconsidered’ presented at the Centre for Business Research Summit on Innovation and Corporate Governance, 29-30 March 2006. Presentation available at:
http://www.cbr.cam.ac.uk/pdf/Anniv_Conf_Deakin_Singh_Presentation.pdf accessed on 16/01/2012.

[323] Rappaport, A., “Creating the shareholder value”, Free Press, 1986.

[324] SyeedumNisa and Khurshid Anwar Warsi, The Divergent Corporate Governance Standards and the Need for Universally Acceptable Governance Practices, *‘Asian Social Science, Vol. 4, No. 9,* September 2008, also available at; www.ccsenet.org/journal.html

[325] La Porta, Rafael, Lopez de Silanes, Florencio, Shleifer, Andrei and Vishny, Robert W., *‘Law and Finance. Journal of Political Economy, Vol. 106, No. 6’*, December 1998. Available at SSRN: http://ssrn.com/abstract=139134.

[326] Hall, B., and Liebman, J., 1997. Are CEOs Really Paid like Bureaucrats? NBER working paper series, No. 6213.; Baker, G., Jensen, M., and Murphy, K., 1988. Compensation and Incentives: Practice vs Theory, Journal of Finance, Vol. 43, 593 – 616.

attribute the current economic crisis to this model.[327] This is asserted so because share value rise went along with executives' compensation.[328]

Moreover, it indulged even non-performing corporations to exaggerate their earnings and trade inaccurate information as in the case of Enron in order to keep their reputation undamaged and to further the rise of the share value which implied the rise of compensations paid to the executives that were linked to that price. To support this assertion, Rotman [329] cynically wonders the coincidence of the Hansmann and Kraakman's publication on "The end of history for corporate law" and the Enron scandal which happened in the same year. By this he wanted to demonstrate that the facts in that publication which supported the dominance of the shareholder value and assuming its worldwide acceptance over other theories did not even survive for a year. Among the critics of Hansmann and Kraakman who assumed that it was the end of history for the battle amongst the various corporate governance models around the world is Antoine Rebérioux who concluded that:

"This thesis appears to us profoundly erroneous, in both its normative and positive (empirical) foundations: shareholder value is not a good principle of governance, nor is it establishing itself throughout the world"[330]

Shareholder value is a result of many things and processes put together. Some of those taken to be fathers of the concept (Shareholder Value) have so far retracted from its support. Jack Welch for example is quoted to have revealed to The Financial Times that:

"… On the face of it, shareholder value is the dumbest idea in the world, Shareholder value is a result, not a strategy… Your main constituencies are your employees, your customers and your products…"[331]

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[327] Ines Bouden and NihelChabrak, "The IASB and the Shareholder Value Priestly Cult!". Available at: http://apira2010.econ.usyd.edu.au/conference_proceedings/APIRA-2010-044-Chabrak-The-IASB-and-the-shareholder-value-priestly-cult.pdf Accessed on 17/01/2012.

[328] *Karl-Heinz Büschemann*, The 'Dumbest Idea in the World'Jack Welch, the figurehead of shareholder value, disowns his doctrine, *The Atlantic Times,* April 2009. Available at:*http://www.atlantic-times.com/archive_detail.php?recordID=1716*

[329] Leonard I. Rotman, *Debunking the "End of History" Thesis for Corporate Law*, 33 B.C. Int'l & Comp. L. Rev. 219 (2010), http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/2

[330] Antoine REBÉRIOUX, 'The end of history in corporate governance? A critical appraisal', *Amsterdam Research Centre for Corporate Governance Regulation, Inaugural Workshop, 17-18 December 2004, pg.2.Available at: http://arccgor.nl/uploads/File/Reberioux%20Amsterdam%202.pdf*

[331] Financial Times, Thursday March 12, 2009.

If it can be generally taken this way, then the gap that existed between the two approaches would slowly fade out since both the shareholder value approach and the stakeholder approach do not dispute the claim of the investor being rewarded for his investments but they differ in what takes priority in terms of strategy. Charles H. Green of the *Trusted Advisor* however, challenges Jack Welch as the perceived father of the Shareholder Value ideology to contribute in articulating his new understanding of the concept (Shareholder value as a result, not a strategy) as he (Green) believes *"… it will go a long way to changing a deeply entrenched, increasingly dysfunctional and destructive ideology".*

This was in reaction to Jack Welch's revelations to the *Financial Times* newspaper. In this same paper, he is quoted to have said:

"The idea that shareholder value is a strategy is insane. It is the product of your combined efforts – from the management to the employees".

So, does this mean that he is getting at the meeting point with the rival approach of the Stakeholder Value model? Does he or proponents of the stakeholder value approach mean that this approach is crystal clear, profitable and well embraced by all corporations and economic systems as well as researchers? The following sub-section looks at what the stakeholder model holds and what pushes it forward as opposed to the shareholder approach.

3.3.3. Stakeholder Value approach

The Stakeholder value approach contends that corporate governance should not be limited to a simple relationship between the shareholders and management. A corporation, being a legal person, is not born to satisfy or to maximize the interests of the shareholders at the expense of other stakeholders. *R. Mitchell et al*[332]., suggest that corporate governance should at its broadest mean:

"…all forces that bear, or should bear, on decision-making within the company. From a regulatory perspective, this would include not merely the legal rights of shareholders, but the contractual covenants of debtors, the commitments entered into with employees, suppliers and customers, the regulations imposed by various government agencies, and

[332]O'Donnell, Anthony, Mitchell, Richard James and Ramsay, Ian, 'Shareholder Value and Employee Interests: Interactions Between Corporate Governance, Corporate Law and Labour Law'. University of Melbourne Legal Studies Research Paper No. 128; *Wisconsin International Law Journal,Vol. 23, No. 3*, pp. 417-476, 2005. Available at SSRN: http://ssrn.com/abstract=753904v

the regulatory structuring of the various markets in which the company operates. Such a perspective is consistent with a 'stakeholder' theory of corporate governance, in which the interests and welfare of employees, creditors, suppliers, customers and the local community are all seen as restricting the freedom of management to maximize wealth for shareholders".

As earlier mentioned, this is the approach generally embraced by the continental European countries especially France, German, and The Netherlands. Advocates for the stakeholder approach argue that the intrinsic or extrinsic worth of a business is to be measured by a combination of its financial success, usefulness to society, and satisfaction of employees. The priorities of the company's targets are of course, determined by the makeup of the individuals and entities that together own the shares and direct the company[333]. In this view, a corporation has to be concerned as well with its workforce's welfare, the environmental issues as well as other business ethics throughout its policies. They (stakeholder value activists) argue that the success of a corporation is to the advantage of its employees as it is for its shareholders because they want to keep their jobs. Regulators and governments in general are always eager to see the prosperity of corporations as pillars of the economic sustainability but at the same time, preserving the environment for the future. John Elkington[334] for example argues that the 21st century business has to have a triple bottom line. He notes that a sustainable business cannot aim at the maximisation of short term profits or even for the medium term profits but should rather aim at setting auditable social and environmental goals as well. In short, stakeholder value approach, it is argued, is a long term success oriented approach compared to the shareholder value approach's short term financial benefits.

The guiding interest in the stakeholder value approach is to protect the "business in itself" and by proxy, protect its stakeholders from the destructive shareholder influence[335] which is self-centred.

This approach (stakeholder value) can be based on economic efficiency[336] by allowing the states create an economic environment that is capable of fostering development of

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333 'Shareholder value', Available at: http://en.wikipedia.org/wiki/Shareholder_value

334 John Elkington, 'Cannibals with Forks: The Triple Bottom Line of the 21st Century Business' (The Conscientious Commerce Series), *New Society Publishers*, 1998.

335 Gelter, Martin, 'Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light' (September 1, 2010). *Fordham Law Legal Studies Research Paper No. 1669444*; *ECGI - Law Working Paper No. 165/2010*; *NYU Journal of Law & Business, Vol. 7, Issue. 2,2011*. Available at *SSRN*:
http://ssrn.com/abstract=1669444

efficient corporate governance structures. That is, systems of governance that leads to the most efficient use of resources to create the wealth for society as a whole and that may be viewed from the social justice perspective[337].

The central problem in every corporate governance approach is who is involved and how is the decision making process realized? To the advocates of Stakeholder value, the goals of a corporation are realized through the combined efforts of all stakeholders including shareholders, employees, customers, suppliers, regulators and the community at large. Each of these constituents has a stake in the affairs of the corporation but of course, at varying degrees. It follows therefore, that in the corporation's decision making process, other stakeholders other than shareholders ought to be involved as partakers of the corporation's success or failure.

Pérez Carrillo[338] too, argues that the balance between interests of different groups of stakeholders – including shareholders is essential for the long term viability of a corporation. She contends that the fair and balanced stakeholder perspective in turn results in long term shareholder maximization value but without neglecting the other constituencies.

3.3.2.1. Criticisms of the Stakeholder value approach

With all varying arguments in support and against, it is obvious that the stakeholder approach cannot escape stiff criticism. It is argued that this approach of governance brings with it a lot of confusion especially on the part of directors. This root from the

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[336] Margaret Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century*, Brookings Institution, Washington, 1995, pg.3.

[337] Gavin Kelly, Dominic Kelly and Andrew Gamble (eds), *Stakeholder Capitalism*, Macmillan, Basingstoke, 1997.

[338] Elena F. Perez Carrillo, Corporate Governance: Shareholders' Interests' and their Stakeholders' Interests, *Corporate Ownership & Control / Volume 4, Issue 4, Summer 2007*. Available at: http://www.virtusinterpress.org/additional_files/journ_coc/full-text-papers-open-access/Paper006.pdf (Accessed on 20/1/2012).
On the same argument, see also as quoted by Elena above:

R.S. Kaplan and D. P Norton, "The Balanced Scorecard – Measures That Drive Performance", *Harvard Business Review,* January-February, 1992, pages 71-79.; R S Kaplan, and D P. Norton, *The balanced Scorecard: Translating Strategy into Action,* Harvard Business School Press, Harvard 1996.; R S. Kaplan, and D P Norton, "Using the Balanced Scorecard as a Strategic Management System", *Harvard Business Review,* January-February, 1996, pages 75-85. These leading authors on management strategies point at the fact that to achieve a correct and efficient balance, businesses is to obtain positive valuation from 4 perspectives: customer perspective, internal perspective, innovation and learning perspective, and financial perspective. Shareholders, taken into account within the financial perspective, and customers are two specific stakeholders. Innovation would imply the need for employee development. Supplier relations should be incorporated within the internal-business perspective.

early 1930s debate between Berle and Dodd on understanding “to whom the corporate managers were trustees”. As noted earlier in a quotation from Micheal Jansen’s work, the argument against stakeholder value is that:

…[whereas] value maximization provides corporate managers with a single objective, stakeholder theory directs corporate managers to serve “many masters.” And to paraphrase the old adage, when there are many masters, all end up being shortchanged. Without the clarity of mission provided by a single-valued objective function, companies embracing stakeholder theory will experience managerial confusion, conflict, inefficiency, and perhaps even competitive failure. And the same fate is likely to be visited on those companies that use the so-called “Balanced Scorecard” approach—the managerial equivalent of stakeholder theory— as a performance system[339].

Others like Pérez Carrillo[340] state that stakeholders’ interests can be interpreted as opposing the shareholders’ rights to obtain a fair value of their investments in a corporation and this would end up discouraging investments and businesses to grow.

In between the shareholder and the stakeholder, a seemingly compromising model has been crafted by the English system. This approach referred to as the ‘enlightened shareholder value’ approach is discussed hereunder.

3.3.3. ‘Enlightened shareholder value’ approach

While advocating the ‘enlightened shareholder value’ approach of corporate governance, the UK Company Law Review Steering Group in 2000 proposed that:

‘it should be an obligation on directors to achieve the success of the company for the benefit of the shareholders by taking proper account of all the relevant considerations for that purpose’ including ‘a proper balanced view of the short and long term, the need to sustain effective ongoing relationships with employees, customers, suppliers and others; and the need to maintain the company’s reputation and to consider the impact of its operations on the community and the environment’

This quotation, enlightening but also widening the shareholder value understanding, emphasises a broader object of the company and a widening of a company director’s

[339] Op. cit., note 14.
[340] Op. cit., note 29.

obligations. A proper balanced relationship of employees, customers, suppliers and others would mean that they have to have a stake in how the company is managed. The company directors have to ensure that all such issues are taken care of.

This was later reflected in the UK 2006 Companies Act under the directors' duties[341]. This implies that, in upholding the benefits of the shareholders, the new company law directly widens the scope of their (shareholders) interests from being limited to short term financial benefits to long term sustainability of the company's success that caters for a wide range of stakeholders[342]. However, the concept is not yet developed to show its distinction from the shareholder value approach or its relationship with the stakeholder value model. Besides, it is still a rather new corporate governance approach that has not attracted yet a great number of researchers and it has not sufficiently been tested in courts.

3.3.4. Corporate Governance approach for Rwanda[343]

As already mentioned, corporate governance varies from country to country mainly due to the divergence in socio-economic, political as well as the legal and regulatory environment. As many authors have conceded, developing nations for example, are "known to have different political and economic environments from those of the developed nations. This is so because they usually suffer from state ownership of companies, weak legal and judiciary systems, weak institutions, limited human resources capabilities, and closed/family companies among other challenges".[344]

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[341]Section 172 of the UK Companies Act, 2006.

[342]*Alistair Darling, Commons Second Reading, 6 June 2006, column 125:*
"For the first time, the Bill includes a statutory statement of directors' general duties. It provides a code of conduct that sets out how directors are expected to behave. That enshrines in statue what the law review called "enlightened shareholder value". It recognises that directors will be more likely to achieve long term sustainable success for the benefit of their shareholders if their companies pay attention to a wider range of matters…Directors will be required to promote the success of the company in the collective best interest of the shareholders, but in doing so they will have to have regard to a wider range of factors, including the interests of employees and the environment".

[343] From this sub-section was developed an article presented in the 5th International Research Conference organised in December 2012 by the then Research Commission of the National University of Rwanda, now University of Rwanda, and subsequently, an article was published. See, D.M. Kayihura, *The Rwanda Corporate Governance Approach in the light of the classical approaches: The Shareholder Value versus the Stakeholder value approaches*, Rwanda Journal, Series H: Economics and Management, Vol.1, 2013.

[344]Mensah, S. (2002). "Corporate Governance in Ghana: Issues and Challenges." Paper presented at *African Capital Markets Conference*, December 2002; Young, M., Peng, M., Ahlstrom, D., Bruton, G., and Jiang, Y. (2008) "Corporate Governance in Emerging Economies: A Review of the Principal-Principal Perspective." *Journal of Management Studies*, Vol. 45(1) pp 196-220 (all quoted in: Khaled Dahawy,

These problems cannot themselves be generalized to fit in each country's situation. A particular study of each country would reveal its specific situation. Rwanda for example, may share some of the difficulties noted in developing countries but not necessarily all of them. Differences in corporate governance approaches appear amongst the developing countries themselves. Corporate governance in the Middle East countries is different from that in Asia and the one in northern Africa is different from that in the west or in the sub- Saharan Africa.[345] The same applies to individual countries within these blocks. It should be noted that some countries like those in the East African Community have undertaken an ambitious move to harmonize their systems in a bid to widen the bloc's market and make it more competitive regionally but also internationally. The first regulations to be targeted for harmonization are those having to do with business.[346]

Each of the above mentioned corporate governance approaches need a well-established infrastructure, clear business understanding and orientation and not least, the economic and political will that is expressed in the country's commitment in levelling the playing field through establishing laws, rules and regulations as well as enforcement mechanisms. What then would be the Rwandan corporate governance approach given its remarkable socio-legal history in civil law but with the current trends of subscribing to neither civil law nor common law but to a kind of a mixed system that also fetches much from the Rwandan traditional history itself?

The following sub-section analyses the journey the Rwandan Government has embarked on since 1994 in as far as reshaping its private sector empowerment and improving the business climate for private individuals and companies as opposed to the former approach where the government was the key, being almost the only player in both political and economic fields of the country. This shall then orient us to finding out what approach the country has opted for in as far as corporate governance is concerned.

In order to get into the Rwandan corporate law and governance as it stands today, it requires first reviewing its recent business history, and its evolution noting that it is a

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Developing Nations and Corporate Governance: The story of Egypt).

[345] Euromoney.(2007). "The Track Record of Corporate Governance in the Middle East." Vol. 38(September) pp 11-12; Fawzy, S. (2004). "How Does Corporate Governance in Egypt Compare with Selected MENA and Emerging Markets?" *The Egyptian Center for Educational Studies*, Cairo University, June 2004.

[346] See for example in an article "New Capital Markets guidelines in the pipeline" by *The NewTimes* (A Rwandan daily) where Robert Mathu, the Executive Director of Rwanda's Capital Markets Authority (CMA) confirmed that they were in the process of harmonizing the capital markets regulations within the region – East Africa. Available at:
http://www.newtimes.co.rw/print.php?issue=14838&print&article=48059 (Accessed on 13/12/2011).

small, poor and land locked country. Above all, it was highly devastated by the 1994 war and Genocide that claimed up to a million lives and left every segment of economic life in shambles. The period prior to 1994 is not considered under this study since the intention of this discussion is to look at corporate governance not as ensured by the state alone but also by involving the private actors and /or in conjunction with the state. It should be noted that prior to 1994, business in Rwanda was purely state (government) dominated. After 1994, the Government of National Unity (GoNU) expressed a clear commitment to promoting an economy that is private sector driven instead of being state dominated.

3.3.4.1. Evolution of Corporate law and governance in Rwanda after 1994

Although company law and corporate governance structures[347] had existed right since the introduction of written law in Rwanda by the colonialists in the late 1800s, the concept of 'corporate governance' is new to this part of the world. In Rwanda, corporate governance can be said to have surfaced right from the emergence of the privatisation drive of state-owned enterprises and parastatals that started in early 1996 [348]. Privatisation was primarily aimed to be an economic liberalisation drive by the government of National unity, supported by the World Bank and IMF [349]. Among objectives of this drive were also to 'ensure better management and financial discipline in privatised companies' and to attract foreign investment to Rwanda. It was expected that such investments would further the transfer of technology and know-how to Rwandans. The intention of the government was to completely withdraw from the ownership and management of all the then State Owned Enterprises (SOEs) [350].

[347] See for example, arts 189 – 203 of the 1988 law on companies particularly on the conduct and liability of corporate directors vis-à-vis the company and third parties(*Loi nº 06/1988 du 12 Fevrier, 1988 portant sur l'Organisation des sociétés commerciales (J.O., 1988, p. 437)).*

[348] The Law establishing the Privatisation Programme was published on 11/March/1996. This was a Law on Privatisation and Public Investment. The Presidential Decree of 3/May/1996 put in place institutions to implement the Privatisation Programme, but the Privatisation Secretariat actually started to be operational just one year later (October 1997).

[349] MoëzCherif, 'Economic Impact of the Privatisation Programme in Rwanda: 1996-2003'. Available at: http://zunia.org/uploads/media/knowledge/RwandaPrivImpact_v1.0R_MCherif_Nov03.doc

[350] It should be remarked that these SOEs were the dominant of the Rwandan Economy yet, they were the most poorly managed companies in the country due to little follow-up and loose corporate governance mechanisms in place implemented by the State. It was easier for whoever was appointed to head one of these SOEs to siphon even the little resources of these enterprises and this led to unending subsidies to these companies. The State owned companies or shares in some companies in all sectors of the economy: Agriculture and agro-processing, Animal husbandry, Banking and Insurance, mining, just to mention a few. Over 74 companies were identified by the Privatisation Secretariat to be privatised. A good number of them have so far been privatised and a few remaining are still under way. See Annex – List of Companies to be privatised in Rwanda, In: MoëzCherif, Economic impact on Privatisation in Rwanda: 1996-2003.

Irresponsible and unaccountable management had led SOEs to be inefficient, unprofitable and was forcing the government, the sole or majority shareholder in most of these companies, to unceasingly inject in subsidies for their survival every fiscal year.

Motivated by its ambitious strategy of founding an economy which is geared by the private sector instead of the *government-do-it-all* approach together with the need to adapt to international best practices of governance, a privatization secretariat was put in place. Its main objective was to identify state owned companies or shares the state owned in some companies and facilitate the state to move out. Consequently, most of these companies identified were acquired by private individuals or companies which, prior to winning the bid, had to present their business plans and strategies not only to exhibit how their businesses would be profitable, but also how they were committed to the business' *long-term sustainability by ensuring sound governance*. In addition, for one to win the bid, he had to show how his business plan would improve the sector of the company's business. This was part and parcel of the administrative/public contract of acquisition. The state reserved the right, in case of failure for the acquirer to abide by the conditions of the contract, to repossess the company and put it back to the market. Besides the privatized ones, the government encouraged the starting up of many new companies throughout all sectors including those that had been confined before as the government's monopoly zone. These included the telecommunications industry, the financial sector, insurance, infrastructure and works, agri-business and agro-processing, hotel industry and mining.

In early 2000, scandals, especially in the financial sector were prevalent. Many financial institutions were declared insolvent before or around 2005 due to poor corporate governance. Inherited from the formerly government led companies, many companies had no proper in-house or external controls, board members were both executives and consequently, their own supervisors. Most notable ones were the *Bank of Commerce, Development and Industry* (BCDI) and the *Banque Continentale Africaine* (BACAR). The government of National Unity had to intervene and bail out some banks for the benefit of the depositors whose savings culture with the banks had remarkably developed compared to the pre-1994 period and the government did not wish such culture (saving) to relent. The managers of these banks, Alfred Kalisa and Kajeguhakwa respectively (these cases shall be discussed later) who were at the same time the majority shareholders of their respective banks were highly implicated in abuse of their positions[351] as directors and managers of the banks because they enriched themselves at the expense of the companies, minority shareholders as well as the depositors.

[351] Read in the article 'Former BCDI boss arrested' In *The New Times* (Rwandan daily English newspaper) of 9th January 2007. Also available on: http://allafrica.com/stories/200701090519.html

These companies (banks) were later acquired by foreign companies: ECOBANK[352] and FINA Bank (later to be acquired by Guarantee Bank – GT Bank) respectively, with a minority of shareholders from the local populace.

The scandals in the financial sector acted as an eye opener to the Rwandan policy makers and by late 2000 a number of corporate governance regulations especially in the financial sector were established. In these regulations, the major concerns from the community such as the accumulation of power (for example, by combining Chairmanship of the board with the functions of the CEO), misuse of office and self-interests (insider dealings) were catered for. For example, art. 20 of the corporate governance regulation of the Insurance business provide that:

"To guide against potential conflict of interest, no individual shareholder with a qualifying holding shall be appointed as a chairman of the Board.

The responsibilities of the Chairman of the board must be clearly separated from that of the Managing Director or Chief Executive Officer to ensure an appropriate balance of power, increased accountability and greater capacity of the Board for independent decision making.

No person shall combine the post of Chairman of the board and Chief Executive Officer of any institution"[353].

Prior to the scandals however, the Rwandan government in 2000 published its ambitious long-term development goals as embodied in what it termed as 'Rwanda's Vision 2020'[354]. Among its pillars was an emphasis on good governance – both in the

[352] ECOBANK acquired 90% of the shares and thus became a majority shareholder in the former BCDI starting from July 2007. The bank had been declared insolvent a year before (2006), due to gross non-performing loans, inadequate operational controls and poor corporate governance. See also: 'Ecobank buys 90 per cent of Rwandan Bank for $ 11.6 million' an article published by *The Nigerian Business.com* (an online newspaper) on 3/July/2007. Available on: http://www.thenigeriabusiness.com/banking91.html Accessed on 19/12/2011.

[353] Art. 20 of the Regulation no. 07/2009 of 29/07/2009 on corporate governance requirements for insurance business, published in the *Official Gazette* n°*35 0f 30/08/2010*. Available at: http://www.bnr.rw/docs/publicnotices/Insurance%20regulation%20n07%20copportate%20governance.pdf (Accessed on 19/12/2011). The article goes further in its last paragraph to emphasize the separation by defining what it means in the term 'relatives' where it says:
"Two members of the same extended family, referring to spouse or family member up to second degree, are not entitled to occupy the position of Chairman and Chief Executive Officer or Executive Director of an institution at the same time".

[354] *Vision 2020* was a result of a national consultative process that took place in Village Urugwiro (Rwanda's State-House) in 1998-99. In these consultative meetings, there was broad consensus on the necessity for Rwandans to clearly define the future of the country. The process provided the basis upon

public and in the private sector. This vision is the guiding path for the country's development plan. It has since become owned by each and every segment of both public and private sector.

In order to open up, Rwanda had also joined regional and international organizations and forums whose intentions had to do with prioritising good governance. Rwanda used such arenas as a forum for peer learning and peer pressure. Among them we may note the New Partnership for Africa's Development (NEPAD) which, in its sixth Summit of Heads of State and Governments held in Abuja, Nigeria in March 2003, adopted the Memorandum of Understanding (MOU) on African Peer Review Mechanism (APRM)[355]. This Memorandum of Understanding was signed by Rwanda on 9th March 2003, committing itself to *"provide all necessary resources to facilitate the processes involved at the national level, access to all the required information and stakeholders".* An important milestone was marked by the APRM Country Support Mission, which took place from 21 to 24 June 2004. Rwanda submitted its Country's Self-Assessment Report (CSAR) and the preliminary Programme of Action (POA) to the APRM Secretariat in March 2005[356].

To ensure that the programme of action was implemented, between 18 and 30 April 2005, a Country Review Mission took place to discuss extensively the CSAR, the Action Plan and the CIP, and to ascertain that Rwanda's National Assessment Process was technically competent, credible and free of political manipulation. This was later followed by the compilation of the country report and its presentation in 2006. As noted in chapter one of this work, APRM can be hailed to have been a milestone in the entrenchment of governance practices in the country's system. On a particular note, corporate governance formed part of the four thematic themes that had been adopted by the Heads of States and Governments in APRM. This therefore became an interesting exercise for each participating country since, each country that had

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which this Vision was developed. Vision 2020 addresses a number of questions among which; how do Rwandans envisage their future? What kind of society do they want to become? How can they construct a united and inclusive Rwandan identity? What are the transformations needed to emerge from a deeply unsatisfactory social and economic situation? These are some of the main questions Rwanda Vision 2020 addresses. Rwanda today, finds itself at a crossroads, moving from the humanitarian assistance phase associated with the 1994 genocide into one of sustainable development. Since 1994, the Government of Rwanda has stabilized the political situation, whilst putting the economy back on track with considerable assistance from development partners. The full version is available in PDF at: http://www.minecofin.gov.rw/node/182 in three official languages (Kinyarwanda, French and English).

[355] Such peer review mechanism had earlier been echoed and endorsed at the Declaration on Democracy, Political, Economic and Corporate Governance, at the inaugural Summit of the African Union (AU) held in Durban, South Africa in July 2002.

[356]NEPAD's African Peer Review Mechanism (APRM), Country Review Report of the Republic of Rwanda by a Panel of Eminent Persons, 2006. Available at: http://www.eisa.org.za/aprm/pdf/Countries_Rwanda_APRM_Report.pdf (accessed on 09/04/2013).

volunteered to be assessed had to conduct its own assessment (CSAR) before it was assessed by the panel of eminent persons. One would actually conclude that this became the basis of all the subsequent reform exercises in line with corporate governance since the report highlighted significant recommendations for the country to improve and build on.

By September 2007, Rwanda had published what it referred to as 'Rwanda's Economic Development and Poverty Reduction Strategy (EDPRS) [357] in which the country reemphasizes its commitment to supporting the development of a "soft infrastructure" for the private sector through implementing commercial justice, business and land registration programs and by improving economic freedom, the regulatory and licensing environment for doing business, and through *promoting principles of modern corporate governance*[358].

In so doing, a review of most business laws was initiated from 2007 on in a bid to ease doing business in Rwanda[359]. This however, did not jeopardize the growing trend towards embracing good governance practices – and corporate governance in particular. In 2009, the new company law was promulgated replacing the 1988 law on commercial enterprises in Rwanda. In the new law as the trend in government policies shows, corporate governance surfaced for the first time in Rwandan company's codes. It was intended to strengthen investor protection by requiring greater corporate disclosure, accountability, by increasing the liability of directors and improving shareholders' access to information. The adoption of this law was among the factors that made Rwanda to be ranked the best reformer in the World Bank's *Doing Business* ranking of 2010[360]. To the Rwandan government and people, ranking first on the world's

[357] *EDPRS* is a document and a process which sets out the country's objectives, priorities and major policies for five years (2008-2012). It sets out the roadmap for government, development partners, the Private Sector, and Civil Society and indicates where Rwanda wants to go, what it needs to do to get there, how it will do it, what the journey will cost and how it will be financed. It is a medium-term framework for archieving the country's long-term development goals set out in the Vision 2020 explained in the *footnote above*. The PDF full version of EDPRS is available at: http://www.minecofin.gov.rw/node/181 . It is worth noting that, these targets are assessed annually every December in *Umushyikirano* (The Annual national-wide consultative meeting) gathering.

[358] Point 19 of the Executive Summary of the EDPRS document, *Ibid*.

[359] In 2007, in an effort to counter Rwanda's ratings in the two previous Doing Business reports (158 and 150) published by the World Bank, President Paul Kagame (of Rwanda) authorized the establishment of a national Doing Business Unit, a task force under the then *Rwanda Investment and Export Promotion Agency* (RIEPA), to identify and drive implementation of reforms to improve Rwanda's business climate. In less than a year, it had done a tremendous job by identifying and successfully implementing 15 investment climate improvements that helped it to achieve an unprecedented improvement in the world ranking, according to the World Bank. See also:
http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/RWANDAEXTN/0,,contentMDK:21916643~menuPK:368660~pagePK:2865066~piPK:2865079~theSitePK:368651,00.html

[360] Other factors were: In 2005 starting a business in Rwanda took 9 procedures and cost 223% of

list of reformers was a reward to their steady efforts towards an economy rooted in professionalism, accountability and responsibility.

One of the assessed improvements during the Doing Business reporting was the protection of investors, specifically, the minority shareholders which Rwanda had already been addressed in its 2009 company law. The table (table one) below shows that Rwanda was among the few top ten reformers (countries) that ensured the protection of investors in its laws.

Table 1

The top 10 reformers in 2008/09

Economy	Starting a business	Dealing with construction permits	Employing workers	Registering property	Getting credit	Protecting investors	Paying taxes	Trading across borders	Enforcing contracts	Closing a business
Rwanda	✔		✔	✔	✔	✔		✔		✔
Kyrgyz Republic	✔	✔	✔	✔	✔		✔	✔		
Macedonia, FYR	✔	✔	✔	✔	✔	✔	✔			
Belarus	✔	✔	✔	✔			✔	✔		
United Arab Emirates	✔	✔						✔		
Moldova	✔			✔			✔			
Colombia	✔	✔		✔	✔	✔	✔	✔		✔
Tajikistan	✔	✔			✔	✔				✔
Egypt, Arab Rep.	✔	✔			✔				✔	
Liberia	✔	✔						✔		

Source: The Word bank: Most Improved Business Reformers in DB Report, 2010.

In the World Bank's comments explaining this report, the Institution noted that:

"For the first time since Doing Business *started tracking reforms, a Sub-Saharan African economy, Rwanda, led the world in reforms. Rwanda has steadily reformed its commercial laws and institutions since 2001. In the past year it introduced a new company law that simplified business start-up and strengthened minority shareholder protections. Entrepreneurs can now start a business in two procedures and three days.*

income per capita. Today entrepreneurs can register a new business in 3 days, paying official fees that amount to 8.9% of income per capita.
* More than 3,000 entrepreneurs took advantage of the efficient process in 2008, up from an average of 700 annually in previous years.
* Registering property in 2005 took more than a year (371 days), and the transfer fees amounted to 9.8% of the property value. Today the process takes 2 months and costs 0.4% of the value.
See also: http://www.doingbusiness.org/reforms/top-reformers-2010

Rwanda has also enacted new laws in order to improve regulations to ease access to credit. Other reforms removed bottlenecks at the property registry and the revenue authority, reducing the time required to register property by 255 days. Overall, Rwanda introduced reforms in 7 out of the 10 categories, rising from 143rd to 67th place on the ease of doing business rankings".

It is worth noting that, since then, Rwanda has been keen to improving more and more. The government in 2007 established commercial courts[361] specifically to ease the dispute resolution for business cases[362]. This was quite imperative since, due to its tragic history of the 1994 Genocide, Rwandan courts were, and to some extent still are, known for their backlog of cases. If business related cases[363] were to be handled by the same courts that handled all other cases it would take decades for such cases to be settled. Many other institutions were put in place to ensure that good governance norms and ethics both in public but also in private sectors are better rooted. An example is the Office of the Ombudsman of Rwanda, the Rwanda Governance Advisory Council (RGAC). This council was later merged with other institutions to become the Rwanda Governance Board (RGB), the Rwanda Bureau of Standards (RBS), the Rwanda Revenue Authority (RRA), the Rwanda Environmental Management Authority (REMA) and, the Office of the Auditor General of Rwanda (OAG). The Rwanda Governance Advisory Council was, and subsequently, the Rwanda Governance Board is mandated to promote and monitor good governance in political, public, corporate and civic domains in Rwanda through research and assessments, advisory services, policy debates and networking. Through its annual countrywide assessments, reports are

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[361]Organic Law n° 59/2007 of 16/12/2007 establishing the Commercial Courts and determining their organisation, functioning and jurisdiction.

[362] 'Commercial courts to improve business environment', The Rwanda Focus (online newspaper), published on May15th, 2008. Available at: http://focus.rw/wp/2008/05/commercial-courts-to-improve-business-environment/ (Accessed on 20/12/2011)

[363] For purposes of this Organic Law establishing Commercial Courts, art.3 provides that, " commercial matters" shall refer to commercial, financial, fiscal and other matters closely related to them regarding:1° disputes arising from commercial contracts or commercial activities between persons or business entities; 2° disputes arising out of the use of negotiable instruments; 3° disputes relating to transactions between persons and financial institutions; 4° disputes related to liquidation, dissolution and recovery of limping business firms; 5° cases related to insurance litigation but not including compensation claims arising out of road accidents by litigants who have no contract with the Insurance firms; 6° claims related to fiscal disputes; 7° claims related to transport litigation; 8° any dispute that may arise between persons who own or manage registered entities and commercial institutions and these include: a) members of the Board of directors; b) directors; c)shareholders; d) auditors; e) liquidators of a dissolved firm; f) managers of the property of a bankrupt business firm; 9° cases arising from bankruptcy; 10° cases related to intellectual property including trademarks; 11° cases related to registration and deregistration of businesses; 12° cases related to appointment or removal of auditors responsible for auditing the books and accounts of a firm. 13° cases related to competition and consumer protection.

drawn up on the current standing of good governance (including corporate governance) and the debate for its further improvement and sustainability is enhanced.

So, having seen the direct commitment of the government to embrace corporate governance and that it has levelled the ground for a fair exercise of such governance, which of the aforementioned approaches (in sections 1 & 2) has it opted for? To answer this question, we have referred ourselves to the analysis of the 2009 company law as amended to date, other relevant regulations available as well as private sector initiatives.

3.3.4.2. The regulatory orientation for the approach to corporate governance in Rwanda

As seen from the historical evolution of the business framework in Rwanda, businesses and their institutions are relatively young and small and according to the survey findings (to be discussed in chapter five), the majority of them are qualified as Small and Medium Enterprises. This however, does not rule out that they deserve to embrace best corporate governance practices that may become the solid foundation for their business' future development. Quoting from the BIZCLIR[364]'s comment on Rwanda:

"*Although most businesses in Rwanda are of a size that does not merit advanced corporate governance procedures and protections, many public and private sector representatives believe that, as the economy advances, corporate governance will become a very important issue and, thus, is necessary to address and build on today. Furthermore, even the smallest businesses would benefit greatly from a culture that respects and implements corporate governance on the most basic level. Currently, most companies are owned by individuals and families, not shareholders, and many are informal. Nonetheless (…) basic business management is important to their success, regardless of their size. Many small businesses reportedly do not incorporate these practices into their business activities*."

By its own initiative, the Rwanda Private Sector Federation published the Model Corporate Governance Code for its members. That code aimed at improving and strengthening the corporate governance standards as well as improving efficiency and competitiveness. Companies would use it to craft out their own codes that meet their own products, situations and capacity and was therefore, a non-binding code except

[364] BIZCLIR was a USAID funded programme that assesses commercial laws and institutions that facilitate trade by assessing the existing legal and institutional framework and the implementation of these laws and policies. For more information on BizCLIR on Rwanda, see: http://www.bizclir.com/cs/countries/africa/rwanda/protecting_investors

where a company decided to approve it as their own. In the introduction to the Model Corporate Governance Code it is stated:

"The general aim of the code is to help improve systems and standards of governance in Rwandan companies. This will facilitate in improving efficiency and competitiveness in the business sector. It will also bolster confidence in the capital market and the confidence of the Rwandan society generally, in the way in which business functions"[365]

Notwithstanding the commitment of the government and policy makers, it is hard to view the same commitment through the 2009 Company law and its 2010 amendment. One would imagine that corporate governance as well as the choice on its approach would be easily provided for while stipulating the duties of company directors. However, the law seems inexplicit on whether directors are strictly answerable to the shareholders alone or whether other stakeholders also have a say in a company's operations and benefits. In article 211 for example, it is stated that:

"Every officer of a company shall exercise:

1° the powers and discharge the duties of his/her office honestly, in good faith and in the best interests of the company;
2° the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[366]

The law does not explain what the best interests of the company should mean[367]; neither have the courts discerned on what this would mean. But it follows from the Company Law 2009 definition of the company as "a corporate body composed of one or more persons *for making profit*[368]" that it shall be to the company's interests when decisions are taken to increase profits regardless of what the process of achieving such profits might be.

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[365] Guiding Code of Corporate Governance, Private Sector Federation – Rwanda, English & Kinyarwanda July, 2009.
[366] Law N°07/2009 OF 27/04/2009 Relating to Companies, O.G N°17bis of 27/04/2009, Art.211.
[367] In general sense, this is so because defining the interests of a company for example, is a matter of fact and so, statutory law can only state in a general way what is wrong (like neglecting the interests of the company) but the law will not positively prescribe in details how directors should behave, etc; the legislator is not a businessman; and, the same applies to the judiciary; they will not declare what the best interest of the company is but, instead, they will of course judge whether a director has violated his duty basing on what the company itself prescribed as its best interests. On the other hand however, we hold that the orientation of any jurisdiction's approach to corporate governance would only be viewed from the provisions of its enacted laws as in the case of s.172 and 174 of the UK's CA 2006 on their new approach – ' The enlightened theory'.
[368] Art. 2(12), Ibid.

Although this law (2009) is very well articulated in terms of shareholders' protection, especially the minority shareholders' protection, it is lacking in terms of describing the duties of the company directors and officers. If Art. 211 of the 2009 Rwandan Company Law was to be compared to for example the UK ss. 172[369] and 174 CA 2006, one would realise there is much that could be added to the Rwandan legislation. Even more because the Rwandan Company law 2009 as amended to date is highly related to the UK Companies Act of 2006. Thus, Rwandan company law should consider elaborating more on the duties of company directors and to explicitly point to whom these duties are owed.

In reaction to the newly established Rwanda Stock Exchange and in anticipation to having many companies going public, the Rwandan new company law (2009) categorises companies into two: private and public companies. Unlike in the previous law (1988) relating to commercial enterprises in Rwanda which distinguished the private from public enterprises on the mere fact of either being owned by private individuals (private) or by the state (public), the law now distinguishes the two on either being able to trade its securities publicly (public company) or not (for private)[370]. This has been noted as a great shift of the understanding of companies in Rwanda. The intention has been to encourage the public to invest their money either by creating private companies or by buying shares from companies that have publicly listed.

Nevertheless, I contend that, just like it is in the Anglo-American Shareholder approach, Art. 211 provides unlimited discretionary powers to the directors and officers to do whatever they would wish with the company's resources provided it can be justifiable as being 'to the best interest of the company'. Within such discretion, directors may subjectively or objectively commit the company's resources to any activities. It is also noted that throughout the legislation, employees are not catered for as for example, one of the stakeholders of the company[371].

The legislation is more dedicated to investor protection than to any other thing. Although Art.211 was not explicit on the duties and to whom these duties are performed, Art. 212

[369] The UK position under s.172 CA 2006 is explicit on what the duties of directors are and to whom those duties shall be directed. The principle of 'Enlightened shareholder value' imposing duties to a wider group of shareholders not just the shareholders is clearly expressed in the law.

[370] Law N°07/2009 OF 27/04/2009 Relating to Companies,OG N°17bis of 27/04/2009, Arts. 6 & 7.

[371] Yet, in other systems like in Europe as Dorresteijn, A. et al., note, at the European level, employee involvement in almost all the decision making processes of a corporation has even increased due to the internationalisation of European business enterprises to a global scale. See, Dorresteijn, A. *et al*., European Corporate Law, 2nd Edition, European Company Law Series, Vol. 5, Kluwer Law International, 2009, p. 203.

provide for and sheds some light in regard to the liability in case of breach of the duties by the director (s) or officer (s) of the company. It reads:

“Where a director or officer wilfully commits a breach of any duty:

1° shall be liable to compensate the company for any loss it suffers as a result of the breach;
2° shall be liable to account to the company for any profit made as a result of such breach;
3° any contract entered into between the director or the officer and the company with regard to that transaction may be rescinded by the company”.

In other words, it is only to the company and indirectly, the shareholders that the directors or officers are liable and accountable to in case of breach of their duties. Other claimants such as creditors, employees, and any other interested party may however have recourse against directors themselves by relying on other laws like civil codes relating to their general obligations as individuals but also as supervisors[372], labour codes, etc.

The conclusion is that article 212 coupled with many other provisions in favour of shareholders and empowering shareholders in the 2009 company law reveals that the Rwandan statutory approach is the Shareholder Value approach and not even the UK’s “Enlightened Shareholder Value”. As already mentioned, the company law defines the company as “a corporate body composed of one or more persons *for making profit*[373]”. Consequently, according to the Companies Law 2009 the interests of stakeholders other than shareholders do not fall under the interests of the company. This is in line with the argument advanced far back in 1970 by Friedman where he wrote that “the social responsibility of business is to increase its profits”[374].

However, the Guiding Corporate Governance Code as published by the Private Sector Federation of Rwanda hints on the company directors considering other stakeholders

[372] Arts. 258 – 260 of the Rwandan Civil Code Book III (CCB III) on conventions and obligations in general. Art. 259 for example provides that “one is not only liable for the acts he/she has committed or omitted by him/herself only, but also for the acts and omissions by those that are under his/her control and supervision. Here, the interpretation of ‘those under his/her control and supervision’ has been interpreted widely to include the people – like the employees or subjects, animals, but also objects.
[373] Art. 2(12), Ibid.
[374] Milton Friedman, ‘The Social Responsibility of Business is to increase its Profits’, *The New York Times Magazine* [New York], 13 September 1970.

too in the decision making process. In a relevant part on the role and duties of a director, the code points out that:

"*Identify the corporation's internal and external stakeholders and agree on a policy or policies determining how the company should relate to them*"[375]

This is also the case where the code in its chapter XVII and chapter XVIII provides for responsibilities to other stakeholders including the employees and on the Corporate Social Responsibility especially on the impact the company's activities will have on the environment in general and the community where the company operates.

In its Annex 1 relating to the "Board of Directors' Charter", the guiding code reiterates on the directors' duties as to always dispense their duties in the 'best interest of the company, and on the honesty and diligence' all of which were mentioned in the Companies Law. However, they also mention other stakeholders as being among the core to attract the director's attention while dispensing their duties with the company. In a relevant part it is mentioned that:

"Consequently, directors undertake to take into account not only the possible financial impact of their decisions but also their consequences for sustainable development, their effect on relations with stakeholders and the general interest of the communities in which the company operates"[376].

We contend that having corporate governance code of practice initiated by the private sector undoubtedly gives it more credibility and ownership and there is a high probability that the practice is likely to develop much faster than where it would be primarily initiated and spearheaded by the regulatory institutions or by the pressure groups and civil society organizations. What remains to assess is how much this guiding code has impacted in companies adapting to it or establishing their own ones but that will not be the object of this research. However, it can be observed that some companies begun establishing and implementing some corporate governance practices even before the PSF Code was in place. Examples are the Kenol Kobil Ltd that deals in petroleum products, some banks like Access Bank, Ecobank, FINA bank and others many of which are subsidiaries of foreign banks or companies. Some also, might be presenting it on their websites and indicating them in their reports but due to the fact that there is an

[375] Guiding Code of Corporate Governance, Private Sector Federation – Rwanda, English & Kinyarwanda July, 2009, pg.6.
[376] Board of Directors' Charter, Ibid, art.2.

insufficient monitoring and compliance procedure, may never actually implement them in Rwanda.

3.3.5. Conclusion on Corporate Governance approaches

Despite globalization, corporate governance patterns continue to differ, and that is because business but also social practices are not uniform. Differences are created by:
- The extent to which laws are enforced, the treatment of stakeholders such as labour and the community, the ways in which executives are compensated, the frequency and treatment of mergers and takeovers, patterns of ownership, business customs in the country concerned, significance of the stock market in the country, concentration of ownership. This is still the rule, rather than the exception[377].

In my discussion and analysis above, I have first compared the two classical approaches of corporate governance – being the Shareholder value approach (Anglo-American) and the Stakeholder approach. I have also looked at the new developments with the emergence of the third approach, the 'Enlightened shareholder value' approach which has some features of both classic approaches mentioned above. The main intention was however, to examine the Rwandan legal and regulatory framework to establish to which of the approaches Rwanda adheres.

In my analysis, I contend that the Rwandan company law is not explicit on which model of corporate governance it does ascribe to. I noted however that in the light of the legal definition of the company it can impliedly be deduced that it ascribes to the shareholder value approach. This is not surprising though, since, as discussed in the evolution of the Rwandan business climate, it was seen that the dominant agency problem that existed before the promulgation of the 2009 company law was the shareholder/director relationship.

Nevertheless, I have also shown that the private sector and even individual companies have voluntarily embraced corporate governance practices by publishing what they consider as their corporate values and good practices. The Rwanda Private Sector Federation (PSF) has published the Guiding Corporate Governance Code for member companies to use for designing their individual corporate governance codes. What is interesting to note from the private sector initiative is that their approach shows a mixture of both the features of the Shareholder Value approach by putting the

[377] International Chamber of Commerce: *Corporate Governance: A basic guide for business practitioners.* Available at:
http://www.iccwbo.org/corporate-governance/id3173/index.html [accessed on 13/01/2012]

shareholder and the 'company' at the fore, but at the same time, considers the interests of other constituents like the company employees, as it is advocated for by the Stakeholder Value proponents.

I conclude therefore that the Rwandan corporate governance approach in practice is taking the trend of the UK's "Enlightened Shareholder Value" since, on one the hand, it is interested in having the shareholder reasonably rewarded for his/her investments, but at the same time, advocates for the responsible and ethical conduct of their business by putting into consideration other constituents like the employees, the community where the company operates from, and others.

3.4. Are Corporate Governance rules voluntary or binding?

The debate on whether corporate governance codes or rules should be binding or voluntary – or the "comply or explain" method - has been on for some years especially after the world's financial meltdown and the major corporate scandals. In order to limit regulatory interventions in the private sector, governments are reluctant to rigorously enforce corporate government codes and prefer to persuade corporations to voluntarily implement their codes. The "comply or explain" principle is the norm in most countries especially in regard to financial reporting for the listed companies[378] and it is becoming the most favoured approach in the draft harmonised code of corporate governance as initiated by RDB. The 'comply or explain' means that the set standards of best practices are laid down and are made known to corporations for them to adopt and implement but with a possibility not to apply them in case a corporation has justifiable reasons for that.

However, with the financial crisis and the rampant corporate scandals around the world, some countries just like many international financial and economic institutions have started doubting this approach. When economic crises erupt, the regulators may bear the blame[379] and as a result, strict regulations especially in the sector where the crack appeared first will surface[380].

[378] This is the case with the UK, The Netherlands, USA, Ireland, and many others.

[379] On the failings of the Irish Financial Regulator see Editorial, "Where was the Regulator?" (2008)15(9) *Commercial Law Practitioner214*; M. Abramson, "Failures of Financial Regulators in 2008" (2009) 16(3) *Commercial Law Practitioner 51;* J. FitzGerald, "Fiscal Policy for Recovery" Working Paper No. 326 (ESRI, 2009) http://www.esri.ie/publications/search_for_a_working_pape/search_results/view/?id=2889K. Regling and M. Watson, "A Preliminary Report on The Sources of Ireland's Banking Crisis" (Prn A10/0700, Government Publications, 2010); P. Honohan, The Irish Banking Crisis – Regulatory and Financial Stability Policy 2003-2008" (2010).

[380] This is what followed the early 2000 Banking Sector Crisis in Rwanda. Many regulations and

Due to this, the answer as to whether corporate governance rules are voluntary or binding in Rwanda, is mixed. Some rules are voluntary whereas others are strictly binding. Corporate governance rules are generally voluntary for private companies[381]. However, when it comes to specific sectors that are judged to be important for the economic development and for the society's welfare like insurance companies and banks, strict and binding rules apply[382].

3.5. Corporate Governance and the Company Directors

Although corporate governance as discussed before involves the different roles each of the stakeholders play in the management and control of companies, company laws and practice put the pivotal role on the shoulders of the company directors[383]. Generally, the Board of Directors (BoD) is entrusted with the running and management of the business and affairs of the company by directing and supervising the management.[384] Directors are directly or indirectly voted or nominated to office by the shareholders in a shareholders' general meeting[385] and indeed, a reasonable chunk of shareholders' powers is delegated to the so appointed or nominated directors to manage and run the company[386]. Thus, due to the intricacies involved in combining ownership and control coupled with the fact that in most cases stockholders are dispersed[387],they only

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instructions from the regulator (BNR) started flowing in. It was no longer the choice of any bank to comply or not at the expense of the clients, depositors, employees, etc.

[381] This is what appears in the PSF Code of best practices in Corporate Governance which serves as a model corporate governance code without a binding effect. The company law (2009 as amended to date) with exceptions to certain strict rules provided therein is silent on corporate governance as a concept.

[382] See BNR regulations: Regulation N° 06/2008 on Corporate Governance of Banks, Official Gazette n° 02 of 10/01/2011; Regulation Nº07/2009 of 29/07/2009 on Corporate Governance Requirements for Insurance Business, Official Gazette n°35 0f 30/08/2010.

[383] According to: Weisbach, M.S., 'Outside Directors and CEO Turnover', Journal of Financial Economics 20 (1988) 431 – 460. North Holland, the Board of directors is widely known to be an important organ of the company that plays a significant role in corporate governance particularly in the monitoring and the supervision of the top management, provide advice and veto poor decisions.

[384] See Art. 169 of the 2009 Rwandan Company Law.

[385] See Art. 167 of the 2009 Rwandan Company Law.

[386] Jensen, M.C., 'The takeover controversy: Analysis and evidence', Midland Corporate Finance Journal 4 (1986), 6-32 , notes that: The Board of directors ensures the effective internal control mechanisms of corporation.

[387] There is enormous literature on Ownership and Control and its variances as was first initiated by Berle and Means in Berle, A., Means, G., The Modern Corporation and Private Property. MacMillan, New York, 1932; then later by Baumol, W., Business Behavior, Value and Growth, MacMillan, New York, 1959; Jensen, M., Meckling, W., 'Theory of the Firm: managerial behavior, agency costs, and ownership structure', Journal of Financial Economics 3, 1976 305 – 360; Grossman, S., Hart, O., 'The costs and benefits of ownership: a theory of vertical and lateral integration', Bell Journal of Economics 11, 1980, 42 – 64; Lim, M.H., Ownership and Control of the One Hundred Largest Corporations in Malaysia, Oxford University Press, Oxford, 1981; La Porta, R., Lopez-de-Silanes, F., Shleifer, A., Corporate ownership

indirectly participate in management through electing directors[388]. The board of directors in return, may and often do, delegate some of their powers to a selected group of managers – normally called *Executive Directors* (ED) or to the committee of directors[389].These are obliged to periodically report to the BoD. The BoD on its turn reports to the General Assembly (GA) of shareholders.

It has to be reminded that the BoD's membership may be appointed from amongst shareholders themselves[390]or from outside, like those they normally call *independent* or *outside* directors. Company directors generally include both those that are carrying out the day-to-day business of the company as well as those that are involved in a limited way as the law or the articles of association so provides. It has to be nevertheless emphasized that the members of the board are jointly and severally liable even where delegations had been made[391]. However, having said this does not rule out the fact that the individual director's liability under exceptional circumstances can be upheld[392].

3.5.1. Who are company directors?

Although many jurisdictions like Rwanda and the UK for example, would hesitate to define who the company directors are[393], researchers have categorised them into various functional categories. For example whereas the Rwandan company law opts for the distinction between the ED and the NEDs[394], the Central Bank (BNR)'s corporate governance regulations prefer the distinction between the independent and the non-independent directors[395]. In general however, company directors that are entrusted with

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around the world. Journal of Finance 54, 1999, 471 – 518; Claessens S., Djankov S., Lang L.H.P., 'Separation of Ownership and Control in East Asian Corporations', Journal of Financial Economics 58, 2000, 81 – 112; and many others that came later.

[388]Longenecker, J. G., Moore, C. W., Petty, J. W., Small Business Management: An Entrepreneurial Emphasis, 11th edit., South-Western College Publishing, USA, P.179.

[389] See Art. 175 of the 2009 Rwandan Company Law.

[390] See Art. 168, ibid.

[391] Art. 175.

[392] Liability of corporate directors, whether jointly or individually shall be discussed later in chapter four of this work.

[393] Rwandan Company Law for example does not define who a company director is. Only in its Art.2 (41) does it define the 'non-executive director' as a director who is not involved in the day to day management of the company. Other attempts are noted in the Central Bank's regulations both for the banking and insurance sectors. In these regulations too, no precise definition of a director is given. They both however, define who an independent director is mainly due to a greater emphasis pressed on these independent directors on the boards of these financial institutions.

[394] Ibid.

[395] Art. 2(2) of the BNR regulation No. 06/2008 on Corporate Governance of Banks, *Official Gazette No. 02 of 10/01/2011* provide that; *"Independent director" means a director who has no relationship or interest in the banking institution or any of its subsidiaries or affiliates or their related interests*; while Art. 1(2) of

the running of a company are the Board of Directors which is divided into those two mentioned above.

Although a 'director' is not clearly defined under Rwandan law, the Company Law defines in general terms who an officer of the company is, in its Art. 2 (38) where it says:

"An Officer of the Company is a person who is appointed by a company for the achievement of the latter's mission".

This mandate applies, of course, to directors. As explained already, Article 211 requires from every company's officers to exercise the powers and discharge the duties of their office honestly, in good faith and in the best interests of the company and demonstrate the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These are basically the duties of the company directors as we shall discuss them further in this chapter. Should we then say that the legislator intended for the two words "Company Director(s)" and "Company Officer(s)" to be used interchangeably and to mean the same? We assume that the Rwandan legislator was probably inspired by the English law that considers the term 'officer' in relation to corporate bodies to entail also the company director[396].

We shall leave this discussion in the rest of our work. We shall be focusing on the company directors to whom Rwandan law entrusts the responsibility of managing, directing and supervising the company and we shall try as much as we can to limit the use of the term "Company Officers".

3.5.1.1. The Board of Directors

Under Rwandan law, the powers to direct, control and the supervision of the company and its management are conferred upon the board of directors.[397] The law provides that

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the BNR regulation No. 07/2009 of 29/07/2009 on corporate governance requirements for insurance business, *Official Gazette No. 35 of 30/08/2010* provides that: an *"Independent director" is a director who has no relationship or interest in the institution or any of its subsidiaries or affiliates or their related interests which could interfere with the exercise of independent judgment in carrying out the responsibilities of a director*.

[396] Section 251 of the UK Insolvency Act 1986 (incorporating the definition in section 1173 of the Companies Act 2006), as amended to date provides that:
An "officer", in relation to a body corporate, includes a director, manager or secretary. The same insolvency Act (1986) in its section 251 again kind of define a "director" as including "any person occupying the position of director, by whatever name called."

[397] Art. 169 of the Company Law states that: "The business and affairs of a company shall be managed by, or under the direction or supervision of the Board of Directors. The Board shall have all the powers necessary for managing and for directing and supervising the management of the business and affairs of

such a board shall act in a collegial administration and shall be of a sufficient number provided for in articles of association for the Board's meeting quorum to be attained. In the subsections hereunder, we shall try to make distinctions among those composing the board of directors.

The first category, that is highly influenced by the common law world and the English system in particular, shall be that where directors are divided into three distinct groupings; a) those referred to as 'de jure' directors, b) the 'de facto' directors, and then the uncommon ones, but who are qualified under the English law, c) the 'shadow directors'. All such categories of directors exist in all systems including Rwanda either explicitly through statute or in practice. They will each be discussed in the next sections.

The other way of distinguishing directors is based on whether a director is charged with the day-to-day business of the company (Executive Director) or not (Non – Executive Director). In general terms, one can say that there are those directors who are controlling the company from a distance i.e. not as full-time directors and those who ensure the day-to-day management of the company. So, ideally, the liability of each would actually depend on what his role is or is supposed to be in the running of the company's affairs whether it is the daily management of the company or as a '*supervisory'* director, notwithstanding certain isolated cases where they may be jointly and severally held liable for an act that was committed or omitted by either of them. It is obvious that directors who are involved in the day to day affairs of the business have more specific knowledge of the company's business information than other directors. In some jurisdictions, other company officers may be considered to be like directors especially where their day to day activities allow them to take important decisions that would greatly affect or impact on the company. Such officers would include for example, Company Secretaries (CS), Commercial Managers (CM), Chief Accountants (CA), depending on the structure and organisation of a company. This is the case of Rwanda where they are sanctioned just like directors for their improper conduct of business[398].

Under the former Rwandan company's code (1988 Law), the chairman (as he is referred to in the common law system) or the *Président Directeur Général - PDG* (as referred to in France or was referred to in Rwanda before) together with other executive

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the company".

[398] For example, Art. 212 of the Rwandan Company Law provides for the liability in case of breach of the duties by the director (s) or ***officer (s) of the company***. It reads:
"Where a director or officer wilfully commits a breach of any duty:
1° shall be liable to compensate the company for any loss it suffers as a result of the breach;
2° shall be liable to account to the company for any profit made as a result of such breach;
3° any contract entered into between the director or the officer and the company with regard to that transaction may be rescinded by the company".

directors or officers depending on what their appellation was, were the ones charged with the daily management of the company. The chairman/PDG had wide powers of management in the company but he was, according to the law, answerable to the board in particular, and to the members (shareholders) in general.

Following the promulgation of the 2009 company law, the powers of the chairman were slashed reasonably and in most cases and combining the chairmanship and the chief executive functions in the same company[399] was prohibited. The board of directors was made more accountable to shareholders than before, and the joint and individual responsibilities of directors were more emphasised.

3.5.2. Categorization of directors based on their appointment

It is fashionable in company laws to stipulate that the Board of Directors are the ones responsible for the management of the company's businesses and affairs. Rwandan law is no exception to that and thus, Art. 169 of the Rwandan company law provides:

"The business and affairs of a company shall be managed by, or under the direction or supervision of the Board of Directors.

The Board shall have all the powers necessary for managing, and for directing and supervising the management of the business and affairs of the company"[400].

However, despite the confusing phraseology of the first *alinea* of this article as to suggesting the different options for the directors either to manage, direct or supervise the business and affairs of a company, the general interpretation in Rwanda has always been a combination of those. In practice however, non-executive directors only supervise and leave the rest of their responsibilities to a selected executive management and the other officers of the company. This actually defines who have the actual control and direction of the company's day-to-day business and affairs but as seen from the provision above, the principle remains that it is from the Board of Directors that all managing powers derive and thus, the directors are accountable[401] to both shareholders and other stakeholders.

[399] Art. 20 of the BNR Corporate Governance Instruction for Banks for example

[400] Art. 169 of the Law N°07/2009 of 27/04/2009 Relating to Companies, Official Gazette N°17bis of 27/04/2009

[401] '**Accountability'** is a fashionable terminology especially in Rwanda's public service but also in private to mean one's responsibility to account for his or her actions. Such an accountability often has the benchmarks and for a company director, the benchmarks are the duties he owes to the company but also, to the stakeholders at large.

3.5.2.1. *De jure* Directors

Generally speaking, a *de jure* director is the one who has been validly and duly appointed under the country's company laws[402] and / or in accordance with the articles of association of the relevant company in question[403]. Rwandan Law has conditioned the appointment to subsequent consent by the appointed person before qualifying him/her a company's director. Where this consent has not been expressed, it means that the appointed person is not ready to be bound by the duties attached to his appointment and office and thus, cannot be held liable except where, despite not having expressly consented, he/she behaved and performed like a director of the same company (see next paragraph). Where a director has expressly consented, he/she shall be held responsible for the liabilities that concern a company director since he/she is the one recognised by law through his/her consent, and has been entrusted with the management of the company in accordance with art. 169. He/she is liable first, for the acts he/she commits himself/herself, and also often jointly and severally liable for the acts committed by other directors where the law provides for it.

3.5.2.2. *De facto* Directors

A de facto director on the other hand, is the one who acts as a company's director, but who is not a *de jure* director. He/she is a person assumed to work as a director and the company recognises his actions in the company although he/she was not actually or validly appointed as such. In some jurisdictions, such people are often recognised in the court rulings in respect of some offences committed where they put in wordings similar to this;

'Any person who was purporting to act in any such capacity (as a director)',

And this makes them liable just like the *de jure* directors for similar offences committed either to the company, or to the third parties. To understand more on the *de facto* directorship, we shall rely on foreign case law as we could not have any relevant domestic (Rwandan) case to illustrate the concept. Although we know that these common-law precedents have no direct influence on Rwandan courts or practice, I am

[402] Art. 167 of the Law N°07/2009 of 27/04/2009 Relating to Companies, Official Gazette N°17bis of 27/04/2009 provides that members of the Board of Directors have to be appointed by the Annual General Meeting of shareholders.

[403] Art. 168 refers to those shareholders whom the articles of association designate as the ex-officio members of the Board of Directors. It may be a qualification of a certain percentage of shareholding or may be due to the fact that he/she is or they are founding members of that company and by that mere fact, the articles confers upon him/her /them a direct entry to and seat at the Board of Directors' meeting.

using them for illustration purposes and to make the concept clearer to the reader. We note for example, that although the New Zealand's Companies Act was not so specific on the appellations of *a de facto* or shadow director, the High Court ruling in *Delegat v Norman [2012] NZHC 2358* is an illustration how one shall be qualified as either a s*hadow* or *de facto* director of a company under the New Zealand's Companies Act 1993 s.126[404] . It should be noted that the wording of this section 126 is common in most common law countries including the UK.

Background of the case[405]

This case involved the failed luxury yacht maker, *Salthouse Marine Limited* (SML). The Jim Delegat Business Trust had contracted with a boat building subsidiary of SML (Boat 93) to construct a luxury yacht for the Trust in November 2009. The construction of the yacht was guaranteed by SML. However, prior to the completion of the Trust's yacht, SML was placed into receivership in February 2010 and then into liquidation in May 2010. Boat 93 was also liquidated. This left the Trust with an incomplete hull (worth between $150,000 and $455,461) and a substantial loss on the payments of $1.23 million it had made to Boat 93 to build the yacht.

The Trust has not pursued claims in contract against either Boat 93 (for breach of contract) or SML (as guarantor) because of their insolvency. Instead, the Trust brought

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[404] Meaning of "director"

(1) In this Act, director, in relation to a company, includes—

(a) A person occupying the position of director of the company by whatever name called; and (b) For the purposes of sections 131 to 141, 145 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7—

(i) A person in accordance with whose directions or instructions a person referred to in paragraph (a) of this subsection may be required or is accustomed to act; and

(ii) A person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and

(iii) A person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board; and

(c) For the purposes of sections 131 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7, a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board; and

(d) For the purposes of sections 145 to 149, and clause 3(4) (b) of Schedule 7 of this Act, a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (c) of this subsection may be required or is accustomed to act in respect of his or her duties and powers as a director.

[405] The summary of the case was taken as was provided on Lexology website in association with the Association of Corporate Counsels by Bell Gully, New Zealand on March 27, 2013. Available on: http://www.lexology.com/library/detail.aspx?g=3a16bba4-f690-4de6-93fc-0dd071a8fa2b (Accessed on 10/04/2013).

proceedings against one of the two directors of SML, Mr Norman, under section 301 of the Companies Act. This section allows a creditor of a company in liquidation to apply to the court for an inquiry into the conduct of a director of the company. Following the inquiry, if the director is found to be in breach of duty to the company, the court may order the director to contribute such sum by way of compensation to the assets of the company as the court thinks just.

Mr. Norman had become a non-executive director of SML in 2008 after being approached by Ms.Salthouse to become an investor in SML. At the time SML was in financial difficulties, but Mr. Norman agreed to fund SML because he admired the yachts built by SML and had a genuine belief that SML's financial difficulties could be turned around. Although Mr. Norman was not appointed as a director of Boat 93 or of any of SML's other boat building subsidiaries, the Trust alleged that he was a 'shadow' or 'de facto' director of Boat 93 in addition to being a director of SML. The Trust also alleged that Mr. Norman was in breach of his directorial duties (under sections 131, 135, 136 and 137 of the Companies Act) by allowing both Boat 93 and SML to trade recklessly.

Ms.Salthouse, the managing director of SML, was the sole director of Boat 93 and the other boat building subsidiaries.

The court's comments on de facto directors

The court noted that section 126 of the Companies Act (New Zealand) distinguishes shadow directors from de facto directors. A shadow director does not purport to act as a director, but instructs or has the power to instruct the actions of an appointed director. In contrast, a de facto director occupies the position of director notwithstanding that he or she has not been validly appointed as such. A *de facto* director is held out by the company and purports to act as a director.

Discussing the principles relating to *de facto* directors, Justice Woolford made the following points:

The concept of de facto director is confined to those who willingly or voluntarily take upon themselves the role, either by usurping the office or by continuing to act once their formal role has ceased. It does not extend to a person who does not willingly adopt the role of director.

In order to establish that a person is a *de facto* director of a company, it is necessary to prove that he or she undertook functions in relation to the company that could properly be discharged only by a director.

There needs to be clear evidence that the person was either the sole person directing the affairs of the company or if there were others who were true directors that he or she was acting on an equal footing with the others in directing the affairs of the company.

If it is unclear whether the acts of the person are referable to an assumed directorship or to some other capacity, such as shareholder or consultant, the person must be entitled to the benefit of the doubt.

Was Mr. Norman a *shadow* or *de facto* director?

The Trust alleged that Mr. Norman was a *shadow*[406] or *de facto* director of Boat 93 because he made or participated in various governance decisions relating to Boat 93. This included: locating and negotiating with customers of Boat 93; incorporating Boat 93; specifying the commercial purpose of Boat 93; entering into build contracts with Boat 93; determining where Boat 93 and other subsidiaries' customers' yachts would be constructed; employing or continuing to employ Ms. Salthouse as the General Manager of Boat 93 and other subsidiaries; and delegating authority to Ms. Salthouse, in her capacity as General Manager, to make operational decisions on behalf of Boat 93 and other subsidiaries.

The court disagreed with both these claims

For Mr. Norman to be a shadow director of Boat 93, the Trust had to prove that Ms. Salthouse had been accustomed to acting in accordance with Mr. Norman's instructions. The court said this test required some sort of "on-going control or influence in a company's affairs". However, there was no evidence provided of Mr. Norman giving Ms. Salthouse directions or instructions in relation to the operation of Boat 93 or the other boat building subsidiaries, so the Trust failed on that ground.

The judge also found on the evidence that Mr. Norman did not assume the status and functions of a *de facto* director of Boat 93. In relation to the governance decisions raised by the Trust, the court found that Mr. Norman carried these out as a director and financier of SML, not representing Boat 93 or the other boat building subsidiaries. Further, the judge held that if there was any doubt about the capacities in which Mr. Norman was acting, the benefit of that doubt was to go to Mr. Norman.

[406] Shadow director shall be discussed in the next subsection. However, because of their confusing character, often claimants submit to court praying for either of the two but they are never specific whether what they claim the respondent to have committed were committed by the shadow director or the de facto one!

Conclusion

In conclusion on this *Delegat v. Norman [2012] NZHC 2358,* it is noted that, even though s. 126 of the New Zealand Companies Act was never specific to name a de facto director,*Justice Woolford* by interpreting s.126, referred its wording in (a) (iii) and (c) to have suggested to mean a *de facto* director where it states that:

"(1) In this Act, director, in relation to a company, includes— (…)

(iii) (…) a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board ;

(c) For the purposes of sections 131 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4) (b) of Schedule 7, a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board;"

In other words, a *de facto* director might not necessarily be an officer of the rank of a director, but any person who takes decisions on behalf of a company, which decisions would have been in the province of a director or collectively in the powers of the board of directors. Such exercise of power may be an individual's own initiative to usurp directorial powers which is left unchecked or might even be a delegation of powers from a director or the board of directors as an organ. What is clear in either way is that he is not formally and legally appointed as a director but he is a director in fact.

3.5.2.3. Shadow Directors

A *shadow director* can be defined as someone who controls a company's directors or someone, on whose command or advice the directors of a given company act, but who hides behind another person (i.e. he is not seen to do so) like the de jure or de facto directors. In the UK's Insolvency Act 1986, a shadow director is specifically defined as:

"shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity)"[407]*.*

[407] Section 251 (Expressions used generally) of the 1986 Insolvency Act in the UK, available at: http://www.legislation.gov.uk/ukpga/1986/45/section/251 (An official UK Website for Legislations), accessed on 16/05/2014.

The definition is a bit modified or improved by the Hong Kong's definition in the 2003 Companies Ordinance which provides that:

"a shadow director in relation to a company, means a person in accordance with whose directions or instructions the directors ***or a majority of the directors*** *of the company are accustomed to act."*[408]

With this definition from Hong Kong, it does not require necessarily the whole Board to be accustomed to working by the instructions of that shadow director, but just a majority of them suffice. Interesting also to note as was emphasized in *Unisoft Group Ltd* case[409] is that:

"It is not necessary to show that the alleged shadow director has influence over all the corporate activities of the company. It needs not be that the board of directors exercises no discretion of their own. It is enough to show that the alleged shadow director has some real influence over the way in which the board of directors acts"[410]*.*

Shadow directors are neither defined by the Rwanda's Insolvency Law[411] nor explicitly defined by the Company Law[412]as amended to date. Impliedly however, if we go by inspiration from the definitions as given by the UK and Hong Kong laws above, we realise that the Rwandan Company law in its articles 27 and 28 compares the conduct of that shadow director with a board being controlled by another company (like a holding or group company). In other words, it implies that this particular board referred to here is a board that is not functioning normally, with the total independency usually expected of any board, but a board that shall have to go by the external instructions – from the external controller[413].

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[408] Section 2 of the Companies Ordinance (Cap. 32) (**CO**) as quoted by ONC Lawyers in the article 'Shadow Directors liable as Directors', January 2010. Available at http://www.onc.hk/pub/1001_EN_Shadow_Directors_Liable_as_Directors.pdf , Accessed on 20/05/2014

[409] *Unisoft Group Ltd (No. 2) (1993)*

[410] Summary of the *Unisoft Group Ltd (No. 2) (1993)* as given in Quizlet – Company 14: The Management of the Company Flashcards at: http://quizlet.com/21017013/company-14-the-management-of-the-company-flash-cards/ accessed on 20/05/2014.

[411] Law Nº12/2009 of 26/05/2009 Relating to Commercial Recovery and Settling of Issues arising from Insolvency, *Official Gazette n° special of 26/05/2009.*

[412] Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009*.

[413] Art. 27 provides that:

"A Board shall be taken to be controlled by another company where:

1° the other company, by exercising a power exercisable by it, can, with or without another person's consent, appoint or remove all the directors of the company, or such number of directors as together hold a majority of the voting rights at meetings of the Board of the company;

2° the parent owns at least one half of the voting powers :

a) power over more than one half of the voting rights by virtue of an agreement with other investors;

The two articles taken together suggest that even in the operations of the directors' daily activities, their concern shall be to satisfy the interests of the company (the individuals in it) that hold control over this other company (for example its subsidiary) but not necessarily the interests of the particular company to which they were appointed as directors (Board members). The concept of the company's interest shall be discussed later in this chapter. The kind of relationship mentioned in the two situations provided in arts. 27 and 28 may result, but not only, from the parent – subsidiary hierarchy. In regard to the liability however, Hobson notes that whereas *de facto* directors are simply betrayed by their actions (breach of duty) but are easily identifiable[414], it is quite cumbersome to identify and consequently hold liable the shadow directors mainly due to insufficient legal backing.[415] He nevertheless acknowledges in reference to Koh[416] that court decisions in most common Law jurisdictions have provided some guidance. In the UK, Australia and New Zealand for example, many cases[417] are attempts to clarify the concept of shadow directors/ We note *Re Hydrodam (Corby) Ltd (1996) 2 BCLC 180* from the UK as the leading case in which Millett J. clarified more on the distinctions between the three categories (*de jure, de facto*, and shadow directors) of company directors where he noted that:

"(i) a de jure director is one who has been validly appointed to the office; (ii) a de facto director is one who, although not validly appointed as a director, purports to act, and is

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b) power to govern the financial and operating policies of the company under any Law or agreement;

c) power to appoint or remove employees and members of the Board of directors or equivalent governing body;

d) power to cast the majority of votes at meetings of the Board of directors or equivalent governing body."
And Art. 28 provides on a Company having power to appoint management where it says:

"A company shall have the power to make an appointment where:

1° a person cannot be appointed as a director of the company without its approval;

2° a person's appointment as a director of the company follows necessarily from the person being a director or other officer of the other company."

[414] Easy identifiability of *de jure* directors is also reckoned by Barber, Matthew, 'Boxing Shadows: Secretary of State for Trade and Industry V Deverell and Limits on the Definition of Shadow Directors' (June 27, 2011). Available at SSRN: http://ssrn.com/abstract=1873168 or http://dx.doi.org/10.2139/ssrn.1873168 p. 2. Accessed by author on 19/05/2014.

[415] Hobson, Michael D. (1998) "The Law of Shadow Directorships," *Bond Law Review: Vol. 10: Iss. 2*, Article 4. Available at: http://epublications.bond.edu.au/blr/vol10/iss2/4 , p.4. Accessed on19/05/2014.

[416] Koh P M C, 'Shadow Director, Shadow Director, Who Art Thou?' (1996) 14, *C & SLJ 340* P.340.

[417] Examples of such cases include: *Re a Company (No 005009 of 1987) ex parte Copp*(1989) BCLC 13; *Standard Chartered Bank of Australia Ltd v Antico*(1995) 18 ACSR 1; *Australian Securities Commission v AS Nominees* (1995) 13 ACLC 1822; *Re Hydrodam (Corby) Ltd* (1994) 2 BCLC 180; *Diary Containers Limited v NZI Bank Ltd* (1995) 7 NZCLC 96,669, (1995) 13 ACLC 3211*; Re Tasbian Ltd* (No 3) [1993] BCLC 297 (CA)*; Re Unisoft Group Ltd* (No 3) [1994] 1 BCLC 609;)*; Re PFTZM Ltd (in liquidation)* [1995] 2 BCLC 354 (ChD); *Re Kaytech International plc; Secretary of State for Trade and Industry v Kaczer& Others* [1999] 2 BCLC 351 (CA); *Secretary of State for Trade and Industry v Deverell [2001] Ch 340 (CA (CivDiv)); Secretary of State for Trade and Industry v Becker* [2003] 1 BCLC 555*; Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), *among others.*

held out by the company as a director; and, (iii) a shadow director, by contrast, does not purport to be a director, and is not held out by the company as a director. On the contrary, a shadow director claims not to be a director, and shelters behind those who appear to be directors, whether de facto or de jure.'"[418]

Millett noted that, for determining whether someone is a shadow director or not, four factors are essential. These are, whether:

(i) The de jure and de facto directors of the company are identifiable.
(ii) The person in question directed those directors on how to act in relation to the company's affairs, or was one of the persons who did.
(iii) The directors did act in accordance with his instructions.
(iv) They were accustomed so to act.[419]

To sum up, whilst the definition of shadow directors have existed for some time now in common law countries, it has always been hard to meet all the factors above discussed in order to hold someone liable as a shadow director. Much of the case law available is majorly relating to either the directors of the company that is the director of another company or to financial institutions whose opinions have been relied upon by a company that later turns insolvent. It also has to be kept in mind that even to the instructions alluded to in defining the shadow director, the legislator clearly distanced a professional opinion or advice and that these do not in any way refer to instructions[420]. However, in specific circumstances, a professional as an individual may be held to be a shadow director where his/her conduct is tantamount to controlling the affairs of the company.[421] Further, it was also revealed in *Re Soft Group Ltd (No.3)* that a shadow director can as well 'function' in relation to companies with a single director.[422]

[418] Hobson, Michael D. (1998) "The Law of Shadow Directorships," *Bond Law Review: Vol. 10: Iss. 2*, Article 4. Available at: http://epublications.bond.edu.au/blr/vol10/iss2/4 ,p.13. Accessed on19/05/2014.
[419]Dignam A.J., Lowry J.P., 'Corporate Finance and Management Issues in Company Law: Section C: Corporate Management I, Revised edition 2008, A study Guide for the University of London, University of London Press, London p. 15, available at: http://www.londoninternational.ac.uk/sites/default/files/corporate_finance_management_issues.pdf , accessed on 19/05/2014.
[420] Under the UK Company Law, this is explicitly provided for in Section 251 (2) of the Companies Act 2006 (C 46). The same is provided for under Rwandan Law in Art. 175 of the Law N°07/2009 of 27/04/2009 Relating to Companies, Official Gazette N°17bis of 27/04/2009 provides that:
"A person shall not be considered as giving instructions to the company just because he/she provided the members of the Board of Directors with a professional advice."
[421] This was the case in *Re Tasbian Ltd (No. 3) Official Receiver v Nixon (1993) BCLC 297* whose facts are hereunder summarized:
Nixon was a professional, a Chartered Accountant and an experienced Company Director who was first engaged by the majority shareholder and financier of Tasbian Ltd, and later, as a professional advisor of

3.5.2.4. Nominee Directors

There is yet another category of company directors that is not often sounded but which actually exists whether in Rwanda[423] or elsewhere - the nominee directors. It is common, for example, for a parent company to have someone designated to closely follow the management of the subsidiary company on its behalf. Such subsidiary company may be having a seemingly independent management under the board of directors, but which is actually under the control of the nominee director. In practice, with or without his presence in the boardroom, no decision can be taken without his assent especially when he is representing the majority shareholder. However, there is

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Tasbian - the Company. Tasbian later went into receivership. The Official receiver's report alleged that Nixon was a director (de facto or shadow) and accused him of trading while insolvent. The court was therefore requested to decide on whether there was an arguable case on Nixon being a de facto or a shadow director. 'A registrar at first instance and then Vinelott J (Chancery Division (Companies Court)) on appeal held there was an arguable case against Nixon. Balcombe LJ (Court of Appeal), with whom Stuart - Smith LJ and Donaldson MR agreed, dismissed Nixon's appeal in finding Nixon 'for whatever purpose, ... was controlling the company's affairs in a manner going beyond the province of a company's professional adviser'. Nixon performed many functions which are usual for company doctors. For example, he negotiated an informal moratorium with trade creditors and monitored Tasbian's trading. However, a critical finding that influenced Balcombe LJ was that Nixon did more than monitor Tasbian's trading. He 'controlled its bank account ...' For a detailed summary, see also: http://quizlet.com/21017013/company-14-the-management-of-the-company-flash-cards/ accessed on 20/05/2014.

The same emphasis on professional advisor's liability was reiterated in the most recent case in that regard in Hong Kong: *Moulin Global Eyecare Holdings Ltd (In liquidation) and others v. Oliva Lee Sin Mei [2009] 3 HKLRD 265* where, a Canadian Trained Lawyer was a non-executive member of the Company and was belonging to the Audit and Remunerations Committee and the Liquidator contended that the whole Board acted in accordance to her instructions and so, to the Liquidator, she was a Shadow Director. Although the Court did not concur with the Liquidator as to the rush to the qualification and instead preferred examining first on the concentration and the composition of the Board in relation to the powers exercised by this Lawyer, the interesting issues in this case are: i) that professionals can as well be qualified as shadow directors depending on the extent of their control of the company's affairs (i.e., going beyond the province of a mere or ordinary company's advisor), ii) that it does not necessarily require someone to be in the shadows always in order to be a Shadow Director, iii) a professional advisor who transcends his/her advisory borderlines can turn into either the de facto director or a shadow director depending on his/her actual involvement in the decision making procedures of the company.

[422] Re Soft Group Ltd (No. 3) [1994] 1 BCLC 609;), p. 620; Also quoted in: Idensohn K., 'The Regulation of Shadow Directors', p. 329. Available at http://www.companylaw.uct.ac.za/usr/companylaw/downloads/articles/idensohn_directors.pdf, Accessed on 19/05/2014.

[423] Art 2(23) of the Rwandan Law N°07/2009 of 27/04/2009 Relating to Companies, Official Gazette N°17bis of 27/04/2009 defines a Nominee as "a person who, in exercising a right in relation to a share, debenture or other property, is entitled to exercise that right only in accordance with instructions given by some other person either directly or as his delegate. A person is the nominee of another person where he/she is entitled to exercise such a right only in accordance with instructions given by that person."

Reference to such kind of officers (nominees) is found with the categories of the top management of companies (including the Board members and other high ranking officials of the company like the Company Secretary and others). See for example art. 34 (4) & (5).

no reason that would preclude the direct election to the board of directors those who are essentially nominated to further the particular interests of a person or a group having an interest in a company. Such a person or group may, for example, have lent money to the company and may seek representation on the board in order to protect its interests. This seems to be common practice today, where banks and other financial institutions investing in a company have a wider interest in overseeing the activities and the decision making by the board. However, whereas the practice of having these nominee directors on the board is well established, the rules regulating their conduct have not been worked out in most jurisdictions including that of Rwanda. Where he is a *de jure* director but with a mandate from the nominator, the underlying issue would then be, to whom does he owe the duties? The nominator[424] or the company to which he serves as a Board member? Being a new concept so far, Rwandan law does not seem to suggest any answer. However, in some foreign jurisdictions like the UK, case law[425]has clarified its stand on this. In the Halsbury's laws of England (480 Nominee directors), it is contended that the mere fact that a director of a company was nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator.[426] He may however owe to the nominator such duties as shall have been stipulated in a formal agreement between the two.[427]

[424] In practice, the general view is that directors usually act in accordance with the wishes and interests of a party that has brought about their appointment and on whose goodwill their continuation in office depends unless that places them in breach of their duties. In *Re News Corpn Ltd* (1987) 70 ALR 419 at 437, according to Bowen CJ, it is noted that nominee directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole. In other words, standing for the interests of a nominator by the nominee is healthy provided that such interests form part of the global interests of the company to which he is serving as a nominee director. Impliedly though, it means that the nominator's interests have to be viewed in a broader perspective of the company's interests and the vice-versa is not true.

[425] In *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, [1990] 3 All ER 404 for example, it was ruled that in the performance of their duties as directors, the nominees were bound to ignore the interests and wishes of their employer. However, in *Re Broadcasting Station 2 GB Pty Ltd* [1964-5] NSWR 1648, NSW SC, it was ruled that it is consistent with a director's duty for the director to follow the wishes of a particular interest which has brought about his appointment, without the need for a close personal analysis of the issues, unless the director is of the view that in doing so he or she is not acting in the best interests of the company as a whole.

[426] Halsbury's Laws of England (480 Nominee directors), available at http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T19926621309&format=GNBFULL&startDocNo=1&resultsUrlKey=0_T19926716662&backKey=20_T19926716663&csi=274661&docNo=6&scrollToPosition=726

[427] This was the case with the facts in cases: *Hawkes v Cuddy*, *Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr); *Re Neath Rugby Ltd*, *Hawkes v Cuddy* [2007] EWHC 2999 (Ch), [2008] BCC 390, [2008] All ER (D) 252 (Nov).

Such representation and authority to oversee or control the activities of a given company on behalf of another brings us to another form of functional categorization of directors; non-independent and independent or inside and outside directors.

3.5.3. Functional categorisation of directors

Directors may be categorised according to how they function in executing their duties. Such functioning may be influenced by the way they were appointed to the board which in turn makes them either independent or non-independent in their directorial duties. Some may be appointed or recruited to carry out the day today running of the company's activities and others just for periodical control, monitoring and supervision of the management. Under this categorization, we shall discuss who the inside and outside directors are, and we shall examine whether they are really independent as they are purported to be.

3.5.3.1. Inside directors

When we talk of an inside director, we are mostly referring to those directors who form part of the board of directors but who are also charged with the day-to-day running and management of the company. These may include: the Chief Executive Officers (CEOs), Executive Chairmen (EC) or sometimes even the Chief Finance Manager (CFM/O). Being in the day-to-day management however, puts them in a potential conflict of interest zone more than their counterparts, the outside directors. The board of directors in general and the outside directors in particular therefore, have a great duty to monitor and control that these inside directors manage and take proper decisions on behalf of and in the interests of the company. Besides sitting and voting at the board of directors' meetings, the inside directors are often the ones who table proposals to the board and once voted, shall be the ones to implement them. The outside directors who can read through, understand, and challenge these inside directors' proposals shall thus determine whether the board is taking a well-thought about strategic decisions for the company or that they are being manipulated by inside directors who might act not for the good of the company, but for their own good (constituting a conflict of interest).

3.5.3.2. Outside directors

The outside directors are those board members that do not run and manage the company on a day-to-day basis. They are appointed to the board not because of their majority shareholding or shareholding at all, but as independents mainly due to their professional expertise, business savvy and qualifications. It is, for example, very common to find a civil engineer, a structural engineer or an architect as an independent (outside) director on a civil construction company's board of directors. Similarly, an expert auditor, a renowned banker or a financier shall quite often appear on the board of director list for any banking and finance institution.

It is generally believed that outsiders play an important role in the monitoring and supervision of the management.[428] Fama, far back in 1980, argued that:

"The probability of the top management colluding and expropriating shareholder wealth might be lowered, and the viability of the board as a market-induced mechanism for low-cost internal transfer of control might be enhanced, by the inclusion of outside directors. The latter might be regarded as professional referees whose task is to stimulate and oversee the competition among the firm's top management"[429]

Various literature on board performances suggest that outside directors bring an independence that carries with it an expectation of superior objectivity in monitoring management's behaviour.[430] So, even though this work is not majorly concerned with the board performance, the board composition, we believe, is an important factor as regards the board performance. In addition, noting the gap that exists between the inside and the outside company directors as regards the level of information about what really takes place within a company's business becomes of a particular interest to us especially when it comes to the liability level. The question here would be that, should both the inside and the outside directors be equally held liable for whatever goes wrong with the company without any regard of whether the company information was equally shared or not? We hold here that in holding directors liable and accountable their knowledge and understanding, where no degree of negligence can be established, be a determinant factor. This is based on the assumption that some inside directors may withhold vital company information from those directors that they think may critically question it. Nevertheless, where the liability in relation to company operations ensue, the law provides for joint and several liability.

3.6. Conclusion of the chapter

This chapter had as the main objective, to introduce us into what really, and generally is understood from the concept of 'corporate governance' before we get more specifically into the duties and liabilities of the corporate directors in the next chapter. Different approaches from different systems but all of which were relevant to our study

[428]Weisbach, M.S., 'Outside Directors and CEO Turnover', *Journal of Financial Economics 20 (1988) 431 – 460*. North Holland, p.431.
[429]Fama, E., 1980, Agency problems and the theory of the firm, *Journal of Political Economy 88,* 288-307.
[430] Chen, J.Z., Cussatt, M., and Gunny, K.A., Can Inside Directors be Effective Monitors? Evidence from Real Activities Manipulation. Available on: http://business.gwu.edu/accountancy/workshops/files/katherine%20gunny.pdf (Accessed on 12/04/2013); Armstrong, C.S., Guay, W.R., Weber, J.P., 'The role of information and financial reporting in corporate governance and debt contracting', *Journal of Accounting and Economics 50, 2010*, 179-234.

have been discussed. The objective of the discussion of different corporate governance approaches enables us to figure out where Rwanda stands as a system with its own cultural, historic and economic background. We have also tried to discuss both from the legal but also from the practical and functional point of view, about who is a director. From the appointment point of view we noted that there are those directors that are appointed as such (de jure) and those that exercise the duties even though they do not legally appear as directors (de facto or shadow directors). From the functional point of view, we have noted that corporate directors are divided into those that run the day to day management of the company (executive directors) and those others that only meet occasionary to supervise and control the running of the company.

The objective of this discussion has been in twofold:

1) it was to show that even though as already noted, there are various categories of company directors, Rwandan law seem to cater only for the *de jure* ones and despite the distinction by definition between the executive and non-executives, the same distinction does not equally apply when it comes to duties or the liabilities resulting from the breach of such duties;

2) to highlight that even though our main focus has been those directors that have been legally appointed or recruited to their positions as company directors, sometimes directors work out of an external instruction or command. In such situations then, and especially when it comes to liabilities that come as a result of what was done by the company directors, such instructors should not be left to go scot-free. They deserve their genuine share of the blame – and liability for that matter, even though they were operating behind the curtain. The problem shall then remain on how to ascertain that a director was not doing what he/she did by him/herself but rather, under the influence/instruction or command from someone else. Could such a director that has been legally appointed be under any obligation to abide by any external instructions for his/her performance of any directorial duties?

The next chapter shall study the duties of company directors and how best they can ensure that the company is professionally run based on standards of good corporate governance principles. It shall as well look at what the consequences in terms of liabilities might be in cases where such duties are breached or not observed as they should.

CHAPTER FOUR: DUTIES AND LIABILITIES OF CORPORATE DIRECTORS AND OFFICERS UNDER RWANDAN LAW

4.1. Introduction

The preceding chapters have introduced us to the company concept and the board of directors as well as the company officers and their relationships with the company. Corporate governance and its principles have been expounded and in the current chapter (chapter four), those principles shall be related to and matched with the directors' duties both statutory and common law ones, the breach of which may attract either civil or criminal sanctions. The chapter further discusses director liabilities in relation to the breach of the fiduciary[431] duties vis-à-vis the company but also those other duties that are owed to third parties and to the community at large.

As already discussed in chapter one of this work, it is clear that a company is an artificial but legal person which, of course, have an independent existence from its owners and managers at least in the eyes of the law. As an artificial entity, it cannot act but only through some human agents – the directors and officers on behalf of the principal – the company. In a broader sense and indirectly, the company is owned and managed by its members – the shareholders. However, due to the intricacies of combining ownerships and control coupled with the fact that in most sizeable companies, members are dispersed throughout the country or even beyond[432] and so,

[431] The term 'fiduciary' according to **Jean Murray** of the '*About.com US Business Law / Taxes'* online Business Glossary, refers to a relationship in which one person has a responsibility of care for the assets or rights of another person. It originates from the Trusts Law and it relates most with trustees. A fiduciary is an individual who has this responsibility. The term "fiduciary" is derived from the Latin term for "faith" or "trust." This definition is available online at: (http://biztaxlaw.about.com/od/glossaryf/g/fiduciary.htm). In corporate context therefore, Board members become fiduciaries of the company but also indirectly, of shareholders who entrust them with the responsibility to run the company on their behalf. By accepting to take up the directorial duties therefore, they get bound to the fiduciary duties to the company. This fiduciary relationship is not in any way limited to the boardroom exercises but it also extends to every moment company officers take decisions relating to company assets and affairs in general.

[432] More about the literature on Ownership and Control and its variances we refer to authors like: Berle and Means in Berle, A., Means, G., *The Modern Corporation and Private Property*. MacMillan, New York, 1932; then later by Baumol, W., *Business Behavior, Value and Growth*, MacMillan, New York, 1959; Jensen, M., Meckling, W., 'Theory of the Firm: managerial behavior, agency costs, and ownership structure', *Journal of Financial Economics 3, 1976 305 – 360;* Grossman, S., Hart, O., 'The costs and benefits of ownership: a theory of vertical and lateral integration', *Bell Journal of Economics 11*, 1980, 42 – 64; Lim, M.H., *Ownership and Control of the One Hundred Largest Corporations in Malaysia,* Oxford University Press, Oxford, 1981; La Porta, R., Lopez-de-Silanes, F., Shleifer, A., Corporate ownership around the world. *Journal of Finance 54*, 1999, 471 – 518; Claessens S., Djankov S., Lang L.H.P., 'Separation of Ownership and Control in East Asian Corporations', *Journal of Financial Economics 58*,

cannot conveniently and efficiently carry on the business of the company, the management is thus entrusted to a smaller but 'professional' group of people called directors and officers. Thus, shareholders elect or appoint, for that matter, certain persons, from among themselves or from anywhere else [433] as the law and the company's by-laws may allow, to carry out the management, direction and supervision of the company. These persons as already seen in chapter three, are known as 'directors', and collectively as 'board of directors' and are considered to be the directing minds of the company as was put in a dictum of Lord Denning's in *H.L. Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons*[434]*:*

"A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and a manager who represents the directing mind and will of the company and controls what it does. The state of mind of these managers is the state of mind of the company and it is treated by the law as such".

It is thus now fashionable in many company laws [435] to stipulate as a general responsibility that the Board of Directors are the ones responsible for the management

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2000, 81 – 112; and many others that came later.

[433]As in case of independent directors. For the definition of independent director under Rwandan Law, refer to Art.2(2) of the Regulation No. 06/2008 on Corporate Governance of Banks, *Official Gazette No. 02 of 10/01/2011* which states that:

"Independent director means a director who has no relationship or interest in the banking institution or any of its subsidiaries or affiliates or their related interests";

and Art. 1(2) of the Regulation No. 07/2009 of 29/07/2009 on Corporate Governance requirements for Insurance Business, in the *Official Gazette No.35 of 30/08/2010* which extends the definition by stating that:

"Independent director is a director who has no relationship or interest in the institution or any of its subsidiaries or affiliates or their related interests which could interfere with the exercise of independent judgment in carrying out the responsibilities of a director".

[434]*H.L. Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons* [1957] 1 QB 159 at 172 as cited in: Gary Slapper and Steve Tombs, '*Corporate Crime'*, Pearson Longman – Longman Criminology Series, 1999, p. 31.

[435] This is of course with the exceptions of those jurisdictions with the "Double – tier system" of governance like German or the Netherlands where the management and supervisory roles are divided among the management Board and the Supervisory Board respectively irrespective of the size of the company. In the Netherlands for example, Arts. 129 and 140 (for public companies) and 239 and 250 of the Dutch Civil Code Book II explain how these functions are divided among the two Boards. But generally, in the two-tier system of governance, the supervisory role is an exclusive province of the supervisory Board. You will note however that, The Netherlands, just like for the European Company (EC), have adopted (see art. 129 a (for public companies) and 239 a (for private companies) an option for companies to have a unitary or a single tier system if they so wished.

of the company's businesses and affairs. Rwandan law is no exception to that and thus, Art. 169 of the Rwandan company law provides that:

"The business and affairs of a company shall be managed by, or under the direction or supervision of the Board of Directors.

The Board shall have all the powers necessary for managing, and for directing and supervising the management of the business and affairs of the company"[436].

This actually defines who have the actual control and direction of the company's day-to-day business and affairs but as seen from the provision above, the principle remains that, it is the Board of Directors who are the managers and thus, are collectively accountable [437] to both shareholders and other stakeholders for their deeds or misdeeds. So, to ensure that this team genuinely serves the person – the company, with a focused mind, some duties have been either by statute or common law, imposed upon them to always serve as their terms of reference in the course of dispensing their tasks.

4.2. Director's Duties and Responsibilities

As shall be discussed later in chapter five of this work, there is a great uncertainty both in practice and to company directors themselves in Rwanda in regard to the extent of the obligations a director assumes towards the company, its shareholders and stakeholders from the moment of their (directors') appointment.

Charles Russell notes that:

"Being a director is easy. Being a responsible director is not.

Being a responsible director means more than just acting with honesty and integrity and using your talents to the company's best advantage.

It means developing an understanding and awareness of the ever increasing legal obligations and responsibilities being placed on directors, breach of which can give rise

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[436] Art. 169 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009*

[437] '**Accountability'** is a fashionable terminology especially in Rwanda's public service but also in private to mean one's responsibility to account for his or her actions. Such an accountability often has the benchmarks and for a company director, the benchmarks are the duties he owes to the company but also, to the stakeholders at large.

to personal liabilities under the civil and criminal law and even disqualification from holding office as a director."[438]

Company directors govern the company on behalf of shareholders who appoint or elect them to the position of becoming members of the Board of Directors.[439] This may be in accordance with the procedures as provided for by the laws[440] and/or in a manner provided for by the articles of association where they may provide otherwise[441]. Members of the board so elected and those that join as ex-officio board members[442]are all obliged by the law, as company officers to work in a collegial manner.[443] This does not however mean that they cannot form standing Board committees specialized for certain functions or to form *ad hoc* committees as the need may arise.[444] This delegation of powers by the Board however, does not at all imply the delegation of responsibility.[445] Equally, the joint and collective responsibility of the Board members

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[438] Charles Russell on 'Director Responsibilities', available at http://www.charlesrussell.co.uk/UserFiles/file/pdf/CR_Directors__Responsibilities.PDF Accessed on 20/05/2014.

[439] This also includes those commonly referred to as the ex – officio members who join the Board not because they were elected by the shareholders but because of their positions they were hired to by the Board of Directors. Examples of these are the Chief Executive Officers (CEOs), Managing Directors (MDs) or the General Managers (GMs) as the titles shall be.

[440] Art. 167 of the 2009 Law on Companies as amended to date provides that:

"Any member of the Board of Directors shall be appointed by the annual meeting of shareholders…". However, the appointment procedure may be regulated further by other specific laws depending on a particular industry or business. For example, Board Members for Financial institutions shall have to be approved first, by the Central Bank before they commence their activities or even before they submit in their assent to the appointment by the shareholders' meeting. Art. 6 of the Regulation on Corporate Governance of Banks (Regulation N° 06/2008 on Corporate Governance of Banks*, Official Gazette n° 02 of 10/01/2011*) provides that: *"No director shall take up his/her position prior to being cleared by the Central Bank. The bank shall submit to the Central Bank duly completed forms annexed to the regulation on Licensing conditions of banks."* While art. 6 (last paragraph) of the Regulation on Corporate Governance of Insurance business says: "… *No director shall take up his/her position prior to being cleared by the Central Bank. The institution shall submit to the Central Bank the proposed director's Personal Declaration form annexed to the licensing regulations."*

[441] The Articles often provide for a direct membership of the CEO or MD as ex – officio members of the Board even when they are not elected through the General Assembly meeting of shareholders.

[442] In most articles of associations of companies, top management like CEOs and sometimes the CFOs become automatically (ex officio) board members because of the management positions they are holding.

[443] Art. 167 (par.2) of the 2009 Law on Companies as amended to date, Ibid says:

"Members of the Board of Directors shall act in a collegial administration and shall be of a sufficient number provided for in article of association for the Board's meeting quorum to be attained."

[444] Art. 173 of the 2009 Law on Companies as amended to date stipulate that:

"The Board of Directors of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of its powers other than its powers…"

[445] Art. 173 (2) provides:

"The Board of Directors that delegates power shall be responsible for the exercise of the power by the delegate as if the power had been exercised by the Board of Directors itself."

This means that even when the Board delegates its powers to the management or to the subcommittee of the Board, it still entirely remains the sole responsible body for whatever shall be performed or omitted by acknowledged by the law does not allude to exonerate personal or individual liability in case there is any, by the concerned director.[446]

Due to the importance and the degree of responsibility so required from the appointed[447] or the contracted directors[448], a statutory consent[449] from this director for taking up of the responsibilities is required and has been made mandatory under Rwandan Company Law.

As already indicated in Chapter two of this work, one of the achievements of the 2009 Company law compared to its preceding 1988 law on commercial establishments was the introduction of directors' duties and protection of shareholders' rights by introducing liabilities and their sanctions especially targeting the stewards who shall be going against the established standards and codes. The law provides for the duties imposed on company directors as in various articles: 33, 72, 93, 102, 187, 190-192, 200, 204 and the consequences of breach of such duties are provided for in articles; 212, 214, 366-3670 and beyond.

It has to be noted that many of the fiduciary duties even in the Common Law jurisdictions were developed by the judiciary without any reference to the written law.[450] This has not been and is not likely to be the case in Rwanda since, all the duties, even though not explicitly explained, as well as their respective sanctions in case of breach, are well provided for in both company law, in the criminal code and as well as in other various Rwandan Laws. Them being new therefore to not only the Rwandan ordinary community but also to the entire legal fraternity, this work endeavours to discuss these

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the delegated.

[446] This is what was confirmed by their Lordship Justices in the case *RPA 0573/08/HC/KIG -Kalisa Alfred (BCDI) case* judgment especially in its paragraphs 231-237. For example, although in paragraph 234 of the same case, the honorable Justices acknowledged the joint criminal liability in corporate decision taking by the Board and the General Assembly, it did not exonerate the PDG – Kalisa Alfred from his individual liability as the court found out that the corporate structures were there just to fulfill the *de jure* (legal) requirements but that they were not competent and independent enough to monitor and supervise or question what was being done by the Executive.

[447] Those non-executive directors who are appointed not ensure day-to-day management of the company but to monitor and supervise management activities.

[448] These are the executives who are principally hired to ensure the day-to-day management of the company.

[449] Art. 177 of the 2009 Law on Companies.

[450] Bernard S. Black's presentation on 'The Principal Fiduciary Duties of Boards of Directors' to the Asian Roundtable on Corporate Governance, Singapore , 4 April, 2001 at pg.1. In the UK, the Case law developed the concepts in relation to the duties of company directors, and was later codified in the 2006 Companies Act mainly due to the influences from the Continental Europe in order to have a shared system of codification of laws other than leaving the game to be led by the Judges. Interesting to note however is that, even the Continental European jurisdictions to day refer themselves much to those judiciary developed concepts and many of them have codified them too.

duties and try to make clear their meaning and scope and later, the liabilities and consequences thereof. The duties to be discussed hereunder are: the duty to act within the powers conferred but with the necessary independent judgment; the duty to promote or act in the best interests (success) of the company; the duty to use reasonable care, skill and diligence; the duty to avoid any conflicts of interests between the director and the company he is serving (also referred to as the duty of loyalty to the company in the Delaware system[451]); and the duty to disclose any interest in a proposed transaction. This shall also go with the duty to disclose the true picture of the company to whoever is concerned; the duty not to enter into a major transaction without seeking for the approval of the duty not to disclose company information and the duty for equal / fair treatment of shares of equal value. In short, these duties can be summarized as the dos and don’ts that company directors have always to bear in mind every time they are called to execute their obligations as company directors.

But to whom are these duties owed? This complex question that has been on for quite some time[452] can be answered either by considering which governance approach has been preferred by a given jurisdiction i.e., shareholder or stakeholder approach (already discussed in Chapter three of this work)[453] in which, the approach may define to whom directors shall be accountable. Alternatively, it can be viewed from the situation the company is in i.e., for example, whether the company is a going concern or whether it is undergoing an insolvency proceedings. Where a company is under insolvency for example, the principal claimants (that is, to whom the directors primarily owe the duties) are the company creditors and employees[454]. Where it is a going concern however, principal accountability is owed to shareholders. According to Martin Gelter and

[451] *See* ‘Is Corporate Directors’ duty of Care a “Fiduciary” duty? Does it matter?’, an essay presented by Professor Christopher M. Bruner of Washington and Lee University School of Law, at the 2013 Fiduciary Law Workshop at Notre Dame Law School, *48 Wake Forest L. Rev. 1027 2013*.

[452] See for example in: Gelter, Martin and Helleringer, Geneviève, “ Lift not the Painted Veil! To Whom are Directors’ Duties Really Owed?” (April 2, 2014). University of Illinois Law Review, Forthcoming; European Corporate Governance Institute (ECGI) - Law Working Paper No. 255/2014; Fordham Law Legal Studies Research Paper No. 2419591. Available at SSRN: http://ssrn.com/abstract=2419591 or http://dx.doi.org/10.2139/ssrn.2419591

[453] This however, does not have any relationship with the one who appointed the director because, a director cannot owe someone a duty due to the fact that it was he who appointed or nominated him. See, Hawkers v Cuddy [2009] EWCA Civ 291, [2009] 2 BCLC 427 P.32. Also quoted in: Derek French, Stephen Mayson & Christopher Ryan, Mayson French & Ryan on Company Law, 28th edit.(2011-2012), Oxford University Press, 2011. P. 481. Some however, acknowledge that the nominee directors do, to some extent, owe the duty to their nominators especially where they are there because they represent their direct interests in that company. See for example: Jon Feldman, Michael Partridge and, Eric Goldberg (Goodmans LLP) on Corporate Financing: ‘Nominee Directors and Confidentiality: the Canadian Law Perspective’, an article available at: http://www.goodmans.ca/files/file/docs/Corporate%20Financing.pdf, accessed on 17/06/2014.

[454] See the intention and provisions of the Law Nº12/2009 of 26/05/2009 relating to Commercial Recovery and Settling of Issues arising from Insolvency, Official Gazette n° special of 26/05/2009.

Genevieve Helleringer [455] and generally speaking though, as directors, whether appointed by the block of certain shareholders (majority shareholders) or appointed as the so-called 'independent' directors, the overall allegiance is supposed to be none than the company – the legal principal.

In principle however, it is generally accepted[456] that company directors owe the duties to their principal[457] since they are the agents of that principal[458] and that as seen already, they act for and on behalf of the principal. It remains then to know how wide the meaning of this principal - the company, and its interests shall be interpreted. The strict interpretation of the company's interests leads to the shareholder value approach while the extended and wider interpretation leads to the stakeholder approach. For Mayson *et al*.[459], however, fiduciary duties are only owed to the company.

4.2.1. The duty to act within the powers conferred

Every company sets objectives or purpose (s) for which it is established. These objectives, except where the articles states otherwise, are commercial purposes.[460] The powers conferred to the management of a company must have a direct relationship with these objectives of the company. For example, art. 33 of the law of 2009 provide that:

"Where articles of association of a company sets out the objective of the company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within that objective, unless the articles of association expressly provides otherwise. …"

Where the objectives are restrictively provided therefore, directors (managers) shall be bound not act *ultra vires,* i.e., beyond the objectives of the company. However, this restriction often becomes difficult especially with small companies whose shareholding

[455]Gelter, Martin and Helleringer, Geneviève, Lift not the Painted Veil! To Whom are Directors' Duties Really Owed? (April 2, 2014). University of Illinois Law Review, Forthcoming; European Corporate Governance Institute (ECGI) - Law Working Paper No. 255/2014; Fordham Law Legal Studies Research Paper No. 2419591. Available at SSRN: http://ssrn.com/abstract=2419591 or http://dx.doi.org/10.2139/ssrn.2419591 (accessed on 26/03/2015).

[456] See, for example, Derek French, Stephen Mayson & Christopher Ryan, *Mayson French & Ryan on Company Law*, 28th edit.(2011-2012), Oxford University Press, 2011, p. 476.

[457] Morse G., Girvin S. et al., *Charlesworth's Company Law*, 17th edit., Sweet & Maxwell, 2005, p.297

[458] The principal referred to here is the Company, not its shareholders or members.

[459] Derek French, Stephen Mayson & Christopher Ryan, *Mayson French & Ryan on Company Law*, 28th edit.(2011-2012), Oxford University Press, 2011, p. 480.

[460] Art. 3 of the Company Law, Ibid. The exceptions to this would for example be where the company is a non for profit one like those promoting research, culture, religion, charitable companies, etc. These type of companies are however not our primary concern under this study.

(ownership) is single or limited to the family. In this situation it becomes hard to distinguish ownership from management. This is the typical case in Rwanda. In such companies therefore, despite the juristic qualification of a company as a distinct moral person and its clear distinction from the shareholders and management alike, it is hard to distinguish the objectives of the company from those of the owner/shareholder/manager. Company's objectives are intermingled with the director's (or shareholder's) objectives and the result is confusion! The line between the two depreciates or to the worst, disappears in favour of the director/shareholder. There is often a tendency of confusing the company's property with the personal one and finally, it becomes quite complex to tell whether the company actually exists or not.[461]

It should be noted clear here that, the breach of the duty to act within the powers does not necessarily require the establishment of a fraudulent intent from the concerned director, but it simply suffices to note that the director acted beyond the powers conferred to him by statute and/or the company by-laws.

For example, as a consequence to acting ultra-vires the company objectives, any party (especially a shareholder)infringed or prejudiced by the acts of the director may cause the company and/or this particular director or jointly as a board to compensate for the damage caused. The same can be done by any of the shareholders to the benefit of the company where it was prejudiced by such act. This is normally what happens where it is the company that has been sued for such infringing acts to the third party. In this case, the company shall bear the responsibility toward the third party and in turn, claim for compensation from the director who purportedly was acting for and on behalf of the company. An example of such situation is for instance where a director or the board of company A, due to the urgency and 'in the best interest of the company' has entered into a major transaction[462] to deal with another company but which later turns out to be

[461] Single member companies are also providing a serious concern for the EU legislators to the extent that they have requested member countries to improvise legislations that would oblige these directors who are doubling as single shareholders of these companies to enter into written agreements only if they contract with the company (see the 12th Directive). This would enable accountability, just in case the company's management went wrong in one way or the other.

[462] A major transaction is defined by the Company Law art. 171 as:
"A major transaction in relation to a company shall mean:
1° the acquisition of, or an agreement to acquire, assets the value of which is more than 10 per cent of the value of the company's assets before the acquisition;
2° the disposition of, or an agreement to dispose of assets of the company the value of which is more than 10 per cent of the value of the company's assets before the disposition;
3° a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than 10 per cent of the value of the company's assets before the transaction.
A company shall not enter into a transaction which involves the acquisition or disposition or the acquiring of rights, interests or incurring obligations of, in any case, more than half the value of the company's

a liability to the company for example, where this company A is sued by the third party company B for the breach of the agreement in a major transaction deal. Note that, under Rwandan law, a major transaction deal would only be legal and acceptable upon approval by the shareholders through a special resolution[463]. Art. 170 of the Company Law (2009) provide that:

"A company shall not enter into a major transaction unless the transaction is approved by special resolution from the meeting of shareholders."

In such a situation as we shall discuss in a later stage, even though the company shall have to be answerable in the face of the third party[464], the director concerned or the entire board of directors as the particular circumstances of the case may be, shall be held to compensate the company for the losses incurred by the company in relation to that director's or the Board's breach of its duty to the company – acting within the powers conferred. So, in conclusion therefore, it means that a director or the board of directors breaches his/its duty but the risk is being liable for it if he/it takes a decision which, either according to general principles, the statute or in the context of the particular internal arrangements of a particular company, should have been taken by the shareholders as the example above illustrated.

4.2.2. Duty to act in the best interest of the company

The duty 'to act in the best interests of the company' has been a subject of discussion with diverging approaches especially in the Anglo-Saxon world mainly in the UK, US, Australia and New Zealand basing on the shareholder profit maximisation principle on the one hand , and on the other hand, the continental European context with the stakeholder approach[465]of governance. The debate was spearheaded by the two great

assets unless the transaction is approved by special resolution."

[463] Under Rwandan Company Law (Art. 2 (30)), **A special resolution** is defined as "a resolution approved by a majority of seventy five per cent (75%) of the votes of those shareholders entitled to vote and who have voted on the issue under consideration. The articles of association may require a majority of more than seventy five per cent (75%)".

[464] In dealing with a company, a creditor acting in good faith is not supposed to know whether or not, the director or any officer is acting within his or her powers in whatever transaction and thus, particularly, Art. 172 of Company Law provides that:

"No creditor or other person dealing with a company shall be concerned to see or inquire whether a major transaction meets the conditions of this Law , except in the case of actual notice to that person."

[465] This is in itself based on the principal corporate governance approaches discussed in Chapter two of this work, i.e., the shareholder approach and the stakeholder approach. The Anglo-Saxon world contends that a corporation is built on the shareholder primacy principle or the shareholder wealth maximization; whereas the stakeholder approach looks at the company as being there not only to serve to egoistic needs of shareholders alone, but also for the multitude of other stakeholders who are affected by or who

authors Berle and Dodd[466] in the 1930s but also the recent ones especially for the stakeholder value approach that include John Plender (1997)[467] and Edward Freeman (2004)[468], among others. As discussed in the preceding chapters however, the distinctions that divided the two blocs are steadily fading especially due to the pressures[469] exerted to corporations in the Anglo-Saxon world. A result of this convergence to stakeholder approach has been for example, the 'enlightened shareholder value approach' adopted by the UK through s 172 of the 2006 Companies Act[470].

The duty itself intends to mean that Directors, when making or taking management decisions in the company, should ask themselves (or at least be sensitive to) what, in their honest opinion, is the best decision for and in the interest of the company, and then vote or act accordingly. This duty is sometimes referred to as the 'duty of loyalty to the company'[471]. It requires directors to apply the genuine 'business judgment rule' which requires directors to act independently and disinterestedly and for the best of the

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affects the company's activities. *See also:* Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' available online at: http://sydney.edu.au/law/slr/slr29_4/Keay.pdf , accessed on 26/05/2014.

[466] See Adolf A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049; E. Merrick Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145; Adolf A Berle, 'For Whom Managers are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365. See also, Adolf A Berle& Gardiner Means, *The Modern Corporation and Private Property* (1932); E Merrick Dodd, 'Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?' (1935) 2 *University of Chicago Law Review* 194; among others.

[467] John Plender, a Stake in the Future: The Stakeholding Solution, Sonoma: CA, Nicholas Brealey Publishing, 1997.

[468]Edward Freeman, Andrew Wicks &BidhanParmar, 'Stakeholder Theory and "The Corporate Objective Revisited' "; (2004) 15 *Organization Science* 364 at 365.

[469] Great pressure has for the last two decades been geared most by the Trade Unions of employees as well as Environmentalists who claim that the capitalistic and individualistic disregard of other stakeholders in corporate decisions do not only ruin these other stakeholders a lone but also affects the performances of the company itself and thereby minimize the shareholder's profits (returns).

[470] This section sets out that:

"(1) A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to —

(a)the likely consequences of any decision in the long term,

(b)the interests of the company's employees,

(c)the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e)the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly between the members of the company."

[471] This concept of the **Business Judgment rule** was first advanced by Delaware courts in the US as the primary standard on which the directors' decision making can be assessed. It simply means that the decisions made by directors who are fully informed and free from conflicts of interest should not be second guessed by a court. This is based on an assumption that they are the best placed persons and experts of what was best for the company.

company. However, even though the application of this business judgment rule is premised on the fact that directors are the specialist and are more knowledgeable on what was best for the company than the courts, for it to apply, courts must be convinced that directors complied with the principal fiduciary duties vis-à-vis the company. Decisions must be taken independently and free from competing personal interests (duty of loyalty) and on the basis of sufficient information[472].

Under Rwandan Law, different provisions have referred to the directors' duty to taking decisions with a reasonable belief that they were in 'the best interests of the company'. Article 213 of the 2009 Company Law for example, sets out that:

"A decision made by a director or another officer of a company shall be considered as valid if:

1° it is made in good faith for a proper purpose;

2° he/she (does)[473] not have a material personal interest;

3° the company is appropriately informed of the decision's subject matter;

4° he/she reasonably believes that the decision is in the best interests of the company.

The director's or officer's belief that decision is in the best interests of the company shall be taken to be a reasonable one unless the belief is one that no reasonable person in his/her position would hold."

In other words, the independent judgment of a director that is done in good faith and without any personal interests fettering in, and with an informed mind shall be taken to be in the company's interest. This also gives latitude to the director as well as the court, in applying or invoking the business judgment rule unless the decisions that were taken were explicitly unreasonable to the eyes of any reasonable director in a similar office and with similar qualifications. The same company interest is reiterated upon in Art. 211 of the same law where it provide that:

"Every officer of a company shall exercise:

[472] John L. Reed and Matt Neiderman (Duane Morris LLP), Directors and Boards: Avoiding personal liability as a director, *Special Report 2004*. Available at: http://www.directorsandboards.com/DBEBRIEFING/SpecialReport.pdf Accessed on 21/06/2014. (The DIRECTORS & BOARD Special Reports are a series of advisories on critical issues of corporate governance and director accountability and liability. They are produced in collaboration with leading experts in corporate law, finance, executive and director recruitment, strategy, communications, and other key components of business leadership.)

[473] The word "Does" in brackets is my own (author's) insertion as I think it was an omission in the legislation as it is.

1° the powers and discharge the duties of his/her office honestly, in good faith and in the best interests of the company;

….".

As provide in the articles above however, it is evident that a subjective criterion shall be applied by the courts to prove that a decision that was taken was not in the best interests of the company. The presumption remains that directors act in the best interests of the company[474] and so, to arrive at the contrary, a Judge shall be compelled to compare it with any other similar decision that is / or would be taken by any other reasonable director who stands in similar or comparable situation / circumstances[475].

As Lord Cranworth L.C. held:

"The Directors are a body to whom is delegated the duty of managing the general affairs of the Company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal…"[476].

Lucy P. Marcus in her article entitled *"A Theory of Boardroom justice"* issued through *The New vision newspaper* (Uganda) suggests that to be able to act in the broader interests of the company, board members should remain in touch with the real world instead of living utopically because they are seated in soundproof rooms. She notes that:

"The board of directors' role is not simply to ensure return on investments for shareholders; it is also to make decisions with due considerations for the community, employees, suppliers, consumers, and even the overall economy. The decisionsmade in that room have an impact beyond the economy, and so, it is not only shareholders who hold the Board members accountable for their choices…"[477].

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[474] In *Re Smith and Fawcett* [1942] Ch 304, 306, as also quoted in *The Bell Group Ltd. (in liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239, at Para. 4,385; Lord Greene MR explained the duty in these terms:
"Directors must exercise their discretion bona fide in what they consider - not what a Court may consider - is in the interests of the company, and not for any collateral purpose".

[475] This shall be based on both objective and the subjective standard critea. The two tests are described in the next section under 4.2.4.1 and 4.2.4.2 respectively.

[476] *Aberdeen Railways Co. v Blaikie Bros.* (1854) 1 Macq. 461 at p. 471.

[477] Lucy P. Marcus, 'A Theory of Boardroom Justice' In the Newvision magazine (A Ugandan Newspaper) issued and accessed on 16/05/2014 at http://www.newvision.co.ug/news/655589-a-theory .

This therefore means that the company's interests may even be broader than just making profits and distributing dividends to shareholders because various considerations have to be put into play.

In a quite recent high level decision of the regional Supreme Court (State of Western Australia) in Australia, in The *Bell Group Ltd. (in liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239, Justice Owen, the trial Judge in reference to the duty to act in the best interests of the company noted that:

"…It is incorrect to read the phrases 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' as if they meant exactly the same thing. To do so is to misconceive the true nature of the fiduciary relationship between a director and the company. And it ignores the range of other interests that might (again, depending on the circumstances of the company and the nature of the power to be exercised) legitimately be considered. On the other hand, it is almost axiomatic to say that that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored".[478]

It therefore remains open to the judge to restrict or extend the interpretation of the best interests of the company in order to assess whether the director, in the exercise of his duties was acting for the best interests of the company. We find this approach of assessment of the best interest of the company by the judicially may be useful to Rwandan courts as they may use it when applying and interpreting art. 211 of the 2009 company law.

[478] An Excerpt from the Judgment by Justice Owen J In '*The Bell Group Ltd. (in liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239 , para. 4,395. Available and accessed from http://www.austlii.edu.au/au/cases/wa/WASC/2008/239.html on 27/05/2014. Also, the case was quoted in the article by Robert Goddard (Senior Lecturer in Law at Aston Business School, Birmingham, UK) "Australia: the director's duty to act in the best interests of the company and the meaning of corporate governance" under the blog on 'Corporate Law and Governance' which was accessed through http://corporatelawandgovernance.blogspot.nl/2008/11/australia-directors-duty-to-act-in-best.html , accessed on 27/05/2014.

4.2.3. Duty to use reasonable care, skill and diligence

The duties of care, skill and diligence are common almost to all laws in relation to directors and officers duties while performing company functions and exercising their powers. Art. 211 of the 2009 Company Law provide that:

"Every officer of a company shall exercise :

…

2° the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[479]

It is noted that Rwandan Law does not impose any minimum qualifications (academic or professional) for becoming a director of a company. It only suffices for one to meet the requirements provided for by Art. 176 of the company law which states that:

"No person shall be appointed to hold office as a director of a company if he/she is a person who:

1° is under sixteen (16) years of age;

2° is, in the case of a public limited company, over seventy five (75) years of age;

3° is an undischarged bankrupt;

4° is prohibited from being a director or promoter of or being concerned or taking part in the management of a company;

5° is not a natural person;

6° has been proven to be of unsound mind; or

7° by virtue of the articles of association of a company, does not comply with any qualifications for directors…."

However, even though Art. 211 does not explicitly elucidate more on who a reasonable prudent person is, the provision invites for both the objective standard and the subjective standard test to evaluate the degree of care, skill, and diligence of the director in a given circumstance.

[479] Art. 211 (point 2) of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009.*

4.2.3.1. The objective standard test criteria

The objective test criteria here means that the standard required of a director is not an extra-ordinary one but rather, that what an ordinary reasonably prudent director, who is placed in a similar situation would do. In other words, what shall be examined here is whether the director employed the knowledge, skills and experience that an ordinary but reasonable director carrying out such functions of a director in relation to a company would perform. It also means that it does not entertain mediocrity as it is based on the minimum standards of any director in that position. Critics of this test however have complained that such might nevertheless promote inaptitude, encourage the shielding of incompetence and lack of knowledge with little motivation to improve as it would be easier for them to hide from statutory liabilities and thus, impacting on the overall performance of the company[480]. With specific industries however, specific obligations are imposed and so, besides the general principle of *'ignorance of law being not an excuse'*, a director cannot be exempted from the liability on the basis of ignorance of laws. Art. 13 of the Regulation on corporate governance of Banks for example provides that:

"Directors should ensure cognizance is taken by management and themselves of all applicable laws and regulations, and systems to effectively monitor and control their compliance. This will likely include provisions for training of personnel in these matters and, when violations do occur, make corrections immediately. It is a duty inherent with the office of directors (or Management) to know the laws and regulations and to ensure that compliance of all laws and guidelines receives the highest priority, and violations are not knowingly committed by themselves or by anyone in their employment.

In particular, every director should be conversant with the provisions of the law organizing the banking activities, National Bank of Rwanda Law and any regulations issued there under or other relevant laws and regulations.

Directors should also review the institutions Central Bank's inspection reports and audit reports and also ensure implementation of any recommendations made."[481]

It is worth noting that the first part of the provision cited above would equally apply to all directors outside the financial industry. Directors have a general duty of managing, directing and supervising the company and its business and cannot claim innocence from rules and regulations and expect their employees to perform in compliance with

[480] J.H. Farrar, N.E. Furey& B.M. Hannigan, Farrar's Company Law, Butterworths, 1991, p.391.
[481] Art. 13 Regulation N° 06/2008 on Corporate Governance of Banks, Official Gazette n° 02 of 10/01/2011.

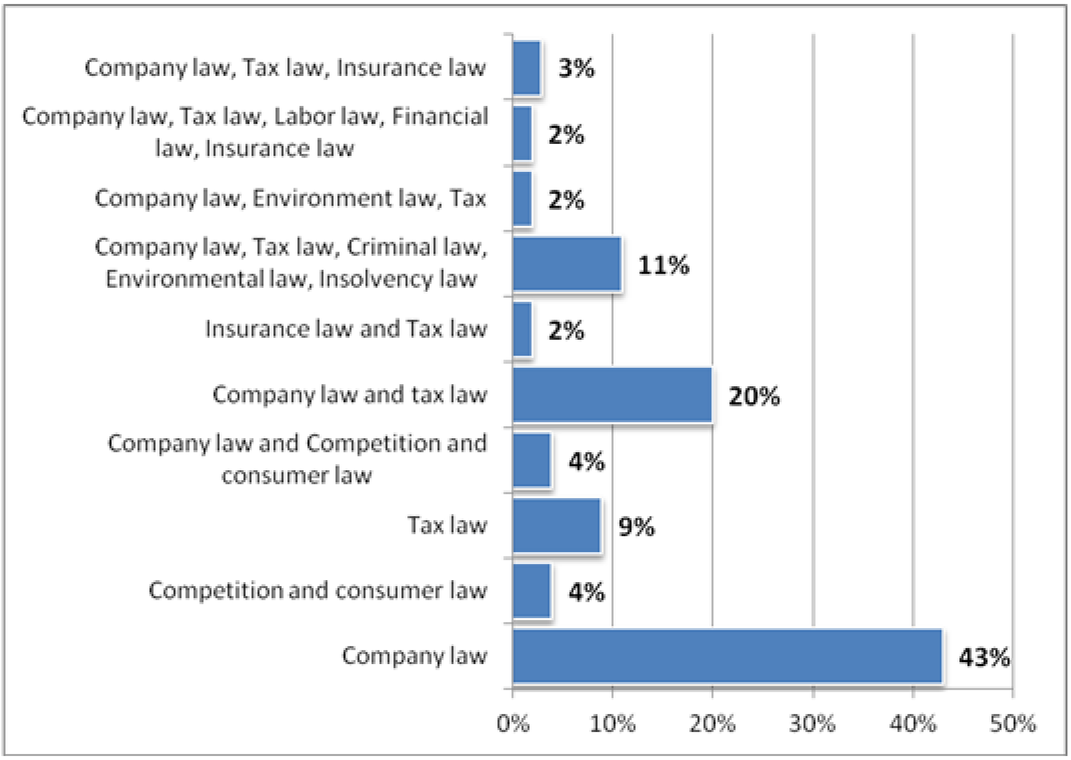
such rules. Directors need to be equipped with the necessary skills to be able to monitor and supervise the compliance expected of that particular business they are serving as directors. They are not, as Art. 211 provides, expected to become experts in all, but at least, to be able to have the basics that would enable an efficient supervisory role.

During our field study, when asked whether there were some specific laws the respondent directors knew were relevant to their tasks as company directors, some (17%) were frank to say, they had no idea at all.

Even those who claimed they knew some laws could not have an exhaustive list and yet, the research revealed that they do not receive any professional support from experts organized by their respective companies. The impact of this is either that directors are driven by the executives or ownership to take decisions without necessarily understanding or analysing the legal repercussions to themselves or to the company. There are various consequences that would follow the noncompliance which would range from administrative to civil as well as criminal sanctions and some of which, would be directly targeting the director as an individual.

The graph below shows us the respondents' enumeration of the laws they thought were most relevant to their specific companies for them to know.

Figure 7: Percentages on the different laws known



Source: Research by author.

Overall, just like Art. 211 of the Rwandan Company Law provides, the duty of care does not require an extra-ordinary degree of performance than that from an ordinary prudent person performing similar duties. The same had already been settled by case law in *Re City Equitable Fire Insurance Co. Ltd*[482] in 1920s where Romer LJ formulated it in one of his three propositions that:

"A director need not exhibit in the performance of his duties (i.e., his functions) a greater degree of skill than may reasonably be expected from a person of his knowledge and experience (i.e., the particular director's own knowledge and experience) and not that of the reasonable man. He must take such care, however, in the performance of his duties as an ordinary man might be expected to take on his own behalf…"

In *Lister v Romford Ice and Cold Storage Co. Ltd*[483] it was held however that, for an executive director who has a fulltime contract with the company, he will be expected to

[482] [1925] ch. 407, p. 428. This case is also quoted in: Morse G., Girvin S. *et al.,* Charlesworth's Company Law, 17th edit., Sweet & Maxwell, 2005, p.311.
[483][1957] A.C. 555.

execute his duties with reasonable skill based on what might be expected of a person in his office.

To sum up on this standard test therefore, even by applying the objective test criteria, a Judge applying Rwandan law would have all the freedom to interpret as to what extent and how much an individual director actually knows or is expected to be knowing given the fact that he assents in writing to take up the position which would impliedly mean that he is aware of the tasks he is called to accomplish.

4.2.3.2. The subjective standard test criteria

The subjective standard criteria on the other hand, means that where a director is or was hired due to his technical know-how, because of his high level experience and skills, he will not be judged or tested based on the ordinary expectations of any other director but will rather be tested comparably with those other directors with similar experience, skills and knowledge. This is what is referred to for example in s. 174 (2 (b)) of the UK's Companies Act in reference to the Director's duty of care, skill and diligence which states that:

"This means the care, skill and diligence that would be exercised by a reasonably diligent person with

(b) the general knowledge, skill and experience that the director has"[484].

This is the actual knowledge, skill and experience that, that particular director has - the subjective test. It has to be noted however that in practice and except for some, a director may be appointed based on his social, business or family network that has no relationship with the technical input ordinarily expected from a company director.

4.2.3.3. Conclusion

We conclude therefore that, by stating in point 2 of Art 211 of the Rwandan 2009 Company Law that every officer should exercise " the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" without elucidating further to what this would intend to mean that Rwandan law leaves room for the judges to give their own interpretations of the reasonable prudent person's judgment without any guidance whatsoever from the legislator. By way of avoiding to reinvent the

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[484] S.174 (2)(b) of the Companies Act 2006 (c. 46), Part 10 — A company's directors, Chapter 2 on the General duties of directors – available at: http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf.

wheel, we suggest that guidance should be based on the two (objective and subjective) standard tests that had been developed by the judiciary but which were subsequently adopted in some statutes like in the UK's 2006 Companies Act.

4.2.4. Duty to avoid conflicts of interest with the company

The duty not to enter into any activity, relationships or engagements that conflict or compete with the interests of the company is premised on the fact that a director is an agent and a fiduciary of the company – the principal that he owes the fiduciary duties to.[485] The duty to avoid any conflicts of interests with the company by the directors under Rwandan law is always taken together with the duty to disclose the interests that the director has or might have in a given transaction or asset / property. The interests may be related to the company's shares[486] or any other property. Along with it is the duty not to disclose any company information for a director's personal interest or otherwise, without prior authorization by the Board.[487] For the purposes of this discussion, we shall present these duties independently.

Arts. 190, 191, 192, 197, 199 and 200 of Company law for example, present situations where a director's personal interests may conflict with the interests of the company he is serving. Art. 190 for example illustrates the circumstances where a director's interests may be interpreted to be conflicting with those of a company. It provides that:

"A director of a company may have an interest in a transaction that company is interested in where:

1° linked to such a transaction or may benefit from it financially;

2° benefits from such a transaction financially or has relationship with any other person concerned with the transaction;

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[485] Derek French, Stephen Mayson & Christopher Ryan, *Mayson French & Ryan on Company Law*, 28th edit.(2011-2012), Oxford University Press, 2011, p.503.

[486] Situations of a director having interests in the shares of a company are provided for in Art. 199 of the Law N°07/2009 of 27/04/2009 Relating to Companies, Official Gazette N°17bis of 27/04/2009 where it states that:

"A director of a company has a relevant interest in a share issued by a company if the director:
1° is a beneficial of the share;
2° has the power to exercise any right to vote attached to the share;
3° has the power to control the exercise of any right to vote attached to the share;
4° has the power to acquire or dispose of the share;
5° has the power to control the acquisition or disposition of the share by another person;
6° may at any time, have such power following an agreement or a consensus".

[487] Art. 197 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis* of 27/04/2009.

3° a member of the Board of Directors, an employee or attorney of the person concerned with the transaction or that can be interested in it and that is other than:

a) a direct subsidiary company;

b) a subsidiary company;

c) a subsidiary of another subsidiary company;

4° is the parent, the child or the spouse of another party to the transaction and who may have financial interest in it;

5° is to some extent directly or indirectly interested in the transaction."[488]

So, being agents and fiduciaries of the company directors have company information in their possession and thus, if they were not bound by the duty to avoid conflicts of interests, they might end up satisfying their interests at the expense of the company or other beneficiaries. In *Mills v Mills* (1938), Dixon LJ contended that:

"Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power"[489]

Earlier, it had been stated by Lord Herschell in *Bray v Ford* (1896) that:

"It is an inflexible rule of a court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is… founded upon principles of morality. I regard it rather as based on consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding fiduciary position being swayed by interestrather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule".[490]

Just for comparison, the UK Companies Act 2006 s.175 provide that:

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[488] Art. 190 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis* of 27/04/2009.
[489] Mills v Mills(1938) 60 C.L.R. 150 P.186.
[490] Bray v Ford [1896] AC 44 PP. 51-2. Also quoted in Derek French, Stephen Mayson & Christopher Ryan, *Mayson French & Ryan on Company Law*, 28th edit.(2011-2012), Oxford University Press, 2011, at p.503.

"(1) A director of a company must avoid a situation in which he has or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

…".

In relation to the UK's s 175 (2), particularly on using the company's information for personal gains, Rwandan Company Law provides in its Art. 197 that:

"Unless provided otherwise by the Law, a director shall not disclose to anyone and for any use the information that he/she possesses by virtue of his/her duties as a director or employee and to which he/she would not have had access in other circumstances.

A company's director may, upon notice to the Board of Directors, put to use or disclose information to a person whose interests he/she represents or to the person authorized to be informed following guidelines, instructions, powers and responsibilities.

The board of directors may authorise a director to disclose, put to use information or act depending on it, provided the company's interests are not jeopardized. Any interest that a director obtained from using the information he/she has access to shall be made known to the company".

For banks, a strict regime applies. First of all, banking law refers explicitly to the directors of the bank as fiduciaries. It however extends their fiduciary duties not only to the bank as a company but also to the bank's creditors and depositors and on top of that the duty and obligation to promote the economic soundness of the country's economy in general[491].

Also, to limit any chances of conflict of interests between a board member or any officer with banks and financial institutions, the BNR issued a regulation specifically castigating lending to insiders and their related persons[492] and it sets the consequences for

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[491] Art.27 (c (1&2)) of Law No. 007/2008 of 08/04/2008 concerning organization of banking in Rwanda that provides that:
"… c) developing the bank's assets by working with the management for construction of a thriving enterprise. To this end, it will focus on the following:

1. To play a fiduciary role with the bank's depositors and other creditors;
2. To refrain from compromising from stability of the country's financial system; …".

[492] Art. 2 of the Regulation N° 04/2008 on Insider Lending of Banks, Official Gazette n° 02 of 10/01/2011 defines an Insider as " a director or person who has executive authority or a shareholder of a bank and

whoever might violate such provisions of the regulation.[493] These administrative sanctions may include among others, dismissing the board and barring any concerned board member from ever getting employed by any other financial institution without the approval of the Central Bank.[494]Insider dealing with the securities of a listed or company or a company pending listing is qualified as a crime by the Corporate Governance regulation of Banks[495]. The Central Bank[496] has widened the scope of what entails the conflict of interests in as far as financial institutions are concerned.[497] It may as well

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includes any related person and any related interest of that person" and defines a Bank's Related Party as meaning:'

"any natural person or legal entity that maintains with the bank at least one of the following relationships:

a) The person is a member of the board of directors or management, or is a senior official of the bank;

b) The person has a direct or indirect qualifying holding in the bank;

c) The person is a member of the board of directors or management of an enterprise under b above, or under g or h below;

d) Any spouse, partner, or family member up to the second degree of any of the persons mentioned under a, b, or c above;

e) Any enterprise in which any of the persons mentioned under a, b, c or d is a member of the board of directors or management;

f) Any enterprise in which any of the persons mentioned under a, b, c, or d above holds directly or indirectly, alone or with others, at least 10 percent of the shares or voting rights;

g) Any enterprise that the bank, alone or with others, controls directly or indirectly;

h) Any enterprise controlled directly or indirectly by an entity that controls the bank.

[493] Art. 9 of the Regulation N° 04/2008 on Insider Lending of Banks, *Official Gazette n° 02 of 10/01/2011*.

[494] See, Art.9 (2) which provides that:

"In addition, to the remedial measures, prescribed by article 8, the Central Bank may impose all or any of the following administrative sanctions on a bank that fails to comply with this Regulation:

…

2. dismissal from the board of the offending director and barring from any future employment at any bank without Central Bank approval".

[495] Art. 42 of the Regulation N° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02 of 10/01/2011* provides that: "Directors, chief executive officers and management should not deal in the securities of any company listed or pending listing on a stock exchange at any time when in possession of information, obtained by virtue of employment or connection with the institution, which is not generally available to shareholders of that company and the public, and which, if it were so available, would likely bring a material change in the market price of the shares or other securities of the company concerned. "Insider dealing" as this is called, is a crime."

[496] Regulation n° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02 of 10/01/2011*.

[497] Art.35 of Regulation n° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02 of 10/01/2011* which provides on the *conflict of interest* states that:

"Directors, chief executive officers and management should not engage directly or indirectly in any business activity that competes or conflicts with the institution's interest. These activities include, although not necessarily limited to, the provisions of the articles below: …" These examples of what might be considered as conflict of interests are provided in the subsequent articles from 36 – 42 and they include; 1) Outside Financial interests by a director, manager or any officer with a customer, creditor or debtor, or any other; 2) Other Business Interests like doing any other lucrative activity during working hours; 3) Other employments; 4) Dual Directorship (which is exclusively not allowed within the Financial Institutions); 5) Trusteeship like taking up appointments to become an administrator of other companies, executor or receiver, ets; 6) Misuse of position to your own advantage; 7) Misuse of the company's information, and to mention just a few.

entail what is discussed here below as the duty not to accept any benefits from third parties.

4.2.5. Duty not to accept benefits from third parties

This duty, closely related to the duty to avoid conflicts of interests, means that directors are obliged to abstain from receiving gifts, entertainments, gratuities or any other kind of benefits from third parties. Such benefits might result in compromising a director's integrity and independence. Directors are called to exercise vigilance and consciousness as to detect undue benefits and distance themselves from these benefits just like they are called to control such possibilities of receiving undue gifts by other company employees. Directors must not accept gifts from persons or entities who deal with the company if the gifts might be perceived to influence the director's decisions[498]. In other jurisdictions like in the United States for example, even if such duty was not statutorily provided for, companies will endeavour to spell that in their specific board charters or board codes of business ethics[499]. Sometimes, such abstinence, depending on a company from the other, may even extend to immediate family members[500] for the Board Members.

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[498] This is what is contemplated in art. 41(par. 2) of the BNR regulation on corporate governance of banks where is states that:
"Directors, chief executive officers and management must not solicit or otherwise accept inducements either directly or indirectly whether in cash or in kind in order to provide any favors to a customer in the provision of loans, acceptance of deposits or any other conduct of the business of the institution to which they are entrusted either jointly or individually".

[499] See for example: Bristol-Myers Squibb Company's Code of Business Conduct and Ethics for Directors which is available at: http://www.bms.com/Documents/governance/dir_code.pdf. Accessed on 04/06/2014; PFIZER INC.'s Code of Business Conduct and Ethics for Members of the Board of Directors – available at: http://www.pfizer.com/files/investors/corporate_governance/cg_code_ethics.pdf. Accessed on 04/06/2014; The Boeing Company Code of Ethical Business Conduct for Members of the Board of Directors – available at: http://www.boeing.com/assets/pdf/corp_gov/conduct_for_directors.pdf; United Microelectronics Corporation's Code of Ethics for Directors and Officers – available at: http://www.umc.com/english/pdf/code_of_ethics.pdf. Accessed on 04/06/2014; Domtar Corporation's Code of Business Conduct and Ethics – available at: http://www.domtar.com/en/corporate/ethics/index.asp?location=SecondaryNav; Ybrant Digital Company's Code of Conduct & Ethics for Directors & Senior Management – available at: http://www.ybrantdigital.com/english/investors/codeofconduct.html; Accessed on 04/06/2014, among others.

[500] New York Stock Exchange Rule 303A (on Corporate Governance as of Nov.3, 2004)(2)(b) for example, defines "immediate family" to include a person's spouse, parents, children, siblings, fathers and mothers-in-law, sons and daughters in-law, brothers and sisters-in-law, and anyone (other than employees) who share such person's home (see: http://www.nyse.com/pdfs/section303A_final_rules.pdf- accessed on 04/06/2014).

4.2.6. (a) Duty to disclose interest in a transaction

Directors are obliged to disclose their interest in whatever transaction or proposed transaction of the company and they must abstain from participating in the decision making over it. Disclosure obligation is a mechanism to avoid intrigue and double-dealing by directors who take decisions on behalf of the company.Art. 191 of the 2009 Company Law for example states that:

"A director of a company shall, forthwith after becoming aware of the fact that he/she is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register[501] *where it has one and disclose to the Board of Directors the company :*

1° where the monetary value of the director's interest is able to be quantified, the nature and monetary value of that interest;

2° where the monetary value of the director's interest cannot be quantified, the nature and extent of that interest".[502]

Note that, this provision has been complemented by art. 191 bis[503] which provides for sanctions to the director in case he / she fails to observe this duty to disclose. Art. 191 *bis* thus provides for sanctions for non-disclosure of their interest by members of the board of directors where it states that:

"Without prejudice to the provisions of the Penal Code and other sanctions provided for under company's Articles of Association, any Director who fails to comply with the provisions of article 191 of this law shall be liable to any of the following administrative sanctions:

1° suspension from the Board of Directors for a period of six (6) months;

2° termination of the expected or acquired interests in violation of the provisions of this article;

[501] Although Companies may have the interests register, it is not a common practice for them to have such and the way the laws itself is stated facilitates in making it optional and thus, many of them if not all, preferring to leave it out since it is not mandatory.
[502] Art. 191 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009*.
[503] Law N°14/2014 of 28/05/2014 modifying and complementing Law N° 07/2009 of 27/04/2009 relating to Companies as modified and complemented to date *(Official Gazette No. Special of 29/05/2014)*.

3° payment of a fine between five hundred thousand (500,000) and five million (5,000,000) Rwandan Francs…"

Such administrative sanctions against the non-disclosing director may be enforced by the Extra- Ordinary General Assembly convened by the board of directors where possible, or in any Extra-Ordinary General Assembly convened out of its (General Assembly) own initiative in case the board was not willing or is as a whole in the breach of such duty. By application of the shareholders too, the court may order for such sanctions.

The following article (Art. 192 of the 2009 Company Law) further provides for the avoidance of a transaction as a consequence of the violation of the duty to disclose the personal interest.[504] The exception to the avoidance mentioned as a consequence of non-disclosure is based on the assumption that the company received a fair value from the transaction. However, the complication that would accrue from that is to know who shall carry out the valuations and how this shall be conducted. Probably, this means that a fair and neutral taskforce/committee shall have to be constituted either by the Board or by the assembly of shareholders to assess whether the company did benefit fairly from the transaction in which one of its directors had a personal interest.

4.2.7. (b) Duty to disclose dealing in the company's shares (inside-dealing)

Directors also have the duty to disclose about their interests in shares of the company they are serving as directors especially with listed companies or those intending to list their shares on Stock Markets. This is referred to as inside-dealing and is strictly provided for by Art. 200. It states that:

"A director of a public company who acquires or disposes of a relevant interest in shares issued by the company shall forthwith, after the acquisition or disposition disclose to the Board:

1° the number and class of shares in which the relevant interest has been acquired; 2° the nature of the relevant interest;

3° the consideration paid or received;

[504] The exception to the avoidance would be where the company acknowledges to have received a fair value out of that transaction. The complication that would accrue from that then is to know who shall carry out the valuations and how this shall be conducted. Probably, this means that a fair and neutral taskforce/committee shall have to be composed to assess whether the company did benefit fairly from the transaction that one of its directors had a personal and a direct interest.

4° the date of the acquisition or disposition."

This mandatory disclosure requirement is based on an assumption that a director of a company in his capacity as a director or an employee of the company or a subsidiary company, has information which is material to the assessment of the value of shares or debentures issued by the company or a subsidiary company, which information would not otherwise be available to him if he was not an insider. Thus, by the use of such inside information, he is put at an unfair advantage compared to outside acquirers of the same shares. Where such shares have unfairly been acquired from a third party by a director, Art. 202 provides for directors / officers, as a remedy, an obligation to reimburse the difference between what was paid and the actual or fair value of the shares to the person from whom the shares were acquired.[505]

4.2.8. (c) The duty to disclose the true picture of the company

Company law also bestows a duty to directors to make known to the public the true picture of the company especially when the company is inviting the public to invest in it through the publication of a prospectus. The breach of this duty carries with it heavy consequences to all directors who shall have signed and authorised the publication of such prospectus as provided for in Art. 72[506].According to Charkham[507], well-managed companies have to signal their accountability to the public (its stakeholders) by providing information about, among others: 1) the company's objectives; 2) principal changes; 3) balance sheet and off-balance sheet items; 4) financial position of the firm and its capital needs; 5) Board composition and company policy for appointments and remunerations; 6) forward-expectations; and, 7) profits and dividends. Under Rwandan law for instance, art. 187 of the 2009 Company law obliges directors to disclose any material and substantial change on the status, management and identity of the company and this time, the mandatory duty to disclose is not directed to the shareholders or the fellow Board members, but to the Office of the Registrar General[508].

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[505] Art. 202 of theLaw N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009* states that:
"Where a director acquires shares or debentures, the director shall be liable to the person from whom the shares or debentures were acquired for the amount by which the fair value of the shares or debentures exceeds the amount paid by the director".
[506] Art. 72 provides for the civil liability for misstatements in a prospectus of the company. This shall be discussed later under this chapter.
[507]Charkham, J (2005), Keeping Better Company, Corporate Governance Ten Years On, Oxford: Oxford University Press. Also cited in: McCahery, J.A. and Vermeulen, E.P.M, Corporate Governance of Non-listed Companies, Oxford, Oxford University Press, pg.45.
[508] Art. 187 provides that:
"The Board of Directors shall disclose the following to or cause it to be registered by the Registrar

The consequence to the breach of this duty to disclose is that the whole membership to the Board is jointly taken to be defaulting.

4.2.9. Duty of confidentiality

Whether in business or elsewhere, officers taken to be confidants of certain private information are always expected to maintain a certain degree of professionalism and integrity is expected of persons occupying the office of their ranks. This is essentially based on the fact that there is much that is said in boardrooms or elsewhere in offices or exchanged which, where mishandled, would cause damages to the company or the institution of that office. To that effect, company directors, being the highest officers of the company, obviously receive and hold confidential information of the company which they are obliged not to divulge outside the company's business perimeters.

Rwandan law bars company directors to using or releasing the company's confidential information especially the one that was gotten by the director in the course of performing his office duties as a director or rather as a company employee. Art. 197(par.1) of the 2009 Company law for example stipulates that:

"Unless provided otherwise by the Law, a director shall not disclose to anyone and for any use the information that he/she possesses by virtue of his/her duties as a director or employee and to which he/she would not have had access in other circumstances".

The only exception to this is when an authorization has been sought and granted by the Board. To grant this authorisation however, the board shall first assess whether such use of the company's information shall not in any way jeopardize the interests of the company.[509] This duty of confidentiality is even more relevant today in the information era than ever before[510]. Technology, business strategy, business models, and how to

General within thirty (30) days:
1° a replacement of any one of the members of the Board of Directors;
2° any change of name, address or any other details about a member of the Board of Directors…."

[509] Art. 197(par. 3&4) provide that:
"The Board of Director may authorize a director to disclose, put to use information or act depending on it, provided the company's interests are not jeopardized.
Any interest that a director obtained from using the information he/she has access to shall be made known to the company".

[510] See, David A. Katz and Laura A. McIntosh, "Corporate Governance Update: Boardroom Confidentiality Under Focus", published by the *New York Law Journal* on January 23, 2014 [where they argue that 'Real-time' communication tools and social media give everyone with Internet access the ability to publicize information widely, and confidential information is always at risk of inadvertent or intentional exposure], The article is also available at: http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.23058.14.pdf ,

apply them, are all discussed in boardrooms. We note that each company may determine what it holds confidential and this might not necessarily be the same for the other. Each business shall therefore be treated separately and distinctly in regard to confidential information. In some sectors more specific rules on confidentiality apply. In the insurance industry for example, the corporate governance regulation provides on how confidentiality shall be at the fore front of that business. Art. 44 of the code (regulation) say:

“Confidentiality of relations and dealings between the institution and its policyholders is paramount in maintaining the institution’s reputation. Thus directors, officers and staff members shall take precaution to protect the confidentiality of policyholder information and transactions.

No director, officer, or staff member shall, during, or upon and after termination of connection or employment with the institution except in the proper course of his/her duty and or with the institution’s written consent divulge or make use of any secrets, copyright material, or any correspondence and accounts of the institution or its policyholders. No director, officer or staff member shall in any way use information so obtained for financial gain…”[511]

Unlike the Company aw (art.197) which empowers the Board to authorise the use of the company information as an exception, the exception for the use of the information relating to the policyholders is reserved to the policy holders’ permission or where the law provides otherwise (say, where the law obliges the insurer to provide such information to state institutions for public and statutory reasons)[512].

Art. 42 of the corporate governance regulation for insurance industry further provides that:

“Directors, officers and staff members shall not misuse any information obtained by virtue of employment or connection with the institution”.

The same high level duty of confidentiality is imposed to directors and officers of financial institutions like banks and micro finance institutions. Art. 42 of the Corporate

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see also for example: **Zion Lights**, “Is This the Age of Communication,” HuffPost Tech (United Kingdom), Dec. 29, 2012 (“One person can send a short message via a tweet that might be read by a million people within a minute. Or spam three million people with the click of a button.”), available at www.huffingtonpost.co.uk/zion-lights/is-this-the-age-of-communication_b_2372785.html. Accessed on 17/06/2014.

[511] Art. 44 of the Regulation Nº07/2009 of 29/07/2009 on Corporate Governance Requirements for Insurance Business, *Official Gazette n°35* of30/08/2010.

[512] Art. 44, ibid. (last paragraph).

Governance Regulation of Banks condemns the misuse of client and company information especially concerning listed companies and share dealings which, according the qualifications of this regulation, would be a crime.

It provides that:

"Directors, chief executive officers and management should not deal in the securities of any company listed or pending listing on a stock exchange at any time when in possession of information, obtained by virtue of employment or connection with the institution, which is not generally available to shareholders of that company and the public, and which, if it were so available, would likely bring a material change in the market price of the shares or other securities of the company concerned. "Insider dealing" as this is called, is a crime…"[513]

To emphasise the level of this duty of confidentiality, the regulation on corporate governance of Banks even forbid the staff possessing the information from passing it on to other staff members who are not supposed to use such information in their daily duties. This is comparable to what is referred to as the "Chinese wall"[514] commonly used in the US financial system isolating one department from the other in terms of information sharing. Art. 44 of regulation N° 06/2008 on corporate governance of banks, Official Gazette n° 02 of 10/01/2011 provides that:

"Confidentiality of relations and dealings between the institution and its customers is paramount in maintaining the institution's reputation. Thus directors, managing director/chief executive officers and management must take precaution to protect the confidentiality of customer information and transactions.

No member of staff or director should during, or upon and after termination of employment with the institution (except in the proper course of his duty and or with the institution's written consent) divulge or make use of any secrets, copyright material, or any correspondence, accounts of the institution or its customers.

No employee or director shall in any way use information so obtained for financial gain.

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[513] Art. 42 of the Regulation N° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02* of 10/01/2011.

[514] According to the Wikipedia <http://en.wikipedia.org/wiki/Chinese_wall> "Chinese wall" is a business term describing an information barrier within an organization that was erected in order to prevent exchanges or communication that could lead to conflicts of interest. For example, a Chinese wall may be erected to separate and isolate people who make investments from those who are privy to confidential information that could influence the investment decisions.

Business and financial information about any customer may be used or made available to third parties only with prior written consent of the customer or in accordance with the arrangements for the proper interchange of information between institutions about credit risks, or when disclosure is required by law".

The director's duty of confidentiality extends to keeping the information away from the shareholders until the due time as shall be judged to the benefit of the company. This however becomes difficult (but remains obligatory nonetheless) to implement especially to the nominee[515] directors who often think that they have the duo loyalty – to the company itself and to the nominating shareholders. However, as Jon Feldman, Michael Partridge and Eric Goldberg argue in their article entitled *"Nominee Directors and Confidentiality: the Canadian Law Perspective"*[516], where a director's interest conflict, precedence is always for the company interests since, a director once nominated, has to subordinate his interests to those of the company he is nominated to serve. In such a situation therefore, even the nominee directors are bound to keep confidential from their nominating shareholders, all the boardroom deliberations and any other important information that is not yet readily served for public or for shareholders' consumption.

The duty of confidentiality under Rwandan law as has been discussed above is both statutory and regulatory. The statutory duty applies to every board member of every company as indicated in art.197 of Rwanda Company Law 2009.The duty laid down in corporate governance regulations applies to the financial institutions (Banks and Insurance companies).The Central Bank (BNR) extends this duty also to other corporate staff members. In addition to these rules, a company's board charter may also contain duties of confidentiality.

Whereas it may seem very persuasive to journalists like Justin Fox of the *Business Times* to go by the words of Warren Buffett in his 1993 letter to Berkshire Hathaway shareholders[517] to encourage the leaking of corporate information by the board

[515] According to Art.2 (23) of the Law N°07/2009 of 27/04/2009 Relating to Companies, *OG N°17bis of 27/04/2009*, a **nominee** is defined as "a person who, in exercising a right in relation to a share, debenture or other property, is entitled to exercise that right only in accordance with instructions given by some other person either directly or as his delegate. A person is the nominee of another person where he/she is entitled to exercise such a right only in accordance with instructions given by that person;

[516] Jon Feldman, Michael Partridge and, Eric Goldberg (Goodmans LLP) on Corporate Financing: 'Nominee Directors and Confidentiality: the Canadian Law Perspective', an article available at: http://www.goodmans.ca/files/file/docs/Corporate%20Financing.pdf , accessed on 17/06/2014.

[517] In that letter as quoted by Justin Fox 'When leaking is the right thing to do', In *The Business Times*, September 21, 2006, Warren wrote that:

"a director who sees something he doesn't like should attempt to persuade the other directors of his views. If he is successful, the board will have the muscle to make the appropriate change. Suppose, though, that the unhappy director can't get other directors to agree with him. He should then feel free to make his views known to the absentee owners".

members, a board member doing that should be knowing that at least under Rwandan law, he will be violating his duties and he then must face the consequences.

4.2.10. The Duty to ensure equal treatment of and acting fairly as between shareholders

The last, but obviously not the least duty binding company directors under Rwandan law is the duty to treat the shareholders fairly, reasonably and equally. However, equal treatment of shareholders does not necessarily mean that shareholders have equal rights in the company since, the shareholder rights may depend on either the percentage of shareholding in that company or the type of shares he/she is holding. Art. 93 of the Company Law 2009 for example states that:

"Before it issues any shares the Board of Directors shall determine the amount of the consideration for which the shares shall be issued and shall ensure that such consideration is fair and reasonable to the company and to all existing shareholders. The consideration for which a share is issued may take any form including payment in cash, promissory notes, contracts for future services, real or personal property or other securities of the company. The amount of consideration for which a share with par value is paid, shall not be less than the par value".

This fair and reasonable treatment, as already mentioned above, can best be explained and assessed by the directors through a critical analysis of each category of shares and their attributes in terms of rights in relation to the provisions of arts. 75[518]& 76[519] of the Company Law but also, the statutes of each particular company as they may offer more details as to how shareholders may be lawfully segregated. Thus, a shareholder cannot assert to be discriminated by denying him to vote in a General Assembly where he/she knows that he/she holds non-voting shares. Similarly, some shareholders holding

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See the article "*When leaking is the right thing to do*" at: http://business.time.com/2006/09/21/when_leaking_is_the_right_thin/ , accessed on 17/06/2014.

[518] Regarding the rights shares may confer to their holders, Art. 75 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis* of 27/04/2009 provides that:

"A share in a company shall be a movable property. A share in a company shall confer on the holder: 1° the right to one vote on a poll at a meeting of the company on any resolution; 2° the right to an equal share in dividends authorised by the Board of Directors; 3° the right to an equal share in the distribution of the surplus assets of the company. The rights specified in sub-paragraph 2° of this article may be restricted, limited, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued."

[519] Art. 76 states that:

"Subject to the constitution of the company, different classes of shares may be issued in a company. Shares in a company may : 1° be redeemable; 2° confer preferential rights to distributions of share capital or income; 3° confer special, limited, or conditional voting rights; 4° not confer voting rights".

preferential shares may be preferred to those with ordinary shares in for example, when sharing company incomes.

4.3. Conclusion

In the preceding sections, various duties that corporate directors under Rwandan Law owe either to the company itself since they are the agents for it – the principal, but also other duties that they owe to third parties like the duty to represent a true picture of the company through an honest prospectus for listed companies have been discussed. Also duties that they owe to the company's creditors and other stakeholders have been expounded. We contend that, although these duties are primarily directed to directors as individuals, they apply to their ordinary way of functioning as directors acting for and on behalf of the company and so, ought to be having as the principal person to be accountable to be the company itself. This would be the case especially for example, where there is a misrepresentation of the true status of the company by depicting it as profitable one in order to induce people into investing in it. In our discussions above, reference has been made to foreign practices and laws especially the UK. We note that these referrals are meant to deepen the insight in the matter and hopefully, these referrals might be of use when Rwandan law is being applied, or that when modifying our company law, the same referrals would inspire our drafters and consequently, the legislators to ascribe to some foreign best practices.

The next section shall address the director's liabilities including general and statutory civil, criminal, tax, to mention a few. Despite the corporate veil, individual directors as discussed in the following section may be held accountable either individually or jointly with the company itself.

4.4. The Liability of Corporate Directors

In most countries, and indeed in Rwanda, the statutory and regulatory regimes basically provide that where directors are acting in good faith and in a manner that is intended to be to the best interests of the company, then, essentially, they should be exempt from any individual liability. This is founded on the legal entity theory of a corporation and its attributes therefrom including its distinction from its shareholding and its management (which also includes the directors) as discussed in chapter one of this work and thus, leaves every deed of company directors to the exposure of the company itself instead. This is premised on the assumption that a company is a person on its ownand would therefore be the deed feasor for the acts committed or omitted by the directors acting for and on behalf of this company. It therefore becomes somewhat complex to draw a clear line of when the director would be acting for and on behalf of the company, and when the same director is beyond that mandate and shall be individually held accountable and liable. Needless to highlight is that where this insulation of corporate directors under the guise of the corporate veil is not controlled, it is expected that there would be some abuses.

4.4.1. Can the 'Lifting of the corporate veil' principle extend to directors?

Traditionally, the concept of *'lifting the corporate veil'* or '*piercing of the corporate veil*' which means that on exceptional statutory or common law grounds[520], courts may derogate from the common principle of the corporate personhood that treats the corporation as a distinct legal person[521] and instead, stretch their hands to individual shareholders that are underneath the cover (shield) of the corporation. Legislators have always upheld the principle of limited liability of shareholders[522] and the distinct personhood of corporations[523]and showed reluctance in statutorily providing for such circumstances where derogation of the principle would be legally acceptable. Lifting of the corporate veil by the courts is often viewed as the only legal response to the

[520] Some authors like P. Davies (ed.), Gower & Davies: The Principles of Company Law, 9th edit, (London: Sweet & Maxwell, 2008), para.8-15, suggest that only three situations (through Statute, Contract and Common law) may be used while derogating from the common rule of the limited liability of shareholders.

[521] This was the legal standing right from the famous case *Salomon v A Salomon & Co Ltd [1897] AC 619.*

[522] Art 137 of the Law N°07/2009 of 27/04/2009 Relating to Companies, Official Gazette N°17bis of 27/04/2009 provides that:
"A shareholder shall not be liable for an obligation of the company by reason only of being a shareholder. The liability of a shareholder shall be limited to:
1° any amount unpaid on a share held by the shareholder;
2° any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable;
3° any liability expressly provided for in the constitution of the company".

[523] Art. 18 of the law cited above states that:
"A company registered under this Law shall be a company with a separate legal status and with the name by which it is registered and continues to exist until it is removed from the register of companies"; and Art. 32 explicitly provide for such company's capacity, powers and the validity of its actions where it provides that:
"Any recognized company shall enjoy within and outside Rwanda:
1° full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction;
2° full rights, powers and legal privileges. Articles of association of a company may contain a provision relating to the capacity, rights, powers or activities of the company only if the provision restricts the capacity of the company or those rights, powers and activities provided for by this Law".

potential abuse of the principles of limited liability[524] and the personhood of corporations by shareholders.

Underneath this corporation again, there are other individuals, the directors of the company whose decisions and actions are, in principle, the acts of the company as earlier noted that the company cannot function by itself without the use of human brains. In principle, the same protection from the corporate veil that shields shareholders from liability is extended to directors. We contend however, that this principle of protection is by law granted where directors operate within the contours of what the law and the company's by-laws allow the directors to do. Beyond that, the veil that covered them as we discuss in the following subsections, shall be lifted or pierced. We note that as a legal measure to control the conduct of company management to being limited to the contours of what the law permits them, different statutory (civil, criminal, tax, and others) as well as the regulatory provisions have been stipulated to provide for the liability and sanctions thereto to the wrongful (those that are outside of what the law permits) acts of directors and officers of the companies individually as directors and officers of the company not the company itself or necessarily taking these directors and officers jointly.

Under Rwandan Law, director's personal liability for violation / breach of directorial duties was unheard of or at least was limited both in statute and practice before the 2009 Rwandan Law on Companies. All breaches of duty, especially to third parties and the consequences thereof were attributed but to the company based on the general rule that whatever the director does, he does but for and on behalf of the company[525]. Where, though it would be quite seldom, directors could be held responsible, it meant that it would be a joint liability for all directors irrespective of their individual contributions to the wrongful acts[526]. In the US for example, the cases that have triggered and trumpeted such possibility of personal (individual) liability of corporate directors were

[524] C. VEZIROGLU, The Doctrine of lifting the veil in the UK, available at: http://www.academia.edu/2349427/The_Doctrine_of_Lifting_the_Veil_in_the_UK accessed on 20/06/2014.

[525] According to **Roth Grantham** in his article: "Director's Personal Liability", *The Cambridge Law Journal, Vol. 62, No. 1* (March 2003), pp.15-17, this was the same position within the Common Law Jurisdictions (see for example, In *Trevor Ivory Ltd. V. Anderson[1992] 2 N.Z.L.R. 517*; *Sealand of the Pacific v. Robert C. McHaffie Ltd [1974 51 D.L.R. (3d) 702*), at least up to late 1990s before the decision by the House of Lords (England) in *Williams V. Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830 which suggested otherwise. In this case that involved one Managing Director of Oakprime Ltd (the beneficiary under the letter of credit issued by one Bank) and another bank that connived with him to authorize the falsified documents, their Lordships found that," there wouldn't be any defence at Common Law to a fraudulent misrepresentation" and thus, personal liability to the director of Oakprime was held. (see the full article through: <http://www.jstor.org/stable/4508956>).

[526] This was the argument advanced by Kalisa Alfred (former *President Directeur General* of BCDI Bank) RPA 0573/08/KIG. In this particular case however, Judges did not hold his argument since his personal influence over the Board composition was very clear and distinct.

Enron[527] and WorldCom[528] where the settlement was reached in having individual directors in their respective companies making some payments directly from their pockets instead of referring it to their respective corporations.

It should be noted however that, even though the individual / personal liability of directors has been emphasised under Rwandan law, it remains mainly where there has been a violation or breach of duties. In other words, it is only when it can be established that there was a breach of the directorial duties that a director may be held personally liable instead of the company. Directors' liability may emanate from a contractual relationship, from a breach of duty, from tort or from a criminal action.

Apart from a few liabilities (including civil, tort as well as administrative) scattered in the first part of the 2009 Company Law, the rest are provided for in the last part of the Company law (Chapter II) that refers to penal provisions. It should also be noted that, apart from these liabilities most of which are civil in nature, many other liabilities including the criminal and tax ones are provided for in other laws other than the company law.

Generally, directors' individual liabilities may be categorized into various forms. These may include but are not limited to: the general company law liabilities emanating from the breach of the general duties of corporate directors, (which would also be argued to be common law directors' liabilities); the specific company law liabilities; directors' liabilities that may be found in other laws other than the company law (tax, employment, environment, social security, etc.); those other liabilities emanating from the wrongful and tortious acts of directors as well as the criminal law liabilities of directors. The following sections provide more details in regard to those different liabilities.

4.4.2. General company law liabilities

Rwandan company law provides for various ways through which a director as an individual may be held liable for his acts or omissions while dispensing his duties as a director of the company. These liabilities are those that emanate from the breach of the general duties of a director[529]. However, as noted earlier (see 4.2.3), where a director fulfilled his fiduciary duties owed to the company by avoiding any possible conflicting interests, i.e., being loyal to the company and applying the care and diligence that a person of his office and qualifications would reasonably apply (objective and subjective

[527] See *In re Enron Corp., Sec., Derivative & "ERISA" Litig., 391* F. Supp. 2d 541 (S.D. Tex. 2005).
[528] See *In re WorldCom, Inc. Sec. Litig., 388 F.* Supp. 2d 319 (S.D.N.Y. 2005).
[529] These include the duty of loyalty, duty of care, skill and diligence, duties of honesty and disclosure, etc.

standard criteria), a director then can invoke the application of the ‘business judgment rule’[530] and thereby avoid the infliction of person liability upon him. Consequently, the liability (where there is any), would turn out to be for the company and not for the individual director. In other words, director’s liability ensues as a consequence to the breach of his duties.

Arguably, as shall be discussed by analysing art. 212 of the Company law in the paragraph that follows, a director has the freedom to invoke the *business judgment rule* and for him to be held liable, two conditions must be fulfilled: 1) there has to be the wilful or voluntary commission or omission of the act leading to the breach of duty[531]; and 2) having the intention to breach the duty[532].

4.4.2.1. The intention to breach the duty

The condition on intentional breach of the duty owed may be adduced from the provisions of art.212 of the 2009 Company Law. The provision states that:

“Where a director or officer **wilfully** commits a breach of any duty: …”

And it goes further to provide for the consequences of the wilful breach of the duty where it states that the director:

1° shall be liable to compensate the company for any loss it suffers as a result of the breach;

2° shall be liable to account to the company for any profit made as a result of such breach;

3° any contract entered into between the director or the officer and the company with regard to that transaction may be rescinded by the company”.

[530] We note that this term or expression ‘Business Judgment rule’ is not originally a Rwandan legal terminology or expression and so, although it is used as it is stated in the American (originally from Delaware) system, we suggest that where it is used or applied in Rwanda, it should be contextualized to Rwandan legal context.

[531] This was also the House of Lords’ (UK)decision in *Williams v Natural Life Foods Limited [1998] 2 All ER 577* where it was ruled that a director is only likely to be found liable if there has been a voluntary assumption of responsibility towards a third party.

[532] This was also the stand for the House of Lords in the case *of Standard Chartered Bank v Pakistan National Shipping Corporation (No 2) [2002] 1 All ER 173* where a director knowingly and deliberately made a false statement in order to obtain payment on a letter of credit. So, the intention here for the director was clear – to defraud. The House of Lords ruled that such director cannot escape the liability just by the fact that he was acting for and on behalf of the company.

In other words, it shall be to the one alleging to the wilful breach of the duty (ies) by the director to prove so since the law as stated above acknowledges that not all breaches may be intentional and thus, only the director's wilful and intentional breaches should attract liabilities against him. Art. 9 of the law on Civil, Commercial, Labour and Administrative procedures[533]impose the burden of proof to the party alleging a breach or fault. The applicant has to prove beyond any reasonable doubt that the director's conduct (act or omission) that is claimed to have been a breach of duty was intentional, and aimed at breaching the duty or duties.

4.4.2.2. To breach the duty with an intention to harm

Rwandan company law assumes that the directors' decisions in performing the duties are in principle, well intentioned and that they shall be considered as valid as long as they fulfil the conditions set in art. 213 of the company law 2009[534]. The article provides that:

"A decision made by a director or another officer of a company shall be considered as valid if:

1° it is made in good faith for a proper purpose;

2° he/she does not have a material personal interest;

3° the company is appropriately informed of the decision's subject matter;

4° he/she reasonably believes that the decision is in the best interests of the company.

The director's or officer's belief that decision is in the best interests of the company shall be taken to be a reasonable one unless the belief is one that no reasonable person in his/her position would hold."

[533] Law No 21/2012 of 14/6/2012 relating to the Civil, Commercial, Labour and Administrative procedure (Official Gazette No. 29 of 29/07/2012) as amended to date by the Law N°15/2014 of 28/05/2014 Modifying and Complementing Law n° 21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and Administrative procedures, *Official Gazette No Special of 29/05/2014* . Note that, whereas it would prove to be hard for a minority shareholder (claimant) for example to easily obtain evidences against the directors from the company, Art. 9 *bis* of the Law cited above states that:
"A minority shareholder shall be entitled to request from the judge and obtain any documentation from the defendant or any witness as long as it may help him/her in the trial either before or during court proceedings." The defendant referred to here in our case would be a director of the company to whom the breach of duty is alleged.

[534] Law No. 07/2009 of 27/04/2009 relating to companies, Official Gazette N0. 17bis of 27/04/2009.

Art. 213 of Rwandan Company law appears to exempt a director who applied his abilities (business skills) and judgments in good faith to the benefit of his company from liability even when his judgments and business choices or decisions turned out to attract undesired liabilities. Only when directors' decisions were bad intentioned, that is, when they were taken well aware that those decisions would harm, would the directors decisions considered invalid and thus, tantamount to attracting individual liability. In cases of alleged liabilities against individual directors for instance in insolvency proceedings, it would suffice to show the court that the decisions taken on behalf of the company were taken in good faith and to the best interests of the company even though they unfortunately ended up causing the undesirable consequences. It would be argued that probably some other forces that are beyond his capacity might have caused the insolvency. Consequently, art. 214 par.1 provides that:

"Where a company establishes that the decision made by a director or a company's officer is not valid, such director or officer shall be held liable for that decision".

4.4.3. Specific directors' liabilities under company law

There are other liabilities that, although may be found provided for by the Company Law, seem to be specific as compared to the general liabilities that are related to the breach of the general duties by the company director as discussed above. Corporate directors for example, may incur personal liabilities where they engage into contracts in the name of the company but where such director acted without proper authority from the company or in total disregard to the laws and the by-laws governing the company. For example, where a director, due to urgency and business necessity entered into a contract that may be qualified whether by the law or by the articles of association as a 'major transaction'[535] within the context of that particular company and for which, such a

[535] Art. 170 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009* provides that:
"A company shall not enter into a major transaction unless the transaction is approved by special resolution from the meeting of shareholders". And, except where the Articles of Association provided otherwise in regard to what a major transaction meant, the same law cited above in Art. 171 defines a major transaction as:
"A major transaction in relation to a company shall mean:
1° the acquisition of, or an agreement to acquire, assets the value of which is more than 10 per cent of the value of the company's assets before the acquisition;
2° the disposition of, or an agreement to dispose of assets of the company the value of which is more than 10 per cent of the value of the company's assets before the disposition;
3° a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than 10 per cent of the value of the company's assets before the transaction.
A company shall not enter into a transaction which involves the acquisition or disposition or the acquiring

director would not be allowed to transact despite the urgency and the business necessity. The director must present such a transaction to the Board of directors and subsequently to the shareholders in an extra-ordinary General Assembly (for a special resolution). Where he fails to do so, the director shall be held individually liable for whatever liability that would emanate from the transactions (contracts) he entered into thinking that he was under the shield of the company.

It has to be noted however that, whether or not the approval from the General Assembly is obtained, the transactions already entered into by the company cannot affect the other parties (third parties) to such transaction. It however impliedly means that the company shall have to honour its commitments vis-à-vis the other parties and in return, claim the recovery from its director(s)[536].

4.4.3.1. Liability for misstatement in a prospectus and other official documents

As discussed earlier, it remains a duty of a director to genuinely represent the company as it is. In case of wilful misrepresentation or misstatement or where the concerned officers (directors in our case) did not apply the due diligence and care expected of them, the law has vehemently sanctioned it. This is more so for the publicly listed companies which are allowed to invite the public to invest in them through the publication of their prospectus. Art. 72, for example, hold any person liable for misstatement in the prospectus where it states that:

"Any person who:

1° is a director at the time of the issue of a prospectus;

2° authorises or causes himself or herself to be named and is named in a prospectus as a director or as having agreed to become a director either immediately or after an interval of time;

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of rights, interests or incurring obligations of, in any case, more than half the value of the company's assets unless the transaction is approved by special resolution".

[536] Art. 172 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis of 27/04/2009* States that:
"No creditor or other person dealing with a company shall be concerned to see or inquire whether a major transaction meets the conditions of this Law, except in the case of actual notice to that person". The logic and protection to third parties dealing with the company is enshrined in art. 33 (point 2) of the same law, where it states that:
"No act of the company and no contract or other obligation entered into by the company and no transfer of property to or by the company is invalid by reason only that it was done in contravention of that restriction."

3° is a promoter;

4° authorises or causes the issue of a prospectus;

Shall be liable to pay compensation to any person who subscribes for or purchases shares or debentures on the faith of a prospectus for any loss or damage sustained by reason of:

a) An untrue statement in the prospectus;

b) The wilful non-disclosure in the prospectus of any matter which he or she had knowledge and which he or she knew to be material".

Many other official and public documents would attract similar attention where Art. 72 quoted above may be read together with, for example, art.365 and art.366 of the same law (Company law 2009). Art. 365 sanctions false and misleading statements where it provides that:

"Notwithstanding the provisions of the penal code, any person who is required to provide a document and who:

1° makes, or authorises the making of, a statement that is false or misleading;

2° deliberately omits or authorises the omission of, any matter whose omission makes the document false or misleading on an important matter;

Commits an offence and shall be liable to a fine of between five hundred (500, 000 Rwf) Rwandan francs and two million (2, 000, 000 Rwf) Rwandan francs".

On its part, art. 366 sanctions the voluntary submission of false documents and it stipulates that:

"Notwithstanding the provisions of the penal code, any director or employee of a company who knowingly makes or submits, or authorises the making or submitting of, a false or misleading statement or report with regard to:

1° a director, employee, inspector, shareholder, debenture holder or trustee for debenture holders of the company;

2° a liquidator, liquidation committee, or receiver or manager of property of the company;

3° where the company is a subsidiary, a director, employee or inspector of its holding company; 4° a stock exchange or an officer of a stock exchange; commits an offence *and shall be liable to a fine of between one million (1,000,000 Rwf) and ten million Rwandan francs (10,000,000 Rwf)".*

It should be noted that, before the enactment of this law, submission of such a false or a misleading statement was neither sanctioned as a civil wrong that would attract damages as stipulated above nor was it a criminal offense that would be sanctioned by imposing either fines or any sentence whatsoever. Consequently, a Chief Accountant of the BCDI bank in case RPA 0573/08/HC/KIG was found not guilty despite his confessions before the criminal court to have manipulated financial documents to be submitted to the regulator (BNR) in order to keep an attractive image of the bank.[537]

4.4.3.2. Liability of company directors in case of Bankruptcy

Bankruptcy is a situation or a legal status where one or an entity is unable to repay the debts it owes to its creditors when they are actually due. Under Rwandan Law, any company's creditor with a claim of at least 20.000Frw which is not paid at its due date may file for the bankruptcy of the failing debtor (the company)[538]. This bankruptcy can also be qualified where a company fails to enforce or execute a final court judgment or where, the court is convinced that considering the company's assets and its contingent liabilities it would be unable to satisfy such liabilities.[539] For a director to be personally liable in case of bankruptcy however, a certain level of intention to damage the interest of the creditors on the part of a director, or a certain degree of negligence on his part must be established.

Article 218 of the 2009 Company law provides for situations where a director of a company that goes insolvent would be personally liable to pay for the company's debts. The provision however begins by providing the procedure through which a director must follow if insolvency is threatening to befall the company. It states that:

"A director of a company who establishes that the company is unable to pay its debts as they fall due shall forthwith request to convene a meeting of the Board of Directors

[537] The BCDI Case RPA 0573/08/HC/KIG, pars. 217 – 218.
[538] Art. 353 of the 2009 Company Law as amended to date states that:
"A company shall be considered to be unable to pay its debts where:
1° a creditor to whom the company is indebted in a sum exceeding twenty thousand Rwanda francs (20,000 Rwf), has served at the registered office a demand under his/her hand or under the hand of his/her Lawfully authorised agent requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure it to the reasonable satisfaction of the creditor;
…"!
[539] Ibid.

within five (5) days to consider whether the Board should appoint a liquidator or an administrator. Where a meeting is called under this Article, the Board shall consider whether to appoint a liquidator or an administrator or to carry on the business of the company.

Where a director fails to comply with this article, at the time of that failure the company was unable to pay its debts as they fell due and the company is subsequently placed in liquidation the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing its business…".

Whereas the provision stated above starts by targeting the executive directors, the second part of it implicates other directors and provides for their liability for collective decision that turned out to be detrimental to the creditors. This refers to the situation where the financial difficulty of the company has been reported to the board but which could not find the necessary attention of the members of the Board. It is this inattention of the Board therefore that is subsequently penalized[540]. In case of financial institutions, a forced liquidation may follow insolvency. Pursuant to art. 95 of the Law No. 07/2008 of 08/04/2008 concerning the organization of Banking in Rwanda, the Central Bank may order for a forced liquidation of a Rwanda Bank where:

"1° implementation of the recovery plan provided for under article 72 of this law is unduly delayed or is jeopardizing the interests of depositors or other creditors;

2° the special commissioner so proposes;

3° the bank or branch is insolvent without possibility of recovery;

4° the foreign bank is undergoing liquidation in its country of origin".

In such a case of forced liquidation, it is obvious that the prime suspects for the Bank's failure are the directors since, under normal circumstances, the signals of the

[540] Where:
1° at a meeting called under this article the Board of Directors does not resolve to appoint a liquidator or an administrator;
2° at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due;
3° the company is subsequently placed in liquidation;
the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors, who did not attend the meeting and voted in favour of appointing a liquidator or an administrator, shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

company's financial difficulties ought to have been detected beforehand by such directors. In fact, this is legally termed as wrongful or fraudulent trading since, where signals of financial failures have been detected, a prudent director wouldn't go ahead to trade but rather report such signals to the regulators[541]. As a consequence therefore, the law empowers the Central Bank with the authority that enabled it to authorise the liquidator to take the following actions against the directors, as per art.112 of the same law:

"1° to affix seals to the property of board members and managers whose responsibility seems to be clearly involved in the bankruptcy of the bank;

2° to proceed by garnishment or interim attachment of any sums owed to said board members and managers and movable and fixed assets belonging to them;

3° to raise objections, in accordance with procedures and means as provided for under civil law, to the exercise of the right to dispose of any fixed asset by these same persons".

Such seals, garnishments or interim attachments of the Board Member's property are taken as a provisional protective measure for the safeguarding of the creditors as well as the depositors' interests. The subsequent articles (113 and 114)[542] of the same law enables the liquidator to use the compensations and/or recovery of resources to satisfy the creditors and depositors of the Bank, not only from the company's assets but also from the contributions from or assets of the directors responsible for the insolvency of that financial institution (Bank).

4.4.3.3. Liability for insider dealing / trading /lending

Insider trading basically means a malpractice where someone or some people, by virtue of their employment relationship or office with the company have access to otherwise

[541] In the UK, Section 213 of the Insolvency Act 1986 (the "IA") provides:
"213(1) If in the course of the winding-up of the company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose the following has effect. 213(2) The Court, on the application of the Liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above mentioned are to be liable to make such contributions (if any) to the company's assets as the Court thinks proper".
[542] "Article 113
If the liquidation of a bank reveals an insufficiency of assets, the Central Bank may decide, at the request of the liquidator, that the bank's debts are to be borne, in whole or in part, individually or jointly, by any board member or manager involved in the bankruptcy of the bank.
Article: 114:
If the directors referred to in Article 113 of this Law do not discharge the liabilities of a bank as required by the Central Bank, the Central Bank may expand the forced liquidation procedure to their assets.

confidential or non-public information thus leading to unfair competition especially to outsiders. Such dealings may relate to either private companies or to companies floating their shares on stock markets. Art. 201 of the 2009 Company Law states that:

"Where a director of a company in his/her capacity as a director or an employee of the company or a subsidiary company, has information which is material to an assessment of the value of shares or debentures issued by the company or a subsidiary company, being information that would not otherwise be available to him or her, the director may acquire or dispose of those shares or debentures only where:

1° in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or debentures; or

2° in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities. The fair value of shares or debentures is to be determined on the basis of all information known to the director or publicly available at that time…"

Where this is not observed, it automatically leads to the liability of that director or officer as provided for by Art. 202 of the same law as above where it says:

"Where a director acquires shares or debentures, the director shall be liable to the person from whom the shares or debentures were acquired for the amount by which the fair value of the shares or debentures exceeds the amount paid by the director".

This provision of the law is not only intended to protect the market players by providing a levelled playing field but also to the protection of economy at large. For Banks, a specific definition has been given of who is an insider. According to art.2 of the regulation No. 04/2008 on insider lending in Banks (Official Gazette No. 2 of 10/01/2011), an insider means a director or any other person who has an executive authority or a shareholder of a bank, and it includes any related person and any related interest of that person. The purpose for such a regulation is to promote public confidence in banks through ensuring that no undue favouritism is granted to the insiders of the banks. The same principle is reflected by art. 46 of the Corporate Governance Regulation for Banks in Rwanda[543] where it provides that:

"Directors, chief executive officers and management should not use their positions to further their personal interests. An institution shall not in Rwanda therefore:

[543] Regulation N° 06/2008 on Corporate Governance of Banks, Official Gazette n° 02 of 10/01/2011

1. Grant or permit to be outstanding any unsecured advances in respect of any of its employees or their associates;

2. Grant or permit to be outstanding any advances, loans or credit facilities which are unsecured or advances, loans or credit facilities which are not fully secured to any of its officers, significant shareholders or their associates.

3. Grant or permit to be outstanding any advance, loan or credit facility to any of its directors or other person participating in the general management of the institution unless it is:

a. approved by the full board of directors of the institution upon being satisfied that it is viable;

b. is made in the normal course of business and on terms similar to those offered to ordinary customers of the institution. The institution shall notify the Central Bank of Rwanda of every such approval within seven days of the granting of the approval;

c. Grant or permit to be outstanding any advance, loan or credit facility or give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any associate or any of the persons mentioned in paragraphs 1, 2 and 3 of this article in excess of 5 per cent of the core capital of the institution; …"

Consequently, to avoid any liability a director must ensure that he is not compromising his office and/or company interests with his personal interests. Art. 35 of the Regulation for the Corporate Governance requirements for Insurance Business[544] in Rwanda states that the basic principle to be observed is that a director or officer of such a company should not use his/her position to make profits or to acquire benefits or advantages for him/herself or his/her related/connected interests.

4.4.3.4. Liability in case of Fraud or untrue declarations of annual accounts

Rwandan Law obliges every company with the exception of the small one, to file its annual accounts to the Registrar General's office not later than three (3) months following the closure of a given financial year. However, though such a duty is meant for the company in general, the law provides for who is responsible, something that would otherwise be taken to be implied, and it is the company directors' duty to sign and file the company's annual accounts. Arts. 253 to 255 of the 2009 Company Law specify the

[544]Regulation nº07/2009 of 29/07/2009 on Corporate Governance requirements for Insurance Business; Official Gazette n°35 0f 30/08/2010.

role of the board of directors from the preparation of the financial statements, the signing, up to filing of the annual accounts. With the exception of small private companies[545], all companies must prepare, sign and file the financial statements together with the copies of their auditor's reports with the office of the Registrar General. In case of untrue or false declarations, by a director or by the Board as a whole,they are held liable and sanctioned. Art. 368 of the 2009 Company Law states that:

"Notwithstanding the provisions of the penal code, any director, employee, or shareholder of a company who, with intent to defraud or deceive a person:

…

2. makes, or is a party to the making of, a false entry in any register, accounting records, book, paper, or other document belonging or relating to the company;

Commits an offence and shall be liable to a fine of between one million (1,000,000 Rwf) and ten millions Rwandan francs (10,000,000 Rwf)".

This therefore means that directors are bound to verify and crosscheck what they are submitting to the Registrar General as true and official documents of the company or else, they shall incur a liability for whatever misstatements, false entry, or any accounting errors in such documents submitted. The same is emphasized by art. 369 (1) relating to the use of electronic devices in recordings or reporting in accounting where it provides for an equivalent fine to the one mentioned above to whoever records or makes available to a person false information on an important matter.

4.4.4. Directors' liabilities based on other laws

Besides the Company Law, there are other various laws where directors' liabilities are provided for. These include, among others, the tax laws, the social securities law, labour law, environmental law, and others. Under this section, we shall labour to explain and highlight some of such liabilities a director may face outside the company law.

[545] Although exempted from filing the annual accounts, small private companies according to Art. 159 of the 2009 Company Law are also required to produce and file a financial summary for registration with the Registrar General.

4.4.4.1. Tax Law and Social Security Premiums related liabilities

Evidently, some directors who responded to this research's questionnaire could not believe that corporate directors would be liable for their activities or inactivity (omission) carried out in their capacities as corporate directors, among which are tax-related liabilities. The findings of the field study revealed that over 13% of the directors that responded to our questionnaire did not know or believe that they can be in one way or the other, be held liable for their services with the company.

Even those who admitted that directors could be held liable thought about for example, cases of misappropriation or embezzlement[546] of the company's property[547] but not for cases of mismanagement, negligence or liability for any unintended omissions. Rwandan Law on tax procedures for example, in its art. 46 bis[548] attach director's liability of non-payment of tax by the company. It states that:

""Directors who are directly involved in the control and management of a private company shall be jointly liable for any tax liabilities incurred by the company if it can be reasonably concluded that they intentionally or negligently caused the company to incur the tax liabilities…".

Thus, for example, in a circumstance where a staff of a company negligently or out of ignorance omitted from paying a certain tax for a given number of years and upon the tax audit by the concerned authority it is established that that company is liable for a certain amount of taxes incurred for the x number of years, that authority may decide to sue both the company and its directors and cause the court to order for a joint liability. However, this is not exceptional to Rwanda.

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[546] Which is also true as Art.325 of the Criminal (Penal) code of Rwanda sanctions embezzlement where it provides that:
"Any employee who:
1° embezzles public or private property, funds, negotiable instruments, documents, or movable property which are entrusted to him/her, by virtue of his/her office;
2° fraudulently destroys or embezzles negotiable instruments under his/her care or which have been communicated to him/her by virtue of his/her office;
shall be liable to a term of imprisonment of seven (7) years to ten (10) years and a fine of two (2) to five (5) times the value of the embezzled or destroyed property".

[547] Mainly what would be referred to as the "internal Liabilities" especially between the management and the company itself, not from the outside.

[548] Art. 46 bis of the Law N° 25/2005 of 04/12/2005 on Tax Procedures. Art.46 bis relates to the Joint liability on payment of taxes as provided for by article 4 of the law n°38/2012 of 20/12/2012 modifying and complementing law nº 25/2005 of 04/12/2005 on tax procedures, O. G nº 13 of 28/01/2013.

4.4.4.2. Environmental liabilities – Pollution and degradation

Rwandan Law [549] on Environmental protection and conservation provides various sanctions to whoever pollutes or degrades the environment by whatever means. Articles from 95 – 110 provide for punitive sanctions ranging from fines to imprisonment sentences or both. By analysing the provisions of this Law, one notices that where for example an offence is committed by a company, the one that is targeted to shoulder the sanctions in case of any offence especially for the imprisonment sentences is the management of such companies. If we may take the example of art. 106 alone (which by the way, carries the heaviest sentence), it states:

"Anyone who buys, sells, imports, carries in transit, stores, buries or dumps toxic wastes on national territory, or who signs an agreement authorising him or her for such activities mentioned from article 92 to article 94 of this organic law, is punished by an imprisonment ranging from ten (10) to twenty (20) years and a fine ranging from fifty million (50,000,000) to two hundred million (200,000,000) Rwandan francs.

The court that pronounces such a sentence may also:

1° seize all equipment which was used in that activity;

2° order the seizure and removal of the waste products at the expense of the owner of the waste".

It has to be reminded that, corporate criminal liability in Rwanda is still yet to be recognized[550] and so, the intentions of the Rwandan legislator for a provision like the one cited above should be throwing a signal to directors and officers of companies that they may find themselves facing steep fines and or even imprisonment for their company's environmental transgressions. The environmental liability for individual directors or officers here would be based on the implied directors' and officers' duty to observe statutory environmental standards as heads of the company but also, on their individual duty not to participate in, or acquiescing to, a conduct that contravenes environmental laws. However, being quasi-criminal in nature, it would rather be hard to

[549] Especially the Organic Law N° 04/2005 of 08/04/2005 Determining the Modalities of Protection, Conservation and Promotion of Environment in Rwanda as amended to date. Also available at: http://rema.gov.rw/rema_doc/Laws/Environment%20Organic%20Law.pdf (accessed on 25/2/2015).

[550] Even in Western Countries where the concept of criminality of legal persons has been accepted in their legal systems, there are always diverging approaches especially in the way they design an analogy between the corporation and a human being capable of committing a crime. It is quite difficult to establish the psychological processes required to confirm the moral turpitude leading to the fundamental *Mens rea* element used for conviction or defence.

have an individual director or officer convicted for environmental offences especially where he would be able to prove that he employed maximum or reasonable diligence in his duties as a director. As such, it would mean that the liability befalls back to the company.

4.4.4.3. Labour Law Liabilities

Notwithstanding what shall be covered later on by analysing the liability of company directors under the criminal code, Rwandan Labour Law (2009) Law N° 13/2009 of 27/05/2009 Regulating Labour under its articles from 167 to 169 provides for penal clauses which do not only stop at fines as would be sufficient for companies but also goes further to even provide for imprisonment sentences. Art. 168 on the worst forms of child labour for example states that:

“Subject to the provisions of the Penal Code of Rwanda, a person found guilty of the offence referred to in article 72 of this Law, shall be liable to a term of imprisonment ranging from six (6) months to twenty (20) years and a fine of five hundred thousand (Rwf 500,000) to five million (Rwf 5,000,000) Rwandan francs or to one of these penalties”.

This again implies that even when the offence has been inflicted by the company as a distinct individual; it would still end up by unveiling the corporation to reach out to its management for this criminal accountability. Managers of mining companies or tea factories that sometimes use / “employ” children should do it at their own risk as such illegal employment may attract some heavy penalties to up to twenty (20) years imprisonment.

4.4.5. Directors’ personal liabilities for torts

Historically, company directors and officers could not to be held individually liable for torts or crimes committed by the companies or its employees solely by virtue of their status as company directors and officers. Grantham notes that, “while tort law imposes liability on the individual tortfeasor, Company law places that liability exclusively on the corporate entity”[551]. This was premised on the long consensus that directors and officers were mere agents of the public entity – the corporation/ company and thus, would be shielded from their personal liabilities[552]and leaves such liability accrued in the

[551] Ross Grantham, “Company Directors and Tortious Liability”, The Cambridge Law Journal, Vol. 56, No. 2 (July 1997), pp. 259-262.
[552] Dalia Tsuk MITCHELL, *Status Bound: The Twentieth Century Evolution of the Directors’ Liability*, NYU

course of their professional activities to their principal – the corporation/company. Grantham[553] argues however that "the law of agency does not purport to relieve the agent from the liability for his actions as agent"[554]. So, as the law evolves, personal liability of directors begun to attach to the company's liability when this individual's conduct causes an injury to a third party[555]. Some tortious acts like negligent installations, poor packaging, contaminations due to imprudence of staff especially in food industries, defective products[556], unreasonable delays or reschedules that are tortious to third parties especially in the transport sector, poor management and oversight[557], etc., are some examples of circumstances that may lead to the directors' personal liability. Under Rwandan company law, many of such acts like omitting to paying taxes or like on false declarations of company accounts that would ordinarily be taken to be attributable to the company itself, have been attached too to the company directors and officers. This is actually what is contemplated in the provisions of the law from articles 366 to 171 and then, art. 173 of the 2009 Company Law. A member of the Board of Directors whether a Non-Executive or Executive shall thus be held personally liable for Company torts where this director or officer actively participated or consented[558] to the commission of the tort. Personal liability may also attach upon

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Journal of Law and Business, Vol., 5: 63.

[553]Ross Gratham, "Company Director's Personal Liability in Tort", *The Cambridge Law Journal, Vol. 62, No. 1* (Mar., 2003), pp.15-17. Accessed through www.Jstor.org/stable/4508956 on 5th /03/2015.

[554] Ross, Grantham, *Op. Cit*. note 114, at pg. 16; see also, Ross Grantham, *Op. cit.* at pg.260.

[555] This was the case in the Court of Appeals (England)'s decision In: *Williams v. Natural Life Health Foods Ltd [1997] 1 B.C.L.C. 131,* as cited by Ross Grantham, *op.cit.*note 113.

[556]*See* Complaint for Damages at 3, *Hoffman V. Smithkline Beecham Corp., No. BC410935* (Cal. Super. Ct. Mar. 31, 2009 WL 890200) in what was referred to as a wrongful death class action suit filed against a publicly held manufacturer of a diabetes drug and its directors and officers. See also, Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA L. REV. 1,13 (1986). Also available online at http://www.jstor.org/discover/10.2307/1072990?sid=21105943598753&uid=40867&uid=67&uid=62&uid=3738736&uid=5911848&uid=2&uid=3&uid=2129&uid=40871&uid=2134&uid=70

[557] *See* Michael R. Smith & Benjamin Lee, *Uninsured-Depositor Litigation: An Emerging Threat to Directors and Officers of Troubled Banks?*, 14 ANDREWS LITIG. REP.1 (2008). In this case, depositors complained that the bank's failure and thus, the depositors' suffering has been largely due to the bank's executives and Board members' negligent management and oversight and thus, seeking for such officers to be personally accountable and liable to the depositors' losses. Just like in this case, although courts have generally held that creditors may maintain direct actions against directors and officers on the basis of mismanagement if they sustained an identifiable loss peculiar and personal to themselves, they have however held that, where misconduct resulted in loss to the corporation and its creditors generally, the right of action belongs to the corporation and must be maintained by it or its receiver (*Also quoted in*: Petrin, Martin. "*The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law."* American University Law Review 59, no.6 (August 2012): 1661-1711).

[558] This consent may be a direct or an implied one. If we may be inspired by an extract from the New York Penal Code (I. Par. 614) to mean the consent:

"A director of a corporation or joint stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. If present at a meeting of the directors at which any act, sufficient proof that such company was under the direction, supervision or control of the director or officer when the tortious act was committed. The degree of involvement or negligence that leads to complicity in the commission of the tortious act(s) shall therefore be paramount in determining whether or not a court should pierce the corporate veil and impose personal liability to this director or officer.

The other factor that the court would likely consider is whether or not the director or officer knew or had a reason to know that such a tortious act was likely to be committed and did nothing that was to his ability to prevent it from happening and yet, the act would be preventable. This would be based on art.169 of the 2009 Company Law that provides for the director's roles to be: to direct, supervise and ultimately to control the company's conduct. Besides, each director individually owe a duty of care, quite independent of the general one by the company he/she serves, to refrain from conducting himself in a manner that he clearly sees would unreasonably cause harm or injury to third parties. By "conducting himself" as a director here involves proper supervision and control of those that he has under his control and supervision. Thus, a director or an officer cannot argue that he is not personally liable because he did not personally prepare the financial statements or that he did not himself commit the injurious act but his subordinate. Articles 258 to 260 of the Civil Code Book III (The Law on Obligations)[559] provide for individual liability for the acts committed (art. 258), for the acts that are not necessarily committed by yourself but that are committed due to your negligence and imprudence (art.259) and finally, for acts not committed by yourself but by those under your control and supervision (art. 260).[560]

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proceeding or omission of such directors in violation of this chapter occurs, he must be deemed to have concurred therein unless he at the time causes, or in writing requires, his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing, or in writing requiring, his dissent from such violation to be entered on such record or minutes". Also quoted In: Frederick Dwight, "Liability of Corporate Directors", *The Yale Law Journal, Vol. 17, No. 1* (Nov., 1097), pp. 33-42, at 34.

[559] Code Civil (Livre 1er), Décret du 30 Juillet 1888 - Des contrats ou des obligations conventionnelles (B.O., 1888, p. 109).

[560]**Article: 258**

« *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé a le réparer* ».

Article: 259

« Chacun est responsable du dommage qu'il a cause, non seulement par son fait, mais encore par sa négligence ou par son imprudence ».

Article: 260

« On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est cause par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde …».

In conclusion therefore, it becomes clear that directors and officers of companies may be exposed to various liabilities for torts whether committed by themselves or by those that are under their control and supervision. One would argue however that for this kind of personal liability to be established, it ought to be ascertained whether there was actually an effective control or supervision of the offender (tortfeasor) or not. In my opinion, it must be beyond doubt that:

1) There was actually the direct link of subordination with a hierarchical chain of authority between the superior and those who have committed the tortious acts,

2) The superior was sufficiently aware (knew or at least had every reason to know) that such tortious acts were being or have been committed and did not do anything to prevent or punish the offender, and

3) Upon notice of the tortious acts, there were no attempts to remedy the situation.

Where the above three conditions cannot be established, liability would not then be for an individual officer or director but for the company.

This opinion is premised on the fact that, the company itself owes some duties to the director(s): 1) to accord to him full authority to supervise and control his subordinates and, 2) to facilitate the director's access to all information relating to the operations of the company (including its staff). Otherwise, besides the torts emanating from his (director's/officer's) own injurious conduct to third parties, it would be unfair for such directors and officers to be held liable for failing to manage and supervise, as this duty exists actually only in relation to the company[561]. It was noted during our field research that some directors would confess that they had no actual authority to control and supervise the activities of their respective companies. This often happens where one or a few members of the board or the ownership would be the ones to guide the decision making in the Board, and the rest simply append their signatures for approval. Such are the directors who were referred to by William O. Douglas as "*Directors who do not Direct*"[562]!

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[561]Petrin, Martin. *"The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law."* American University Law Review 59, no.6 (August 2012): 1661-1711. This article is available in American University Law Review: http://digitalcommons.wcl.american.edu/aulr/vol59/iss6/3

[562] William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1314-15 (1934); see also Robert A. Gordon, *Business Leadership in the Large Corporations* 347-50 (1945).

4.4.6. Redress in relation to directors' civil liabilities

Civil liability under this section is discussed as distinguished from the criminal liability which we shall discuss later. The distinction shall be based on who has the power to sue and on the outcome of the court judgment. Generally, where there is a civil liability of a person, in our case - a director, it gives a person suing the rights to obtain redress from another person for example, the ability to sue for damages for personal injury. There is also the right to obtain an injunction. For there to be an award of damages, the injured party has to have suffered an actual loss, be it personal injury, damage to property, or financial loss. In case of a company, the loss or the injury and thus, the damages, are relevant if they are suffered by the company itself. In this case however, it remains to know, who shall sue for the company? Whereas it is easier for any other individual who suffers the damage to directly sue the director for redress, it is somehow complicated where it is the director's company that has suffered the damage(s). Where it is the company that has suffered the damage(s), there are three different options: 1) the company can sue through representation by directors, or 2) the claim can be brought in through what is usually referred to as a 'Shareholder's Derivative Suit or action[563]'. This right and power to sue by a shareholder or any other interested person on behalf of the company under Rwandan law empowers any interested party especially the shareholder to sue for and in the interest of the company with an intention to recover what was lost by the company back to it. Those entitled with the power to sue may include a third party, a creditor of the company for example, that decides to sue the director jointly with the company or without the company especially where the company has been wound up[564] and, 3) by the administrator where the company is under the

[563] A Derivative Action is a lawsuit brought by a company's shareholder or a group of shareholders against the director or directors jointly, management and/or other shareholders of the company, for a failure of management or for the loss inflicted by the sued to the company. In effect, the suing shareholder claims to be acting on behalf of the company, because the directors and management are failing to exercise their authority for the benefit of the company and all of its shareholders. This type of suit often arises when there is fraud, mismanagement, self-dealing and/or dishonesty which are being ignored by officers and the Board of Directors of a company. (See: West's Encyclopedia of American Law, edition 2. S.v. "Derivative Action." Retrieved May 27 2015 from http://legal-dictionary.thefreedictionary.com/Derivative+Action).

[564] According to art. 360 of the Law N°07/2009 of 27/04/2009 Relating to Companies, *Official Gazette N°17bis* of 27/04/2009 as amended to date (on the continuation of liability of corporate directors and shareholders), a director or a shareholder cannot be exempted from liability merely because a company was subsequently wound up, when he/she committed a wrong or omitted to do something that the law or a duty obliged him/her to do when the company was still alive. It states that:

"The removal of a company from the register of companies shall not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register".

insolvency procedure and it is suspected that there are some kind of mismanagement done by directors for which they may be held personally liable. The administrator mentioned in option three here above comes in just like the directors would, had it been that the company was undergoing through insolvency procedure which is suspected to have been caused by mismanagement by its directors. The only distinction between the directors and the administrator in this cause is that whereas the directors would act in the best interests of the company alone, the administrator acts both in the interests of the company and its creditors.

4.4.7. Directors' Criminal Liabilities – *A criminalization of company Law?*

As earlier on alluded to, corporate criminal liability has not yet achieved landing in Rwanda. Like elsewhere in the World, the basic challenge is the ordinary assumption in criminal liability that for the liability to be affirmed there must be a meeting of both mental and physical elements to the offence. Because of this, companies everywhere in the World would commit all sorts of offences and directors would benefit from hiding behind the corporate veil which shields corporate actors. However, the current development around the world is that in principle, all offences involving such mental element – as most offences do, would require to go with the "identification principle". This, in turn, would mean that, where this corporate criminal liability is to be found, attachment of the directing minds of that company would become inevitably called for and thus, the personal liability of directors and officers of such company.

In some countries, like in the UK, various laws like the Bribery Act 2010 (section 7 i.e., failing to prevent bribery), the Corporate Manslaughter and Corporate Homicide Act 2007, and of late, the new investigative tools such as the introduction of deferred prosecution agreements (DPAs)[565] into UK law on the 24 February 2014 by the Crime and Courts Act have all taken the same direction. In Rwanda too, various Laws (Labour, Company, Tax, Environmental, etc., not to mention the Criminal Code itself) as already seen in the preceding sub-sections, provide for penal sanctions. The Rwandan

[565] The Deferred Prosecution Agreement (DPA) Code of Practice ("DPA Code") was issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013 ("the Act"). DPA is a discretionary tool created by the Act to provide a way of responding to alleged criminal conduct where the prosecution, out of its discretion, invites a company suspected to have committed an offence for a negotiation on an offence, of which process most probably ends up into a financial penalty plus other pledges by the suspected company. For more on DPA, *See*, "Deferred Prosecution Agreements Code of Practice Crime and Courts Act 2013", a document available at: <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf> accessed on 27/2/2015.

legislator, acknowledging that some crimes may be committed under the cover of businesses and cooperatives structures dedicated a whole chapter (arts. 336 - 346) to what it refers to as “Commercial and Cooperative offences” under the Criminal Code. Provisions under this chapter relate to the offences that may be committed by individual business people[566] as well as those that may be committed by managers of business entities[567]. Any simple offence that would ordinarily be thought to be a civil wrong or negligence by a company director or officer has been criminalized to become an offence that attracts a prison term that may even go up to three years[568]. Other possible circumstances where a director would be implicated are those mentioned for example in

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[566] See for example provisions from art. 333 to 335 of the Organic Law instituting the Criminal Code (*Organic Law N° 01/2012/OL of 02/05/2012 Instituting the Penal Code; Official Gazette nº Special of 14 June 2012*); where art. 333 for instance provides for such an induced grave bankruptcy for a business person by providing that:

“Any insolvent business person who fraudulently:

1° misappropriates, conceals all or part of his/her assets;

2° accepts debts that he/she does not owe;

3° conceals his/her account books;

commits grave fraudulent bankruptcy and shall be liable to a term of imprisonment of one (1) year to three (3) years and a fine of one hundred thousand (100,000) to one million (1, 000, 000) Rwandan francs”.

[567] In Fraudulent Bankruptcy of business entities for example, art. 336 provides that:

“Any director, manager or liquidator, in other words any representative but not dealer of an insolvent company, who fraudulently:

1° misappropriate or conceals assets of the company;

2° ascribe debts to the company which it does not owe;

3° conceals records of the company;

4° does not publish acts of the company or any modifications under terms and conditions provided for by the law;

5° declares false reports;

6° causes bankruptcy of the company;

7° due to the absence of a balance sheet, or by means of a false balance sheet, allocates among shareholders dividends not drawn from real profits;

8° favours one creditor to the detriment of other creditors;

9° engages in overspending of the assets of the company;

10° spends large amounts of money in games or any other transactions of pure chance;

11° purchases and sells below market price or takes large amounts of loans, put negotiable instruments into circulation or adopt any other ruinous means of procuring funds;

shall be liable to a term of imprisonment of one (1) year to three (3) years and a fine of five hundred thousand (500,000) to five million (5, 000, 000) Rwandan francs”.

[568] Things like poor book keeping have been codified. See art. 337 which provides:

“Any administrator, director, manager or liquidator in other words any representative but not dealer of an insolvent company, who due to his/her fault, is found with:

1° books of accounts with no entry posted in, prescribed accounting unexecuted, or written in a language other than that which is prescribed by the law, account books that are not completed and do not show the exact profit or loss of the company, without any fraud;

2° omission of the declaration of the company insolvency under terms and conditions provided for by the law relating to the settling of issues arising from insolvency;

shall be liable to a term of imprisonment of six (6) months to two (2) years and a fine of two hundred thousand (200,000) to three million (3,000,000) Rwandan francs or one of these penalties.

art. 342, that alludes to the issuing or authorizing to issue false documents[569]. The two paragraphs of this article (342) vary from the constitutive elements of guilt. Whereas the first paragraph reads:

"*1° makes or authorizes the making of, the document that is false or misleading*;

does not require the awareness and the intentional mind to commit the offence, the second paragraph reads:

"2° deliberately omits or authorizes the omission of any matter whose omission makes the document false or misleading on an important matter".

The second paragraph thus implies the intention to offend as a prerequisite for the accused to be found guilty. While it might be easier from the second paragraph to escape liability by establishing that at the time when the document was being drafted or at the moment it was authorized to be published the author or authorizer had to his best knowledge and had no reason to believe it was false, it would be rather difficult with the first paragraph since, it establishes that the author or the authorizer does it clearly with deliberate intentions to commit an offence.

In either way, the provision states that the concerned person:

"*Shall be liable to a term of imprisonment of six (6) months to two (2) years and a fine of five hundred thousand (500,000) to two million (2,000, 000) Rwandan francs or one of these penalties*".

Some other provisions categorically target company directors alone as the minds and the decision making organ with a managerial, supervisory and controlling role. Art. 348 of the Organic Law instituting the Penal Code thus states for example that:

"Any of the members of the board of directors of a company who :

1° by impersonation or other fraud induces a person to give credit to the company;

2° defrauds creditors of the company:

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[569] *"Any person required to provide a document who:*
1° makes or authorizes the making of, the document that is false or misleading;
2° deliberately omits or authorizes the omission of any matter whose omission makes the document false or misleading on an important matter;
shall be liable to a term of imprisonment of six (6) months to two (2) years and a fine of five hundred thousand (500,000) to two million (2,000, 000) Rwandan francs or one of these penalties."

a. by giving, transferring, or causing a charge to be given on property of the company to another person;

b. causing property to be given or transferred to any person;

c. causing or being a party to an execution levied against any property of the company;

shall be liable to a term of imprisonment of one (1) year to two (2) years and a fine of two million (2,000,000) to ten million (10,000,000) Rwandan francs or one of these penalties".

Company Directors' liability may also be qualified under the new breeds of offences like "corruption". The criminal code[570] defines Corruption as:

*"a. any act of abuse of a position, power or honour one enjoys within a state organ, in a public or **private institution**, in a foreign company or international organization working in the country, or power conferred by any other function which is used contrary to the law, by giving to oneself, giving to others or requiring an illegal benefit or a service contrary to the law;*

b. any act leading to the accumulation of property without legal justification;

c. using a person with a position, power or honour mentioned under item (a) of this Article, in order to benefit from an illegal advantage or a service contrary to the law;

d. giving or agreeing to give a gift in cash or any other illegal benefit , for the provision of a service or act in unlawful way or to reward the provider of the service or act rendered, either by the recipient or an intermediary;

e. requiring, receiving or accepting to receive a gift in cash or any other illegal benefit for the provision of a service in an unlawful way or to be rewarded once the service is provided or the act is done either by the recipient or an intermediary. "

Consequently, acts like insider lending or using inside information may be prosecuted as being a corruption offence rather than being ordinary offences. The difference would be that corruption related crimes in relation with Rwanda's zero-tolerance with corruption practices would attract heavier sentences than where they would be taken as ordinary crimes.

Under the Penal Code too, offences to do with tax evasion, avoidance or non-payment have all been sanctioned and are punishable to up to a prison term of two years, and

[570]Article 633 of the Organic Law n° 01/2012/OL of 02/05/2012 establishing the penal code.

directors, being the managers of companies are quite exposed to such offences whether it is done wilfully or by mistake. Art. 371 of the Organic Law instituting the Penal code (without giving a fine option this time) provide that:

"Subject to the provisions of Articles 369 and 370 of this Organic Law, any person who commits any act of non-payment of required tax shall be liable to a term of imprisonment of six (6) months to two (2) years."

4.5. General Conclusion on the Directors' liabilities

Company directors and officers in Rwanda are today more exposed to risks of personal liability than ever before. As seen in the above discussion under this chapter, directors' liabilities may be summarily categorized into three (3) main categories: 1) those emanating from the wrongs (offences) committed vis-à-vis the state or the entire society, 2) those other wrongs harmful to outsiders[571] (tortious liabilities) including shareholders and creditors and finally, 3) internal wrongs which are mainly committed against the company. Various laws and regulations especially the criminal code and the Company law provide for different instances where corporate directors can be held personally liable for their acts or omissions while dispensing their directorial duties. The main difference is that in Company Law, only fines are imposed to the wrongdoer while for the Criminal code, in addition to fines, jail sentences or either of the two and a deprivation of any civil rights as the law can allow may be imposed as well. It should be noted however that even where the Company Law fines have been imposed on a director, nothing prevents the prosecution or any other interested party to initiate criminal proceedings or a claim in tort (both criminal charges and Tort claims shall be discussed later) against the same director. This is so because, the Rwandan legislator on Company Law preferred to use an accommodating wording where he says, "Notwithstanding the provisions of the penal code…", and then he goes on to provide for fines, some of which are even considered to be extremely high compared to what many directors get as remunerations for their services or what they actually have![572]

[571] The term 'outsider' is used here to distinguish other people from the company itself and the state or state agencies. Thus, outsiders here would include but not limited to: shareholders, employees, directors (in their individual and/or contractual capacities), creditors, etc.

[572] This legislative terminology has been used throughout in all penal clauses from art. 365 – 373 of the Company Law N°07/2009 of 27/04/2009 relating to Companies, *Official Gazette N°17bis* of 27/04/2009 as amended to date. If we may take for example art. 367, it states that:
"Notwithstanding the provisions of the penal code, any director, employee, or shareholder of a company who : 1° fraudulently takes or applies property of the company for his own use or benefit, or for a use or

4.5.1. Wrongs against the public interest

Under Rwandan Law, many of what used to be civil, commercial or administrative wrongs in business transactions have been codified as criminal offences mainly to ensure a business environment that is as much as possible free from malpractices. Further, in an environment where what ought to be shareholder activism - private enforcement of laws[573] turns out to be shareholders' inaction or passivity, public enforcement of corporate governance becomes the only alternative[574]. It is assumed that, by committing such a business wrong, the repercussions go beyond the individual company or victim to affect the whole society at large. Thus, commercial offences now range from bankruptcy related acts or other business activities, from Capital Markets related acts like insider dealings, misleading practices and statements as well as disclosure of confidential information[575], to non-payment of taxes and issuing of bounced cheques. These offences may be categorized into: main categories: 1) those whose imprisonment penalty options range between six (6) months to two (2) years,

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purpose other than the use or purpose of the company;
2° fraudulently conceals or destroys any property of the company;
commits an offence and shall be liable to a fine of between one million (1,000,000 Rwf) and ten millions Rwandan francs (10,000,000 Rwf)".
See also the wording of art. 191*bis* (on sanctions of non-disclosure of interests by the members of the Board of Directors) of the Law N°14/2014 of 28/05/2014 Modifying and complementing Law n° 07/2009 of 27/04/2009 relating to companies as modified and complemented to date, *Official Gazette No. Special of 29/05/2014* which states that:
"Without prejudice to the provisions of the Penal Code and other sanctions provided for under company's Articles of Association, any Director who fails to comply with the provisions of article 191 of this law shall be liable to any of the following administrative sanctions:
1° suspension from the Board of Directors for a period of six (6) months;
2° termination of the expected or acquired interests in violation of the provisions of this article;
3° payment of a fine between five hundred thousand (500,000) and five million (5,000,000) Rwandan Francs. …".

[573] According to Erik BERGLOF &Stijn CLAESSENS, "Corporate Governance and Enforcement", *World Bank Policy Research Working Paper 3409*, September 2004, at p. 15 - note the difference between **Private and public enforcements** as: under **private law enforcement**, private agents (like shareholders, creditors, etc) avail themselves of the framework defined by law or regulations to punish violations from contracts, using the courts to adjudicate and the state to enforce the final judgment; while with **Public Enforcement**, the government not only provides the final enforcement system, but also acts as the prosecutor.

[574] John C. COFFEE JR., *"Gatekeepers: The professions and Corporate Governance",* Oxford University Press (2013), pg. 317 notes that Corporate scandals that predominantly happened in the US between 1990s and early 2000s were partly due to the weakened private and public enforcement mechanisms.

[575] When it comes to criminal liability, Capital Market offences for example would mainly apply to directors and officers of professional institutions referred to by art. 3 of the Law N° 01/2011 of 10/02/2011 Regulating Capital Market in Rwanda, *Official Gazette n° 13bis 0f 28/03/2011*. These professionals are: Brokers, Dealers, Sponsors, Investment advisors, Investment Banks, Investment Managers, Custodian s, Securities Exchanges, Clearing Houses, and Credit rating agencies.

and 2) those that are more heavily punished to discourage any attempt to commit them as the impact of such offences may be far reaching not only to the business itself or to the individual creditors but also to the economy at large. Such offences attract a prison sentence ranging mainly from two (2) to five (5) years. Under this second category offences you may find acts like piracy, unfair competition, causing confusion to businesses or business activities, fraudulently using other people's formula of innovation, just to mention a few. For this category of wrongs committed to society, anybody including the regulatory authorities may initiate criminal proceedings with the Police or the Prosecution. Being regarded as wrongs against the society, it does not require the initiator to establish his/her relationship or interest in the proceeding. The Banking Law for example accords such powers of investigation and prosecution to Police and Bank officials in charge[576]. Thus, following the codification of all those offences as criminal, corporate directors are today quite exposed to high risks of personal criminal liabilities more than ever before.

4.5.2. Wrongs to outsiders

As indicated earlier, these are those wrongs that emanate from the directors' (whether in the name of the company or not) activities (actions or omissions) that turn out to be harmful to outsiders. They may be contractual or quasi-contractual or tortious. Whereas not so common in Rwanda to direct such action against the individual directors, the rate at which Rwandan business and mind-set is developing suggests to the researcher that it is most likely to become common practice in future. Just like it was understandably unheard of for such serious intellectual property disputes to be handled by Rwandan courts due to the very low level of business it was, and yet, today, we have had complex cases like that of Cecile KAYIREBWA[577], the Bakhresa (AZAM) and Mikoani (AZANIA)[578] case, etc. The same way, it is anticipated that, in the near future, private

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[576] Art.118 of the Law N° 007/2008 of 08/04/2008 Concerning Organization of Banking which states that: *"Infractions of this Law or any other infraction jeopardizing banking activities shall be ascertained by the judicial police officers as well as by the Central Bank's officers granted with judicial police powers in the domain."*

[577] Cecile KAYIREBWA's case (*RCom 0178/12/HCC*) was about the copyright for her songs that were being played by local radios and TV stations (ORINFOR, Contact FM, Radio Flash, City Radio, Voice of Africa and Radio Isango Star) without any prior agreement or any payment of royalties thereof to her, something that was considered contravening the Intellectual Property Law in Rwanda.

[578] BAKHRESA and MIKOANI case (*RCom 1256/14/TC/Nyge*) concerns the two great rival grain milling companies with AZAM and AZANIA Brand names respectively in Tanzania but both of which had opened up similar companies in Rwanda in a bid to extend their business activities across the region. BAKHRESA having registered and established itself in Rwanda before MIKOANI, it registered both its brand name (AZAM) and that alleged to be MIKOANI's (AZANIA) for its own sole exploitation and protection on Rwandan market, something that MIKOANI takes to be a breach of common principles of

enforcement of the duties of individual directors is likely to become more frequent. For such kinds of liability actions however, the injured (the victim) is the one responsible to institute such a claim against the director, and he shall bear the burden to prove that it was the director's person not the person of the company that harmed him for the liability to befall to the individual director.

4.5.3. Wrongs against the company itself (internal liabilities)

Acts or omissions of the company director or officer that went either contrary to the company law or against its by-laws including the Company's Articles of Association are considered to be wrongs committed against the company. These acts mainly relate to the breach of fiduciary duties. In case of suit, such legal actions are remedied by either restitution of the benefit together with interests, civil damages if any, and/or any other disciplinary or administrative sanctions including being fired where need be. Where the interests of a company are harmed by its own director or officer, the law provides for who has the power to sue on its behalf. Various articles (222 – 225 as well as 310) of the Company Law allow any shareholder, a member of the Board of Directors, a debenture holder, a creditor or any other interested party to sue on behalf of the company. However, the law warns those that may want to sue for the company that they have to bear the costs and repercussions. Art. 223 of Company Law provide that:

"A company, a member of the Board of Directors or a shareholder may request the court to file a claim on behalf of the company or its subsidiary.

Those applying for the authorization to file a case or intervene shall take into consideration the following:

1° the likelihood of the proceedings that may follow;

2° the costs of the proceedings in relation to the decision to be taken;

3° the nature of any action already taken by the company or its subsidiary;

4° the interests of the company or its subsidiary in the proceedings being commenced, continued, defended or discontinued".

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fair competition but also, a fraudulent acquisition of an already registered brand name in East Africa.

4.6. Conclusion

Company directors in Rwanda need to be aware of all sorts of liabilities and offences as set out in this work. As discussed above, some business decisions may end up as commercial offenses or as today commonly referred to in Rwanda – as economic crimes where, an appropriate risk assessment and ample time prior to decision making was not taken into account. The criminalization of many practices into offences does not in any way replace the civil, administrative or disciplinary sanctions that may be imposed on the individual directors and officers[579]. The government and policy makers have deliberately preferred criminalizing most of these otherwise civil wrongs just to ensure that investments are attracted but also, that these investments may be sustainable through proper governance. Today, a special sub-department (for Economic crimes) of the Criminal Investigations Department (CID) within the Rwanda National Police (RNP) has been created to deal with the above mentioned liabilities and other similar offences. In addition, although in theory, but also legally to some extent, the nature of the liability of corporate directors is considered to be collegiate, practice shows that liability may turn out, especially in relation to criminal charges, to be personal or directed to some of the directors while leaving out the others. As we have seen, this was the choice in the *Alfred Kalisa and BCDI case*. The prosecution shall always reserve the right and the discretion to prosecute or not to prosecute anyone.

[579] See for example, Chapters V to X of the Law N° 01/2011 of 10/02/2011 Regulating Capital Market in Rwanda, Official Gazette n° 13bis 0f 28/03/2011; arts. 112 and 113 of the Law N° 007/2008 of 08/04/2008 Concerning Organization of Banking in Rwanda; Arts.361 to 373 of the Law N°07/2009 of 27/04/2009 Relating to Companies - *OG N°17bis of 27/04/2009*; Art. 10 (2) (relating to the prohibitions or suspension of rights and privileges to directors) of the Regulation N0. 05/2008 on Credit Concentration and Exposure, *OG No.02/of 10/01/2010*; Art. 47 (on the remedial and disciplinary measures) of the Regulation N° 06/2008 on Corporate Governance of Banks, *Official Gazette n° 02 of 10/01/2011;* Art.9 ofRegulation N° 04/2008 on Insider Lending of Banks, *Official Gazette n° 02 of 10/01/2011.*

CHAPTER FIVE: DIRECTORS' UNDERSTANDING OF THEIR DUTIES AND POTENTIAL LIABILITIES

5.1 Introduction

From the previous chapter (chapter four), it has been made clear that company Directors in Rwanda are exposed to various individual / personal liability risks in relation to their directorial duties. What remained to be investigated was whether or not, the directors themselves were aware of such exposure and besides, whether they knew how the duties they are called for are dispensed. There being no any other prior research to refer to, or any tangible case law to analyze, the remaining option was therefore to carry out a survey and come up with the raw – first-hand information (data) gathered directly from the directors themselves as respondents. This chapter takes us through the survey process as well as its substantial findings. It should be reminded that, this survey approach was undertaken as a means of determining whether 1) corporate governance is ensured by the directors who understand the weight and legal implications of what they are called for and, 2) in case of breach of their duties, whether it is clearly known to them what the extent is, of their personal, joint and several liability.

Under this chapter, it should be noted that although the chapter is intended to solely reveal the findings and thus, the image of Rwanda's corporate directors' knowledge and understanding of the liabilities they are exposed to, some foreign references shall scatterdily be used for not necessarily comparing it with Rwandan system but simply for information to the Rwandan readers of my work on how it is done elsewhere or in some instances, what authors have said about the same subject elsewhere around the world.

5.2 The survey and its findings

As already mentioned above, there being no secondary data available about directors in Rwanda to be used in our research to assess their mode of functioning and their extent of understanding the degree of exposure to liability risks, a primary data collection and analysis in form of a survey accompanied by unstructured interviews was the ultimate option and thus, a research tool in form of a structured questionnaire had to be prepared, elaboration of the survey and the techniques to be applied was employed. The testing of the questionnaire and the decision on sampling strategy and the sample size (SMEs and Big Companies) was taken and, a sample of 120 respondents from all around the country (without necessarily having an equal distribution of representation among the provinces and the Kigali City since business activities themselves are not evenly distributed among these provinces and Kigali City) was preferred as a reasonable number that was sufficient to inform our research[580], and company directors (members of the Boards of Directors) of different companies were preferred as the main targeted group (first category of our respondents) that had to respond to the questionnaire directly, together with a few other respondents (second category) from the regulatory authorities like from the Registrar General's office and the Central Bank (BNR) or from other senior corporate officers like corporate secretaries who were interviewed and had to respond to unstructured questionnaire. The second category of our respondents were considered due to the fact that they, in one way or the other have to do with corporate governance practices either as internal senior corporate officers or externally as corporate governance regulators.

This therefore justifies our choice of the research methodologies applied – a mixture of both 'Doctrinal[581] and Socio – Legal' methodologies. For, unlike the ordinary doctrinal and theoretical legal research methodologies where the issues concern the identification of the relevant legislations, cases and secondary materials in law to use, ours necessitated designing a questionnaire for the primary data collection, the need to define and justify the target population, collecting the valid data and the use of the appropriate analytic methods and the interpretations of the data collected[582] although our intentions under this particular research have not been necessarily to follow strictly all the social scientific research rules but rather, to come up with assembled pool of verifiable data that may serve as a basis for our conclusions on our particular subject of research. For, as Lee E. Teitelbaum puts it in recommending for the greater use of empirical research as a better way to advance our understanding of the law and how the law works:

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[580] The majority of companies selected were from Kigali City as it hosts a bigger percentage of formal businesses and activities in form of companies especially the so called 'big' companies. Kigali City equally hosts a number of Small and Medium Companies and businesses compared to those found in other regions (provinces).

[581] Library-based, concerned majorly with the analysis of legal principles from primary sources (like legislations and case laws) as well as secondary sources (like dictionaries, text books journals, case digests, etc) and how they have been developed and applied – the process of selecting and weighing materials taking into consideration the hierarchy and authority as well as understanding the social context and interpretation (see Mike McConville andWing Hong Chui (eds), *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, p. 40 & 47, for more about the distinctions between Doctrinal and other legal research methodologies).

[582] See Mike McConville and Wing Hong Chui (eds), Research Methods for Law, Edinburgh University Press, Edinburgh, 2007,pp.41.

"*If laws are intended to produce certain results, questions about whether they do produce the expected results, whether they produce other results, and whether the identifiable results are as consistent with the reason for law as one might have anticipated, are all important to examine.* [italics original]"[583]

Thus, the directors' understanding of their duties and the possible liabilities under our study could not be simply assumed based on the fact that different legislations, scientific works and courts decisions have been provided and elaborated as such, but also to investigate whether these laws and such scientific authorships as well as court judgments have actually had an impact as was intended by the respective authorities concerned – legislations, the doctrine and case laws.

5.2.1 Elaboration of the survey and the techniques employed

Under this chapter (chapter Five), an empirical study in the form of a survey was thus conducted both by conducting some interviews with relevant selected personalities like from the Registrar General's Office[584], the Central Bank of Rwanda[585], the Private Sector Federation (PSF)[586], some individual big company owners, but also by distributing questionnaires for information gathering and data collection from various company directors in relation to their knowledge of and awareness to their duties and possible liabilities as they execute their directorial functions. The exercise here included designing a suitable questionnaire with the guidance from experts in social sciences research techniques[587], testing the questionnaire, distributing, collecting, and analyzing them as well as compiling the findings in a scientific way[588]. The Statistical Package for Social Sciences (SPSS) was preferred as the software that was to be used in consideration to its comparative advantages. A questionnaire with Twenty one (21) questions was then structured to test the researcher's principal assumptions on:

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[583] L.E.Teitelbaum, 'An overview of Law and Social Research' (1985) 35 *Journal of Legal Education* 466. Also quoted In: Mike McConville and Wing Hong Chui (eds), Research Methods for Law, Edinburgh University Press, Edinburgh, 2007, at. P.47.

[584] Interview with the then Deputy Registrar General – Yves Sangano

[585] Faith Batamuriza –Cluster Manager , Banking Supervision.

[586] Claver Mugabo – Deputy Chairman, and Dr. Ivan Twagirashema, Energy Chamber (PSF).

[587] Thanks to Gerard NYABUTSITSI, former Vice Rector, Kigali Institute of Science and Technology, and Lecturer of Administrative Sciences and Research methods at the Faculty of Social Sciences, Political Science and Administration at the former National University of Rwanda – NUR (now University of Rwanda - UR) for his insights and corrections in structuring and testing my questionnaires.

[588] Thanks to Mr. Jean Baptiste HABYARIMANA (then, a Statistician with a project at the Ministry of Agriculture in Rwanda but now a teaching staff at the University of Rwanda) who assisted me in entering and transforming my field research data into the SPSS applications and results.

1) The knowledge, awareness and skills of directors in relation to their directors' duties and potential liabilities;
2) The basis of appointment and appointment procedure
3) How their directorial functions are carried out in relation to what they ought to do, and
4) What their respective companies as well as the regulatory entities do to facilitate in enabling the directors to effectively execute their roles/tasks.

The questionnaire was structured on the basis that, to the researcher, the liability of directors should be based on the assumption that the directors themselves knew or at least had the required level/capacity to know that by acting or omitting to do in a certain way would lead to a breach of a certain duty (well known to him/her) or a commission of a crime. In other words, do those directors have the capacity to carry out their duties with an informed mind?

It should be noted that, although the intended sampling was the stratified sampling where the researcher had to divide the respondents into those from big, medium and small companies, it was later found to be impossible since, there was no clear cut or reliable and official statistics of such categorization of companies in Rwanda besides having it provided for in the company law and in the Ministerial Order[589]. Neither the Rwanda Development Board (RDB), the Rwanda Revenue Authority (RRA), the Rwanda Governance Board (RGB), nor the National Institute of Statistics of Rwanda (NISR) had carried out a thorough study to come out with such an official categorization or classification of companies at the time (October 2012 – May 2013) when this survey was conducted. Based on the Rwanda Establishments Census of 2011 as was carried out by the Ministry of Trade and Industry (MINICOM) in conjunction with the National Institute of Statistics of Rwanda (NISR) however, albeit the fact that it is in contradiction with the Private Sector Federation's (PSF) 2008 study findings[590], reveals that over 99%

[589] In a 2008 Private Sector Federation(PSF) study however, it was found out that Small and Medium Enterprises (SMEs) constituted 97.8% of Rwanda's Private Sector business. They were estimated to be around 72,000 businesses but of which, around 25,000 were registered. *See also*: Ministry of Trade and Industry: Small and Medium Enterprises (SMEs) Development) Policy, June 2010. Available at: <http://www.minicom.gov.rw/fileadmin/minicom_publications/policies/SME_Devt_policy_V180610.pdf>, accessed on 11/03/2015.

[590] The PSF study that was conducted almost four years before that of MINICOM and NISR one had revealed that SMEs constituted 97.8%! It should be recalled that this was pre-promulgation and enforcement of the 2009 Company Law that significantly simplified the incorporation process for the companies and attracting of more domestic and foreign investments into the country. It ought thus be expected that the number of 'big' companies have risen since, most of the foreign investments that are processed through the Rwanda Development Board are often given priority based on the number of employees such investment projects shall employ as well as the capital volumes that being brought into the economy.

fall under the SMEs category[591]. So, due to such contradictions in relation to the exact percentages of categorizations and irrespective of different sizes of the companies, the researcher preferred to randomly select 120 directors without any consideration of whether these companies are big or small, from the same province or not, within the same sector of production or service or not, etc. What is not disputed however, is that SMEs represent a significant proportion and they constitute the backbone of the Rwandan economy.[592] The respondents themselves had to freely classify their companies by telling whether they consider themselves to be an SME, a big, or a multi-national company. Of all those that received and responded to the questionnaires however, 58% considered themselves as SMEs whereas 42% considered themselves as big or multi-national companies even though there was nothing set as a standard to base on[593]. This shall later reveal that in comparison, respondents from big companies were the ones who responded[594] most to the researcher's questionnaire as opposed to those from the small and medium companies.

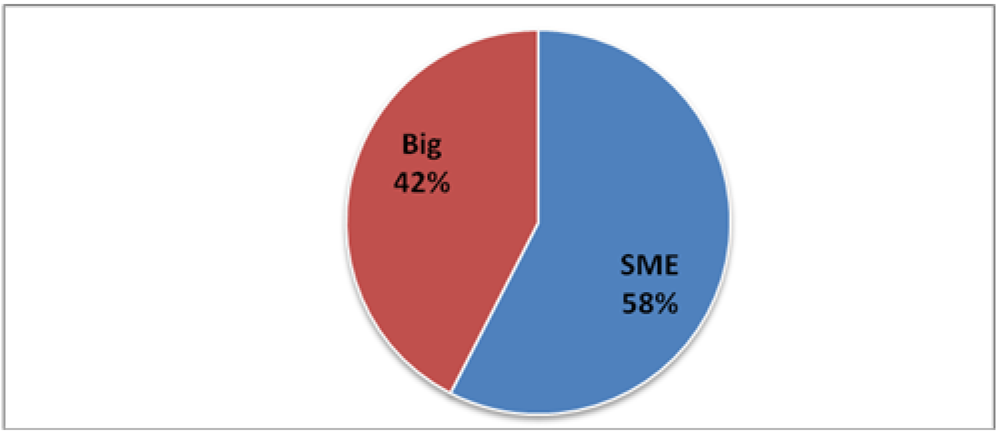
[591] This study's findings is disputed as it based its categorization solely on the number of employees (1-100 for SMEs, and above 100 employees for big companies) each company employed without any other considerations for example whether the company's activities were labour intensive or not. It is believed that this categorization may be misleading as many big companies are now days more of ICT intensive than labour.

[592] The big representation of SMEs in Rwanda is not surprising since it appears to be almost the same even at the European level where SMEs represent 99% of all businesses and that this sector provides 2/3s of the Private Sector Jobs. See, "*Fact and figures about the EU´s Small and Medium Enterprise (SME)*", available at: http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/index_en.htm , accessed on 21/04/2015.

[593] In comparison to the European Union, SMEs are qualified so basing on either the number of employees (<10 for Micro, <50 for Small, and <250 for Medium) but also the total turn-over (2 Million Euros for Micro, 10 Million for Small, and 50 Million for Medium) or the total balance sheet (2 Million Euros for Micro, 10 Million for Small, and 43 Million for Medium Enterprises) but for them, SMEs are divided into those that are Micro, those that are Small and those that are Medium. See, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm , Accessed on 21/04/2015.

[594] But they equally have the highest percentage of those that did not respond or return the filled questionnaire.

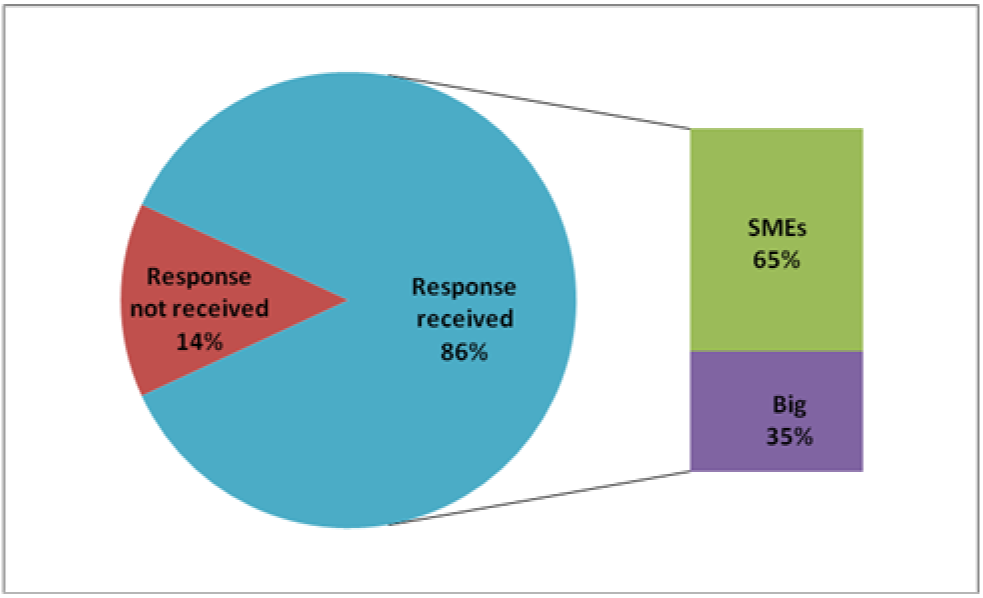
Figure 9: Comparison from respondents by percentages (Big & SMEs)



Source by the author.

During the process of the questionnaire distributions and collection, some companies were physically visited whereas for some other directors, meetings or delivery and collection of questionnaires were done to and from their points of convenience. Where direct contacts with directors seemed to be difficult, Company Secretaries (where available) were used to link us to such directors for distribution and collecting back the questionnaires. Of all the questionnaires distributed to 120 directors, 86% (103 questionnaires) were filled and returned while 14% (around 17 questionnaires) were distributed, received by the respondents but were not returned. Majority of those not returned still were from those assumed to be big companies.

Figure 10: The questionnaires return (response) rate



From the author's survey findings.

In a few instances where need arose[595], direct interviews were conducted with some of the concerned officials especially with the regulators[596].

5.2.2 Board membership selection: Chosen to fill or to serve? Serving who?

For the Board to be, there (at least as expected) has to be a process through which, such membership is selected, obviously, based upon a certain standard criteria. This is judged important based on the fact that, as different authors have found out[597], the

595 Like where I wanted to hear from the views of other stakeholders who are not necessarily targeted as primary respondents to the survey but who are equally concerned with good corporate governance and its monitoring.

596 For example, the interview held with Ms. Faith BATAMURIZA, Cluster Manager, Banking Supervision, The Central Bank of Rwanda (held on 17/03/2014); Interview held with Ms. Louise KANYONGA, The Registrar General of Companies at the Rwanda Development Board (RDB) (24/03/2014), the one held with Dr. Ivan Twagirashema, the Chair of the Energy Chamber at the Private Sector Federation (PSF) of Rwanda (10/3/2014), among others (see the list of the interviewees on the Annex). It should be noted that, the socio-legal approach here was not applied to employ necessarily all the sociological research techniques for substantive analysis of this study but rather, was used as a tool mainly for data collection.

597 Cristina BETTINELLI, Boards of Directors in Family Firms: An Exploratory Study of Structure and Group Process, *Family Business Review 2011, 24 (2),* pp.151 – 169. Bettinelli suggests that majority of those companies which had more of outside directors were believed to employ more knowledge and skills than those with limited number of outside directors. The online version of this article can be found at: http://fbr.sagepub.com/content/24/2/151

appointment procedure (or specifically, the appointing authority) greatly impact on the directors' conduct and behavior during his directorship. Who appointed you to the Board of the Company you are serving on as a Board member? Board members tend to believe that they are only accountable to those that appointed them to office rather than thinking about the broader spectrum of those to whom they are accountable. Rwandan law provides for the shareholders in a general assembly as the authority to appoint and dismiss the Board members[598]. As to what extent these appointees are actually accountable to the shareholders themselves as an appointing authority or to what extent the shareholders are actually the ones with powers to appoint the directors as in accordance with art. 167 of the company law referred to above provides, remains an open gray area for other research. Equally worth noting is that, as already established by some authors whether in the non-listed[599] or listed companies, the founding members (shareholders) often retain a dominant decision-making power by way of holding or retaining the controlling majority shareholding. This happens even in developed economies (like the United States) where it would be expected that firm ownership is extensively dispersed[600]. Board members as well as management would then likely get tempted, acknowledging such authority, to lean to the best interests of such controlling shareholders at the expense of the entire stakeholdership[601].

[598] Art. 167 of the Law N°07/2009 OF 27/04/2009 RELATING TO COMPANIES, OG N°17bis of 27/04/2009 provides that:
"Any member of the Board of Directors shall be appointed by the annual meeting of shareholders…". Their appointment however, in case of financial institutions, may be subject to the regulator's (The Central Bank's) scrutiny and approval, as in accordance to the Law No. 007 of 2008 concerning the Organization and Functioning of Banks. Art. 180 of the same law also provides that:
"A director of a public limited company may be removed from office by an ordinary resolution passed at a meeting called for that purpose. A director of a private limited company may be removed from office by special resolution passed at a meeting called for that purpose …".
[599] Claessens, Stijn, Joseph Fan and Larry Lang, "The Separation of Ownership and Control in East Asian Corporations," *Journal of Financial Economics*, LVIII (2000), 81-112.; Faccio, Mara and Larry Lang, "The Ultimate Ownership of Western European Corporations," *Journal of Financial Economics*, LXV (2002), 365-395; La Porta, Rafael, Florencio López-de-Silanes, and Andrei Shleifer, "Corporate Ownership Around the World," *Journal of Finance*, LIV (1999), 471-517; Morck, Randall K., David A. Stangeland and Bernard Yeung, "Inherited Wealth, Corporate Control and Economic Growth: the Canadian Disease?," in Morck, Randall K. ed. *Concentrated Corporate Ownership* (Chicago, IL: University of Chicago Press, 2000), 319-369. See also: Bennedsen, M., Pérez-González, F., Nielsen, K., and Wolfenzon, D., "Inside the Family Firm: The Role of Families in Succession Decisions and Performance", 2007 (A paper in the JEL classifications: G32, G34, M13, available at: https://www.gsb.stanford.edu/sites/default/files/documents/Perez_Gonzales%20paper.pdf accessed on 13/04/2015).
[600] Berle, Adolf and Gardiner Means, *The Modern Corporation and Private Property* (New York, NY: Mcmillan, 1932).
[601] Bennedsen, M., Pérez-González, F., Nielsen, K., and Wolfenzon, D., *"Inside the Family Firm: The Role of Families in Succession Decisions and Performance"*, 2007 (A paper in the JEL classifications: G32, G34, M13, available at:

Yet, broadly and legally speaking, accountability by both management and the Board is owed to the whole spectrum of stakeholders, and this applies to both Executives and non-executive directors alike even though some studies on Board / directors' behavior assume that the two (executives or managing directors and non-managing ones) would, in such circumstances behave differently[602]. Directors are formally or informally selected by specific shareholders (such as venture capitalist or an important shareholder) or other stakeholders of the corporation (such as where the laws or the by-laws allow the appointment by the creditors or employees of that company)[603], or are elected to represent a specific group of shareholders (like the minority investors). Such directors are therefore referred to as the "constituent directors"[604]. The figure below shows directors' appointing authorities as was revealed by the directors. It has to be pointed out that those that expressed were self-appointed are those that are either the sole shareholders or majority shareholders of their respective companies.

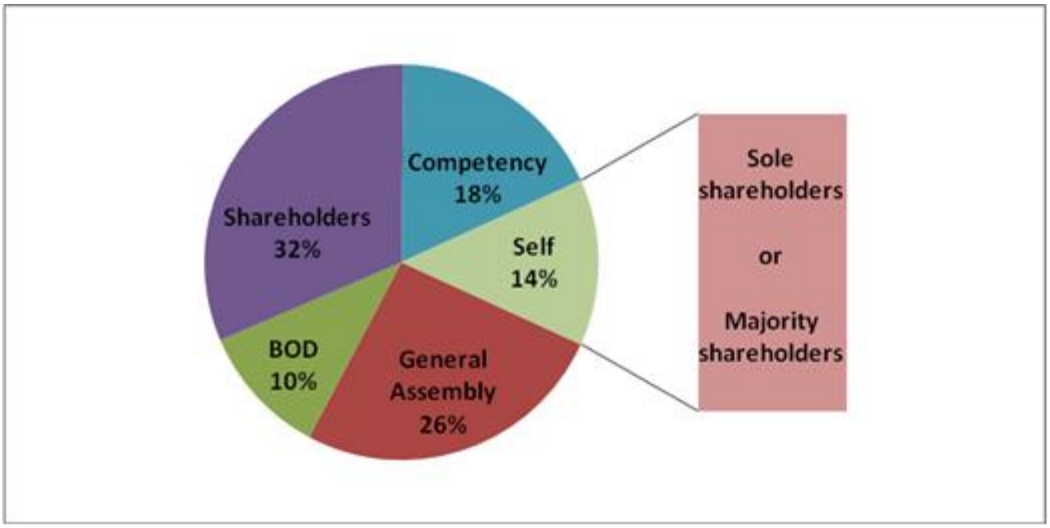
https://www.gsb.stanford.edu/sites/default/files/documents/Perez_Gonzales%20paper.pdf accessed on 13/04/2015).

[602] See for example Adams, Renee B. and Hermalin, Benjamin E. and Weisbach, Michael S., *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework & Survey* (April 10, 2009). Charles A. Dice Center Working Paper No. 2008-21; *ECGI* - Finance Working Paper No. 228/2009; Fisher College of Business Working Paper No. 2008-03-020. Available at SSRN: http://ssrn.com/abstract=1299212 or http://dx.doi.org/10.2139/ssrn.1299212; *48:1 Journal of Economic Literature* 58-107.

[603] It has to be reminded that, companies are free to develop its own by-laws in form of its own Articles of association that may provide all the details required by that specific company. The provisions of such Articles of Association may provide contrary to what even the Company Law says on particular issues of interest.

[604]Gelter, Martin and Helleringer, Geneviève, 'Lift not the Painted Veil! To Whom are Directors' Duties Really Owed?' (April 2, 2014). University of Illinois Law Review, Forthcoming; European Corporate Governance Institute (ECGI) - Law Working Paper No. 255/2014; Fordham Law Legal Studies Research Paper No. 2419591, pg. 1. Available at SSRN: http://ssrn.com/abstract=2419591 or http://dx.doi.org/10.2139/ssrn.2419591 (Accessed on 30/03/2015).

Figure 11: Appointing authorities for directors



Even though it generally appears from the figure above that majority of the respondents were formally appointed by the shareholders to the tune of over 58% (i.e., 32% by shareholders + 26% by the General Assembly as indicated in the chart above) the procedure and the basis on which they were being appointed communicates a lot in what was expected of them as output in as far as the governance principles are concerned. In general as indicated in the chart above, the some (over 42%) of these directors are chosen either due to their family relationships or on a friendship basis[605] as this is a common practice in all private companies especially the family owned and the start-ups. The intention of such directors' appointments is generally varied and may include to ensure the business remains in the family hands (14% for family businesses) or that the day-to-day management is shielded where need be, by their longtime friends (42%) even where they have gone wrong. Additionally, and in my own observations as a board member of some companies, I can say that some are also appointed to fulfil the mandatory requirement to have a board, while others are simply appointed for boasting and for pleasure that the company is professional and is well managed especially on the side of the appointing authority where he/she is the sole shareholder of that company. Others, according to the interviewees' responses, are appointed due to the pressures from the financiers like Banks which condition their loan approvals on the satisfaction that there is a proper management structure within the company because that will assure that the funds disbursed are likely to be well managed and the loans to be serviced accordingly.

[605] As the representation shows, no clear appointing procedures are followed in their selection.

In some other private companies which have State Investment Corporations / Institutions (the likes of Investment Bank of Rwanda – BRD, The Rwanda Social Security Board or its owned companies like UDL – Ultimate Developers Limited, and others) as shareholders, the nominee directors to these private companies very likely have often a political function to this Board rather than serving the business goal and interests of the company to which they are appointed as directors. This is not exceptional to Rwanda though[606].

So, in view of the above, and informed by the findings from the survey as indicated in the table above, it can be deduced that the procedure of, the one who and the intention that motivated the appointment may influence the behavior and the performances of the directors. For example, where a director was appointed by a friend without any other performance and/or competence related considerations or records, the director may, if at all he does function, aim to satisfy the interests of the *de facto* appointing authority more than those of the company to which, *de jure*, he was appointed to serve. Mintzberg notes that:

"…the directors can protect whomever they choose to ... depending on their own needs and the pressures to which they are subjected"[607]

Indeed, where the basis of a director's appointment was to fulfil the external requirements and pressures, the directors so appointed shall fill the positions but shall not effectively serve to their capacity as directors to the interests of the corporation. Board meetings shall seldomly be convened and yet, the only way for directors to exercise their authority as directors is through board resolutions that are taken from Board meetings.

Gelter & Helleringer in their work on *"Lifting not the painted veil! To whom are directors' duties really owed"* have noted that all directors are loyal but there are those that are more loyal than others, and they are those that are loyal to not only the corporation!

[606] Gelter, Martin and Helleringer, Geneviève, *Lift not the Painted Veil! To Whom are Directors' Duties Really Owed?* (April 2, 2014). University of Illinois Law Review, Forthcoming; European Corporate Governance Institute (ECGI) - Law Working Paper No. 255/2014; Fordham Law Legal Studies Research Paper No. 2419591. Available at SSRN: http://ssrn.com/abstract=2419591 or http://dx.doi.org/10.2139/ssrn.2419591, pg. 14. *See also*, Daniela Weber-Rey &JochenBuckel, Corporate Governance in Aufsichtsräten von öffentlichenUnternehmen und die Rolle von Public Corporate Governance Kodizes, 177 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT 13, 14 (2013).

[607] Henry Mintzberg: Power In and Around Organisations, 1983, Englewood Cliffs, N.J.: Prentice-Hall, pg.69. See also its review by Jeffrey Pfeffer, 'Power In and Around Organisations', *American Journal of Sociology*,Vol. 91, No. 2 (Sep., 1985), pp. 454-456. Available at: http://www.jstor.org/stable/pdf/2779781.pdf (Accessed on 30/3/2015).

So, if there are those that are loyal to not only the corporation, to what else or to whom else are they loyal? Are there distinct duties between those appointed to serve the corporation and those appointed to serve the corporation and someone or something else? The answer is simple. As by the requirements of the law, there exists no distinction. The law requires every director upon his/her appointment to the Board, to be loyal not to anybody else and to nothing else, but to the corporation and the corporation alone. Often times, loyalty is inspired by the selection power or authority and especially that the appointer retains the power to dismiss[608]. And so, the loyalty and allegiance shall follow the power to appoint and that is why, the 'constituent directors' often find themselves in this dilemma of double loyalty. Andrews S. Gold in "The New Concept of Loyalty in Corporate Law" notes that being loyal as a director is to serve in good faith[609]. Loyalty in the company context requires that a fiduciary (a director - in this case) acts to advance the corporation's or shareholders' best interests. Where a director acts to the contrary, it leads to disloyalty of the fiduciary to the principal.

Where the appointment was due to the relationships with the top management of the company (for example with the CEO), the loyalty bends towards this top management than to the company[610]. And, because board appointments confer prestige, as well as financial rewards, social ties are created through the appointment process itself and, few personalities would actually resist such offers. Thus, even if outside board members are formally independent of top management, potent psychological and social elements can have an effect on board working processes[611]. Edward J. Zajac and James D. Westphal[612] note that, for the CEOs and the entire top management to maintain their control and power over the corporation, they often endeavor to exclude Board members (candidates) with experience in active Boards as candidates for directorships in favour of those directors (candidates) with experience in other passive Boards who are expected not to exert a lot of pressure and thereby hold control over management. They note That:

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[608]E.W. Thomas, The role of Nominee Directors and the Liability of Their Appointers, in CORPORATE GOVERNANCE AND THE DUTIES OF COMPANY DIRECTORS 140, 150 (Ian Ramsay ed. 1997). See also, Norman Veasey& Christine T. Di Guglielmo, How many Masters Can A Director Serve? A Look at the Tensions Facing Constituency Directors, 63 BUS. LAW. 761 (2008).

[609] Andrew S. Gold, 'The New Concept of Loyalty in Corporate Law', 43 U.C.(University of California), Davis Law Review, 457, 461, 468-470 (2009) (Explaining how the requirement to act in good faith expands the fiduciary duty).

[610]Fich, Eliezer M., and Lawrence J. White. 2005. "Why Do CEOs Reciprocally Sit on Each Other's Boards?" *Journal of Corporate Finance*, 11(1–2): 175–95.

[611] Cristina Bettinelli, Boards of Directors in Family Firms: An Exploratory Study of Structure and Group Process, Family Business Review 2011 24: 151; The online version of this article can be found at: http://fbr.sagepub.com/content/24/2/151 (Accessed on 31/3/2015).

[612] Edward J. Zajac and James D. Westphal, Director Reputation, CEO-Board Power, and the Dynamics of Board Interlocks, 529/ASQ (Administrative Science Quarterly), September 1996, p.1.

“more powerful CEOs will avoid director candidates who have participated as directors in increasing the level of board monitoring and control over CEOs on other boards, while favoring new director candidates with prior directorship experience in protecting or bolstering CEO control”[613].

It is thus, often hard for this appointee to critically and effectively serve to the requirements of the directors as envisaged by art. 169 of the company law (that is, management, direction and supervision).[614]

When directors were asked (through the questionnaire) on how they appreciated their appointment or the appointment procedures used in the selection of Board members, over and above 50%(percent) seemed to be satisfied with the procedures in place. This may be interpreted in three ways: 1) that the procedure was duly followed, 2) that they did not know what procedures were appropriate to be applied or 3) that they would not contest the way they themselves were appointed as it would render their own appointment improper or at least to be a biased one. The last case would lead to doubting the independence from the management[615], although I have done no thorough investigations or research in that regard as it was beyond my scope. However, the 2012 Baseline Corporate Governance Survey in Rwanda that was conducted by the Rwanda Development Board, revealed that lack of board nominations procedures, induction process as well as the eventual monitoring of the Board performance as the inefficiencies and gaps within Corporate Governance practice in Rwanda[616]. This corroborates very well with this study’s findings where, apart from generally appreciating their appointment, it was not easy for the respondents to explain clearly on their appointment procedures. Close to 30% of the respondents (without any distinction of those from small and big companies) were frank to reveal that no procedures were used at all, while around 70% of the respondents simply appreciated the way they were appointed without mentioning anything as to how they were appointed as the figure below shows.

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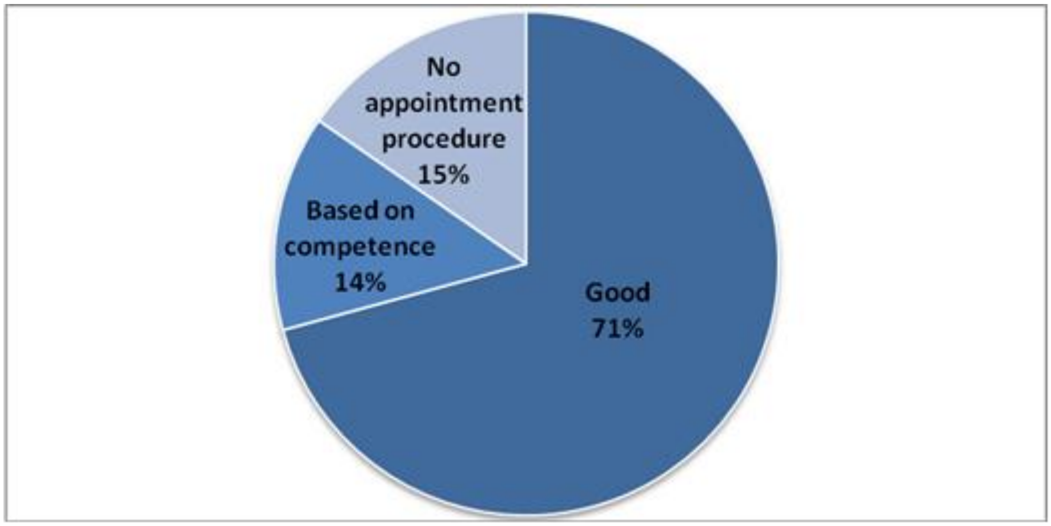
[613] Ibid.

[614] The business and affairs of a company shall be managed by, or under the direction or supervision of the Board of Directors. The Board shall have all the powers necessary for managing, and for directing and supervising the management of the business and affairs of the company (Art. 169 of Law N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009).

[615] Jeffrey L. Coles, Naveen D. Daniel, Lalitha Naveen, “Boards: Does one size fit all?”, Journal of Financial Economics 87 (2008) 329–356, pg. 1.

[616] Corporate Governance Policy for Rwanda (Final Draft report) commissioned by Rwanda Development Board – submitted by ADS – Appropriate Development Solutions (a Consultancy Firm) in association with Trust Law Chambers, July 2014. The findings in this report were later presented to a validation workshop (of the Rwanda’s Corporate Governance Policy Framework) on November 26, 2014 at Lemigo Hotel. Note that, until **10/8/2016** when the final copy of this work was submitted for printing, the policy had not yet been approved to be implemented.

Figure 12: Appreciation of the appointment procedure used



Author's survey findings

As indicated earlier, only a few of the directors, especially those from subsidiaries of foreign banks or Insurance Companies, had gone through interviews and assessments before being appointed Board members. The rest had been simply offered positions and they found themselves seated in the Boardrooms the next day.

Now, the issue in relation to our particular study (Corporate Governance and the liability of corporate directors) is thus, should the liability of corporate directors and its enforcement be considerate of all such constituent appointments or alternatively, that the liability measures and their enforcement should uniformly be applied? We contend that, irrespective of the constituent representations to the Board, once appointed, the director's functioning to the Board should not be to the service of individual interests but, as per the Rwandan law requirements, to the joint objective of the company and thus, where gone wrong, liability should be objectively established instead of being subjective by accounting for all those other considerations[617].

5.2.3 Board Membership terms: Should it be limited or open-ended?

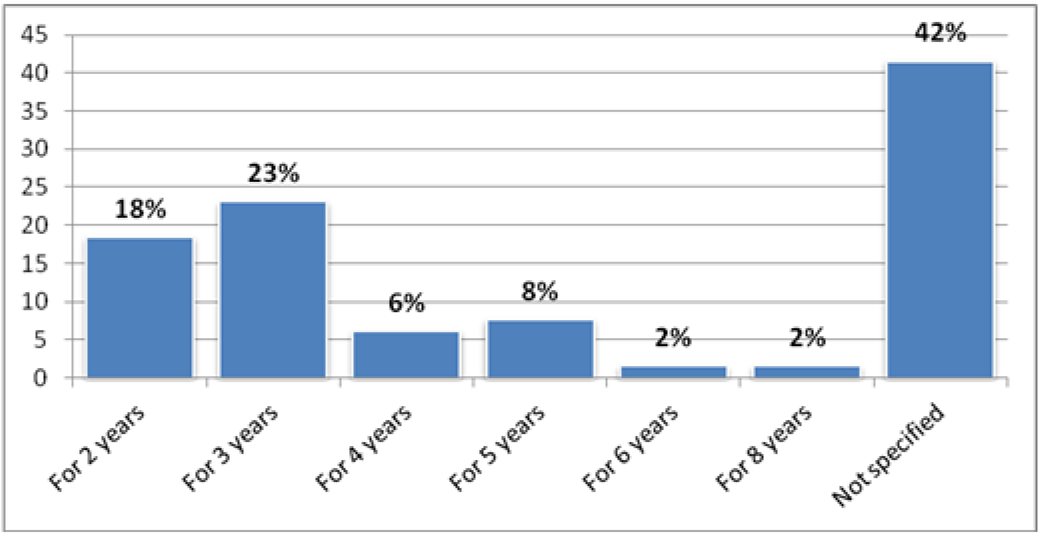
[617] Refer to the early 1930s discussions between Berle (for Shareholder Wealth Maximization) and Dodd (for Stakeholder value approach). Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); A.A. Berle, Jr., *For Whom Corporate Managers ae Trustees: A Note*, 45 HARV. L. REV. 1365 (1931); E. Merrick Dodd, Jr., For Whom Are Managers Trustees?, 45 HARV. L. REV. 1145 (1931). Interesting is also Bratton and Wachter's critique of the works of these two (Berle and Dodd). William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008).

In the Corporate Governance practices world-wide, companies[618] have different traditions as regards to Board members' appointment and terms. What seems to be in common however is that Board members have often had limited terms to serve after which new blood with fresh ideas come in to take over the management, direction, and supervision of the company. However, to ensure the continuity of services, a staggering process - where some Board Members' term ends while for others are still well set in place as it helps for the new to learn from their senior serving Board members. The Board membership term is not a new concept in Rwanda either, even though, some respondents (42%) expressed to have been appointed to serve without a specified term.

Whereas it is not the prime intention of this work to assess the real impact of having the term limits (or not) for boards of companies, we hold that there should be such provisions of term limits for every company. We however further hold that such term limits should be voluntary (that is, depending on the will of each respective company) and reasonable so as to act as backstop to excessive tenure lengths. Lengthy or tenure-less boards become prone to lack of independence and often lead to unpredictability around director positions openings and thus gives the executive management ample opportunity to win and use the un tiring board. The longer the Board serves unchanged, the more the dividing line between the Board and executive management gets thinner, and the more the independent and professional duty to control and supervise the management actions fades away.

Figure 13: Term of years appointed to serve (by the respondent) as a Director

[618] According to Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, ECGI Law Working Paper N0. 170/2011 (January, 2011), there are different practices around the World. In the United States the usual term is one year, but the shareholders can opt for a staggered board with up to three years terms, Model Bus. Corp. Act Ann. § 8.06, 4th ed. 2008. In Finland it is also one year, staggered boards are permissible, but regarded as against good corporate governance, 9Fin 15 et s. In Norway it is two years, 20Norw 11, staggered boards seem problematic, but permissible; in Japan it is two years, but for executive officers only one year, 17Jap 11; in Australia three years, 2Austr 13; in the Netherlands and Portugal four years, 21Neth 7; 23Port 7. In some countries such as Germany and Austria the term of office can legally be and is usually five years and is renewable, 12Germ 8, 3A 6, but without a staggered board. In Belgium and Greece six years, 4B 5, 13Greece 11. In the United Kingdom the usual period was three years of office on a one-third staggered basis (Combined Code Provision A.7.1). But the formula in the UK Corporate Governance Code is now: B.7.1: "All directors of FTSE 350 companies should be subject to annual election by shareholders. All other directors should be subject to election by shareholders at the first annual general meeting after their appointment, and to re-election thereafter at intervals of no more than three years. Non-executive directors who have served longer than nine years should be subject to annual re-election . . . ." As to FTSE 350.

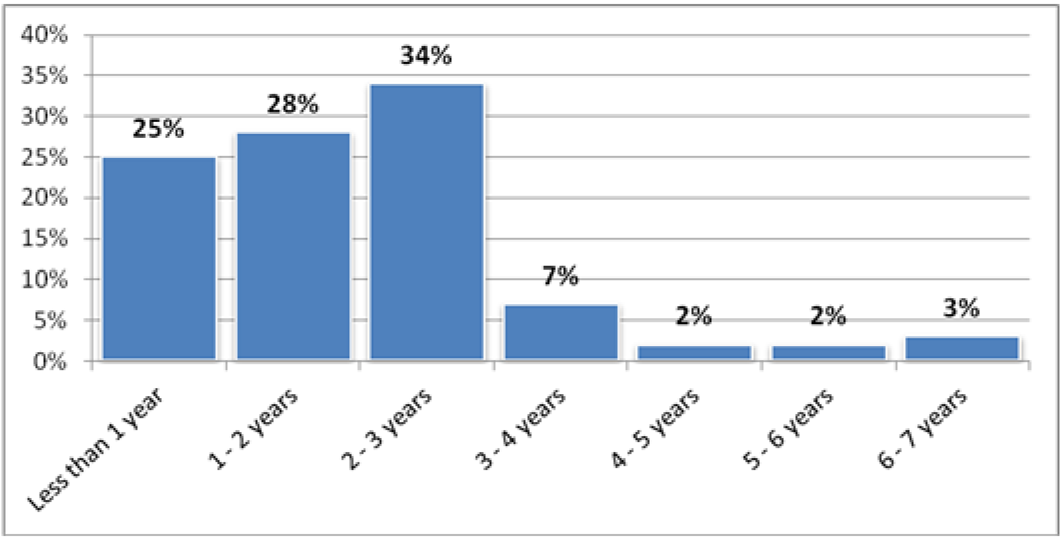


Author's survey findings

It was noted however that in most companies, there was no clear policy in regard to the appointment procedure, term limit specification, as well as the succession plan[619] of the Board after the expiry of the existing term. Some respondents to the survey questionnaire confessed to have been appointed and were never assigned any specific tasks as Board members; some had served beyond their terms without any formalities effected while some others had no term specifications. As was revealed too, by the baseline survey on Corporate Governance in Rwanda[620], over 30% of the respondents revealed to be having no mechanisms for rotating board members and 23% revealed to be having no set quota needed for board meetings.

[619] Succession planning is recommended in various Corporate Governance Codes. See for example art. 8 par.3 of the BNR Corporate Governance Regulation for Insurance Companies, REGULATION Nº07/2009 OF 29/07/2009 ON CORPORATE GOVERNANCE REQUIREMENTS FOR INSURANCE BUSINESS, Official Gazette n°35 0f 30/08/2010. It provides that:
"The issue of management succession, business continuity and disaster recovery shall be included in the planning process".
[620] Baseline Corporate Governance Survey administered by Rwanda Development Board (RDB), May 2012. This survey which was carried out with the a double aim: 1) to understand the practice and implementation of corporate governance in Rwanda and, 2) to establish the existing gaps in corporate governance practice in Rwanda, was conducted in a five (5) representative parts: Huye (South), Musanze (North), Kayonza (East) and Rubavu (West) representing the four (Provinces) and then, the Kigali City.

Figure 14: Number of years served by the directors



Author's Survey findings

5.2.4 Board size and the distribution of tasks amongst Board members

Different authors especially from economics, finance and management [621] have elaborated on the importance of team work[622] by the Board members, the size of the Board [623] and the distribution of tasks among the Board members through Board

[621] 43. Jeffrey L. Coles, Naveen D. Daniel, Lalitha Naveen, "Boards: Does one size fit all?", Journal of Financial Economics 87 (2008) 329–356.; 42. Schwartz-Ziv, M., and M. Weisbach, 2013, "What Do Boards Really Do? Evidence from Minutes of Board Meetings," Journal of Financial Economics 108, 349-366.; 37. Klein, A., 1998, "Firm Performance and Board Committee Structure," Journal of Law and Economics 41, 275-303.; Hermalin, B., and M. Weisbach, 1988, "The Determinants of Board Composition," RAND Journal of Economics 19, 589-606.; Shivdasani, A., and D. Yermack, 1999, "CEO Involvement in the Selection of New Board Members: An Empirical Analysis," Journal of Finance 54, 1829-1853; among others.

[622] McIntyre, M. L., Murphy, S. A., & Mitchell, P. (2007). The top team: Examining board composition and firm performance. Corporate Governance, 7 (5), 547 – 561.

[623] Jeffrey L. Coles, Naveen D. Daniel, Lalitha Naveen, "Boards: Does one size fit all?", Journal of Financial Economics 87 (2008) 329–356. Also available at: <http://sites.temple.edu/lnaveen/files/2014/05/JFE_boards_2008.pdf> The authors here did a great job in studying the factors and different perspectives upon which deciding the size of a firm's Board size should be based. These perspectives include: 1) The Agency perspective (which argues that larger size ensures vigilance and effective monitoring and supervision of the management activities), 2) The Resource Dependency Theory Perspective (which assumes that the larger the Boards, the greater the opportunities and links for the business), and 3) The Stewardship Theory Perspective (whose relevancy is simply put on the ratios between the inside vis-à-vis the outsiders since it is feared that the inside directors may overwhelm the outsiders with a lot of information that would be hard for them (outsiders) to process for an informed decision making). But generally, the authors believe that a larger size of the Board would be

committees[624] but also in other various works on corporate governance[625]. Under Rwandan Company Law and other relevant laws in Rwanda, there are no statutory provisions that strictly prescribe the structure[626] or numbers for the composition of the Board of Directors[627]. Article 167 of Rwanda's 2009 Company Law for example simply provides that:

better and is likely to have more knowledge and skills required at their disposal for the dispensation of their duties than a smaller sized Board;

Renee B. Adams, Benjamin E. Hermalin, and Michael S. Weisbach, The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey, *Journal of Economic Literature*, 62 Vol. XLVIII (March 2010) note that, "as a board member's share of a team's output fall, he or she supplies less effort".

[624] Jeffrey A. Sonnenfeld as he reviewed the governance processes underlying the collapse of Enron, Tyco and World Com noted that those responsible for governance mostly concentrate on rules, procedures and things such as the composition of committees. Sonnenfeld, JA, 2002, "What makes Great Boards Great", *Harvard Business Review*, September.; Also, Companies are free to have as many Board committees as they find necessary. See Art. 9 of the REGULATION Nº07/2009 OF 29/07/2009 ON CORPORATE GOVERNANCE REQUIREMENTS FOR INSURANCE BUSINESS, Official Gazette n°35 0f 30/08/2010.

[625] COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH 1201-10 (Klaus J. Hopt et al. eds., 1998); CORPORATE GOVERNANCE IN CONTEXT – CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US 731-42 (Klaus J. Hopt et al. eds., 2005); HANDBUCH CORPORATE GOVERNANCE, 931-52 (Peter Hommelhoff et al. eds., 2d ed., 2009); Marco Becht et al., ch. 12, Corporate Law and Governance, in HANDBOOK OF LAW AND ECONOMICS, VOL. 2, 833 (A. Mitchell Polinsky& Steven Shavell eds., 2007). Cf. also the collection CORPORATE GOVERNANCE, CRITICAL PERSPECTIVES ON BUSINESS AND MANAGEMENT, 5 VOLS (Thomas Clarke ed., 2005), and Renée B. Adams et al., The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey, 48:1 JOURNAL OF ECONOMIC LITERATURE 58-107 (2010).

[626] Specific Corporate Governance regulations especially in the Financial services sector like Banks and Insurances have mandatory provisions for specific committees. Art. 9 of the BNR Corporate Governance Regulation for Insurance Companies, REGULATION Nº07/2009 OF 29/07/2009 ON CORPORATE GOVERNANCE REQUIREMENTS FOR INSURANCE BUSINESS, Official Gazette n°35 0f 30/08/2010, provides for the "Board Audit committee":

"The Board shall establish, on a mandatory basis, a Board Audit Committee and shall ensure that other committees, at the Board or management level, oversee specific responsibilities in key areas of the insurance business such as investment, asset/liability, and risk management".; Arts. 24 – 28 of the REGULATION N° 06/2008 ON CORPORATE GOVERNANCE OF BANKS, Official Gazette n° 02 of 10/01/2011 refer to different Board Committees (Board Audit Committee (arts. 24 & 25), Board Credit Committee (art.26), Board Assets and Liability Committee (art.27), as well as the Board Risks Management Committee (art. 28)) and provide details of each committees' responsibilities.

[627] This has an exception with the Companies in the Financial sector due to their special nature - they have a mandatory minimum number (five) to which they cannot go below. Art. 18 of the REGULATION N° 06/2008 ON CORPORATE GOVERNANCE OF BANKS, Official Gazette n° 02 of 10/01/2011 provides that:

"Due to the special nature of deposit taking institutions which gives them an added responsibility of safeguarding the interests of the depositors, all institutions licensed under the law concerning the organization of Banking, to have at least five directors".

The exception is also with the listed companies whether on the normal listing or listing as an SME. See art. 5 of the CMA Guidelines (The Capital Market Disclosure Guidelines N° 17 for the Public Offer of

"…Members of the Board of Directors shall act in a collegial administration and shall be of a sufficient number provided for in article of association for the Board's meeting quorum to be attained"[628].

This provision emphasizes a "sufficient number" but leaves it to the specific articles of association for each company to determine what the sufficient number would be for it. Worth to note however is that, having been made optional[629], only a few of the companies in Rwanda do have articles of association. It thus becomes a challenge for these and other companies to determine the sufficient number of directors either in the articles or based on the Law that acts as a *de jure* substitute of articles of association for companies that do not have such[630]. So, whereas it is clear that a Board of Directors may be composed of one Board member (as is the case indicated in art. 182 of the Company law), the law does not clarify what would be meant by the "sufficient number" nor does it mention what would be an unreasonable size or composition (by whatever reason) of the Board of Directors for companies in Rwanda.

For effectiveness purposes especially with companies having a given number of Board members however, it is common for such a team to divide itself into Board subcommittees specific to certain divisions depending on the particular business of a company[631]. Membership in such subcommittees normally depends on the training (if

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Securities for the Small and Medium Enterprises in Rwanda) on the minimum number of Board Members (a minimum of 3).

[628] Art. 167 of the Law N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009.

[629] Art. 54 of the Law N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009 provides that: "Any company may have or not have articles of association".

[630] Art. 55 of theLaw N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009 states that:

"Where a company does not have articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in this Law. Where a company has articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in this Law except to the extent that they are restricted, limited or modified by the constitution of the company in accordance with this Law".

It has to be noted that Rwandan Company Law allows companies, where they so decide, to have a single director. See for example the provisions of art. 182 which states that:

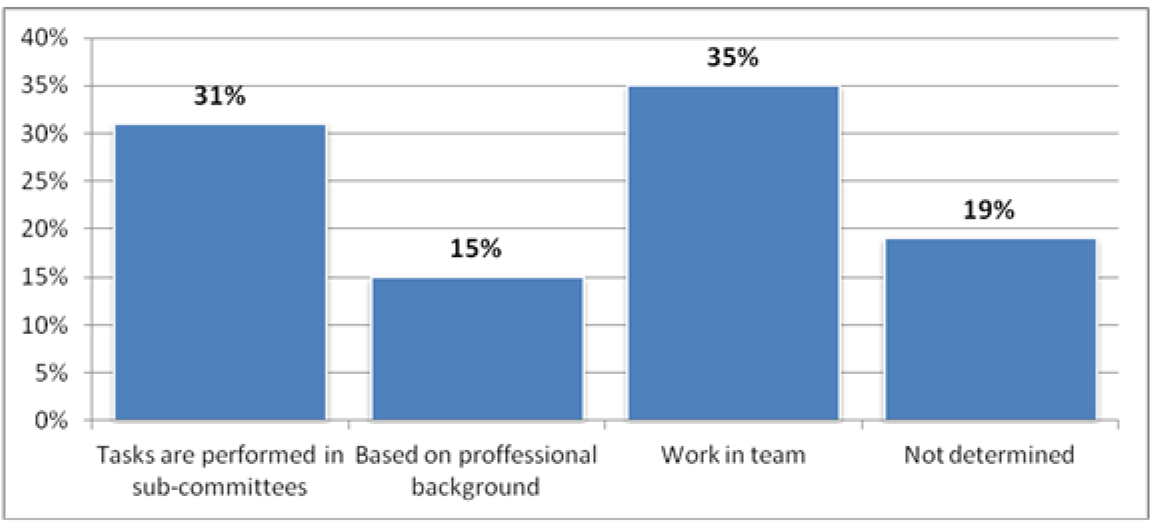
"Where a company has only one director, that director shall not resign office until that director has called a meeting of shareholders to receive notice of the resignation until one or more new directors are appointed".

[631] In specific regulated industries like the Financial industry, such experience and knowledge may even be a prerequisite for their licensing. This is the case with for example in art. Art.4(d) of the Central Bank's Regulation Nº06/2009 OF 29/07/2009 ON LICENSING REQUIREMENTS AND OTHER REQUIREMENTS FOR INSURANCE INTERMEDIARIES, Official Gazette n°36bis of 06/09/2010, provides that:

"the directors and officers have adequate general, commercial and professional knowledge and ability as well as having a good reputation to enable them to conduct the business competently and competitively;".

any), experience or familiarity in such departments. In some industries that are strictly regulated like the Banks, the minimum subdivisions of the Board into Board committees is provided for[632]. Whereas this division of work has been found to be quite useful in regard to the performance of companies[633], this study revealed that only 46% of our respondents used Board Committees in their Boards, and 54% worked as a group (that is, they do not divide themselves into subcommittees) in their Board activities and they felt comfortable with that. It is submitted that, where a company's Board is collectively working without Board Committees, except for the small companies, there is more likelihood of that Board bloc to easily fall prey to the Executive Management's policies and strategies' direct approvals than it would be with a Board with standing committees that would have ample time and professionalism (or at least specialism) dedicated on a particular subject matter.

Figure 15: Showing the functional structures of Company Boards



Author's survey findings

It should be noted however that whether working through subcommittees or as an entire Board, Rwandan law obliges the Board to work and function in a collegial manner[634]. This means therefore that even when subcommittees or Board committees have been

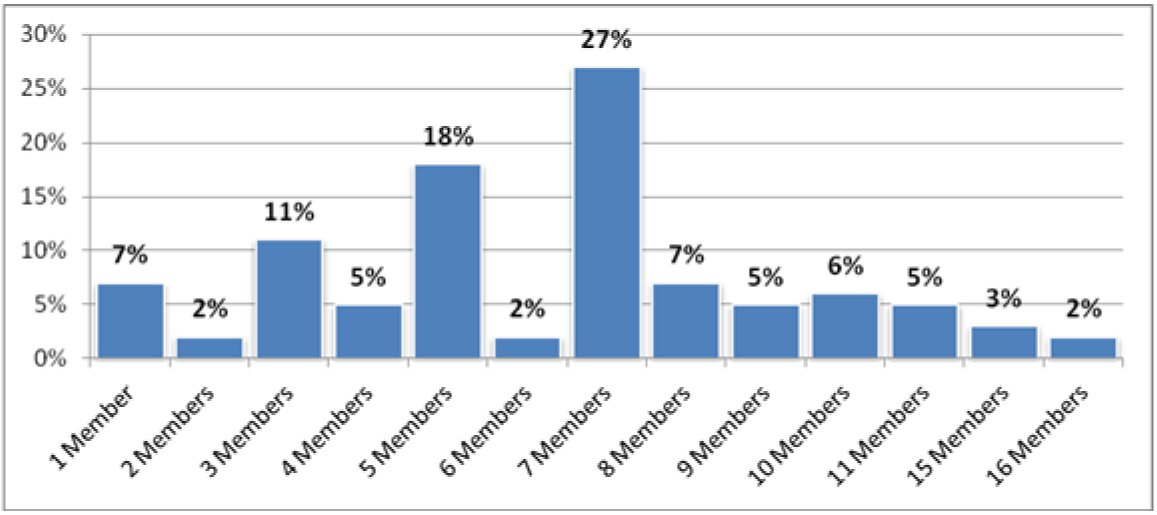
[632] The Central Bank's Regulation on Corporate Governance for Banks (Regulation N° 06/2008 on Corporate Governance of Banks, Official Gazette n° 02 of 10/01/2011) enlists four (4) principal committees: 1) Audit Committee, 2) Credit Committee, 3) Assets and Liabilities Committee, and finally 4) The Risk Management Committee. To these, some Banks have preferred to add the Human Resources and Remunerations Committee.

[633] Klein, A., 1998, "Firm Performance and Board Committee Structure," Journal of Law and Economics 41, 275-303.

[634] Art. 167 of the Law N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009.

formed, the accountability remains with the Board as a whole not with the Board committee membership alone[635].

Figure 16 Board composition (numbers of the Board members) in the companies surveyed and the percentages thereof.



Descriptive Statistics					
	N	Minimum	Maximum	Mean	Std. Deviation
What is the size of your board? Big	27	4	16	8.41	2.805
What is the size of your board? SME	34	1	15	5.00	2.850
What is the size of your board? Big & SME	61	1	16	6.51	3.284

Author's survey findings

In our survey as indicated in the figure and the descriptive statistics above though, it was revealed that even without a statutory guidance in as far as the Board size and composition was concerned, the board sizes were within the recommended range[636] for both SMEs as well as for big companies. The average size according to our

[635] See for example art. 23 (on the mandate of Board committees) of the REGULATION N° 06/2008 ON CORPORATE GOVERNANCE OF BANKS, Official Gazette n° 02 of 10/01/2011 provides that:
"Board committees assist the board and its directors in discharging the duties and responsibilities, however the board remains accountable".
[636] Jensen, M. C. (1983). Organization theory and methodology. The Accounting Review, LVIII (2), 319 – 333.

respondents was 5 members of the Board for SMEs, whereas it was 8 for the big companies.

The division of labour into subcommittees of the Board generally is positive as it allows for a small team, with the requisite knowledge and skills specific to that committee to effectively carry out their activities. They can investigate, provide orientation and advice where needed in a time saving way since the committee members will be expected to be doing what they are familiar with.

However,subcommittees shall be meaningless if their composition is simply for formality so as to fulfil the legal requirements for such committees. That is, where committee members do not have enough training, requisite skills plus the commitment to serve as a technical committee, it may turn out to be disastrous to the company since the full Board often relies on the advice and recommendations availed by such subcommittees. This therefore stresses the importance of the Board composition in terms of qualifications, coupled with the continuous trainings to fill out the remaining gaps in terms of the requisite skills.

5.2.5 Board membership's awareness of their tasks and duties

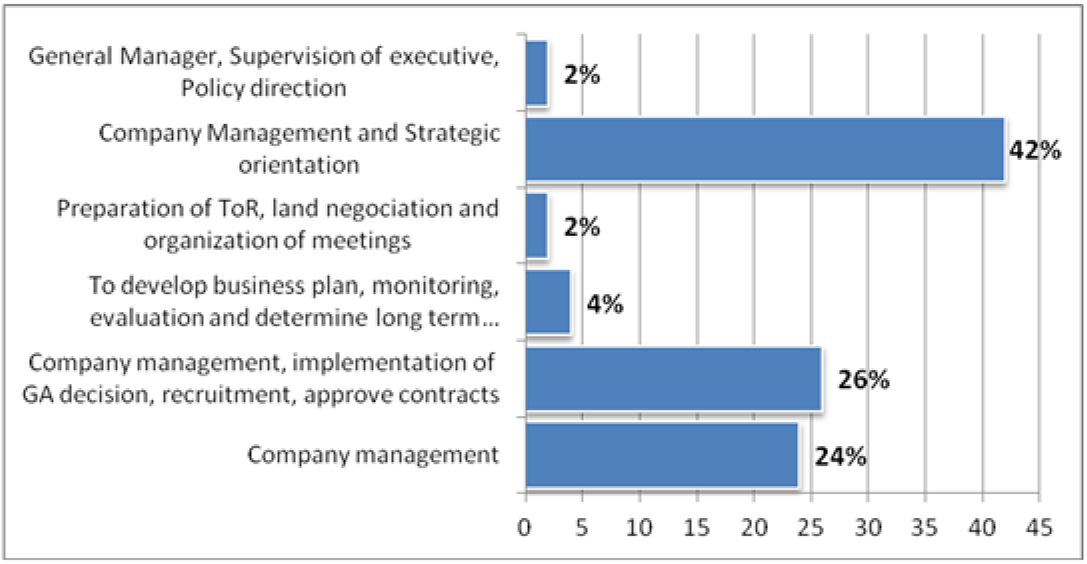
Board members' awareness of their responsibilities is the minimum to expect. Directors have a wide range of roles, responsibilities and accountabilities which they must understand fully in order for their companies to achieve its maximum potential. The Board of Directors sets the strategic direction for the company, sets the company's policies and priorities, monitors its performance and ensures its compliance with internal policies and external legal requirements[637]. Art. 169 of the Rwandan Company Law summarizes the role of the Board of Directors into three main functions: managing, directing and supervising the affairs (business) of the company [638]. Generally, governance is the common term used to describe the way a board fulfils its varying roles. To achieve this task however, a certain degree of understanding of what you are called for, to have a dedication and a constant renewal (refreshment) and development of the skills and knowledge is paramount. The findings of our study however, indicate that the majority (over 50%) of the respondents (members of the Board of Directors – including the Executive Directors) as indicated in the graph below have a low degree of

[637] Renee B. Adams, Benjamin E. Hermalin, and Michael S. Weisbach, The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey, *Journal of Economic Literature,* 2010, 48:1, 58–107, http:www.aeaweb.org/articles.php?doi=10.1257/jel.48.1.58.

[638] Art. 169 of Law N°07/2009 of 27/04/2009 Relating to Companies, OG N°17bis of 27/04/2009, as amended to date.

understanding of their responsibilities as a Board. This, as indicated earlier might have to do with their selection criteria – i.e., on the basis of family or social relationships or to fulfill the legal and structural requirements (see 5.2.2).

Figure 17: Understanding of Directors' Duties and Roles

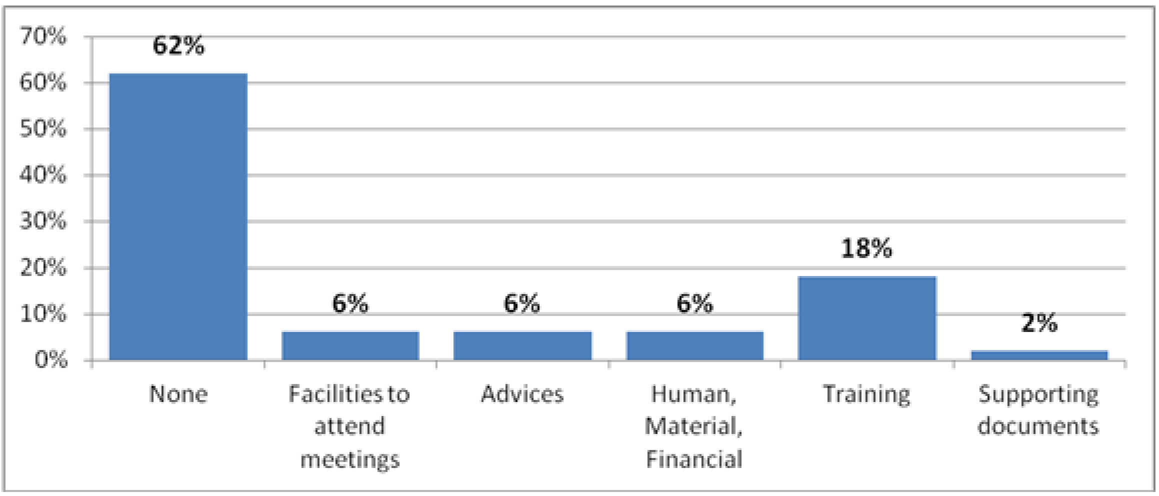


At the end of the day however, each of Board member's contribution to the total output of the entire Board is necessary for the general Board performance. For this individual contribution to the company by the Board members to be effective and sustainable, I contend that each company owes a duty to inform, train and support such a director.

For a Board member to have the capacity and be able to have an eye of scrutiny to the management's performance in attaining the company's objectives, for him to be able to constructively challenge the executives and to help in the development of the company's strategy, for him to be able to appreciate the integrity of the financial reports (information / statements) provided by the management, for the board to establish reliable internal controls and risk management systems, the board being able to recruit competent executives, appreciate the appropriate levels of remuneration for such top executives and the proper planning for the successions of both the top executives and the board itself, it all requires having a certain level of understanding, knowledge and skills as well as the constant support services to this Board in terms of training (especially on the awareness of directors' duties and what is expected of them), facilitations both at financial and technical levels (for example enabling these directors to have expert opinions on different technical issues), attractive remunerations and compensations to motivate the commitment, to mention just some.

To the Rwandan situation, the requirement for all the above becomes even more demanding given the general level of knowledge, education, skills and exposure the Rwandan business community possesses. The extent of Rwanda's business community's knowledge and awareness on the Board functioning, on the awareness of their Board duties, of their exposure even to the liability risks is quite limited. The graph below reveals that more than 80% of our respondents confirmed to have received no tangible company support in the fulfillment of their duties as Board members.

Figure 18: Directors' facilitation in performance of duties

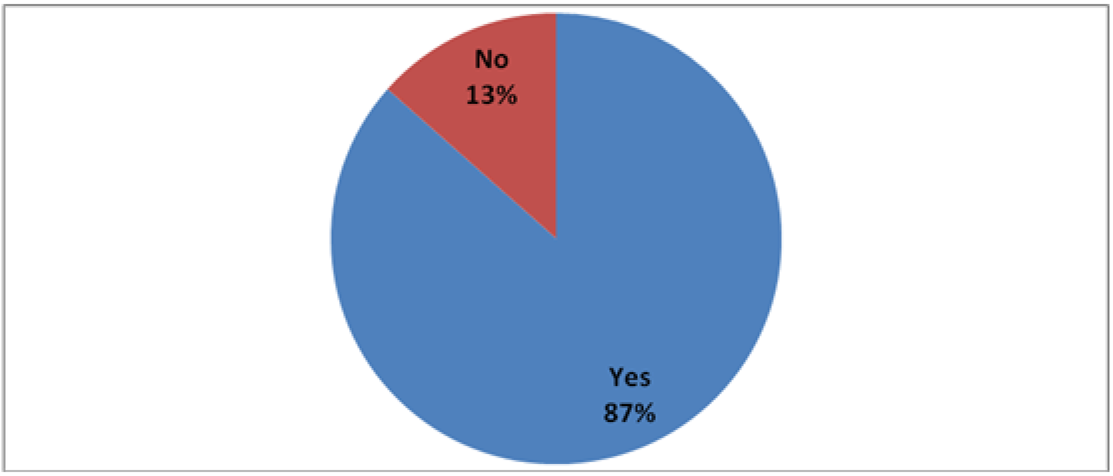


Source: The author's survey findings, 2013

5.2.6 Directors' performance evaluation and awareness on the potential liabilities

It is interesting to note that, despite the fact that a significant number of our respondents expressed a low level of awareness in as regards to their tasks, duties and responsibilities as Board members, the study revealed as the figure below shows, that majority of them (87%) were aware that personal and individual liability of company directors would accrue where they went wrong!

Figure 19: Directors' awareness of personal liability possibilities



What is paradoxical however is that they are aware of their exposure to risks and liabilities on one hand, and on the other as the survey shows (see in 5.2.7 below), they do not seek to inquire what they ought to be doing as Board members and how they would achieve that. Their inaction nevertheless does not relieve the company itself from its duty to inform, to train, to upgrade the directors' skills, to lead them to the constructive exposures (like facilitating them to attend regional and international directors' symposiums, conferences, …), etc., all of which would lead to the betterment of the company at the end, through the directors' awareness of their duties and in turn avoid potential liabilities.

In companies where Board members are fully aware of their duties and the potential liabilities in breach of such duties, it is assumed that directors will most probably strive to fulfill their duties either due to the professionalism required or at least in avoidance or fear of the likely repercussions that would ensue in case of breach. In a Deloitte article *"Framing the Future of Corporate Governance: Deloitte Governance Framework"*[639], the author notes that Boards of Directors are still struggling with fundamental questions including the following:

1) *What is the role of the board in the company's corporate governance program, and how does that differ from the role of management?*
2) *Where should we be spending the majority of our time?*
3) *Compliance with laws and regulations is an important starting point, but how do we position the board as a strategic partner with management?*

[639] Deloitte, Framing the Future of Corporate Governance: Deloitte Governance Framework, available at: http://www.deloitte.com/assets/DcomUnitedStates/Local%20Content/Articles/AERS/US_AERS_Governance_%20Framework_102412%20Final.pdf accessed on 08/04/2015.

4) *Exactly what should we be doing in the critical areas of oversight such as strategy and risk?*
5) *How does the work of the committees relate to and differ from the work of the full board?*

These and many more such questions are typical for Board members in Rwanda. Board members are appointed as such and from that, in general nothing follows to enable them to know what they are appointed to do. As the survey findings have revealed, directors in Rwanda do not get induction to the Board functioning and operations, no training, no supporting materials availed to them, no expert advisory services availed to them, etc. I contend that the company itself has a duty to help directors to be aware of what they are appointed to do and so, companies have to be accountable in as far as evaluating how much has been invested in an individual Board members' development as a Board member. And, no wonder, because Board members have realized they do not know (in as far as Board functioning is concerned), and so impliedly they do not efficiently function, they have no policies in place to evaluate a director's performance. Understandably, if they did, it could turn out rough on each one of them since some of them may even spend the whole year without sitting as a Board and even where they sit, they find everything readily prepared by the executives for the Board members' signatures. This may be due to ignorance or is done deliberately by the executives in order to enable them to go unchecked[640].

The Board uses various tools and processes to assess its (general) and individual member's performance. These processes may be through but not limited to the internally generated forms, through the questionnaires designed to be filled out every end of a designated period, it may also be through hiring an external independent body or consultants[641] who would evaluate, provide feedback and propose various ways to improve on its performance.

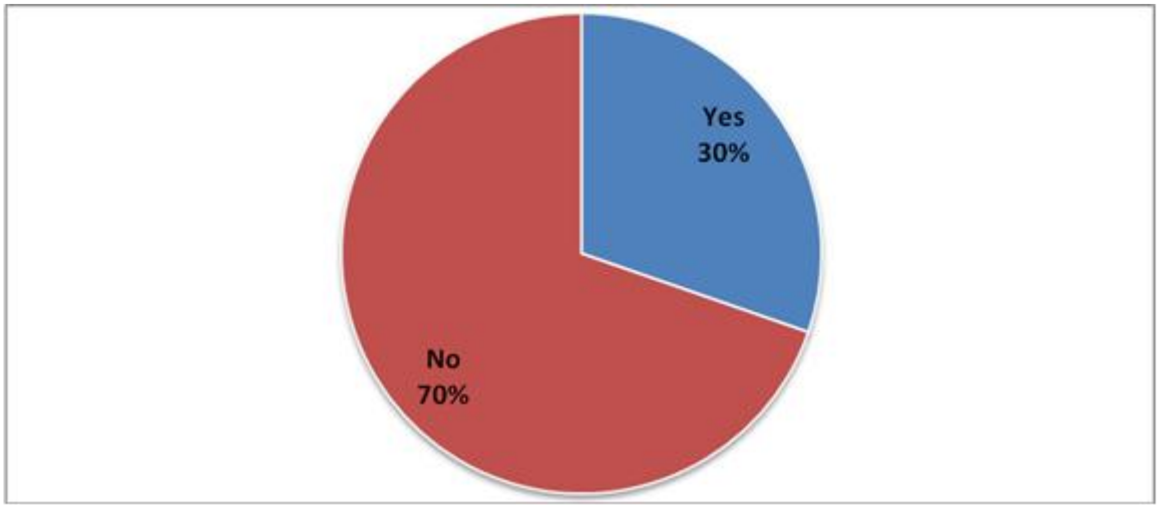
Asked whether their services as Board members have ever been evaluated, the survey revealed that only 30% of the respondents have ever been evaluated. The Board activities are routinely done and there is nobody to assess whether they are performing to the company's expectations or whether they (directors) have fully employed their

[640] This would actually be unfortunate because, great Boards serve to add value to the Executive management and the senior management of the corporation by constructively and effectively engaging it to the better of the corporation.

[641] Board members are often candid and frank to outsiders than when talking to internal staff (see Beverly Behan, "Board Assessment: Designing The Process" In 'The Corporate Board', November/December, 2004 – An Excerpt from the book "Responsible Executive Compensation for a New Era of Accountability" by Peter T. Chingos (eds), published by John Wiley & Sons, 2004).

potentials (capacities) to the benefit of the company or not. The figure below indicates the percentages in response to whether or not they have ever been evaluated.

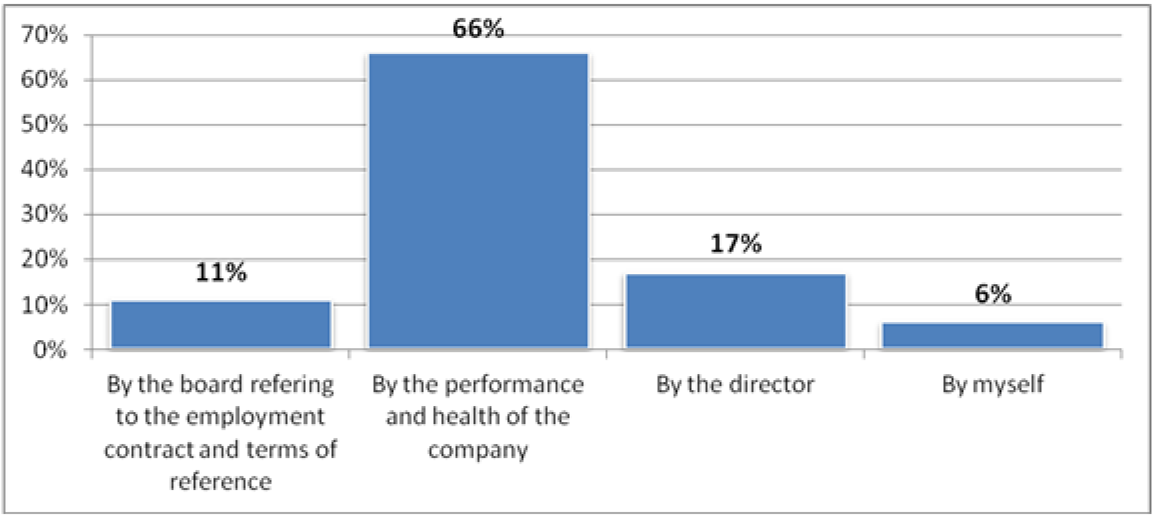
Figure 20: Whether as directors they have ever been evaluated



Even among those who claim to have been evaluated, over 72% were simply contented by the performances of their respective companies and thus implicitly claimed that their evaluation is simply evidenced by the companies' flourishing. To put it differently, that if they were not performing, their companies would have collapsed! It was revealed that in most[642] companies, there were no formal or structured Board evaluation policies in place. With this 'nobody cares' practice, the concern about each individual's contribution remains at stake.

[642] I say in most companies because some of them especially in the banking and financial sector in general have such evaluation mechanisms. It should be noted however that even where there are such systems, it was noted that it is mainly due to foreign influences especially with the companies whose majority shares have been acquired by foreign companies. Where there were no such acquisitions, the Chairman of the Board may be a foreigner and so, imports such a best practice from his / her own country or from his/her experiences with other Boards elsewhere.

Figure21: Shows how Board members think they were evaluated



Evaluation of the entire Board or the individual director's performance is a healthy exercise for a company because, a well conducted evaluation helps the board, committees and individual directors to discover their own strengths and weaknesses and thereby encourage them to perform to their maximum capabilities. Good corporate governance requires boards to evaluate their performance and appraise directors at least once a year.

5.2.7 Directors' awareness and understanding of relevant laws

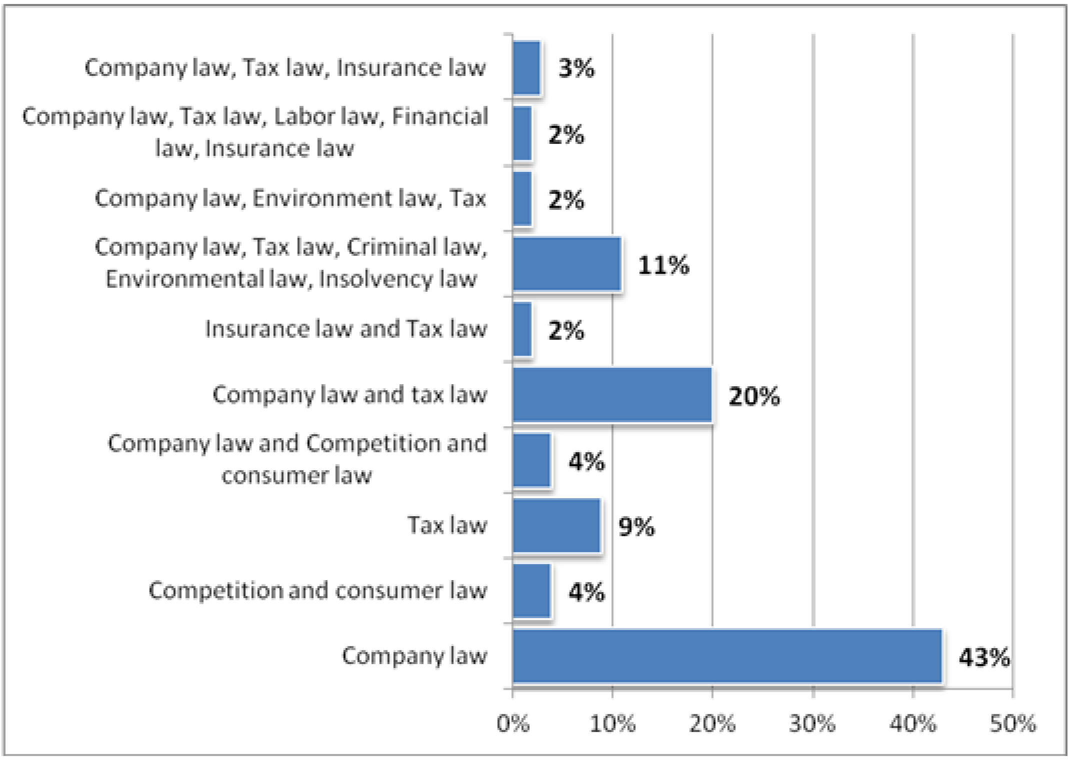
Besides for directors acquainting themselves with the duties and obligations as well as the practices of each specific company they are serving as Board members, they also need to acquire some knowledge about the laws especially those affecting or governing their specific industry. Some Laws are common to whichever type of a company irrespective of the specific industry from which it belongs. These may include but are not limited to for example: Company laws, Tax laws, Securities laws, Mortgage laws, Mergers and Acquisitions, Contract laws, Insolvency laws, to mention just a few. Some others are mandatory to specific sectors like Banking laws and relevant regulations (for Banking institutions), Laws and regulations on Insurance (for Insurance companies), Laws on Microfinance and relevant regulations for Micro-Finance institutions, Laws on Telecommunications and ICT as well as their relevant regulations for concerned companies, Laws and regulations on food safety for companies in such specific production industry, and many other sector specific laws. Worth noting is that, these laws quite often do not only provide for the directors' duties and obligations but they also provide for their sanctions in case of breach of such duties imbedded therein.

Company law for example provides for the general duties of a director but for a director in the Banking sector for example, the banking law, the corporate governance regulation for the banks as well as other relevant regulations add more strict duties and standards of behavior that may not necessarily be expected from another director in the construction industry. The Criminal Code which sounds quite distant to many directors shall come in then with not only liability consequences with fines but also suggests jail sentences! Some industries however, oblige directors there to familiarize themselves with the relevant laws of industry[643].

Despite the importance of these laws, the survey that was conducted under this study reveals that some directors (17%) were completely ignorant of any laws that pertain to their directorial duties at all. This would imply therefore that they always carry out their duties (if at all they do) in complete disregard (or ignorance) of the legal provisions that should be taken into account in executing their duties. When asked in case of training, which laws they thought would be preferred, over 80% were understandably referring to company and tax laws. Very few (11%) of them thought criminal law (code) provisions were in any way relevant for them to know about.

[643] For example, Art.13 of the REGULATION Nº07/2009 OF 29/07/2009 ON CORPORATE GOVERNANCE REQUIREMENTS FOR INSURANCE BUSINESS, (Official Gazette n°35 0f 30/08/2010) provides that:
"Directors should have a working knowledge of all applicable laws, regulations, guidelines and directives affecting the institution to ensure that compliance with them receives the highest priority and that any non-compliance is not knowingly committed by themselves or by anyone in their employment and is immediately dealt with.
The Compliance Function shall provide training of personnel in these matters.
In particular, every director should be conversant with the provisions of the Insurance Law, the law governing the Central Bank of Rwanda and any regulations, directives and guidelines issued to implement these laws and regulations…"..
The same is emphasized in art.13 of the REGULATION N° 06/2008 ON CORPORATE GOVERNANCE OF BANKS (*Official Gazette n° 02 of 10/01/2011*) where it is clearly mentioned that it is a duty inherent to directors to know and make known these laws to those they lead for better compliance functions.

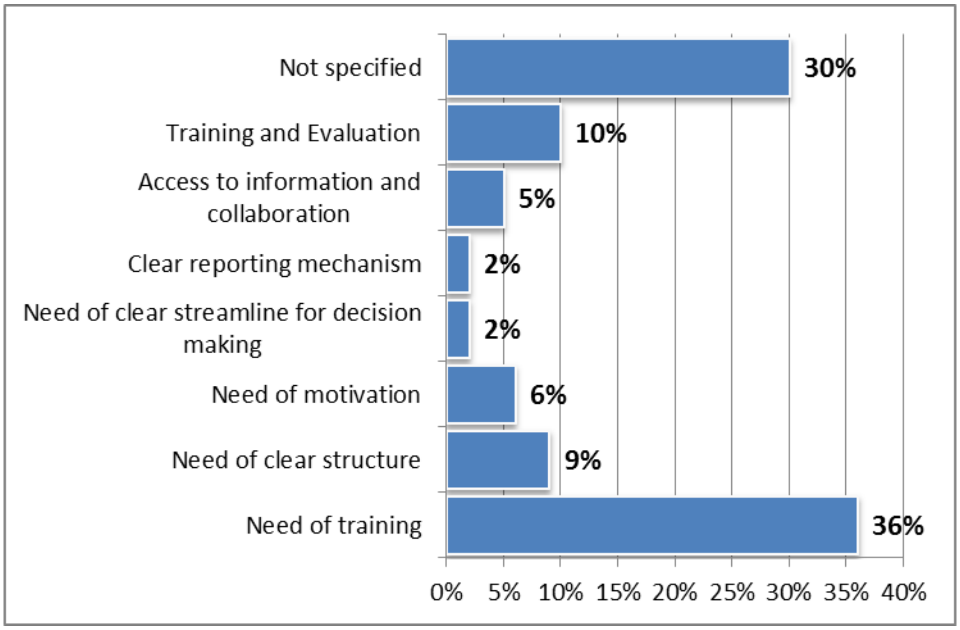
Figure 22: Preferential areas for directors' training



What is interesting to note however, is that directors expressed the need and are eager to know and acquire more knowledge in relation to their duties as directors. The answers to both related questions (the first being what they thought would be the effective remedy for the individual liability, and the other about what they thought they needed for better performance as directors), put emphasis on training and access to information (51%), where training was mentioned most frequently. Other suggestions by the directors included the motivation (6%) and having clear corporate structures in place (13%).[644] Out of all the respondents, 30% were not decided about what they needed to do better for serving on their respective Boards[645]. To my opinion, a director who has no desire to know more or to acquire more knowledge and skills does not deserve to be at the helms of any company – not even on a start-up's Board because, as his skills will not improve and develop, so shall be his company.

[644] This would involve a clear indication of flow of authority (hierarchy), having a functional Board with clear structures, committees and meeting agenda, having technical and support services readily available to those Board members wishing to have such, etc.
[645] These who do not know what is actually needed for them to serve better their respective institutions are such directors who indeed enjoy being Board membership – as if it was an 'honorary conferment' and have no interest of being and acting as a real director would be. Such directors need to be identified by the respective regulatory authorities so that they may be relieved of such duties as they add no value neither to the companies to which they are appointed as directors, nor to the economy at large.

Figure 23: What would improve directors' services to the company



From author's survey findings.

5.2.8 Challenges encountered during the survey exercise

From the outset, there were no any other primary data available for me to comprehensively inform my research on the directors' perceptions and understanding of the duties and liabilities of directors in Rwanda from a practical point of view, and so, the only remaining and available alternative was engaging into a survey of this kind to generate, by myself, the raw and primary data that I would later base on to deduct my research conclusions. This however, would not go challenges-free! The challenges encountered during this survey exercises were the following:

1. Being from a legal background, with our limited familiarity with the primary data processes and our usual reliance on the secondary data analysis, it was obviously hard to imagine and later get convinced on how I would engage and succeed in conducting a survey, something considered more as 'the other social sciences menu' than for Law. Indeed, the fear was founded as even designing a suitable questionnaire was a serious challenge; leave a lone testing it, distributing the questionnaires, conducting interviews and recordings, not to mention the data analysis itself.

2. Dealing with a *non-documentarist* society that does not easily value research and its relevance and position in the development process of a country. In Rwanda, surveys are taken with varying perceptions. In cities including the capital where many companies are concentrated, surveys are considered as time wasting especially to my kind of target group – the busy directors on one hand, but on the other, as something that you cannot easily give in to, since, by providing your personal perceptions (especially the negative ones) in view of your services with the company, you would be "washing your dirty linen in public"! This is why the majority of those that received but did not respond to the questionnaire were from cities. To the villagers (directors of companies from rural areas), it was more friendly than in cities even though as a researcher, I could not quench their thirst – they expected that I would end up conducting a training with them yet, besides having had no mandate to do so, I did not also have the necessary logistics for it.

3. The financial limitations cannot also escape a mention among the challenges encountered. For, it was not so easy to travel across the country and conduct interviews with all those I felt would be my targeted respondents, collect back the feedback, etc. I was thus obliged to downsize my respondents to only 120, and my outreach on the field, to only a representation of a few companies in every province.

4. The last but obviously not the least challenge was my limited knowledge and skills in using and applying any of the social sciences or the statistical software in synthesizing and digesting the collected primary data for me to ease the interpretation. I had to hire a specialist to help me in installing and entering data into SPSS that later generated the information fed into it with the tables and graphs as presented in this work. With this therefore, I would recommend that Law schools, including the one where I come from (School of Law of the University of Rwanda) to include in their curriculum and encourage the use of other social sciences research methodologies and the relevant software like the SPSS.

5.3 Conclusion on the survey findings

From this survey that was carried out in relation to this research, it has been particularly revealed that the gap between what actually appears in books and codes of law - that is, the assumption that corporate directors are fully aware or should be so aware of their duties is quite distant from what actually is in practice in as far as corporate governance is concerned. This pertains both to what directors know and understand about their duties as well as to their possible exposure to personal liabilities. The study has further revealed that even though structural corporate bodies in form of corporate Boards are often formally established almost by each and every company big or small, public or private; the functional Boards (where directors actually know and do what they are expected to do as directors whether in Board committees or in the full Board) are in practice quite limited.

It is submitted that the whole process and lack of knowledge and awareness hinges principally, in 1) the mode of selection and recruitment of these directors, 2) the way they are introduced (if at all they are) in their functions, 3) the way they conduct their businesses in their boardrooms and whether their tasks are distributed to standing committees or not, and finally, 4) whether they have received any facilitations whatsoever in relation to their duties or not. It has been noted that more often than not, be it the companies themselves, the regulators or even policy-makers, have been reluctant to be of any help in enabling these directors to be aware of both the statutory and non-statutory duties they are expected to fulfill as well as their respective consequences in case of breach.

Rwandan Company Law has institutionalized the office of the Company Secretary (see the discussion on this office at pages 72-75 of this work) as a mandatory office to all companies except for the small ones. Concrete responsibilities for such an office have been elaborated as to include, among others:

“1° to advise members of the Board of Directors on their responsibilities and powers;

2° to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and submission of all company documents required by the law to relevant organs as well as consequences due to the failure to comply with such regulations; …”,[646]

In reality though, companies have been reluctant to hire them (Company Secretaries) and where they have been hired, they are either not granted the authority to implement

[646] See art. 11 of the Law N° 14/2010 of 07/05/2010 Modifying and Complementing art. 219 of the Law N° 07/2009 of 27/04/2009 Relating to Companies, Official Gazette n° special of 14/05/2010. This provision obliges every company other than a small one to have a Company Secretary where it states that:
“Any company, other than a small private company shall have a Company Secretary whose duties shall be the following: …”.

the statutory roles as statutorily prescribed for their office, or are themselves incompetent to reasonably perform as expected of his/her office. In light of the responsibilities of the Company Secretary, this is rather serious because you cannot advise the Board when you yourself deserve to be advised. However, on the appointment and use of the Company Secretaries in facilitating Board members in accomplishing Board duties, a positive improvement was noted especially with the companies having foreign influence (that is, those that have a foreign origin or those local companies whose shareholdings were wholly or partially acquired by foreigners)[647]. The same positive remarks are to be made for the companies that have listed with the local bourse – The Rwanda Stock Exchange (RSE) where the Rwanda Capital Markets Authority (CMA) prior to licensing them to list have to inspect inter alia, whether their governance system is in order and functioning by the standards.

The incentives to change the *status quo* as genuinely revealed by the respondents in our survey was unexpectedly not dominated by pecuniary enrichments in terms of director remunerations but rather by the quest to know and acquire more knowledge and skills in relation to the directorial duties and the mitigation of risks relating to their personal liabilities due to their positions as corporate directors.

[647] This is the case with Companies like MTN Rwandacel (of a South African origin), some Banks like BanquePopulaire du Rwanda (with Shareholding by Rabobank from The Netherlands), Access Bank (with Shareholding by Access Bank Plc from Nigeria), and others.

CHAPTER SIX: GENERAL CONCLUSION AND RECOMMENDATIONS

This concluding chapter has two subdivisions: 1) the general conclusion, and 2) the recommendations and the way forward that the researcher suggests to be put into consideration by relevant stakeholders. The structure and scope of this work has been influenced by the contextualization of the research and its possible impact within the Rwandan context. Moreover, this thesis shall be the first of its kind on corporate governance and Rwandan law in relation to corporate directors' duties and liabilities.

The central research questions under this study have been to investigate and analyse:

(i) *What are the duties of directors according to Rwanda's corporate governance norms?*
(ii) *To what extent are company directors liable under Rwandan Law?*
(iii) *Do company directors, appointed as such, understand the extent of the duties a director owes to the company itself, its shareholders, its creditors, as well as the community at large under Rwandan Law and the liabilities that may arise when these duties are violated?*

To answer these questions, chapter one introduced the general corporate context and the distinction between the company and its shareholding and management. Corporate theories, especially the entity theory (also sometimes referred to as the legal theory) and the nexus of contracts theory (also sometimes referred to as the economic theory) have been discussed. In chapters two and three, the corporate governance landscape and framework have been elaborated on in the light of the evolution of corporate law and corporate governance in Rwanda, which shows a major shift from a civil law approach to a more common law approach. The research reveals that Rwanda today subscribes to a mixture of both shareholder and stakeholder governance approaches. The chapters two and three also deal with the statutory and practical contributions of various institutions to the development and governance of corporations in Rwanda as well as to the understanding of corporate governance as an international concept. Chapter four explains the scope of the statutory duties and liabilities of directors as they stand today under Rwandan law, whereas the last chapter (chapter five) before this conclusion and recommendations presents a summary of the findings resulting from a survey that was carried out during the period 2012 to mid-2013.

6.0. General conclusion

The importance of good corporate governance to Rwanda is beyond discussion as has been set out in this work, due to the struggle and competition for scarce resources (investment capital), whether domestic or foreign. Where companies, whether listed or not, adopt good governance practices, the probability of misconduct decreases and the returns on stock will be better than for stock of companies with bad governance[648].

As discussed in chapter one of this work, a corporation is a legal being, a person not naturally born but through the proper incorporation processes. Amazingly however, once made to exist and right from its 'birth', this creation has to legally stand on its own. From that moment, it has its own duties to fulfill as well as obligations towards others. However, as observed earlier, despite its independence, this person (the company) has no physical body neither does it have a mind to direct its choices and opinions in the fulfillment of its objectives as are set out from the moment of incorporation. So, a corporate 'management' has to be instituted– the chief executive officer (CEO) and other senior corporate officials[649]. It is this management that will function as the mind behind this 'person'- the company[650]. For, this artificial being cannot, and will never function by itself, soulless and mindless as it is, yet it was created to drive forward according to its objectives.

This makes the board of directors central in the corporate governance discourse. Under Rwandan law, a board of directors is a team composed of a few selected executives (like the CEO and sometimes the CFO) and the non-executives (composed of some shareholders or their representatives and often independent personalities).[651] The non-executives, including the independent directors, are entrusted with the mandate to, among others: 1) support the executive management in as far as management oversight and supervision are concerned, 2) the strategic planning to ensure the

[648]Arcot, SR, and Bruno, VG (2006), 'One Size Does Not Fit All: Evidence from Corporate Governance', Working paper (available at: SSRN: http:ssrn.com/abstract=887947) accessed on 24/04/2015.
[649] See, in the popular UK case *Tesco Supermarkets Ltd v. Natrass* ([1972] AC 153).
[650] For reference purposes, in the UK, Lord Denning (UK) in determining the controlling mind In *H.L. Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons* [1957] 1 QB 159 at 172 noted that:

"A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state and mind of the company and it is treated by law as such".
[651] Depending on the provisions of each respective company's by-laws and articles of association, if any.

prosperity of the corporation, 3) the selection and recruitment of a competent senior management team that ensures the efficient day-to-day running of a corporation, 4) risk identification and management, especially by ensuring the scrutiny and integrity of the company's financial control systems, 5) to ensure that the corporation is compliant with all other legal requirements, 6) to ensure proper succession planning that guarantees the sustainability of the company's growth, and 7) ensure good public relations with shareholders and other stakeholders to mitigate reputational risks of the company.

Impliedly so, and in line with the provisions of art 169[652] as discussed in chapter 4 of this work, directors (the board of directors) have a threefold function: 1) to serve as managers, 2) as advisors to the executive management and senior officers about management issues, but at the same time, 3) to serve as monitors and supervisors of management[653] of which they are part. In other words, they control and supervise themselves as managers of the corporation in the broader sense of the word as intended by and within the spirit of the law (art. 169). In practice however, these functions seem to be divided. There are those hired to manage and those appointed to advise, control and supervise the managers yet, when it comes to accountability (and liability thereof), this practical and functional distinction is ignored. With a few exceptions like where an individual director misappropriated a company's property, the general view is that directors are jointly and severally liable for the company's failures.

6.0.1. What are the duties of directors according to Rwanda's corporate governance norms?

Under Rwandan law, the directors' duties can be divided into two principal duties from which others may stem. These are: 1) the duty to act within the powers, the duty of loyalty *vis-à-vis* the company, and 2) the duty of care, skill and diligence which, as discussed in chapter 4 under 4.2.3, involves the application of both objective and subjective standards.

In principle under Rwandan law, each company is expected to set its own objectives either in the memorandum of incorporation for companies without articles of association, or in both the memorandum and in the articles of association. This shall then be considered the province of operation for both the company and for those acting in its name.[654] All directors have a duty to align corporate activities with the expectations of

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[652] Of the Law N°07/2009 of 27/04/2009 relating to companies, O.G N°17bis of 27/04/2009.

[653] Jonathan R. Macey, *Corporate Governance: Promises kept, promises broken*, Princeton University Press, Princeton, New Jersey, 2008, at p. 53.

[654] See for example art. 33 of the 2009 Rwandan Company Law that states:

the corporate constituents, which can be viewed through the objectives set, and the well-established standards as explained in chapter 4 that aim to ensure the avoidance of deviances from such set objectives. Even though engagements of the company with third parties going beyond the objectives shall not be invalid as article 33(2) states, acting ultra vires shall nevertheless expose the director to the risk of personal liability unless his business judgment was in the interest of the company and was approved by the company. Where such approval is missing, any interested party including a shareholder may seize the court in order to claim for reparation (to the company) and for damages resulting of acting ultra vires.

Other duties like the duty to act in the best interest of the company may flow from that. We have noted under chapter 4.2.2, that this duty is controversial especially when it comes to its application and enforcement. We note that the principal challenge is to answer the question "who decides and appreciates what is in the best interest of the company"? The answer may lead us to what in the American (precisely: the Delaware) legal system is known as the "business judgment rule".[655] This entails that it should in principle be left to the directors to decide what really is in the best interest of the company and that there is no reason to second-guess what these interests are[656]. One would wonder whether Rwandan judges would take the same position considering the corporate law's mixed approach of governance (stakeholder and shareholder approach). However, we note that the assumption from the American 'business judgment rule' is, to some extent, provided for in art. 213 of the 2009 Company Law where it says:

"Where articles of association of a company set out the objective of the company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within that objective, unless the articles of association expressly provides otherwise…"

[655] The business judgment rule is an American judicially created doctrine that protects directors from personal civil liability for the decisions they make on behalf of a corporation. This rule however, has been taken to be the least understood concept in the entire corporate field. See, Lyman P.Q. Johnson, Corporate Officers and the Business Judgment Rule, 60 BUS.LAW. 439, 454 (2005) ("Manne's statement about the rule remains as true in 2005 as when first made in 1967: the business judgment rule is 'one of the least understood concepts in the entire corporate field.'"); Henry G. Manne, Our Two Corporation Systems: Law and Economics, 53 VA. L. REV. 259, 270 (1967). Also quoted in: Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 Wm. & Mary Bus. L. Rev. 521 (2013), at 526.http://scholarship.law.wm.edu/wmblr/vol4/iss2/5.

[656] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), overruled by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (indicating that it is a presumption that in making a business decision the directors act on an informed basis in good faith and in the honest belief that the action was in the best interests of the company). Also quoted in: Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 William & Mary Bus. L. Rev. 521 (2013), http://scholarship.law.wm.edu/wmblr/vol4/iss2/5 (accessed on 24/04/2015).

"…The director's or officer's belief that the decision is in the best interests of the company shall be taken to be a reasonable one unless the belief is one that no reasonable person in his/her position would hold."

This implies that except where it is manifestly clear that there was a competition between a company and one or any of its agents (directors), there will be no breach of duty and the director shall not be held accountable and liable for his/her deeds.[657] The free zone for appreciation by the directors however, is limited by other duties like the duty to avoid a conflict of interest with the company, the duty to disclose any personal interests in any transaction in which the company is involved and the duty not to accept third party benefits at the expense of the company. Being fiduciaries to the company, it is noted that directors must at all times advance the company's interests and, by all means, must avoid that their personal interests are competing with those of the company[658]. The other principal duty is the duty to use reasonable care, skill, and diligence. This duty, laid down in art. 211 of the Company Law (as discussed in chapter 4.2.3) is insufficiently specified, which renders it difficult to evaluate in case of failure on the director's part.[659]

However, the standard criteria for selection of a board member, as set out in art. 176 of the 2009 Company Law seem to be too loose and lacking as to the required level of understanding and appreciation of this duty. This article does not set minimum requirements in terms of qualifications or experience and exposure but rather on social conduct and criminal record status alone. This means that discretion shall be left to the court to appreciate to which 'reasonably prudent person' the alleged director may be compared with. The survey conducted during this study has revealed a clear disparity between those directors who are aware and are well conversant with their duties and liabilities and those who do not know anything about their tasks as directors (but who are nevertheless enjoying the titles of directorship). So, who shall serve as the standard gauge?

We finally note that the Rwandan judicial system together with researchers should endeavor to further develop and clarify the duties set out in chapter 4. As explained in

[657] This was the case in *Prosecution v. Alfred Kalisa (RPA 0573/08/HC/KIG)* of 21/11/2008, popularly known as The BCDI case!

[658] See Articles 191 of the 2009 Company Law and art.191 bis stated in the 2014 amendment to the 2009 company law as presented in the Law N°14/2014 of 28/05/2014 modifying and complementing Law N° 07/2009 of 27/04/2009 relating to Companies as modified and complemented to date (Official Gazette No. Special of 29/05/2014).

[659] Said article states: "Every officer of a company shall exercise: (…) 2° the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

that chapter, the duties are scattered over different laws, notably provisions of company law and the criminal code, and they appear to be narrowly stipulated which may lead to directors' confusion as to their extent.

6.0.2. To what extent are company directors liable under Rwandan law?

Where there are duties and obligations, there are liabilities in case of violation of those obligations. This work has endeavored to highlight that directors' liabilities are provided for under Rwandan law albeit that such provisions, like the provisions on duties and liabilities, are scattered over various laws (company law, labour law, insolvency law, environmental law, tax law, contract law, and others) and regulations[660] which may complicate a director's quest to get acquainted with them. These liabilities may attract severe civil sanctions but also criminal sanctions, which may even include prison sentences. We note that some directors may find these sanctions inflicted upon them although they actually did not know about them.

Although liability sanctions are justified as they may provide company stakeholders with protection against management's misconduct and that in that respect directors' liability provisions are considered important and effective as compliance and risk-allocation mechanisms and may serve as a deterrent to intentional breaches of duties, we submit that they may not necessarily be an answer to some of the actual dilemmas of illiteracy in regard to duties some corporate directors in Rwanda are suffering from.

The current trend of corporate governance in Rwanda as indicated in chapters 3 and 4 shows that Rwandan law makes it difficult for corporate directors to hide behind the corporate veil (like before, under the 2009 Company law) and that corporate directors may now be accountable to their primary principals – the shareholders, but also to a number of other constituents including but not limited to employees, creditors, regulators, and environmental activist groups. The research shows that corporate directors are exposed to various individual liabilities including the classical ones like the civil liabilities emanating from directors' violation of fiduciary duties owed to the company, but also to new breeds of liabilities relating to for example, environmental degradation, fiscal frauds as well as non-compliance with statutory reporting requirements. What should be specifically frightening to directors, most of these liabilities have also become criminal offences under the 2012 Criminal Code[661].

[660]Especially in the mandatory corporate governance regulations by the Central Bank – BNR for both insurance and banking institutions.
[661]Organic Law N° 01/2012/OL of 02/05/2012 Instituting the Penal Code, Official Gazette nº Special of 14

However, these liability provisions are based on the assumption that the tasks and duties are entrusted to directors being stewards who are competent and able to implement them. We submit, however, that this assumption is disregarding the Rwandan corporate environmental context. Upholding the *one-size-fits-all* principle – that is assuming that the misbehavior of directors is always intentional and well calculated in order to squander the investments of the capital providers – the shareholders - is not always justified because it is not justified to treat ignorant directors in the same way as those who knew what they were doing. What is actually needed in Rwanda is better training of directors instead of more liability provisions. Liability provisions do not have any deterrent effect if directors do not know about them. The compensatory effect of civil liability of directors in Rwanda is also questionable, because the D&O liability insurance is not practiced.

6.0.3. Do company directors, appointed as such, understand the extent of the duties a director owes to the company itself, its shareholders, its creditors, as well as the community at large under Rwandan law and the liabilities that may arise when these duties are violated?

It has been revealed in our research findings as noted in particular under chapter 5.2.5 of this work that the majority of directors questioned do not actually understand their duties. This is due to, among others, the way directors were appointed as discussed under 5.2.2 and whether they went through an induction or not, the way they are empowered and tasked to function (5.2.4) and to whom they are actually serving. This conclusion applies equally to directors of SMEs and large companies. It will be obvious that they cannot imagine to be held liable for any duty that they do not know is theirs. Nevertheless, where a company faces management problems that may lead to its failure to meet its obligations, we have noted that the individual as well as the joint liability of board members becomes the next option for the law enforcers, irrespective of whether directors knew about their duties or not and the possible liabilities in case of breach of these duties. We contend that, upon appointment, the company has a duty to assess the competences and knowledge and skills gap for every director. That must be followed by a bid to bridge the skills gap identified and empowering the director to clearly understand his duties and what he is called for in order for him to efficiently perform to the fullest of his abilities and consequently be accountable where his performance is questionable.

Where one of the challenges in the developed economies today would be to find those who are willing to serve on boards[662] due to their fear of the potential liabilities attached to their directorship duties despite their qualifications or in relation to their poor remunerations[663], we have noted that the situation is a bit different in Rwanda. According to our survey findings, many of these directors, especially the non-executive directors (NEDs) 1) lack the necessary knowledge, skills and competence to carry out their duties[664], 2) sit on various boards and yet still have their principal job responsibilities, 3) are often nominated not due to their skills and abilities, but rather due to unprofessional relationships with the nominating or proposing authority like the majority shareholder(s), and 4) are characterized by overreliance on the executive directors' guidance where they were instead supposed to help them as well as the company by challenging the executive directors' proposals and ideas for a constructive decision making processes[665].

As a consequence, we suggest that in assessing to what extent liability of directors should ensue; an examination should be conducted whether they (directors) actually had the requisite knowledge and skills sufficient for them to efficiently and professionally dispense their agency duties. Only when this is confirmed, the control and supervision (by the board of directors) ought to have been as effective as it had been entrusted to a team of specialists and ought to have avoided the bureaucratic costs for collective decision-making by the entire membership (shareholders). Furthermore, the available infrastructural environment should have been quite enabling and conducive for directors to honestly add and maximize value to the shareholders' investments. As already mentioned, where there is one shareholder (or a few connected shareholders) who doubles as a board member, his authority overwhelms the other directors in the decision-making process. And finally, an assessment of whether the legal and regulatory framework for their (directors') functioning was well comprehensible by them should be a factor to consider by the courts. In other words, the subjective standard test as set out in 4.2.3.2 should be taken into account where appropriate.

The lawmakers apparently have introduced severe liabilities and criminal sanctions on the assumption that directors know or should have known the law which is far from

[662]Especially on Audits and Financial committees.
[663] Even though what they are being currently paid may sound quite exorbitant to the other part of the world compared to what they themselves are getting.
[664] The "rationally ignorant" theory that initially applied to shareholders in relation to their passive role in the management of the corporations is today equally applying to some NEDs!
[665] Lawrence E. Mitchell, 'Structural Holes, CEOs, and Informational Monopolies: The missing link in Corporate Governance', *70 Brook. L. Rev. 1313,* 2004-2005, at 1, suggests that it is a generally accepted principle that the Board is the *ultimate monitor, the failsafe for managerial excesses and the circuit breaker in times of corporate crisis*.

reality. That leaves courts with the harsh task to apply the law to people that have no knowledge of it. Apart from taking the subjective test criteria into account where appropriate, we contend that it is also necessary for both the government and companies to take steps to heighten awareness among directors!

6.0.4. who has the capacity to sue on behalf of the company that has suffered due to its director(s)' wrong deeds?

As elaborately discussed in chapter 3 of this work, and as emphasized by art.169 of the 2009 Rwandan company law, we have seen that it is the directors who are managing, controlling and supervising the company on behalf of its shareholders. They stand for the company itself but also for the shareholders' investments into that company. The problem comes then when those who are the managers, controllers and supervisors are the ones who are wronging the company and, the question is, who would then save or recover for the company if not its directors? The answer to this question has been provided under 4.4.6 of this work where it was found that in such a case there are three options:

1) where not all directors are involved, the remaining (innocent directors) shall represent the company by suing the wrongdoing ones in recovery of whatever the company lost or suffered due to their deeds;

2) where all directors were involved or where shareholders do not hold any more trust in even those that are remaining, or where the remaining ones find no interests in suing their colleagues (defaulting/wrongdoing directors), the interested shareholders forming a group that constitutes a majority required as per their articles of association may file a shareholders' derivative suit / action in the interest and on behalf of the company;

3) and, lastly, in case the company is undergoing insolvency proceedings, the administrator so appointed would have, and normally he has, the powers to carry out any legitimate action including a law suit against whoever´s actions might have led to the company's insolvency. This is always done first, in protection of the company, and second, in order to raise enough assets that would meet or at least minimize the company creditors' loss as it goes through its insolvency proceedings.

Rwandan law widens the power to sue the director in case of breach of duty to various individuals including any shareholder interested, a debenture holder, a creditor, any member of the board, and any other interested person (arts. 222-225, and 310 of the 2009 Company law). It is obvious that the State can act in case of criminal liabilities.

We contend that due to the low or inexistent level of shareholders' activism in Rwanda, corporate governance practices are highly codified. We also conclude that this low level of activism will persist as long as corporate governance literacy and familiarity to practices is not rooted within the market players themselves. Government enforcement institutions like police, prosecution and the judiciary remain the substitute options for the protection of corporate stakeholders especially the minority shareholders. This is again something justifying the pre-maturity of the self-regulatory mechanisms as of today or in the near future.

6.0.5. What is the Rwanda's corporate governance model?

We have noted especially under **3.3.4** that it is not clearly explicit to determine to which corporate governance model Rwanda ascribes. However, we note that the statutory approach as per the company law 2009 especially considering the provisions of art. 212 of the same law, one would rush to conclude that it stands for the shareholder value approach. But when one analyses the different corporate governance codes including both the guiding code by the Private Sector Federation but also the ones as issued by the regulatory institution (Central Bank - BNR), they appear to go beyond the shareholders' own interests to cater too, for the other stakeholders as well, thus leaning more to the stakeholder value approach / model.

Thus, we contend that Rwanda's corporate governance model is a mixed one, something coming close to the UK's enlightened shareholder value as both the interests of shareholders but also those for other company's stakeholders are to some extent considered.

6.1. Recommendations

We note that a chain of entities, authorities and institutions have the duty to facilitate corporate performances by educating, training and empowering directors before thinking about their punishments. To facilitate ethical, efficiency, and professional performance by directors which ultimately leads to economic development, different stakeholders must be involved in the capacity building and empowerment of the boards of directors. This applies especially to SMEs in developing countries such as Rwanda where apart from the problem that SMEs may not have sufficient resources to implement such capacity building, they may even be unaware of its importance.

For a Board to effectively carry out the tripartite functions (direction, management and supervision – art.169) properly and professionally, the Board's composition [666], members' selection criteria and procedures have to be elaborate and particularly, should be independent of intervention by the company management so as to avoid such management influences and thereby preserving the independency and professionalism of the Board. This has to be made a statutory requirement for all Boards. William Douglas[667] argued as far back as 1934 in favor of such statutory rules requiring a majority of board seats to be occupied by individuals not affiliated at all with the management.

Conflicting interests between the executive board members and the company, negligence or even lack of knowledge about their duties and responsibilities in the company's management, coupled with lack of commitment among others by the other board members (the NEDs) may render companies into turmoil. This may highly be influenced by either:

1) The fact that corporate directors, whether executive or non-executive, feel that they can operate with total independence under the cover of the corporate veil as guaranteed by corporate legislation and so, believe that they cannot be personally held responsible for their actions or inaction. This work has elaborately shown that this position can no longer be taken. Various laws clearly condemn and sanction such laissez-faire behavioral attitude of directors.

2) Lack of strict corporate regulatory oversight. Whereas a greater improvement in terms of corporate governance principles ownership was noted in banking and financial institutions due to relatively close supervisory commitment from the regulator – The Central Bank (BNR) with its mandatory corporate governance regulations on one hand, the concept of corporate governance on the other hand appeared yet not to be entrenched in other sectors of production especially within the SMEs. It should be noted that, the regulatory role advocated here is not for a market police but rather, a market facilitatory role of the regulator by ground-laying that leads to professional business conduct and thereby leading to a flourishing and sustainable economic growth.

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[666] Board composition being a wider term, and according to FitriyaFauzi and Stuart Locke in "BOARD STRUCTURE, OWNERSHIP STRUCTURE AND FIRM PERFORMANCE: A STUDY OF NEW ZEALAND LISTED – FIRMS, ASIAN ACADEMY of MANAGEMENT JOURNAL of ACCOUNTING and FINANCE (AAMJAF), Vol. 8, No. 2, 43 – 67, 2012, pg. 46; it includes the "board demographics, board structure, board recruitment, board member motivation and criteria, board education and evaluation, and board leadership".

[667] William O. DOUGLAS, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1314-15 (1934); see also ROBERT A. GORDON, BUSINESS LEADERSHIP IN THE LARGE CORPORATION 347-50 (1945).

For the corporate governance challenges highlighted above to be turned around into governance opportunities instead, a holistic set of recommendations are suggested hereunder.

To begin with, we recommend that the 2009 Rwandan company law as amended to date be revised and that the duties of corporate directors be highlighted and elaborated on since the governance of the corporate institution is key to its success. Such a process may be successful where the registrar general's office spearheading the process involves other stakeholders like directors themselves, who may be drawn from different (size) companies, regulators (like the Central Bank, RURA, etc.), professional associations (bankers, insurers, lawyers, accountants, etc.) enforcement authorities like the police, prosecution, the bar association and the judiciary. This is suggested because a common understanding of issues (duties and liabilities in our case) by the whole spectrum of stakeholders would simplify its application and enforcement.

The same review should also elaborate more on the powers of shareholders and other stakeholders especially on the appointment and removal of directors. Some companies may have these subjects further elaborated by their articles of association. But since the government policy has preferred having these articles of association as optional for companies, a more detailed company law would be preferred; after all, the company law substitutes the articles of association for those companies that preferred not to have them. Company law may for example make it mandatory for each company to have a nominations committee of its Board that may be composed of shareholders or any other appointed persons that may closely work with the shareholders in elaborating the criteria and process of recruitment to and relieving directors thereof from their duties which they may submit as recommendations to the full Board.

Whereas it seems clear that the Rwandan corporate governance policy[668] as well as the revised corporate governance code - both of which are of now in their final stages of publication - may suggest subscribing to the *comply-or-explain* principle, we recommend that this should be taken with caution. We say so because, this principle suggests that a company is expected (in the actual sense, not obliged) to apply a certain set of practices in a code of corporate governance (or of best practices) and where it finds it inappropriate to apply a practice, it must state the reasons in a directors' report that is part of the annual accounts. Failure to give a proper explanation means that the company has not complied with the code. Although this would be taken as an admirable way of allowing flexibility and thus, avoiding a one-size-fits-all mandatory

[668] See p. 43 (on comply or explain) in the draft Corporate Governance Policy for Rwanda, submitted to Rwanda Governance Board (July 2014) and presented at the stakeholders' workshop at Lemigo Hotel on 26th Nvember 2014, by ADS Consulting Firm in association with Trust Law Chambers.

compliance, we submit that it may weaken the directors' willingness to abide by the code's provisions, especially since most of the SMEs in Rwanda may fall under the category of those companies that are not obliged to file their annual reports to the office of the Registrar General[669].

Besides, the principle (comply or explain) suggests that there should not be a regulatory institution to enforce it, but that the market should appreciate whether the reasons provided for not complying are convincing or not[670]. We argue that this kind of self-regulation is only possible where the legal and regulatory environment is well and sufficiently in place; where the level of understanding and knowledge of corporate operations and functioning is understood well by both shareholders and their governance agents – the board of directors, and where the market itself is properly developed and properly regulated by other surrounding factors like proper flow of and easy access to market information. All such infrastructural aspects are a pre-requisite to a self-regulatory environment.

On the basis of the findings of the survey carried out in this study, it seems that the *comply-or-explain* principle cannot work well in Rwanda, where directors (and shareholders) exhibit a clear gap of knowledge and awareness of their duties and the consequences of their breach. We recommend that for companies to be given such leeway and discretion to decide for themselves to comply with the established code or to explain why their deviations to be not rushed to. This is because such an approach (comply or explain) would necessarily require the parties concerned to be at a certain level of understanding of their duties, the laws and the consequential liabilities there attached that to our opinion, and to Rwandan context in particular, needs to be nurtured and assessed before letting it go by itself. For self-regulation to be effective as McCahery and Vermeulen[671] contend, companies ought to be to a large extent capable of drafting and adopting contractual mechanisms by themselves to create credible commitments that help to protect investors against any abusive tactics by the firm's agents or any other. We contend that Rwanda's economy that is dominated by the mushrooming SMEs is not yet there.

In the same line of argument, we instead recommend for a reinforcement of the Office of the Registrar General which we find at the moment under-staffed and yet, as already

[669] See Articles 251 and 258 of the Law N°07/2009 of 27/04/2009 relating to companies, OG N°17bis of 27/04/2009.

[670] See: Keay, Andrew R., Comply or explain: In need of Greater Regulatory Oversight? (September 10, 2012), available at: http://ssrn.com/abstract=2144132 or http://dx.doi.org/10.2139/ssrn.2144132 , accessed on 28/04/2015.

[671] Joseph A. McCahery and Erik P.M. Vermeulen, Corporate Governance of Non-Listed Companies, Oxford University Press, Oxford, 2008 at 218.

indicated under our chapter 2.2.3.3.1 (last paragraph) of this work, has an extremely wide scope of activities and responsibilities. This office should have, for example, a corporate supervisory (or monitoring and evaluation) section that would regularly receive and evaluate reports and monitor whether the operations of companies are in accordance with set principles (whether set by law/statute, articles of associations, corporate governance codes, other regulations, etc). It could then be charged with the assessment of a corporation's business health based on the reports submitted and timely intervene where necessary, rather than waiting for companies to be on their death-beds, leaving the stakeholders no option but to go to court in an attempt to claim a share in the company's remains[672], which are in most cases insufficient or inexistent due to inefficiencies in control and supervision that have actually led to its failure.

A corporate supervisory department as suggested above could gather statistical data (information repository) of corporate entry, performance or even failures, adaptations to corporate best practices and others instead of relying on speculative assumptions. Moreover, where companies expect such regular surveys into their operations and functioning, self regulation based on the comply or explain principle could actually work.

The same office would liaise with other private (private sector) and other public initiatives (from other specific regulators) initiatives in organizing for trainings, stakeholders' awareness campaigns on the importance of good governance practices and what it entails and peer exchanges, all leading to an improved corporate management environment, which in turn impacts positively on economic growth.

Alongside the contributions from the revised company law and the institution of the office of the Registrar General, we recommend the establishment of a private institution in the form of a Corporate Governance Institute / Centre in Rwanda by a private sector initiative or by the training institutions that would be charged with planning, developing and enforcing the education and training programs especially for board members, company secretaries (as compliance officers) and shareholders of both listed and non-listed companies to ensure that they are competent and reliable players in the corporate governance. Such institution would also be instrumental in organizing forums and events (seminars and conferences) for peer learning but also net-working exercises that would indirectly bring about a positive change. It is assumed that in such organized events or forums, board members would learn about their duties from each other through experience sharing even much more than they would do from books or lecture-halls.

[672] Like what happened in the case *Registrar General v. Rwandatel Ltd* and later, *Registrar General v. Rwandatel in Liquidation.*

We also recommend that instead of drafting and promulgating a new code of corporate governance or best practices as suggested in the Rwanda's Corporate Governance policy Framework, a draft of which was submitted by the consultants to the RDB in July, 2014, harmonization of the existing codes[673] and regulations with the new corporate governance policy should be considered. After all, these codes were initiated by the private sector, which must ultimately implement whichever code of corporate governance that shall be published and by the regulator (in this case BNR) which will still remain the regulator for its specific sector (financial). Thus, to avoid frustration of their respective efforts as earlier employed in developing such codes and regulations and for easy ownership of the process, a new and improved comprehensive version that builds on what already exists should be considered.

Alongside the revised version of a 'harmonized' code of best practices or corporate governance, which should apply to both listed and unlisted companies, we recommend specific additional standards for particular sectors of public concern like financial services sector. For the listed companies, a higher standard to be developed by the Capital Markets Authority (CMA) should be imposed.

To individual corporations in general, it is recommended that they establish, according to their respective structures, a board recruitment and succession mechanism and planning including term limits for board members that would enable companies' access to the initiatives and networks from new entrants. This should also go hand in hand with directors' motivation either through privileges or salaries that relate to and further directors' performances. This would also mean that a fair and professional evaluation systems need to be established in companies as one of the best practices even without referring to the mandatory or the codified suggested practices but as a corporate tradition and best practice.

We also recommend the empowerment and use of corporate secretarial services to those companies that already have them and encourage those that haven't yet established such services to do so. Company secretaries as compliance officers of companies would, as the law empowers them to[674], improve a lot in as far as corporate governance and particularly the role of directors is concerned.

[673] Like the Private Sector Federation (PSF)'s "Guiding Code of Corporate Governance" published in July 2009. Available at: http://www.psf.org.rw/IMG/pdf/corporate_governence_en.pdf (accessed on 1/5/2015).
[674] Art. 11 of the Law N° 14/2010 of 07/05/2010 Modifying and Complementing Law N° 07/2009 of 27/04/2009 Relating to Companies, Official Gazette n° special of 14/05/2010. A discussion on the role of the company secretary has been discussed under chapter two of this work.

SUMMARY IN DUTCH

CORPORATE GOVERNANCE EN DE AANSPRAKELIJKHEID VAN BESTUURDERS VAN VENNOOTSCHAPPEN: HET GEVAL RWANDA

Bedrijfsschandalen zijn in Rwanda sinds 2000 of zelfs kort ervoor aan de orde van de dag, zowel bij *grote* ondernemingen zoals commerciële banken[675] als bij kleine en middelgrote bedrijven[676]. Zo zouden er bijvoorbeeld tegen het einde van juni 2006 negen microfinancieringsinstellingen zijn gesloten vanwege corruptieschandalen, een gebrek aan good practices bij microfinancieringsinstellingen (MFI's), en slecht beheer van fondsen[677]. Bestuurders en functionarissen van bedrijven verschuilden zich opzettelijk achter de structuur van de rechtspersoon, of werden hierdoor onbewust gedekt bij het plegen van diverse soorten misbruik. Onlangs hebben echter alle stakeholders - aandeelhouders, met name de minderheidsaandeelhouders, crediteuren, toezichthouders[678] en wetgevers[679] zich op het standpunt gesteld, dat het bestuurders niet is toegestaan om zich te blijven verschuilen achter de 'corporate veil'. Op dit terrein wordt een toename van het aantal rechtsprocedures verwacht. Bovendien maken andere stakeholders zich zorgen over de handelwijze en de onzorgvuldigheid van zowel directeuren als commissarissen in de directiekamers. Het schort aan het opstellen en opvolgen van een bedrijfsbeleid, hetgeen vergaande consequenties heeft voor alle stakeholders, met inbegrip van de aandeelhouders. De wetgever in Rwanda heeft ter beperking van misbruik door bestuurders diverse wetten uitgevaardigd inzake de verplichtingen van bestuurders en, indien nodig, hunaansprakelijkheid in geval van schending van deze verplichtingen. Deze verplichtingen en aansprakelijkheden zijn echter verspreid over talloze wetten en het vermoeden is dat de desbetreffende bestuurders mogelijkerwijs niet op de hoogte zijn van de inhoud en vindplaatsen ervan, noch van het feit dat zij daadwerkelijk persoonlijk aansprakelijk kunnen worden gesteld bij het uitoefenen van hun vennootschappelijke verplichtingen. Aansprakelijkheid als gevolg van slecht management en de niet-naleving van de verantwoordingsplicht is

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675 Bijvoorbeeld de gevallen van de Bank of Commerce, Development and Industry (BCDI) en de *Banque Continentale Africaine* (BACAR).

676 Met name bij microfinancieringsinstellingen.

677 Zie: Microfinance Transparency, Rwanda Country Survey report. Te vinden op http://www.mftransparency.org/wp-content/uploads/2012/05/MFT-RPT-105-EN-Country-Survey-Rwanda.pdf (bekeken op 29/4/2015).

678 Dit heeft ertoe geleid dat de Centrale Bank (BNR) corporate governance voorschriften voor financiële instellingen heeft uitgevaardigd.

679 De nieuwe Wet inzake het Vennootschapsrecht (van 2009 met wijzigingen tot op heden) die sterk de nadruk legt op corporate governance en compliance.

ongetwijfeld een onderdeel corporate governance. In het kader van goede corporate governance ligt het accent sterk op aansprakelijkheid, omdat de hand over hand toenemende schandalen laten zien dat sommige vennootschappen enkel worden opgericht om een middel te creëren, via hetwelk gewetenloze individuen of nalatige beheerders schulden en andere verplichtingen ontlopen onder de dekmantel van een bedrijf.

De centrale vragen voor dit onderzoek waren derhalve:

(iv) *Welke verplichtingen hebben bestuurders volgens de corporate governance normen van Rwanda?*

(v) *Hoe ver reikt de aansprakelijkheid van bestuurders van vennootschappen op basis van Rwandees recht?*

(vi) *Zijn als zodanig benoemde bestuurders van vennootschappen, op de hoogte van enerzijds de reikwijdte van de verplichtingen van een bestuurder jegens de vennootschap, haar aandeelhouders, haar crediteuren, evenals de gehele maatschappij op basis van Rwandees recht en anderzijds de uit een schending van deze verplichtingen mogelijkerwijs voortvloeiende aansprakelijkheid?*

Grond voor en doel van dit onderzoek

Dit onderzoek is gebaseerd op het feit dat, ondanks de enorme hoeveelheid literatuur over corporate governance in het algemeen met betrekking tot de ontwikkelde landen, er nog weinig is geschreven over de minst ontwikkelde landen. En zelfs de weinige literatuur over dit onderwerp, vertoont een neiging tot veralgemening. Een analyse van corporate governance vereist echter onderzoek van een individueel land, waarbij men nagaat welke factoren hebben geleid tot het specifieke gekozen governance systeem[680]. Zo vindt men in de literatuur bijvoorbeeld niets over de vraag hoe de bewustwording van bestuurders en functionarissen van hun verplichtingen en hun mogelijke aansprakelijkheid in het algemeen zou kunnen worden aangepakt. In sommige economieën worden bestuurders op een georganiseerde wijze gerekruteerd,

680 Babic V., Corporate Governance Problems in Transitional Economies, p.1. Beschikbaar op: http://www.afic.am/CG/CGProblemsInTransitionEconomies.pdf Gelezen op 30/11/2011.

ingewerkt en permanent geschoold, terwijl men er elders van uitgaat dat bestuurders op de hoogte zijn van hun verplichtingen en derhalve van hun aansprakelijkheid, blijkbaar in de veronderstelling dat deze beschikken over de vereiste kennis en vaardigheden, of op basis van het bekende maar ruime adagium dat *'iedereen wordt verondersteld de wet te kennen'*. Het laatste is het geval in Rwanda. Wij stellen dat het ontbreken van deze kennis en dit besef ertoe kunnen leiden dat bestuurders hun taken onbedoeld inefficiënt uitvoeren en dat, aangezien een corporate governance analyse dient te worden gemaakt tegen de achtergrond van de specifieke ontwikkeling en het sociale, economische, juridische en politieke stelsel van elke jurisdictie, een studie naar de bijzondere kenmerken van Rwanda noodzakelijk was.

De aansprakelijkheid van de individuele bestuurder vloeit voort uit de algemene principaal/vertegenwoordigingsproblematiek, omdat sommige tekortkomingen van de vennootschap worden toegeschreven aan het tekortschieten van bestuurders in de nakoming van hun verplichtingen, hetgeen kan leiden tot aansprakelijkheid van de tekortschietende bestuurders. Tegenwoordig is, zoals reeds gesteld, de door bestuurders eeuwenlang genoten bescherming (corporate veil) tanende, omdat in veel landen, inclusief Rwanda, het vennootschapsrecht expliciet voorziet in gevallen waarin de afscherming in de vorm van de corporate veil dient te worden genegeerd of doorgeprikt[681], zodat de individuele bestuurder of alle bestuurders tezamen hoofdelijk in rechte kan/kunnen worden aangesproken.[682] Men kan zich afvragen of deze strenge wetgeving, met name wat betreft de persoonlijke aansprakelijkheid voor bestuurders, volstaat om de specifieke corporate governance problemen van Rwanda op te lossen.

De huidige Rwandese Wet inzake vennootschappen (2009) bevat in vergelijking met de voorgaande wet (1988), wel bepalingen aangaande diverse corporate governance onderwerpen. Men heeft getracht misbruik door bestuurders tegen te gaan door het beperken van de handel in aandelen[683], het invoeren van openbaarmakingverplichtingen[684], het (voor het eerst in het Rwandese recht) opleggen van de verplichting tot een behoorlijke vervulling van de taak[685], en de aansprakelijkheid

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681 Er zijn verschillende uitdrukkingen in omloop om deze doorbraak van bestuurdersaansprakelijkheid (penetration through the corporate veil) aan te duiden. De Amerikanen spreken over '*piercing the corporate veil*', terwijl de beleefde Engelsen het hebben over '*lifting the corporate veil*'.

682 Gary Slapper en Steve Tombs, Corporate Crime, Pearson Longman, Longman Criminology Series, 1999, p.31.

683 Art. 201 van de Wet inzake vennootschappen, Nr. 07/2009 d.d. 27/04/2009, als gepubliceerd in het Staatsblad (Official Gazette) Nr. 17bis d.d. 27/04/2009.

684 Artt. 199 - 200

685 Artt. 211

van bestuurders en functionarissen van vennootschappen[686]. Men heeft echter bijvoorbeeld nagelaten te definiëren, wanneer bestuurders van een vennootschap moeten handelen voor en ten behoeve van de vennootschap en wanneer niet, en hoe dan te handelen. Wanneer en hoe sprake is van een doorbraak van bestuurdersaansprakelijkheid conform Rwandees recht. Deze onderwerpen werden geanalyseerd in deze studie.

Rwanda is voorts overgestapt op een hybride systeem, dat niet meer zoals voorheen zuiver 'civil law' is, maar ook niet zuiver 'common law', en bijgevolg wat corporate governance betreft niet voor de stakeholder-, noch voor de aandeelhouderbenadering kiest. Integendeel, men heeft getracht om de goede praktijken van beide systemen over te nemen. Dit houdt ongetwijfeld in dat er in de nabije toekomst een code voor bedrijfsethiek zal worden uitgevaardigd, die de best practices uit beide systemen incorporeert in één geharmoniseerde code[687]. Welke benadering zal deze code hanteren: de aandeelhouderbenadering of de stakeholderbenadering? Dit is essentieel, omdat het corporate governance model bepaalt wie de belangrijkste uiteindelijke belanghebbenden zijn in bedrijfsrechtelijke aangelegenheden, en hoe de hieruit voortvloeiende verplichtingen en aansprakelijkheid van de bestuurders worden uitgebreid of beperkt. Op basis van de keuze voor een corporate governance model, is het mogelijk aan te geven wat het uiteindelijk doel van de vennootschap is of zou moeten zijn, en bijgevolg welke doelen de bestuurders moeten of mogen nastreven. Op basis van een dergelijk model kan men beoordelen aan wie de bestuurders van de vennootschap verantwoording dienen af te leggen. Leggen zij enkel aan de aandeelhouders verantwoording af, of ook aan andere stakeholders?

Naast de centrale onderzoeksvragen worden daarom in deze studie ook de volgende vragen aan de orde gesteld:

- Welk corporate governance model past men toe in Rwanda?
- In welke mate kan de bestuurder van een vennootschap of enige andere functionaris in deze positie persoonlijk aansprakelijk worden gesteld voor zijn/haar fout, en in welke mate kan deze zich, ondanks zijn/haar handelingen, juridisch verschuilen achter de vennootschapsvorm naar Rwandees recht;
- Wie is bekwaam om in rechte op te treden tegen de zich misdragende bestuurder?

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686 Artt. 212, 214, 218, e.a.

687 Een conceptnota inzake het corporate governance-beleid met het doel te komen tot een geharmoniseerde code voor corporate governance en best practices werd op 26 november 2014 besproken in een validatieworkshop in Hotel Lemigo, Kigali, en voorgestaan door het Kantoor van de Registrar General (ORG) van de Rwanda Development Board (RDB).

- Dient de vennootschap altijd op te komen voor de aansprakelijkheid van haar bestuurders, zelfs indien deze nalaten datgene te doen, wat een persoon met hun (van de bestuurders) kwalificatie, positie en status redelijkerwijs zou hebben gedaan;
- Erkennen bestuurders van vennootschappen de reikwijdte van hun verplichtingen en de bij een schending hiervan conform het Rwandese recht uit deze verplichtingen volgende aansprakelijkheid?

Deze studie onderzoekt in de eerste plaats Rwandees recht, maar omdat het Rwandese rechtsstelsel niet vrij is van externe invloeden, wordt er zo nu en dan aandacht besteed aan andere stelsels. De onderzoeker houdt er echter rekening mee, dat corporate governance altijd moet worden bekeken binnen de context van een bepaald systeem, in casu de Rwandese context. In deze studie zijn de termen 'onderneming', 'bedrijf' en 'vennootschap' uitwisselbaar; daarnaast omvat een mannelijke aanduiding zoals 'hij', 'hem' of 'hemzelf' altijd tevens een vrouwelijke aanduiding als 'zij', 'haar' of 'haarzelf', en vice versa. Vermeld dient ook te worden dat verwijzingen naar bepalingen van Rwandees recht zonder enige precisering betrekking hebben op de Rwandese Wet inzake vennootschappen *Nr. 07/2009 d.d. 27/04/2009,* zoals gepubliceerd in de *Official Gazette Nr. 17bis d.d. 27/04/2009* en zoals gewijzigd en bijgewerkt tot op heden. De in deze studie vermelde buitenlandse jurisprudentie dient enkel ter informatie; onder geen enkele voorwaarde mag deze worden geacht bindend te zijn in Rwanda.

De gehanteerde onderzoeksmethodologie

Voor dit onderzoek werd deels een benadering op basis van de doctrine[688] en deels een empirische of sociaal-juridische methodologische benadering gehanteerd. Dit houdt in dat voor sommige onderdelen van het onderzoek een analyse werd gemaakt van de doctrine door het analyseren van documentatiemateriaal zoals juridische literatuur, jurisprudentie (indien beschikbaar), wetgeving en internetdocumenten, terwijl daarentegen bij de bestudering van de vraag of de bestuurders zich bewust zijn van hun taken en verplichtingen, evenals van hun aansprakelijkheid, de voorkeur uitging naar een sociaal-juridische aanpak. In deze laatste categorie wilden wij een steekproef

688 Hutchinson, *Researching and Writing in Law*, (2e druk), Pyrmont, NSW: Lawbook Co., 2006, pag.7-8, 19: Onderzoek van de doctrine is het onderzoek dat '*is gebaseerd op boeken, met een focus op het lezen en analyseren van primair [zoals wetgeving en jurisprudentie] en secundair documentatiemateriaal [zoals juridische woordenboeken, tekstboeken, krantenartikelen, annotaties en juridische encyclopedieën];* Hutchinson definieert onderzoek van de doctrine als het *'Onderzoek dat een systematisch overzicht verschaft van de regels die betrekking hebben op een specifieke juridische categorie, de verhouding tussen de regels analyseert, een uitleg verschaft van probleemgebieden, en misschien de toekomstige ontwikkeling voorspelt' (pag.7).* Ook geciteerd in: Mike McConville en Wing Hong Chui, *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, pag. 47.

doen uit verschillende vennootschapscategorieën, vragenlijsten zo ontwikkelen dat deze ingevuld zouden worden door verschillende bestuurders, de vragenlijsten verzamelen, ze analyseren en de bevindingen presenteren. Dit vormde een middel om vast te stellen 1) of corporate governance wordt gewaarborgd door bestuurders die zich bewust zijn van het belang en de juridische consequenties van hun positie, en 2) of deze bij het schenden van hun verplichtingen al op de hoogte zijn van de omvang van hun persoonlijke en hoofdelijke aansprakelijkheid.

Voor deze specifieke studie werd een combinatie van bestudering van de doctrine en hantering van sociaaljuridische methoden geschikt geacht, omdat de antwoorden op onze onderzoeksvragen niet konden worden gevonden in de juridische boeken, wetten, juridische artikelen of tijdschriften, noch in enige binnenlandse of buitenlandse wetgeving. We stelden vast dat, ondanks het feit dat Rwanda enkele wetsbepalingen inzake bestuurdersaansprakelijkheid kent en de veronderstelling dat bestuurders de bepalingen kennen[689], het noodzakelijk was om de kloof tussen de 'law in books' en de 'law in action' te onderzoeken en begrijpen.

Ter beantwoording van de eerdergenoemde onderzoeksvragen is het werk verdeeld in zes hoofdstukken. Hoofdstuk een introduceert de algemene vennootschapscontext en het onderscheid tussen het bedrijf, het aandelenbezit en het management. Vennootschapstheorieën, m.n. de 'entity theory' (soms ook de juridische theorie genoemd) en de 'nexus of contracts theory' (soms ook de economische theorie genoemd) worden besproken. In de hoofdstukken twee en drie volgt een uitvoerige behandeling van het landschap en het kader van corporate governance tegen de achtergrond van de evolutie van vennootschapsrecht en corporate governance in Rwanda, waar een belangrijke verschuiving waarneembaar is van een civil-law benadering naar een common-law benadering. Uit het onderzoek blijkt, dat Rwanda vandaag de dag op het gebied van governance een combinatie voorstaat van een aandeelhouder- en een stakeholderbenadering. De hoofdstukken twee en drie behandelen ook de wettelijke en praktische bijdragen van diverse instellingen aan de ontwikkeling en het bestuur van vennootschappen in Rwanda, evenals aan het begrip van corporate governance als een internationaal concept. Hoofdstuk vier beschrijft de reikwijdte van de wettelijke verplichtingen en de aansprakelijkheid van bestuurders, zoals deze gelden onder huidig Rwandees recht; het laatste hoofdstuk (hoofdstuk vijf) geeft een overzicht van de bevindingen resulterend uit een in de periode 2012 tot medio 2013 uitgevoerde enquête, waarna de conclusie en de aanbevelingen volgen.

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689 Op basis van het algemene beginsel "*ignorance of law is no excuse*" – "*Nul n'est censé ignorer la loi"*!

Bevindingen van deze studie

Hierna volgt een samenvatting van de bevindingen van deze studie per onderzoeksvraag.

Welke verplichtingen hebben bestuurders conform de Rwandese corporate governance normen?

Volgens Rwandees recht kunnen de verplichtingen van bestuurders worden verdeeld in twee hoofdcategorieën, waaruit andere verplichtingen kunnen voortvloeien. Deze zijn: 1) de verplichting om te handelen binnen de vertegenwoordigingsbevoegdheid, de loyaliteitsverplichting jegens de vennootschap, en 2) de in hoofdstuk 4 sub 4.2.3. besproken verplichting tot een behoorlijke taakvervulling, waarvoor zowel objectieve als subjectieve normen gelden.

Krachtens Rwandees recht dient elke vennootschap in beginsel haar eigen doelen te vermelden, ofwel in de akte van oprichting voor bedrijven zonder statuten, of in zowel de akte van oprichting als de statuten. Dit wordt dan geacht het werkdomein te zijn, zowel voor de vennootschap als voor degenen die handelen in naam van de vennootschap. [690] Alle bestuurders zijn gehouden om de activiteiten van de vennootschap op één lijn te brengen met de verwachtingen van de stakeholders, die zijn af te leiden uit de gestelde doelen evenals de in hoofdstuk 4 genoemde gevestigde normen, die beogen afwijkingen van deze gestelde doelen te voorkomen. Ofschoon de tussen de vennootschap en derden in strijd met het doel gemaakte afspraken conform artikel 33 lid 2 geen nietigheid tot gevolg hebben, loopt de bestuurder bij een ultra vires handeling het risico van persoonlijke aansprakelijkheid, tenzij zijn zakelijk oordeel het belang van de vennootschap diende en werd goedgekeurd door de vennootschap. Indien deze goedkeuring ontbreekt, heeft iedere belanghebbende, met inbegrip van een aandeelhouder, het recht om zich te wenden tot de rechter met een vordering tot herstel (aan de vennootschap) en tot schadevergoeding als gevolg van de ultra vires handeling.

Andere verplichtingen, zoals de verplichting om te handelen in het belang van de vennootschap, kunnen hieruit voortvloeien. In hoofdstuk 4.2.2 stelden wij vast dat deze verplichting omstreden is, vooral wat de toepassing en handhaving ervan betreft. Wij

690 Zie bijv. art. 33 van de Rwandese Wet inzake vennootschappen van 2009, dat luidt als volgt:
"Indien de statuten van een vennootschap het doel van de vennootschap vermelden, geldt de veronderstelling dat enige aangelegenheid of activiteit die niet valt binnen dit doel ongeoorloofd is, behoudens voor zover in de statuten uitdrukkelijk anders wordt bepaald ..."

stellen dat het antwoord op de vraag "wie bepaalt en beoordeelt wat in het belang van de vennootschap is" van essentieel belang is. Het antwoord hierop voert ons naar de in het Amerikaanse rechtssysteem (meer specifiek dat van Delaware) bekende figuur van de "business judgment rule".[691] Deze houdt in dat het in beginsel de bestuurders zijn, die bepalen wat daadwerkelijk in het belang van de vennootschap is en dat er geen reden is om -de keuze voor- deze belangen achteraf te bekritiseren[692]. Men kan zich afvragen of Rwandese rechters, gezien de gemengde benadering van governance (stakeholder- en aandeelhouderbenadering), hetzelfde standpunt zouden innemen. Het uitgangspunt van de Amerikaanse 'business judgment rule' is echter tot op zekere hoogte verwerkt in art. 213 van de Wet inzake vennootschappen van 2009, dat als volgt luidt:

"... De overtuiging van de bestuurder of functionaris dat de beslissing in het belang is van de vennootschap wordt geacht redelijk te zijn, tenzij geen redelijk persoon in zijn/haar positie deze overtuiging zou zijn toegedaan."

Dit houdt in dat, behalve in die gevallen waarin er een evident belangenconflict is tussen een vennootschap en een of meer van haar vertegenwoordigers (bestuurders), er geen sprake zal zijn van schending van een verplichting en de bestuurder niet verantwoordelijk en aansprakelijk dient te worden gehouden voor zijn/haar handelingen.[693] De vrije beoordelingsruimte van de bestuurders wordt echter beperkt door andere verplichtingen, zoals de verplichting tot het voorkomen van een belangenconflict met de vennootschap, de verplichting tot het melden van persoonlijke belangen bij iedere transactie waarbij de vennootschap is betrokken, en de verplichting

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691 De "business judgment rule" is een in de Amerikaanse rechtspraak ontwikkelde doctrine, die bestuurders beschermt tegen persoonlijke civielrechtelijke aansprakelijkheid met betrekking tot de beslissingen die deze nemen in het belang van een vennootschap. Deze regel wordt echter gezien als het minst begrepen concept binnen het gehele vennootschapsrecht. Zie, Lyman P.Q. Johnson, Corporate Officers and the Business Judgment Rule, 60 BUS.LAW. 439, 454 (2005) ("Manne's opmerking over de regel geldt in 2005 nog net zo zeer als toen deze in 1967 voor het eerst werd gemaakt: de "business judgment rule" is 'een van de minst begrepen concepten binnen het gehele vennootschapsrecht.'"); Henry G. Manne, Our Two Corporation Systems: Law and Economics, 53 VA. L. REV. 259, 270 (1967).259, 270 (1967). Eveneens geciteerd in: Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 Wm. & Mary Bus. L. Rev. 521
(2013), op 526.http://scholarship.law.wm.edu/wmblr/vol4/iss2/5.

692 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), verworpen door *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (waarin erop wordt gewezen dat men veronderstelt dat de bestuurders bij het nemen van een zakelijke beslissing handelen op basis van informatie, te goeder trouw en in de oprechte overtuiging dat de handeling in het belang van de vennootschap was). Eveneens geciteerd in: Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 William & Mary Bus. L. Rev. 521 (2013), http://scholarship.law.wm.edu/wmblr/vol4/iss2/5 (gelezen op 24/04/2015).

693 Dit was het geval in *Prosecution v. Alfred Kalisa (RPA 0573/08/HC/KIG)* d.d. 21/11/2008, beter bekend als de BCDI zaak!

om geen voordelen van derden aan te nemen ten koste van de vennootschap. In hun functie van zaakwaarnemer van de vennootschap dienen bestuurders te allen tijde het belang van de vennootschap te behartigen, en op alle mogelijke manieren te vermijden dat hun persoonlijke belangen concurreren met die van de vennootschap[694]. De tweede hoofdverplichting is de verplichting tot een behoorlijke vervulling van de taak. Deze verplichting, neergelegd in art. 211 van de Wet inzake vennootschappen (als besproken in hoofdstuk 4.2.3) is niet specifiek genoeg, waardoor het moeilijk is om de tekortkoming van een bestuurder te beoordelen.[695]

De standaard selectiecriteria voor een bestuurder, als geformuleerd in art. 176 van de Wet inzake vennootschappen 2009, lijken te vaag en onvolledig met betrekking tot het vereiste niveau van inzicht in en waardering van deze verplichting. Dit artikel bevat geen minimumeisen in termen van kwalificaties of ervaring en exposure, maar richt zich vooral op sociaal gedrag en status van het strafblad. Dit betekent dat de rechter discretionaire bevoegdheid heeft om te beoordelen met welke 'redelijkerwijs verstandige persoon' de vermeende bestuurder kan worden vergeleken. De bij deze studie gehouden enquête heeft een duidelijk onderscheid aan het licht gebracht tussen bestuurders die zich bewust zijn van en vertrouwd zijn met hun verplichtingen en aansprakelijkheid, en hen die geen idee hebben van hun taken als bestuurder (maar toch de titel van directeur voeren). Wie dient er nu als maatstaf te dienen?

Tot slot merken we op, dat het Rwandese gerechtelijke systeem en onderzoekers gezamenlijk zouden moeten trachten om de in hoofdstuk 4 van dit werk beschreven verplichtingen verder te ontwikkelen en uit te werken. Zoals in dit hoofdstuk uiteengezet zijn de verplichtingen verspreid over diverse wetten, vooral op het terrein van het vennootschaps- en het strafrecht, te vinden en lijken deze eng geformuleerd, hetgeen bij bestuurders kan leiden tot verwarring over de reikwijdte ervan.

In welke mate zijn bestuurders van vennootschappen aansprakelijk krachtens Rwandees recht?

Waar sprake is van verplichtingen en verbintenissen, is het evident dat schending ervan leidt tot aansprakelijkheid. In dit werk heb ik getracht te illustreren dat het Rwandese recht voorziet in bestuurdersaansprakelijkheid, al zijn de desbetreffende bepalingen,

694 Zie art. 191 Wet inzake vennootschappen 2009, en art.191 bis als vermeld in de wijziging van 2014 van de Wet inzake vennootschappen 2009, opgenomen in Law N°14/2014 d.d. 28/05/2014 ter wijziging en aanvulling van Law N° 07/2009 d.d. 27/04/2009 inzake vennootschappen zoals gewijzigd en aangevuld tot op heden (Staatsblad (*Official Gazette*) nr. Special d.d. 29/05/2014).

695 Het desbetreffende artikel luidt: "Iedere functionaris van een vennootschap dient te betrachten: (…) 2° de mate van behoorlijke taakvervulling die een redelijk verstandig persoon in vergelijkbare omstandigheden zou betrachten".

evenals de bepalingen inzake verplichtingen en aansprakelijkheid, verspreid over diverse wetten (vennootschapsrecht, arbeidsrecht, faillissementsrecht, milieurecht, fiscaal recht, overeenkomstenrecht, e.a.) en regelingen[696], wat het voor een bestuurder moeilijk maakt om zich ervan op de hoogte te stellen. Deze aansprakelijkheid kan ernstige civielrechtelijke en ook strafrechtelijke sancties, met inbegrip van een gevangenisstraf, tot gevolg hebben. Wij stellen vast dat deze sancties soms worden opgelegd aan bestuurders, ondanks het feit dat deze eigenlijk niet op de hoogte waren van het bestaan ervan.

Ofschoon sancties in de vorm van aansprakelijkheid gerechtvaardigd zijn, omdat zij de stakeholders van een vennootschap bescherming bieden tegen wangedrag van het management, en in dit opzicht bepalingen inzake bestuurdersaansprakelijkheid belangrijk en effectief worden geacht als compliance- en risicospreidingmechanismes en kunnen dienen ter afschrikking van het opzettelijk schenden van verplichtingen, betogen wij dat deze niet noodzakelijkerwijs een antwoord vormen op enkele actuele dilemma's die te maken hebben met het gebrek aan kennis van hun verplichtingen bij sommige bestuurders van vennootschappen in Rwanda.

Zoals in de hoofdstukken 3 en 4 beschreven heeft corporate governance er in Rwanda voor gezorgd, dat bestuurders van vennootschappen zich moeilijk kunnen verschuilen achter de corporate veil, en dat zij nu verantwoording zijn verschuldigd aan hun primaire lastgevers, de aandeelhouders, maar ook aan een aantal andere stakeholders, met inbegrip van maar niet beperkt tot werknemers, crediteuren, regelgevers en milieuactivistische groepen. Uit het onderzoek blijkt dat bestuurders van vennootschappen blootstaan aan diverse vormen van individuele aansprakelijkheid: niet enkel de klassieke, zoals de civiele aansprakelijkheid voortvloeiend uit de schending door de bestuurder van fiduciaire verplichtingen jegens de vennootschap, maar ook nieuwe vormen van aansprakelijkheid die betrekking hebben op bijvoorbeeld de verslechtering van het milieu, fiscale fraude en de niet-naleving van wettelijke vereisten inzake verslaglegging. Het feit dat op het merendeel van deze vormen van aansprakelijkheid strafrechtelijke sancties conform het Wetboek van Strafrecht van 2012 staan, zou voor bestuurders extra verontrustend moeten zijn[697].

Het is echter nog verontrustender, dat deze aansprakelijkheidsbepalingen zijn gebaseerd op de veronderstelling dat de taken en verplichtingen worden opgelegd aan

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696 Met name in de dwingendrechtelijke corporate governance regelingen van de Centrale Bank – BNR voor verzekerings- en bankinstellingen.

697 Organieke wet nr. 01/2012/OL d.d. 02/05/2012 ter invoering van het [Rwandese] Wetboek van Strafrecht, Staatsblad (Official Gazette) nr. Special d.d 14 juni 2012.

bestuurders die competent en in staat zijn om deze uit te voeren. Wij betogen echter, dat deze veronderstelling geen rekening houdt met de context van het vennootschapslandschap in Rwanda. Het vasthouden aan het principe van *one size fits all,* d.w.z. de veronderstelling dat wangedrag van bestuurders altijd opzettelijk is en bedoeld om de investeringen van de kapitaalverschaffers -de aandeelhouders- te verkwanselen, is niet altijd gegrond. Wij betogen dat het niet gerechtvaardigd is om onwetende bestuurders op dezelfde wijze te behandelen als degenen die wisten wat zij deden. Wat in Rwanda eigenlijk nodig is, is een betere training van bestuurders in plaats van meer aansprakelijkheidsbepalingen. Bepalingen inzake aansprakelijkheid hebben geen enkel afschrikwekkend effect als bestuurders hier niet van op de hoogte zijn. Het compenserend effect van civielrechtelijke bestuurdersaansprakelijkheid in Rwanda is ook twijfelachtig, omdat geen beroep wordt gedaan op de D&O aansprakelijkheidsverzekering, ook al is deze aanwezig.

Begrijpen als zodanig benoemde bestuurders van vennootschappen de reikwijdte van de verplichtingen die een bestuurder krachtens Rwandees recht heeft jegens de vennootschap zelf, de aandeelhouders en de crediteuren ervan, en de gehele gemeenschap, evenals de uit een schending van deze verplichtingen eventueel voortvloeiende aansprakelijkheid?

Onze onderzoeksbevindingen, in het bijzonder in hoofdstuk 5.2.5 van dit werk, hebben aan het licht gebracht, dat het merendeel van de ondervraagde bestuurders eigenlijk geen besef heeft van hun verplichtingen. Dit heeft te maken met, onder andere, de wijze van benoeming van bestuurders, zoals besproken in 5.2.2, en het al dan niet hebben gevolgd van een introductie, de wijze waarop hen bevoegdheden en de opdracht tot functioneren zijn verleend (5.2.4) en de vraag wie zij in concreto dienen. Deze conclusie is van toepassing op bestuurders van zowel MKB als grote vennootschappen. Het spreekt voor zich, dat zij zich niet kunnen voorstellen aansprakelijk te worden geacht voor enige verplichting waarvan ze niet op de hoogte waren. Wij hebben echter vastgesteld dat wanneer een vennootschap te maken heeft met managementproblemen resulterend in het tekortschieten in de nakoming van verplichtingen, de rechtshandhavers de individuele en hoofdelijke aansprakelijkheid van bestuurders zien als volgende optie, ongeacht de vraag of de bestuurders wel of niet op de hoogte waren van hun verplichtingen en hun mogelijke aansprakelijkheid bij het schenden ervan. Wij betogen dat de vennootschap is gehouden om bij iedere benoeming van een bestuurder onderzoek te doen naar diens hiaat in deskundigheid, kennis en vaardigheden. Hierna dient een aanbod te volgen om het vastgestelde hiaat aan te vullen en de bestuurder in staat te stellen tot een duidelijk begrip van zijn taken en hetgeen men van hem verlangt, zodat hij efficiënt overeenkomstig zijn volledige capaciteiten kan opereren en bijgevolg verantwoording kan afleggen indien zijn functioneren grond voor twijfel geeft.

Wie kan een vordering instellen ten behoeve van de vennootschap, die een verlies heeft geleden door het onrechtmatig handelen van haar bestuurder(s)?

Zoals uitgebreid aan de orde kwam in hoofdstuk 3 en zoals art. 169 van de Rwandese Wet inzake vennootschappen van 2009 benadrukt, zijn het de bestuurders die ten behoeve van haar aandeelhouders de vennootschap besturen, beheren en toezicht erop houden. Zij vertegenwoordigen de vennootschap zelf, maar ook de investeringen van de aandeelhouders in de vennootschap. Er ontstaat een probleem wanneer de bestuurders, beheerders en toezichthouders degenen zijn die de vennootschap benadelen, en de vraag is: wie redt de vennootschap of zoekt verhaal ten behoeve van haar, behalve de bestuurders? Het antwoord op deze vraag levert onderdeel 4.4.6 van dit werk, waar voor een dergelijk geval drie opties worden genoemd:

4) indien niet alle bestuurders betrokken zijn, dienen de overige (onschuldige) bestuurders de vennootschap te vertegenwoordigen, door het instellen van een vordering jegens de zich misdragende bestuurders ter compensatie van het door de vennootschap ten gevolge van hun handelingen geleden verlies of nadeel;

5) indien alle bestuurders betrokken zijn, of indien de aandeelhouders geen vertrouwen meer hebben in degenen die overgebleven zijn, of indien de overgebleven bestuurders geen belang hebben bij het instellen van een vordering jegens hun collega's (in gebreke blijvende/onrechtmatig handelende bestuurders) kunnen de belanghebbende aandeelhouders als groep die een door de statuten vereiste meerderheid bezit een afgeleide vordering / een vordering in het belang en ten behoeve van de vennootschap instellen;

6) en tenslotte, indien de vennootschap in staat van faillissement is verklaard, zou de hierin benoemde curator de bevoegdheid hebben, en heeft deze normaal gesproken ook, om elke legitieme vordering met inbegrip van een proces in te stellen tegen eenieder wiens handelingen tot het faillissement van de vennootschap kunnen hebben geleid. Dit wordt altijd gedaan, in de eerste plaats ter bescherming van de vennootschap, en in de tweede plaats om voldoende activa bijeen te brengen ter compensatie of althans minimalisering van het verlies van de crediteuren van de vennootschap tijdens de faillissementsprocedure.

Rwandees recht verruimt de bevoegdheid tot het instellen van een vordering tegen de bestuurder in geval van schending van diens verplichtingen tot de volgende individuen: iedere belanghebbende aandeelhouder, een obligatiehouder, een crediteur, ieder directielid, en iedere andere belanghebbende (artt. 222-225, en 310 van de Wet inzake vennootschappen van 2009). Het ligt voor de hand dat in geval van strafrechtelijke aansprakelijkheid de staat kan optreden.

We stellen dat corporate governance praktijken in Rwanda in hoge mate zijn gecodificeerd als gevolg van de geringe mate of het ontbreken van aandeelhoudersactivisme. We concluderen ook dat deze geringe mate van activisme zal voortduren, zo lang de marktspelers zelf onvoldoende op de hoogte zijn van corporate governance en niet vertrouwd met de toepassing ervan. Rechtshandhaving door de overheid, zoals de politie, het OM en de rechterlijke macht, blijft een vervangingsmiddel ter bescherming van stakeholders van vennootschappen, m.n. de minderheidsaandeelhouders. Dit pleit opnieuw voor het ontwikkelen van zelfregulerende mechanismen op korte tot zeer korte termijn.

Welk corporate governance model heeft Rwanda?

Zoals met name sub **3.3.4** beschreven**,** is niet eenduidig vast te stellen, welk corporate governance model voor Rwanda geldt. Wij stelden dat men enkel op basis van de Wet inzake vennootschappen 2009, in het bijzonder gezien de bepalingen van art. 212 van deze wet, tot de conclusie zou kunnen komen dat de wetgever de shareholder value benadering hanteert. Indien men echter de diverse corporate governance codes, met inbegrip van de richtinggevende code van de Private Sector Federation maar ook de door de regelgevende instelling (Centrale Bank - BNR) uitgevaardigde code analyseert, lijken deze de eigen aandeelhoudersbelangen te overstijgen en ook rekening te houden met andere stakeholders, waardoor ze meer richting de stakeholder value benadering / het stakeholder value model gaan.

Wij stellen derhalve dat Rwanda een gemengd corporate governance model heeft dat overeenkomst vertoont met de 'verlichte' shareholder value van Groot-Brittannië, aangezien zowel de belangen van aandeelhouders als die van andere stakeholders van de vennootschap tot op zekere hoogte in aanmerking worden genomen.

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QUESTIONNAIRE FOR THE PhD RESEARCH ON:

"Corporate Governance and the liability of Corporate Directors: The case of Rwanda"

Being carried out by**: Didas M. KAYIHURA,** Lecturer of Company Law, Faculty of Law, The National University of Rwanda, Rwanda; PhD researcher, Private Law Department, Faculty of Law, Economics and Governance, Utrecht University, The Netherlands.

Supervised by**: Professor A.F.M. Dorresteijn**, Professor of Company Law, Molengraaff Institute of Private Law, Faculty of Law, Economics and Governance, Utrecht University.

E-mail: a.f.m.dorresteijn@uu.nl

Concept note and the summary description of this research

It is an internationally agreed principle that once a company/corporation is duly registered as such with a limited liability form of a business structure, becomes a distinct and a separate person altogether from its shareholders, directors, employees and others. From the date on which its certificate of incorporation is issued, it becomes capable of entering into any business and any other related transactions like any other legally capable person would do[698]. It can enter into contracts, own and dispose of its property, sue and be sued and to mention just a few. In short, it is capable of performing any duties and capable of incurring any liabilities as the law permits. It is noted however that, though capable and distinct from all those mentioned above, a company as it stands with that moral or legal personality, it does not have a distinct mind, body or soul from those of its agents; that is – its directors, both executive and non executives as well as its employees. This therefore means that whatever this moral person does, does it but through the human agents (directors and other employees). Under Rwandan Law, like in many other laws, it is the company directors that are charged with the company's business direction and administration[699].

In principle, whoever performs any duty on behalf of the company/corporation in his or her capacity as a company's agent thus commits the company to this performance but not to him/herself. Consequently, any liability that would accrue from such performance of the act for and on behalf of the company befalls to the company not to its agent. This, like any other principles does not go without exceptions though!

698 In regards to the Legal status and the capacity of a company under Rwandan Law, see arts. 18 & 32 of the 2009 company law.

699 See art. 169 of the Law mentioned above.

This study tries to investigate from the Rwandan perspective, whether there are any circumstances that would lead to personal or joint liability of a director or directors when performing his/her duties as a company director. It also investigates when and when not Rwandan Corporate directors would benefit from the insulation of the corporate veil. The study also tries to look at what the legal (express and implied) duties of company directors are and what the legal consequences would be in case of breach or *ultra vires* these duties. It shall also assess the facilitations corporate directors enjoy for better performance of this rather cumbersome task of directorship in a company under Rwandan Law.

For company directors, the findings of this study shall offer a basis upon which they can best evaluate their role in the running of their respective company's business and social life. It shall as well try to put together all the express and implied duties and the possible liabilities thereof in case of breach or *ultra vires* these duties. The provisions from different scattered Rwandan laws relevant to directors' duties as well as inspirations from other developed systems shall inform this study for the better performance of Rwandan Corporate sector. And for me, the outcomes of this study shall contribute to the completion of my PhD project and thus, leading to the award of a Doctorate Degree in Law from Utrecht University, The Netherlands.

Answering this questionnaire takes **25 – 30** minutes of your precious time! The responses shall remain confidential and the respondents anonymous. The whole study is purely intended for research and academic purposes and shall not be used for any other ends whatsoever.

I would appreciate if the answered questionnaire is returned not later than **11th January, 2013**.

I thank you very much for your help and support in answering the questionnaire herewith attached.

Kind regards,

Didas M. KAYIHURA

PhD researcher, Utrecht University, The Netherlands

Tel: 0788 495 778

E-mails: m.d.kayihura@uu.nl or dkayihura@nur.ac.rw

QUESTIONNAIRE (NB, Feel free to add more lines than the ones provided)

1. In which category (SME, big, multinational Company, etc) does your company fall?

   ……

2. Who appointed you to the Board of the Company you are serving on as a Board member?

   …….

   …….

   …….

3. How do you appreciate the appointment procedure that was used when you were being appointed to this Board?

   …….

   …….

   ……..

4. Do you serve as an executive or a non-executive Board member?

   ……..

5. How long is the term you were appointed to serve at this Board?

   ………

6. For how long (how many years) have you served on this board? …………………………………………………………..

7. How many other Boards of companies, if any, do you sit on as a board member?

   ……..

8. What is your professional background?

………..

………..

……

9. How does your professional background facilitate you in the execution of your Board duties?

……

…….

………

10. What is the size of your Board? …………………………………………………………………………………….

11. What is your opinion on the size of this (your) Board in relation to the efficient performance of Board tasks?

………

………

……

12. Describe (in terms of numbers) the composition of your Board (NEDs, EDs and independents).

………

……

……

13. How are Board tasks distributed amongst the Board members?

……

……

……

14. Describe the general responsibilities of the Board you sit on and your specific contributions towards their accomplishment.

………..

……

……
……

………..

15. What support services have you received ever since you assumed your directorship to this company to enable you serve better?

………

16. How have your services to this company been evaluated (if they have), and by who?

……….

………..

17. What instruments/aids does the company use to help you know better about your duties as a director?

………..

………..

………..

18. Do you think that as a company director you may be personally liable in any way due to the performance of your duties as a company director? If yes, in which circumstances?

………

………

……..

19. What is your opinion on personal liability for company directors?

………

………

………

20. What do you think would be the possible remedies for personal liabilities (if any) for company directors?

………..

………..

………..

21. What would you wish to have in place, for you to serve better as a company director?

………..

……

22. Are there any specific laws you know, or you think would be useful for you to know and use in your duties as a company director? If yes, Name them.

……

……..

………

Thank you very much for your precious time!