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**THE ROLE OF CORPORATE GOVERNANCE IN THE PROMOTION OF
BUSINESSES IN EAST AFRICAN COMMUNITY: A Case Study of RWANDA**

Thesis submitted in partial fulfillment of
academic requirements for the award of the
Master's Degree in Business Law

Prepared by **Alfred BANDORA**

Supervisor: **Dr. Denis BIKESHA**

Kigali, May, 2022

CERTIFICATION

I, The undersigned, do certify that I have read and recommend to deposit a Thesis entitled **THE ROLE OF CORPORATE GOVERNANCE IN THE PROMOTION OF BUSINESSES IN EAST AFRICAN COMMUNITY: A Case Study of RWANDA** in fulfilment of the requirements of a Master's Degree in Law from the University of Rwanda.

.....

Dr. Denis BIKESHA

DECLARATION

I, BANDORA Alfred, do declare that this thesis is authentic and a product of my hard work. It has never been presented anywhere in any other university or institution. Where other people's works have been used, references to that effect have been provided, and in some cases, quotations made. It is on the basis of the above that I declare this work to be originally mine.

Signature.....

DEDICATION

I dedicate my work to the Almighty loving God who is the alpha and omega. Your infallibleness is not questionable to have enabled me see the light of the day with immeasurable mercy, love and power. Your providence, direction and undying consideration made me what I am today and I am capable of accomplishing tasks in academic arena like this one.

To my family; I cannot appreciate more especially my caring wife Roy BANDORA whose prayers and hospitality have been instrumental in giving my academic work a human face. To my God given daughters and sons, I must say you are wonderful to me and your presence under the sun has given me pride and ushered in hope to the extent that I can see light at the end of the tunnel because of your unending beauty and love you have exhibited from childhood. My father Mzee James BAYIJAHE together with my late mother Genesta BAYIJAHE, I must say thank you for begetting me and providing necessary upbringing until I became a man of my calibre and substance. You did what you could and deep in me I am not complaining.

This work is successfully done due to their constant prayers, support before, during and at completion of my studies. My family is a treasure, fountain of my strength, honour and a unique gift from God. To my siblings, colleagues and friends who supported me morally or otherwise, I must move a vote of thanks for your awesome care.

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Singling out few names would leave me with a moral and intellectual guilt and/or debt, thus by mentioning some of them only means citing a few examples. I would like to sincerely thank my worthy supervisors, Dr. Denis BIKESHA and Dr. Richard KARUGARAMA for helping and guiding me from the initiation to the finalization and putting to a close this study. They have not only been guiding me but also mentored me throughout my research.

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BANDORA Alfred

LIST OF ABBREVIATIONS AND ACRONYMS

- Art. : Article
- BITs : Bilateral Investment Treaties
- BNR : Banque nationale du Rwanda
- CEO : Chief Executive Officer
- Co.Ltd : Company Limited
- EAC : East African Community
- EDs : Executive Directors
- GA : General Assembly
- GDP : Gross Domestic Product
- Ibid : Ibidem (Same book, same author same page)
- ICSID : International Centre for Settlement of Investment Disputes
- Id : Idem (Same book, same author, and at different pages)
- No : Number
- NOCs : National Oil Companies
- NTBs : Non-Tariff Barriers to Trade
- OECD : Organisation for Economic Co-operation and Development
- OHADA : *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*
- Op.cit : Opere citato (cited above)
- P : Page
- PSF : Private Sector Federation
- RDB : Rwanda Development Board
- RG : Registrar General
- RGB : Rwanda Governance Board
- RURA : Rwanda Utility and Regulatory Agency
- SA : South Africa
- SADC : Southern African Development Community
- SOEs : State - Owned Enterprises
- Supra note:* earlier cited in the(same book, same author, and at different pages)

UK : United Kingdom

UNCITRAL: United Nations Commission on International Trade Law

US : United States

vol : Volume

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ABSTRACT

Corporate governance has become an issue of global importance and certainly that is why I was compelled to check its role in the promotion of businesses in EAC and hence zeroing in on Rwanda as a case study. It has been proven that doing commercial business in any state with good and propitious business laws promotes economic development of that state and hence prosperity.

For the case of EAC and particularly Rwanda as a member state, harmonizing business laws may undoubtedly spur economic development without any fear of contradictions. It is in this spirit and letter that I chose to make a research on this topic and explore the role of harmonization of business laws in these East African Countries and try to discern whether not doing so may adversely affect the set goals of economic development.

My thesis is comprised of three chapters and a conclusion with recommendations to this effect. Rwanda's political history was characterized by turmoil and upheavals which largely contributed to the stunted economic growth because emphasis was not put on business development but rather on individual draconian controls based on identity and so on. After the war and genocide of 1994, the political landscape changed fundamentally and there was government programs to uplift peoples' lives and safeguard human rights especially the fundamental rights. All this required that the functioning of the central government be tailor-made on the rule of law and respect for individual freedoms and liberties. To duly arrive at this, things had to grow well when grass and lawn grow on law court stares. It was respected and progressively things gained momentum hitherto.

As a country that is land locked and needs to register economic development through imports and exports of goods and services, it had to make allies with bordering countries through the signing of different protocols that form the treaty of EAC. It happened and this was mainly done to ease and develop policies and programs aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit. In the field legal and judicial affairs where this research lies, harmonization of business laws and its role in the development of businesses in EAC was explored and expounded with clear benefits outlined.

Chapter one of the research paper deals with the overview of Rwanda's historical corporate governance and its accession to EAC. This overview traces Rwanda's corporate governance from the period when Rwanda obtained its political independence in 1962 to the current dispensation. Corporate governance regulates the exercise of power (that is, authority, direction and control) within a company in order to ensure that the company's purpose is

achieved namely; the creation of sustainable shareholder value, the *raison d'Etre* of most for profit companies. The structures, processes and practices that the board uses to direct and manage the operations of a company determine how the authority is exercised, how decisions are taken, how shareholders have their say and how decision-makers are held to account. In this chapter, citation of most reputable writers were used as doctrines to support my arguments and in some cases domestic laws referred to in an effort to fortify my point of view. Also, theories and essential requirements for the registration of the company were highlighted plus showing how a corporate body can be liable criminally basing on Rwandan laws.

In chapter two, we managed to elucidate the impacts of corporate governance in EAC as well as the picture of corporate governance in Rwandan law. In Rwandan corporate governance we showed how general assembly of shareholders works, the ordinary general assembly as well as the extra ordinary general assembly. Rights and responsibilities of shareholders in this chapter are also discussed as well as how company directors are appointed. The composition of the board, the executive board and non-executive board of directors and their appointments are discussed based on the laws of Rwanda. The roles of the chairman, secretary to the company and company auditor are also discussed in this chapter. Governance of state owned entities and codes of best practices are fully discussed with some overview of salient impacts in Rwanda corporate governance, foreign direct investments, legislation and regulations.

In chapter three, a bigger picture of harmonisation of business laws in EAC is shown with introductory remarks of what harmonisation aims to do and what it is in real terms. Harmonisation of laws generally and harmonisation of business laws in particular are discussed as well as its importance to the EAC member states.

Finally, the conclusion based on the aforesaid discussion is made plus recommendations suggesting what should be done in order to preserve our corporate governance practices since this is seen as the modern way of spearheading commercial businesses in Rwanda.

Key words: Corporate Governance, Harmonisation of Business Laws, East African Community

1. General introduction

From time immemorial until recently in 1970s, Rwanda's commercial business was based on sole proprietorship and to some extent partnership was the most preferable form of the business where persons used to invest and earn profits out of the business for themselves.¹ Though these forms of mercantile still exist, they are not the most common preferable forms of commercialization today. The knowledge and taste of the consumers has changed due to the advent of technology and globalization. Business community realized that they needed to come together and share business acumen in order to maximize efforts and energies which also require a lot of money and borrowing.² Because of involvement of few individuals in sole proprietorship or partnership, this needed big investments and capital to increase production hence, formation and creation of corporate governance.

Therefore, to fulfil these needs mentioned above, corporate form of business came into existence and also as time demand shifted from traditional goods to the capital goods and technological products. This required skilled labour and large capital to realize these needs hence corporate governance.³

Initially, several forms of associations were known to medieval law and as such some of them the concept of incorporation was early recognized. However, incorporation seems to have been used only in connection with ecclesiastical and public bodies, such as chapters, monasteries and boroughs like in Great Britain, which had corporate personality conferred upon them by a charter from the Crown or were deemed by prescription to have received such a grant.⁴

In the commercial domain, the principal medieval associations were the guilds of merchants, organizations which had few resemblances to modern companies but corresponded roughly to our trade protection associations, with the ceremonial and mutual fellowship of which we can see relics in the modern Freemasons and Livery Companies.

¹<https://www.britannica.com/topic/law-merchant> , accessed on 27/07/2021

² Ibid.

³<https://solo.bodleian.ox.ac.uk/primo-explore/fulldisplay?docid=oxfaleph016532590&context=L&vid> accessed on 27/07/2021

⁴Ibid.

Many of these guilds in due course obtained charters from the Crown, mainly because this was the only effective method of obtaining for their members a monopoly of any particular commodity or branch of trade. Incorporation as a convenient method of distinguishing the rights and liabilities of the association from those of its members was hardly needed since each member traded on his own account subject only to obedience to the regulations of the guild. ⁵

Turning to the East African Community as a regional Block of African continent which also aims to expand business so that their people can register some level of economic development, the East African Community (EAC) is a regional intergovernmental organisation of 7 Partner States: The Democratic Republic of the Congo, the Republics of Burundi, Kenya, Rwanda, South Sudan, Uganda, and the United Republic of Tanzania, with its headquarters in Arusha, Tanzania. The EAC is home to an estimated 300 million citizens, of which over 22% is urban population. With a land area of 4.8 million square kilometres and a combined Gross Domestic Product of US\$ 240 billion (EAC Statistics for 2019), its realisation bears great strategic and geopolitical significance and prospects for the renewed and reinvigorated EAC.⁶

However, The East African Community (EAC) was first established in 1967 as a result of a treaty between Kenya, Tanzania and Uganda, and was a typical example of a sub-regional organisation whose members were connected through the history of British colonialism and had experienced integration solutions in the colonial times. It collapsed in 1978 due to disagreements emanating from political governance and intolerance of leaders of those partners states. Later, and after the ushering in of new leaders, there was dire need to revamp the functioning of this community because it was deemed highly beneficial to the peoples of this community in terms of socio-economic and political prosperity.

Apparently, the work of the EAC is guided by its Treaty which established the Community. It was signed on 30 November 1999 and entered into force on 7 July 2000 following its ratification by the original three Partner States - Kenya, Tanzania and Uganda. The Republic

⁵Ibid.

⁶<https://www.eac.int/overview-of-eac>, accessed on 17/05/2022

of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became full Members of the Community with effect from 1 July 2007, while the Republic of South Sudan acceded to the Treaty on 15 April 2016 and become a full Member on 15 August 2016. The Community's newest member, the Democratic Republic of the Congo as shown by various documentations acceded to the EAC Treaty on 8 April, 2022.⁷

Having noted that it is the fastest growing regional economic blocs in the world according to reliable information, the EAC is widening and deepening co-operation among the Partner States in various key spheres for their mutual benefit. These spheres include political, economic and social. Apparently, the regional integration process is in full gear as reflected by the encouraging progress of the East African Customs Union, the establishment of the Common Market in 2010 and the implementation of the East African Monetary Union Protocol.⁸The process towards an East African Federation is being fast tracked, underscoring the serious determination of the East African leadership and citizens to construct a powerful and sustainable East African economic and political bloc according to what everyone reads in different official communiqués from the secretariat based in Arusha, Tanzania.

This EAC has got vision, mission and values as embedded in the treaty that establishes it. While its vision is “to be a prosperous, competitive, secure, stable and politically united East Africa, its mission is “ to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments”. Finally, Underpinning the EAC is peoples ‘commitment to their values of:⁹

- Professionalism
- Accountability
- Transparency
- Teamwork

⁷Ibid.

⁸Ibid.

⁹Ibid.

- Unity in Diversity
- Allegiance to EAC Ideals

2.Problem statement

Since corporate governance is typically thought to be the exclusive domain of boards of directors, in broader sense, it's a task delegated by law and by the company's owners (its shareholders), defined by government and regulators in legislation and codes of good governance practice and shared by boards, in some measure, with a company's management. Differences in National Company laws of different countries of East African Community negatively impact cross-border business when article 74 of the same treaty provides and caters for this situation.

This is a clear indication that different corporate laws in the same member states signatory to the treaty are hampering and contravening the spirit and letter of the treaty that establishes the EAC which undermines economic and social progress of these partner states. In order to resolve this inconsistency in the application and implementation of this treaty, it was espoused in article 126(b) of the treaty.¹⁰ "

Given what is practically on the ground, this Harmonisation that is being referred to in the above treaty has not been put into practice by the partner states and hitherto, individual states in the community still make their own corporate rules and laws given their level of economic advancement. I find this problematic in spurring and spearheading economic development of these member states together since the intent and purpose of widening and deepening the cooperation is not put into proper use. This is the basis of this research paper (dissertation) since for example business people will not freely and easily perform their duties in accordance with their wishes and plans due to conflict of laws.

¹⁰ "In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonise all their national laws appertaining to the Community; and (c) revive the publication of the East African Law Reports or publish similar law reports and such law journals as will promote the exchange of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning and the standardisation of judgments of courts within the Community."

Harmonisation and approximation of laws in EAC is seen as a remedy to the lingering challenges in doing business because conventional laws supersede and outlive any national encumbrances that might be brought by culture, custom and any other societal traditional traits which hamper economic progress. I am not saying that culture, customs and traditional values are not desirable, but since culture is dynamic some cultural norms are archaic to apply to the present situations. An enterprise may want to register as a foreign company but because of different corporate laws that sometimes are tailor-made on the state's culture, customs etc, a foreigner ends up in totally cultural made businesses that are not in line with conventional best practices.

With differences in Company Laws, some companies might lose profits and face hardships while trading across the border. Companies might for example be made to pay taxes, to register or subjected to bureaucratic red-tapes which make trading freely hard for them to operate hence lowering their profits. In this dissertation, we shall explore how shared corporate laws and the present government's serious stance on company registration through Rwanda Development Board have helped Rwanda as a nation to stimulate and spur its economic development efforts in the post genocide era.

Also, more light will be shed on cross border trade and Harmonisation of laws through relevant protocols in the East African Community as an economic and political bloc. Difficulties occasioned by different domestic corporate laws in this community will be discussed. An example is where the republic of Rwanda and Tanzania have been having differences in public transportation of their people and goods using public means like Trinity Bus Company from Rwanda to freely cross to and within Tanzania yet the protocols on free movement of goods and services plus common market were signed by all the member states.

The differences in state company laws will impact cross-border trade in a way that informal businesses will be encouraged after business people finding it harder to register their companies hence resorting to informal cross- border trade which is undesirable. This informal cross- border trade is always not regulated which makes traders take risks of violating trade laws of any sovereign state. More so, disharmonized company laws will

affect cross-border trade and will be hard for the East African Community to fully implement its protocols espoused in articles 75 and 76 of the Treaty that establishes East African Community. If laws are not harmonized and are indeed different, there is a possibility of not having desired movement of persons, goods and services which negatively impact and limit cross border- trade generally.

When there are differences in EAC company laws, business people of this community will take it upon themselves and illegally resort to negotiations of businesses between themselves when written and harmonized laws should have paved way for such trading environment. These illegal negotiations between business communities can be disadvantageous to the individual country depending on who is losing taxes when agreed upon conventional laws could do the work in a transparent and clear manner. This can thus lead to some exploitation of traders in one country. When there are differences in company Laws in EAC, there is a possibility of increased Non-Tariff Barriers to Trade (NTBs) and when looked at carefully, one can easily point out that differences in company laws in EAC is itself a barrier to cross cross-border trade since business people will find it difficult to know which laws to apply when trading across their borders and free trade will be affected.

Finally, since corporate governance is key in the administration and management of companies in Rwanda given what has been registered by the government, differences in company laws of the East African Community countries may lead to increased informal cross border trade, possibility of respective governments losing revenues, consumers getting undesirable goods and services not forgetting other related vices like smuggling, hoarding etc. strong and harmonized corporate governance laws in the East African Community countries may spearhead free movement of goods and services with ultimate objective of making desired profits and good social coexistence of their citizens in general.

3. Research questions

The above context gives rise to the following research questions:

- a) Is harmonized corporate governance law desired in managing companies in EAC which makes shareholders comfortable?
- b) What are the advantages or merits of corporate governance as opposed to the traditional form of business?
- c) How does Harmonisation of business laws in the East African Community promote business in Rwanda?

4. Purpose of the study

The primary objective of this research is to highlight the role of harmonized corporate governance law in spurring economic development in regional countries of East African Community and particularly in Rwanda. This will help to clearly come up with impacts brought up by corporate arrangement in doing business in the member states and finally give recommendations.

5. Methodology

The research is of the qualitative type which involves study of books, electronic/internet sources, journal articles, theses and dissertations, decided cases and legislation. The existing literature is subject to scrutiny in this study. The analysis is done from the perspective of corporate governance law taking into account the way in which corporate laws and regulations play an important role in corporate governance and their Harmonisation in East African Community. The study benchmarks Rwandan legal regime on governance of SoE's against some of the relatively developed systems in other East African Countries. The following methods are used in this study:

- Gathering and review of laws and regulations relevant to the subject,
- ∞ Collection and review of academic and advisory materials that present the options for improving governance of public enterprises in other jurisdictions,
- ∞ Review of Court decisions relevant to the subject.

As mentioned above, doctrines, regional conventions, company laws and socio-legal or empirical approaches were used in this research study.

Nevertheless, while conducting the research whether corporate governance has played a pivotal role in stimulating and promoting business in East African Community and particularly Rwanda, legal research approach was applied. A mixture of protocols of EAC treaty and doctrines were deemed to be the most favourable authority for this research study. Review of various scholarly writings relevant to the study and especially those that have sufficient data regarding corporate governance.

6. Study outline

This research study consists of three chapters preceded by a general introduction. Chapter one analyses and gives overview of Rwanda's historical corporate governance and its accession to EAC countries. Some concepts thereof are defined to avoid ambiguity while the second chapter gives account of how corporate governance in EAC is designed to work and its impacts highlighted; the third chapter discusses Harmonisation of business laws in EAC and in doing so, merits of corporate governance are elucidated with lucid analysis and finally, a conclusion and some recommendations are given on what we think should be done to give Rwanda corporate governance a human face.

CHAPTER I: OVER VIEW OF RWANDA'S HISTORICAL CORPORATE GOVERNANCE AND ITS ACCESSION TO EAC COUNTRIES

Introduction

Rwanda was separated from Burundi and gained independence on 1 July 1962, which is commemorated as Independence Day each year. Rwanda is a small country with an area of 26,338 square kilometres (10,169 square miles). Comparatively, Rwanda is about the size of the state of Maryland in the United States of America.¹¹ Like many other countries, the tendency over the years has been to move from the narrow perception and definition of individual business and corporate governance where corporate governance has been defined as "the practice by which companies are managed and controlled"¹² to increasingly broader definitions that encompass elements of managing long-term risks, overseeing ethical performance and sustainable business practices and taking accountability for the company's relationships with multiple stakeholders.¹³

The concept of companies and their functioning in Rwanda developed in the 19th century during the period of colonization, that's to say when Rwanda was still under the influence of Belgium, France and Germany. During this era, all policies, law and regulations that were made or enacted mostly reflected the interests of the colonial masters.¹⁴ From the time when Rwanda attained political independence in 1962, the country was characterized by political turmoil to the extent that talking about corporate governance in business affairs was utopic and not known by the populace because what was central then was by and large self-determination.

It was therefore next to impossible for any citizen to think of corporate arrangements in such a chaotic period. As some semblance of peace and security were being attained in the whole country that took hardly a decade from then, that is when business arrangements in

¹¹https://en.wikipedia.org/wiki/Geography_of_Rwanda, accessed on 15/02/2022

¹² This definition from the 1992 UK Cadbury Report remains one of the most enduring definitions of corporate governance in use today.

¹³ Ramani Naidoo, TM Booysen and KA Rayner, corporate governance, An Essential Guide for South African Companies, Third ed, 2016, P.3

¹⁴ Didas M. K, Corporate Governance and the liability of corporate directors: the case of Rwanda, 2016.

form of corporate governance started to take shape with inspiration from neighbouring countries colonized by the British like Kenya, Uganda and Tanzania. Also, when the French took over from the Belgians who had colonized Rwanda earlier, the mode of doing business somehow started to take shape in a formal way which saw different companies being formed and corporate governance was introduced subsequently.

1.1 Background

Rwanda is a country where market economy equally faces challenges of economic evolution as Rwanda Development Board does not cease to register many emerging business companies. Countries with strong company practices attract capital through investors.¹⁵ Countries that have good corporate governance practices like adequate corporate disclosure and sound board practices are more likely to attract both domestic and foreign investors undoubtedly. There are countries where code of companies' governance has been established for the overall purpose of ascertaining a level of standards of companies' management and direction.¹⁶

Corporate governance regulates the exercise of power (that is, authority, direction and control) within a company in order to ensure that the company's purpose is achieved namely; the creation of sustainable shareholder value, the *raison d'Etre* of most for profit companies. The structures, processes and practices that the board uses to direct and manage the operations of a company determine how the authority is exercised, how decisions are taken, how shareholders have their say and how decision-makers are held to account.¹⁷ Basically, it deals with who is responsible for what. As Mel Gill so succinctly and effectively put it, corporate governance consists of the structures, traditions and processes of leadership and stewardship that; assign power, define roles, responsibilities and leadership, and ensure accountability.¹⁸

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Supra note, RamaniNaidoo, TM Booysen and KA Rayner, corporate governance , 7, p.4

¹⁸ Supra note, RamaniNaidoo, TM Booysen and KA Rayner, corporate governance , 7, p.4

After the independence from Belgium, such pressure was not heard of as business generally was individualistic and not corporate save may be in around 1970s when companies like Caisse Sociale du Rwanda dealing with workers' pensions and SONARWA Insurance company were instituted. Because of the waves of change in neighbouring countries which were far ahead than Rwanda, it was imperative to adopt the corporate way of doing business where new companies were formed in 1980s up to 1994 change of country leadership which came in earnest and revamped the status quo of doing business.

With the new political dispensation, there has been the zeal and want under the Rwanda corporate governance to promote and woo foreign investors with favourable and preferential treatment of starting up businesses in Rwanda. For instance, Rwanda Development Board (RDB) is at the helm of wooing investors to ease doing business, National Bank of Rwanda (BNR) whose prime role is to control and preserve macroeconomic stability, Rwanda Utilities Regulatory Agency (RURA) to regulate proper functioning of business and avoid unfavourable competition, Rwanda Governance Board (RGB) among others.

1.2. Incorporation

Rwanda has undergone different corporate law reforms right from the company law of 1988 that established commercial organizations, company law of 2009 relating to companies in Rwanda as modified and complemented in 2010, the Law n° 27/2017 of 31/05/2017 governing companies, the Law N°17/2018 of 13/04/2018 governing companies and of recent the Law N° 007/2021 of 05/02/2021 governing companies in Rwanda. Although these corporate laws were amended frequently to pave way for new innovations in doing business, these reforms left Rwanda with a substantially more business-friendly environment.

Incorporation pursuant to article 2 which provides definitions of some terms in Law N° 007/2021 of 05/02/2021 governing companies in Rwanda is "a legal process used for a company to be formed and have legal personality separate from that of its owners". Article 3 thereof provides that " One or more persons may form a company by pooling together resources or services for business purposes and filling out a prescribed form developed by

the Registrar General in accordance with the provisions of this Law”. If all the above are fulfilled and respected to the letter then actual incorporation for any company is completed legally in accordance with the laws of Rwanda.

Every company in Rwanda can be categorized as private or public company according to the company law. In incorporating a company, there are essential requirements embedded in its articles which cannot be left out of view in elucidating the incorporation process which are; A company is incorporated if it fulfils the following essential requirements:

1° having a name;

2° having one or more shareholders;

3° in the case of a company limited by shares, having one or more shares;

4° having one or more directors, at least one of whom must be ordinarily resident in Rwanda.

Where two (2) or more persons jointly hold one or more shares, such persons are treated as a single shareholder”¹⁹.

1.3 Risk Governance in Corporate Organisations

Risk is an inherent and unavoidable element in the conduct of any business. Taking and managing risks is part of what companies need to do to generate profits and generate returns for their shareholders. The immediacy with which leaders of companies, and indeed of countries, today have to assimilate and react to changes in the political and economic landscape makes a responsive system of risk governance critical to organizational survival. ²⁰Risks are uncertain future phenomena which if left unchecked, could adversely affect the achievement of a company’s business objectives. Risks are not limited to sudden, abrupt events, but can also arise from gradual changes which occur

¹⁹ See Arts 5-6 of Law N° 007/2021 of 05/02/2021 governing companies in Rwanda

²⁰ Supra note, RamaniNaidoo, TM Booysen and KA Rayner, 1, P.287

overtime. ²¹ The word 'risk' comes from the Latin ' *to dare*' and the business of daring , according to Bob Garrat, belongs in the Board Room. Business by definition is the undertaking of risk for reward and risk is a fact of business life.²² Taking and managing calculated risks is necessary for companies to create profits and hence to grow shareholder value.

The challenge for boards and management is to maintain the optimum balance between taking as much risk as the company can tolerate and simultaneously keeping these risks within carefully defined, controlled and tolerant limits.²³ every company, regardless of its size or corporate structure, must at some level anticipate the business risks it may face to improve the prospects for its long-term survival. It has been suggested that risk management is arguably more important for smaller companies which traditionally have a higher rate of business failure.

Not all risks, however, are negative. The realization that risk governance which looks only at the downside of uncertain future events can, at best, offer only damage limitation and control has led to a consideration also of positive risks which, if they materialize, could yield benefits for the organization. ²⁴ An opportunity is defined similarly to risk, except that it is a future uncertain event which would have a positive effect leading to benefits and rewards. Opportunities are not always the flip-side of threats and certain opportunities may be completely unrelated to threats the company is facing, while others may be the inverse of related threats. Risk governance includes the total system and process of risk management. It includes the development and implementation of a policy and plan for a systematic, disciplined approach to evaluating and improving the effectiveness of risk management as well as the related internal control, compliance and governance processes within the company. ²⁵

The Board's role in risk governance is one of its most critical, yet elusive responsibilities according to John Engen in his book " *Grabbing Risk by the Tail*". He contends that helping

²¹ Ibid. p. 287

²² Ibid. p.287

²³ Ibid. p. 287

²⁴ Ibid. p.288

²⁵ Ibid. p.288

the company navigate its way through or around risk is one of the Board's primary purposes. The Board's job is not to manage risk itself, but to ask quick questions of management about the company's mechanisms for identifying potential threats and what its plans are should something unexpected happen.

1.4. Legal Theories of the Company

That a company, being a unique entity, conducts distinct activities for its business and that such activities are in contrast or distinct to the activities of its owners, or stakeholders, or stockholders. It also maintains that the business entity is accountable for its own liabilities. The entity theory stipulates limited or no liability to owners, depending on the business structures. Owners, stakeholders, stockholders are typically not accountable for liabilities and loans of the company entity.²⁶

1.5 Essential requirements for the registration of a company

As above mentioned succinctly, for a company to be incorporated or registered in the republic of Rwanda, necessary incorporation documents must be submitted to the Registrar General of Companies at Rwanda Development Board. According to the company law of 05/02/2021. Incorporation documents are well defined and they include articles of association or memorandum of association or both and any subsequent changes to such documents as prescribed by the RG.²⁷

It is important to note that the following are submitted to the Registrar General when applying for the company registration as by law established: ²⁸

1° incorporation documents in the form prescribed by the Registrar General and signed by every shareholder or member or by each applicant, if any;

2° consent in the prescribed form signed by each of the persons named as the company's directors and secretary in the incorporation documents;

²⁶Dr.MugangaDidas, FCiarb,Rector, Institute of Legal Practice and Development (ILPD), notes presented in LLM class about comparative company law, 2019, University of Rwanda.

²⁷ See Art. 19 of Law N° 007/2021 of 05/02/2021 governing companies in Rwanda

²⁸ See Law N° 007/2021 of 05/02/2021 governing companies in Rwanda

3° consent in the prescribed form signed by each member or shareholder of the company or by his or her agent who has been authorized thereto in writing;

4° the memorandum of association of the company;

5° where the company has articles of association, a copy of the articles of association;

6° beneficial ownership information where applicable.

If the instruments authorizing the agent are signed by an authorized representative, they are accompanied by that representative's authority to sign." It is evident that whoever wants to register a company in Rwanda is only required to get this company law code and follow the provisions therein with ease.

1.6. The corporate veil

As it has been above mentioned, a company has a legal identity of its own. A legal and natural consequence attached to this aspect is that only the company can be liable in respect of a wrong done by the company. The owners of the company will normally be free of any liability. They are said to be protected by the 'veil of incorporation'. This image regards the company's artificial legal personality as a veil, which hangs between the company and the members of the company.²⁹ As we have already seen, the idea that the members of a company are not liable for the company's wrongdoings is very well established. But there are circumstances in which a court of law or a statute will lift the corporate veil so that the members of the company are not protected by the company's artificial legal personality. There are no pre-determined circumstances in which a court of law can lift the corporate veil. However, under circumstances hereunder the corporate veil may be lifted. The corporate veil may be lifted when it is remarkable that the company was incorporated for fraudulent purposes.³⁰

²⁹Gilford Motor Co Ltd v Horne [1933] (Court of Appeal)

³⁰Ibid.

1.7. Criminal Liability of Companies

Most countries agree that corporations can be sanctioned under civil and administrative laws. However, the criminal liability of corporations or companies has been more controversial and raising a multitude of debates. While several jurisdictions have accepted and applied the concept of corporate criminal liability under various models, other legal systems and families have not been able or willing to incorporate or adopt it. Critics have voiced strong arguments against its efficiency and consistency with the principles of criminal law.³¹

The Rwandan Penal law recognizes criminal liability of companies because it imposes penalty to companies that involve in criminality and the criminal liability is established when the offenders have acted by virtue of the following: 1^o power of representation; 2^o decision-making power; 3^o power of supervision. The criminal liability of public institutions, companies, cooperatives, public or private entities or organizations with legal personality.³² However, it does not exclude the criminal liability of their representatives, those who hold leadership posts within them or their co-offenders and accomplices. The main goals of criminal liability of corporations are similar to those of criminal law in general.

1.8. Advantages of incorporation of Company

The legal nature of a company goes together with advantages. The first which is a backbone of incorporation is the creation of separate legal entity which is different from the shareholders.³³ With separate legal personality, there is the application of perpetual succession as earlier seen in Key major characteristics of a company.³⁴ In addition to this, if the company is registered as limited one, the liability of shareholders will only be limited to their shares or guarantees.

³¹Anca Iulia Pop, Criminal Liability of Corporations: Comparative jurisprudence

³² Law N°68/2018 of 30/08/2018 determining offences and penalties in general, articles 88 - 90

³³ This doctrine to separate legal entity was established by the House of Lords in the worldwide known case of Salomon v Salomon, where it was held that a legally incorporated company is different from its members, regardless of whether all shares may be in the hands of one single person. See Salomon v A Salomon & Co Ltd [1897] AC 22.

³⁴ N.J. MIETUS, J.E.ADAMSON and M.FISK, 12th Edit., Applied Business Law, Ohio, South-Western Publishing Co., 1982, p. 660.

There are various advantages of company incorporation because when the company is not registered and operates like a *de facto* company, there are a number of legal effects that are attached to it like the lack of the capacity to sue, this is rooted from the provisions of the law relating to civil, commercial, labour and administrative procedure where it states that “the claim cannot be admitted to the court unless the plaintiff has among other things the capacity to sue”³⁵ and this applies to companies without legal personality as they cannot sue. The lack of capacity to contract³⁶ and the lack of the capacity to own property on their own.³⁷

³⁵See Arts . 2, 21 of Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure See also case no. RCOM 0480/13/TC/NYGE, Par.17 Commercial Court, Nyarugenge, October 23, 2013, JV Seburikoko and Berco Construction v. RTDA,

³⁶ Chambres des Métiers, Créer son entreprise artisanale: Choisir sa forme, Luxembourg, ISBN:, 2014, pp.38, 39.

³⁷ D.SMETS et al., Le Controle des Associations Momentanées: Aspects Juridiques, Comptables, Fiscaux et Revisoraux, Institut des reviseurs d’entreprise, 1996, p. 29. Also available at <https://www.ibr-uire.be/fr/publications/series_cloturees/etudes_ire/Documents/Contr%C3%B4le/Le%20contr%C3%B4le%20des%20associations%20momentan%C3%A9es%20%20aspects%20juridiques,%20comptables,%20fiscaux%20et%20revisoraux.pdf>> Visited on 24th /07/2021.

CHAPTER II: CORPORATE GOVERNANCE IN EAC AND ITS IMPACTS

Corporate governance in general is said to regulate the exercise of power (i.e Authority, direction and control) within a company in order to ensure that the company's purpose is achieved and this encompasses;³⁸

- i) The creation and ongoing monitoring of an appropriate and dynamic system of checks and balances to ensure the balanced exercise of power within a company;
- ii) The implementation of a system to ensure compliance by the company with its legal and regulatory obligations;
- iii) The implementation of a process whereby risks to the sustainability of the company's business are identified and managed within acceptable parameters; and
- iv) The development of practices which make and keep the company accountable to the company's identified stakeholders and the broader society which it operates.

Corporate governance is thought to be the exclusive domain of boards of directors, but in broader sense, it is a task delegated by law and by the company's owners or shareholders. The structures, processes and practices that the board uses to direct and manage the operations of a company determine how authority is exercised, how decisions are taken, how shareholders have their say and how decision makers are held to account. ³⁹

As Mell Gill briefly put it, corporate governance consists of structures, traditions and processes of leadership and stewardship that assign power, define roles, responsibilities and leadership, govern communication with stakeholders and ensure accountability.⁴⁰ Good corporate governance was described at the launch of king IV as "wholesome leadership in practice". Good corporate governance has its foundations in leadership that is both effective and ethical. It is on the basis of this that leadership starts with each person

³⁸ Supra note, RamaniNaidoo, TMBooyesen and KA Rayner, 7, P.4

³⁹ Supra note, RamaniNaidoo, TMBooyesen and KA Rayner, 7, P.4

⁴⁰ Supra note, RamaniNaidoo, TM Booyesen and KA Rayner, 7, P.4

charged with governance duties in the company under the guidance of a board that must, as a collective, lead ethically and effectively.⁴¹

The company is managed in a triangle form where the shareholders are at the base, the shareholders are generally viewed as the ultimate or residual owners of the company, and they select the personnel at the next level namely, the Directors. The board of Directors appoints the Chief executive Director (CEO) and other company officers, determines company policies, oversees the company officers' work and in general manages the company or supervises the management of the company's affairs.⁴²

Legally speaking, Directors are the supreme in the daily management of the company. Company governance is most often viewed as both the structure and the relationships which determine company direction and performance.⁴³ In Rwandan law context the power to manage the company is entrusted to the board of directors⁴⁴ and the board of directors is typically central to company governance. Its relationship to the other primary participants, typically shareholders and management, is critical. Additional participants include employees, customers, suppliers, and creditors.

Scholars like Bruce Weber defined company governance as "accountability to providers of capital."⁴⁵ Other scholars like Shleifer&Vishny, define Company governance as "how investors get the managers to give them back their money".⁴⁶ Generally speaking, Corporate governance refers to the set of systems, principles and processes by which a company is governed.⁴⁷ Stakeholders in this case would include everyone ranging from the board of directors, management, shareholders to customers, employees and society. The management of the company hence assumes the role of a trustee for all the others.

⁴¹ Supra note, RamaniNaido, TM Booysen and KA Rayner, 7, P.5

⁴² James D. Cox and Thomas Lee Hazen, Corporations, 1997,P.146

⁴³ Cadbury Report in 1992,p.1

⁴⁴ Supra note, Law N° 007/2021 of 05/02/2021

⁴⁵ Bruce Weber is the Dean of the Learner College of Business at the University of Delaware, USA.

⁴⁶Shleifer&Vishny, "A Survey of Corporate Governance," Journal of Finance 52(2) 1997: 738)

⁴⁷X., Company administration available at [https://economic timesindiatimes.com/](https://economic.timesindiatimes.com/) accessed on 24th /07/2021.

2.1 Corporate Governance in Rwandan Law

Under Rwandan law, the company Act provides how the company should be managed by the board of directors who are appointed by the general assembly of shareholders or those who have voting shares. ⁴⁸Directors are appointed for the purpose of acting in the best interests of company or shareholders, but the problem may happen when they act to the contrary. It is of no doubt that when they act to the contrary or act ultra vires, they are individually liable for the damage caused. The liability can be both civil and criminal depending on the act itself. Rwandan company law provides both, but does not clearly show the circumstances under which directors can be liable. The principle is that a company is a separate legal entity which is different from its employees or the owners.

Company governance refers to a system by which companies are managed and controlled. Board of directors are responsible for the governance of the companies. The general assembly shareholders' function in company governance is to appoint directors. Countries with strong company atmosphere attract capital. Countries that guarantee investor rights and have good company governance practices like adequate company exposé, sound board practices, have potentiality to attract both domestic and international investors.⁴⁹

In several countries, codes of company governance have been established to guarantee least principles of corporate governance and disclosure are adhered to. Some of the practical examples of these include; Cadbury Code and Hampel Committee in the United Kingdom and the King's Code of South Africa.⁵⁰ The establishment of the code will go a long way in setting standards for how companies are managed to secure the values of the shareholders. In Rwanda, there is a code established by Private Sector Federation (PSF) but

⁴⁸ See Law N° 007/2021 of 05/02/2021 governing companies in Rwanda, articles 147-156

⁴⁹ See Memoire presented by ZIGIRABABIRI Protogene, UR, LIABILITY OF COMPANY DIRECTORS UNDER RWANDAN COMPANY LAW in Partial Fulfillment of Academic Requirements for the Award of Bachelor's Degree in Law (LLB), 2016, P.16. Investors are those persons who carry out business activities that are related to investment. The term investment means "the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise" With investment, there are a number of elements that are required so as to qualify a business act as investment. Those elements are a contribution of money or other assets of economic value, certain duration, an element of risk, contribution to the host state's development. These elements have been established by International Center for Settlement of Investment Disputes (ICSID) in Salini and Italstradale v. Kingdom of Morocco, ICSID Case N° ARB/02/13, Decision on jurisdiction, 23 July 2001, 42 ILM 609]

⁵⁰ Supra note, Memoire presented by ZIGIRABABIRI Protogene, 19, p.16

it does not explain adequately how companies should be governed. This section is devoted to elaborate much among other things on company governance under Rwandan company Law context.⁵¹

2.1.a General Assembly of Shareholders

As explained in the preceding chapter and emphasized quite often, a company as a separate legal entity must have organs that ensure its proper functioning. Its governing organs are the Shareholders in general meeting and the Board of Directors. The Company's General Assembly is the company's congress in that, all important and critical decisions are voted and approved. Example of such decisions are where shares of a company limited by shares are converted into company limited by guarantee, changing the company name ,Alteration or revocation of the articles of association of a company.⁵² General assembly of shareholders is divided into three categories depending on the nature and the capacity of shareholders. Those categories are Constituent Assembly, the Ordinary General Assembly and the Extraordinary General Assembly.

2.1.b The Ordinary General Assembly

As is usually accustomed, the board of directors convenes an annual general Assembly of shareholders to be held according to the law established:

1° once a year and not later than fifteen (15) months after the last preceding meeting;

2° not later than six (6) months after the date of approval of the company's balance sheet; However, a newly incorporated company may hold its shareholders' meeting within eighteen (18) months of its registration.

The company may hold a general assembly of shareholders on the date agreed upon by directors. Also, Notice of each meeting is sent to all shareholders not less than twenty-one (21) days before the date of the general assembly.⁵³

The notice states, at a minimum the agenda for the next meeting as well as information regarding directors to be elected at the general assembly including biographies, a

⁵¹ Idem

⁵² Supra note, Law N° 007/2021 of 0 5/02/2021 governing companies in Rwanda, arts 100-109

⁵³ Supra note, Law N° 007/2021 of 0 5/02/2021 governing companies in Rwanda, art 100.

statement of their business experience and any directorships held by them in other companies. The rationale of the ordinary general assembly is to permit the shareholders to question the management about the yearly report, to take part in voting on any resolutions put before the meeting and to elect new directors if it is deemed appropriate.

2.1.c Extra- Ordinary General Assembly

Generally speaking, the extra-ordinary general assembly specializes in looking into different decisions such as the approval of the raise or reduction of the company's capital.⁵⁴ This assembly can also be convened for examining other issues like the acquisition proposal, the resignation of the chairman or any other issue that is urgent and may not necessarily wait for the Ordinary shareholders' meeting's schedule. Apart from these, extra ordinary general assembly of shareholders can convene for discussing any topic related to amending the company's law with the exception of the amendments that could deprive the shareholder his basic rights that comes with being a partner in the company.⁵⁵

The law governing companies in Rwanda in its article 103 also states that;

*" A shareholders' general assembly other than the annual general meeting is a shareholders' extraordinary meeting. The Board of Directors or any other person so authorized in the company's incorporation documents, may convene a shareholders' extraordinary meeting. The Board of Directors convene a shareholders' general extraordinary meeting upon request made by written notice served on the company signed by one or more persons holding the right to exercise not less than five per cent (5%) of the votes entitled to be cast on the issues to be discussed at the meeting as set out in the notice."*⁵⁶ However, the extra-ordinary general assembly can issue resolutions in matters within the ordinary general assembly's jurisdiction. It would apply the same restrictions and conditions of the ordinary general assembly.

2.1.d. Rights and Responsibilities of shareholders

The history of company law has been one of increasing flexibility for directors and decreasing rights for shareholders. Although the law seems to have coalesced around the norm of shareholder primacy, this is not necessarily reflected in the specific legal rights of the Shareholder. A better understanding of the rights and responsibilities of the shareholder is indeed needed. The Rwandan Company law gives the shareholders the right

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Supra note, Law N° 007/2021 of 0 5/02/2021 governing companies in Rwanda, art 103

to vote, right to receive information of the company on a timely and regular basis, receive a distribution in respect of the shares. There are another number of rights that a shareholder must enjoy in respect to the company namely the right to secured method of shares registration, rights to transfer shares⁵⁷ and other rights which are associated to the shares.

Additionally, shareholders have another burden in the wellbeing of the company. Those obligations that are connected to shareholders are the obligation to ensure that only skilled and reliable persons who can add value to the company are elected or appointed to the board of directors; guarantee that the board of directors is at all the time held accountable and responsible for the proficient and successful governance of the company⁵⁸.

2.1.e Company Directors and their appointment

A board of directors is a body elected or appointed members who jointly oversee the activities of a company.⁵⁹It is a challenging position which requires knowledge, confidence, analytical skills and an external, objective viewpoint in order to assist the company's interests.⁶⁰The Rwandan company law does not define a board of directors but rather it gives the responsibilities. A board's activities are determined by the powers, duties, and responsibilities delegated to it by shareholders.⁶¹ These matters are typically detailed in the company's bylaws.⁶² The bylaws commonly also specify the number of members of the board, how they are to be chosen, and when they are to meet. The members of the Board

⁵⁷ Ibid

⁵⁸ McNulty, T., Roberts, J. and Stiles, Creating Accountability within the board: the work of the effective nonexecutive director, London: DTI, Higgs Review, 2003,P.169, as cited by ZIGIRABABIRI Protogene in his memoire 2016, p.20

⁵⁹ ADOLF A. BERLE, JR. & GARDINER C. MEANS, The Modern Corporation and Private Property ,1932,P.79, as cited by ZIGIRABABIRI Protogene in his memoire 2016, p.20

⁶⁰ Sir Tom, Non-executive Directors: Their Role and Responsibilities, Article, available at https://www.icas.com/_data/assets/pdf_file/0014/2417/Non-Executive-Directors-Roles-and-Responsibilities-in-a-Private-Company-ICAS.pdf, Accessed on 24th /07/2021

⁶¹ X., Responsibility of shareholders, Available at http://www.bhpbilliton.com/~media/bhp/documents/aboutus/ourcompany/governance/150923_aboutus_governance_termsofappointmentofnonexecutivedirecto>> accessed on 24th July 2021

⁶²X., Responsibility of the directors, Available at at<<<http://www.metsaboard.com/Investors/Board-Of-Directors/Pages/default.aspx>>> accessed on 24th July 2021

are appointed by the resolution of annual general meeting of shareholders.⁶³ Only natural persons are allowed to be in the Board of Directors.⁶⁴

A company may appoint a natural person as a director according to the company law established in Rwanda when such a person meets or fulfils the following requirements: ⁶⁵

1° being at least sixteen (16) years of age;

2° being a discharged bankrupt, if applicable;

3° not being subject to a disqualification by a court's order;

4° not having been sentenced in the immediately preceding five (5) years to a penalty under this Law or the Law regulating Capital Market or for economic crimes;

5° complying with any qualification for directors contained in the company's incorporation documents;

6° not having a mental disability as certified by a recognized medical doctor.

2.1.f Composition of the Board

Even though each company director is required to act in the line of company's best interests, there is a need of separation and this separation is aimed at maximizing the interests of the company. The board of directors is divided into three categories : Non-executive board of directors, executive board of directors, and Independent board of directors.⁶⁶

2.1.fi Non-executive Board of Directors and their appointment

Non-executive director also sometimes known as an outside director is a director who does not have a material or monetary relationship with company or related persons, except sitting allowances.⁶⁷ Non-executive directors do not own shares in the company and they

⁶³ Article 153 of Law N° 007/2021 of 0 5/02/2021 governing companies in Rwanda'' Notwithstanding anything in its incorporation documents, a private company must have at least one director and a public company shall have at least two (2) directors. Directors must act in a collegial administration and must be of a sufficient number provided for in incorporation documents of the company for a meeting to be attained.

⁶⁴ Article 156 of Law N° 007/2021 of 0 5/02/2021 governing companies in Rwanda

⁶⁵ Ibid

⁶⁶ Paul L Davies, The Board of Directors: Composition, Structure, Duties and Powers, Stockholm, Sweden, 200, PP 20-22, Available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf> , accessed on 25thjuly 2021,

⁶⁷ Lucian AryeBebchuk, Corporate Governance on an International Level, Tamkeen, Article, available at <http://ww1.tamkeenconsult.com/> accessed on 25thjuly 2021

do not participate in the daily management of the company.⁶⁸ The Rwandan company law defines A non-executive director as a person who does not form part of the management team of the company and who is not an employee of the company or affiliated with it in any other way, but who can own shares in the company.⁶⁹

In order to appoint non-executive Directors, there are some basic requirements one may base on such as being a Strategic thinker, Influencer, Balanced, Impartial, Advisor, capable of taking tough decisions or being heavily networked. The company needs them for the overall aim of generating interests. One of the most important points to note is that all directors, whether executive or non-executive, have a core set of legal responsibilities that they must carry out. The decision on when a Non-Executive director should be appointed needs to be based on a fully thought out strategy relating to the expansion and development of the company overall. All executive directors should be in agreement that not only a Non-Executive director is required but also the timing of the appointment.⁷⁰

2.1.f.ii Independent Directors and their appointment

Independent director means a person other than an executive officer or employee of the company or any other individual having a relationship which, in the opinion of the issuer's board of directors would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.⁷¹ The purpose of identifying and appointing independent directors is to ensure that the board includes directors who can effectively exercise their best judgment for the exclusive benefit of the Company, judgment that is not clouded by real or perceived conflicts of interest.⁷²

⁶⁸ David G. Epstein and Richard D. Freer, Business Structure, 3rd Ed., West, a Thomson business, 2007, P.148. cited by ZIGIRABABIRI Protogene in his memoire 2016, p.21

⁶⁹ See art 158 of Law N° 007/2021 of 05/02/2021 governing companies in Rwanda

⁷⁰ Stephen Schwarz and Daniel J. Lathrope, Corporate and partnership Taxation, 6th Ed., West Publishing Co, 1994, P.88, as cited by ZIGIRABABIRI Protogene in his memoire 2016, p.22

⁷¹ X., Definition of independent Directors, Available at <http://files.shareholder.com/downloads/avid/0x0x259481/b737f7c9-7d35-4f25-93af-8b846f40f911/avidd> accessed on 25th July 2021

⁷² Lewis D. Solomon and Alan R. Palmiter, Corporations: Examples and explanations, 3rd ed., New York, 1999, p. 87.

2.1.f.iii Executive Board of Directors and their appointment

An executive director is the privileged operating officer or administrator of a company. Executive director titles (EDs) are commonly reserved for the heads of companies and their duties are similar to a chief executive officer's (CEO) of the company. An executive director normally is a full time officer of the company, he or she is employed by the company to perform specific task.⁷³ Executive directors work together with other employees in the company.⁷⁴ Under the Rwandan company law, executive directors play a central role in the well -being of the company. Requirement to for the appointment as a director as stated earlier vary depending on the nature of company.

The board of directors is expected to have or must have overall understanding of the operation and information technology systems of the credit bureau; meet at least once quarterly in any manner, including teleconferencing; ensure that the activities conducted in all offices of the credit bureau are in full conformity with the Law; appoint a competent Chief Executive Officer and Chief information technology officer; ensure that the credit bureau maintains, at all times, an effective system of internal controls; ensure that the credit bureau maintains a customer's claims and inquiries service to assist customers who may be affected by the information contained in the database..

2.1.f.iv chairman of the Board of Director's Role

The role of the chairman as highlighted by Private Sector Federation in its code of corporate governance is summarized in various aspects but the most known are;

*“ to lead the board; to chair meetings of the board and members, ensuring order, proper conduct meetings, affording participants a reasonable opportunity to speak, ensuring decisions are fairly made, deciding on technicalities and to cast the deciding vote in case of ties; Not only that ...to organize and facilitate a balance of internal and external relationships, to facilitate effective board management; Financial reporting, Evaluation of board performance”.*⁷⁵

⁷³ Stephen Griffin, Company law: Fundamental Principles, 3rd ed., University of Wolverhampton, Longman, 2000, p. 227.

⁷⁴ X., Executive Directors, Available at <http://www.investopedia.com/terms/e/executive-director.asp> accessed on 25th July 2021

⁷⁵ Private Sector Federation, Guiding Code of Corporate Governance, 2009, as cited by ZIGIRABABIRI Protogene in his memoire 2016, p.23

Irrespective of all the different functions of different categories of the Board of Directors, the law holds them to be taking decisions jointly, and this implies a joint liability for any failure on either of the Board member in the Board functions.

2.1.f.v Company Secretary's Role

A company secretary is a senior position in a private sector company or public sector organization normally in the form of a managerial position.⁷⁶ Company secretary has high level responsibilities. Company secretary is the primary source of advice on the conduct of business. Under Rwanda company law, the notion of company secretary was incorporated first in the company law of 2009 and its 2010 amendment strengthened the role and functions of the company secretary.

2.1.f.vi Company Auditor

An auditor is an official whose job is to carefully check the accuracy of business records. Legally speaking, an auditor is an accountant who verifies the books of a company, stating whether they give true and fair position of the company. Under the new company law N° 007/2021 of 05/02/2021, the appointment of a particular auditor is authorized by the shareholders by ordinary resolution.⁷⁷ A person or firm is not qualified for appointment as auditor of a company according to the law unless, in the case of a firm, every partner is a full or associate member of an institution⁷⁸ or association of chartered accountants recognized in Rwanda.

To conclude this chapter, Governance structures and practices in Rwanda should be designed by the board to fulfill its duties effectively and efficiently.⁷⁹ The board of directors, as the central mechanism for oversight and accountability in our corporate governance system, is charged with the direction of the corporation, including

⁷⁶ X., Company Secretary, Available at <http://www.businessdictionary.com/definition/company-secretary.html> , accessed on 25th July 2021

⁷⁷ See art 132 of Law N° 007/2021 of 05/02/2021 governing companies in Rwanda

⁷⁸ See art 133 of Law N° 007/2021 of 05/02/2021 governing companies in Rwanda

⁷⁹ Corporate Governance and Institutional Transparency in Emerging Market, Journal of Business Ethics , Volume 59, 2005, Available at <http://link.springer.com/article/10.1007/s10551-005-3412-1> accessed on 25th July 2021

responsibility for deciding how the board itself should be organized, how it should function, and how it should order its priorities.⁸⁰

2.2. Impacts of corporate governance in EAC

Globally, ownership is the basis of power over a company. After the industrial revolution when businesses were most often controlled by the people who owned them, there was little need for the formal codes of corporate governance.⁸¹ In theory, as shareholders are responsible for choosing the board of directors which in turn appoints management, it follows that management works for the shareholders and should, accordingly, work in their (shareholders) interests by maximizing the value of the company.

Corporate governance goes beyond management, and the two concepts are quite distinct.⁸² In essence, those who govern determine and authorize what companies do. Executives manage companies by virtue of the authority delegated to them by those who govern. If management is about running the business, then governance is about seeing that it is run properly. All companies in Rwanda therefore need governing as well as managing.⁸³ This in effect will stimulate and efficiently improve domestic functioning of companies in Rwanda as well as paving way for the profit maximization.

The steady application of these policies and principles, among other things, intends to create a healthy, compliant, transparent, and accountable corporate culture that is continuously reviewed and improved in order to ensure that your behavior aligns with the values your organization seeks to embody.⁸⁴ This is a cornerstone for success, that enables the creation of opportunities for growth and a competitive advantage. Good corporate governance has become a key focus area for businesses to position themselves favorably in order to withstand a difficult economic situations in Rwanda.

⁸⁰Ibid.

⁸¹ Supra note, RamaniNaidoo, TM Booysen and KA Rayner, 1, P.8

⁸²Idem. 1, P.9

⁸³Ibid.

⁸⁴ Supra note, <https://www.curasoftware.com> , accessed on 17/1/2022

2.3. Benefits of good corporate governance in EAC

The following are some of the benefits of good corporate governance in EAC ;⁸⁵

a. Building morale, reputation, and a legacy:

As shown by experts, implementing procedures that support good governance enhances a company's identity where stakeholders and potential investors are confident to place increased levels of trust in you, which in turn allows you to develop stronger, longstanding relationships. In Rwanda, this has already manifested itself in every corporate business and have proved to be advantageous than sole proprietorship.

b. Increasing success rate for financial performance and enhances sustainability:

Implementing protocol for good governance is intended to assist with being able to quickly identify issues as well as to quickly make decisions to resolve these potential issues thus reducing the eventuality of a crisis and the cost it bears. In Rwanda, this has effectively worked to this end and it is an act worth applauding.

c. Creating a greater ability to attract and retain talent:

A significant focus has been placed on culture being a key contributing factor to the success of a company. Maintaining transparency, surrounding fairness, accountability and operations, gives your employees a greater sense of responsibility and awareness as to where they are positioned to create value within an organisation. Any business organization with corporate arrangement needs some level of a cultural working environment in order to succeed and maintain fairness, accountability and transparency. This has effectively worked in Rwanda because now we have a business working culture that enables even regional countries to trust partnering with local entrepreneurs with confidence.

⁸⁵ Supra note, , <https://www.curasoftware.com> , accessed on 17/1/2022

d. Creating an effective framework aimed at meeting business objectives:

Decision-making that takes into consideration major stakeholders such as employees, suppliers and the community alike has created a wider vision for successful results. Providing each stakeholder with a percentage of valuable involvement creates a more accountable culture, generating a higher potential to reach objectives within an organisation. The way corporate businesses are conducted in Rwanda reflect the above and creates more accountable culture and potential to reach their set objectives. Effective frame work mentioned above is important the good corporate governance

e. Creating more opportunities to attain a competitive advantage:

Every industry is either constantly evolving or has the potential to evolve at a certain point; adopting good governance and creating an environment where its practices can be sustained is vital to ensuring that your organisation is adaptable to change, thus providing a greater competitive advantage and chance at survival. The attainment of Competitive advantage here is critical in the creation of opportunities said above.

f. Creating opportunities for investment:

An organisation that represents stability and reliability increases its chances of attracting premium investors, as well as increasing their opportunity to borrow funds at a better rate.

g. Providing a practical way to guide decision-making at all levels:

The ability to make informed decisions can quickly improve performance and reduce the effects of potential failures. One way to promote this kind of decision-making ability is to ensure that information is readily available to key stakeholders, i.e. a culture of transparency. This has effectively helped corporate organisations in Rwanda contrary to sole proprietorship.

Strong corporate governance practices in Rwanda will undoubtedly increase the effectiveness and efficiency of business operations through instilled values that emanate from leadership throughout and has the potential to yield major benefits for any organization that is registered as corporate.

2.4. Salient impacts in Rwanda Corporate Governance

2.4.i Access to Capital

As observed above, lack of access to capital at competitive rates remains a major obstacle to the progress and improvement of many companies both public and private and indeed of EAC countries. Some scholars believe that corporate governance deals with the ways in which suppliers of finance assure themselves of getting a return on their investment⁸⁶ and investors believe that some of the risks of investing in an emerging market –currency fluctuations which impact the rate of return on an investment, political stability, endemic corruption and the demand for facilitation fees may well be mitigated by good corporate governance.

In Rwandan context, we need all these aspects verified by the stakeholders in order to get access to capital, but the trend apparently is commendable as espoused by Rwanda Development Board. Under the new world order of doing business, companies now have to compete on equal terms for investment, internationally traded resources and human capital wherever they are in the world.⁸⁷ While any investment involves risks, investors are globally demanding assurances that such risks are identified and properly managed. Also board of directors of companies accept that it is fully to investors for the investment.

2.4.ii Foreign Direct Investment

A country's sound corporate governance in companies gives it reputation elsewhere as Arthur Levitt, a former chairman of the US, SEC put it that "markets exist by the grace of investors,... No market has a divine right to investors' capital.... If a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere. If investors are not confident with the level of disclosure, capital will flow elsewhere. If a country opts for a tax accounting and reporting standards, capital will flow elsewhere. All enterprises in that country regardless of how steadfast a particular company's practices may be, suffer the consequences".⁸⁸

⁸⁶RamaniNaidoo, TM Booyesen and KA Rayner, Supra note, 1, P.15

⁸⁷ Idem, P.16

⁸⁸RamaniNaidoo, TM Booyesen and KA Rayner, Supra note, 1, P.16

In Rwandan context of doing business, foreign direct investment is critical as it can revamp the economy with pouring liquidity in operationalization of company investments and capacity building of Rwandans. Rwanda's GDP in 2021 stands at \$10 billion with a population of about 13 million which is still low by all standards. This means that we still need injection of more capital for investment since there is a base line of security of persons and their property plus political will from the government.

However, corporate governance and reducing levels of corruption should not be seen as a guarantee that foreign investment will promote economic development in Rwandan context. What is clear is that for as long as Rwanda is not prepared to embrace transparency and good governance, the only foreigners likely to prefer Rwanda as an investment destination are those with an interest in exploiting minerals and Gorilla tourists.

2.4.iii Legislation

Legislation such as the Rwandan company Act of 05/02/2021 provides the legal structures in terms of which companies are created and empowered. Companies are creatures of the statute and cannot exist unless created by law and given certain powers in terms of their founding documents. This effort in itself is a precursor to good working environment under corporate governance protected by the law.⁸⁹ It is the corporate law that defines the manner in which companies come into existence; its objectives, authorities, rights and obligations as separate legal entities, the offences of which they are capable and the penalties applicable in those offences.⁹⁰

Typically, legislation also lays down minimum requirements for reporting by the companies to their shareholders, determining what, how frequently and to whom information must be provided. Companies must also comply with a host of other laws that regulate, for instance, health and safety issues, competition, marketing and employment practices and tax obligations.⁹¹ All these aspects combined together are clearly aimed at

⁸⁹ Idem

⁹⁰ Ibid. p 38

⁹¹ Ibid.

putting in place mechanisms of governance that promote business in Rwanda. Sole proprietorship cannot envisage and provide all these mechanisms which also manifest themselves in providing Rwandans with jobs which ultimately pay them salaries and hence social economic development of the country.

2.4.iv Regulations

Under corporate governance, one has to emphasize that all regulations exist to assist in the implementation of the primary legislative process. In other words, primary legislation such as the companies Act contains provisions which allow certain bodies established under the law to make regulations, in terms of defined processes, on a range of matters within their areas of responsibility. ⁹²This nonetheless, permits the law to be applied more effectively and efficiently, quickly and with greater flexibility having regard to the changing circumstances. These regulations thus may involve the orders of government agencies and regulatory bodies put in place by the state for the governance of corporate bodies and the protection of investors.⁹³

2.4.v Codes of Best Practice

There is corporate governance codes proliferating around the world such as the Kings Reports in South Africa and the combined reports in United Kingdom(a consolidation of recommendations of the Cadbury Report and subsequent UK corporate governance Report) and these have usually been the adoption of these codes as a precondition to a stock exchange listing. ⁹⁴The UK combined code for instance is not mandatory for listed companies, but these companies are required to report on whether they have complied and if not, why not? In what is commonly called “ comply or explain” approach. ⁹⁵

Rwandan corporate structure need to also review and adopt this method of Codes of Best Practice because it ensures transparency and can also woo investors to buy shares in the domestic companies without fear of losing their liquidity which in effect spurs economic development of our local companies and creates job opportunities.

⁹² Ibid.

⁹³ Idem

⁹⁴ Ibid. p39

⁹⁵ Idem

In Rwanda, stock exchange listing on public liability companies like banks have started featuring though on sparse scale. A contentious issue at this moment is whether the requirements of corporate governance codes should be mandatory (in other words, policed and enforced by penalties and other punitive measures) or recommended only thereby giving them the advantage of being flexible, adaptable and responsive to changing business circumstance.⁹⁶ The global trend appears to be towards the development of hybrid systems, where governance principles are increasingly being legislated.

In South Africa for instance, the presentation of “ King IV” which has been described as the platinum standard of corporate governance codes, differs significantly from its predecessors. Its aim is to present corporate governance as a “holistic and integrated set of arrangements” written as aspirational outcomes rather than a set of rules. ⁹⁷ The leadership responsibilities of the board are the development of strategy, the approval of policies and plans to give effect to that strategy; providing oversight of the implementation of the strategy and policies and ensuring accountability to the company’s shareholders through appropriate disclosure of company’s financial, ethical and environmental performance. ⁹⁸

2.4.vi Governance of State owned Entities

The importance of good corporate governance to the success of state owned entities cannot be over emphasized. Good corporate governance is paramount to the success of the SOE itself and an those who are impacted by it, as said by king IV (2016) of South Africa.⁹⁹ To him, sound governance and leadership starts with a focus by the members of the boards of state owned entities on their own individual and collective character and behavior. For instance, South Africa’s state owned entities (SOEs) are of immense strategic importance because they control communications (SABC and Telcom), Transport infrastructure (

⁹⁶ Ibid.

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹RamaniNaidoo, TM Booysen and KA Rayner, Supra note, 1, P.353

ACSA, Transnet, Portnet, Sanral and prasa), Energy and resources (Eskmo, TCTA, Petronet), defence (Denel) and funding (IDC, DBSA).¹⁰⁰

The above quasi monopoly gives state owned entities great influence and makes them lucrative sources of patronage.¹⁰¹there are currently 700 wholly or partially state owned entities in South Africa including 167 national and provincial departments and 301 public entities.¹⁰² In East African Community especially that Democratic Republic of Congo has joined fully to make the biggest economic block on the continent, if these achievements of SA are realized and directly put into use, our community can register a big improvement in terms of corporate governance and hence economic prosperity.

As to whether SoEs can succeed in doing corporate work, in their comprehensive analysis of the failure of many of South Africa's state owned entities to deliver on their mandates, Lynn McGregor and former Deputy Minister, Nozizwe Madlala Routledge argued that ultimately " *quality of corporate governance depends on whether governors have the capacity , knowledge, experience, expertise and integrity to make and carry out wise decisions in the best interests of the shareholder, company and the public*".¹⁰³

State owned entities are governed collectively, and to the extent applicable by their founding legislation, treasury regulations, the protocol on corporate governance for the state owned enterprises plus memorandum of incorporation which provides additional rules in terms of which these companies must be governed.¹⁰⁴

In 2015, the OECD published revised guidelines on corporate governance for state owned entities (the guidelines). The guidelines are international agreed standards for how governments should exercise the state ownership function to avoid pitfalls of both passive ownership and excessive state intervention.¹⁰⁵The first guidelines were first developed in

¹⁰⁰Ibid.

¹⁰¹ King IV, SOE Sector supplement, part of the King IV Report on corporate governance for SA (2016), P.111

¹⁰²Ibid.

¹⁰³ McGregor, L and madlala-Routledge, N: can state owned companies succeed? And improving corporate governance of SA's state owned companies.

¹⁰⁴Ibid.

¹⁰⁵OECD (2015), OECD Guidelines on corporate governance of State-owned Enterprises, 2015, Edition, OECD Publishing, Paris.

2005 as a complement to the OECD principles of corporate governance (The Principles) and were updated in 2015 to address new issues that have arisen concerning SOEs in the domestic and international context.¹⁰⁶ These guidelines aim to professionalize the state as an owner; make SOEs operate with similar efficiency, transparency and accountability as good practice private enterprises; and ensure that competition between SOEs and private enterprises, where such occurs, is conducted on a level playing field.

¹⁰⁶Ibid.

CHAPTER III: HARMONISATION OF BUSINESS LAWS IN THE EAST AFRICAN COMMUNITY

Harmonisation of business laws in EAC is of paramount importance in doing business in the member states as it enables the inflow of goods, services and persons with little difficulty plus making uniformity of laws governing these states as a precursor to garner dividends in those commercial activities. When you analyse one of the preambles of the treaty that creates EAC, it states among others that the member states decided to come together with a view to realizing a fast and balanced regional development and resolve to creating an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic and sectoral policies and their efficient management while taking cognizance of the developments in the world economy as contained in the Marrakesh Agreement Establishing the World Trade Organization. If all these objectives are effectively arrived at, then harmonization of business laws is imperative for these member states in order to fast track these commercial activities without encumbrances occasioned by different legal regimes. Harmonization of business laws in EAC therefore is key in order to realize all the above mentioned goals.

3.1 Harmonisation

According to legal pundits, Harmonisation is said or aims to effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards¹⁰⁷. In this regard, harmonisation can be seen as a step towards unification in which case it aims or strives towards unification.

In the European Union where it has taken root for instance, harmonisation of law (or simply harmonisation) is the process of creating common standards across the internal market.¹⁰⁸ Though each European Union member state under the law has primary

¹⁰⁷ <https://www.google.com/search=harmonization+of+laws> , accessed on 09/04/2022

¹⁰⁸ Idem

responsibility for the regulation of most matters within their jurisdiction, and as a result, each has its own laws. To crown it all, Harmonisation is geared or aims to:¹⁰⁹

- *Create consistency of laws, regulations, standards and practices, so that the same rules will apply to businesses that operate in more than one member state, and so that the businesses of one state do not obtain an economic advantage over those in another as a result of different rules.*
- *Reduced compliance and regulatory burdens for businesses operating nationally or trans-nationally.*

It is on the basis of the above that the objective of the European Union to achieve uniformity in laws of member states is to facilitate free trade and protect citizens.

According to legal experts, Harmonisation is a process of ascertaining the admitted limits of international unification but does not necessarily amount to a vision of total uniformity.¹¹⁰ They also emphasize that Harmonisation is usually not comprehensive but partial, in that it does not seek to create a sole authority of law on a particular subject. This is because measures to harmonize law cannot go further than that which is necessary.¹¹¹ Experts contend that Harmonisation is unsystematic and unmethodical.

Taking the regional context, on 18th June 2007, The Republic of Rwanda and the Republic of Burundi acceded to East African Community Treaty and on 1st July 2007, Rwanda and Burundi become full members of the East African Community.¹¹²

In pursuance of the provisions of paragraph 1 of Article 5 thereof which is relevant to the Harmonisation of corporate governance, , *“the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated,*

¹⁰⁹https://en.wikipedia.org/wiki/Harmonisation_of_law , accessed on 09/04/2022

¹¹⁰Ibid.

¹¹¹Ibid.

¹¹² When did Rwanda join the East African Community available at <https://www.google.com/search> accessed on 17/1/2022

harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.”¹¹³

To this end, the attainment of sustainable and durable growth and development of the member States by the promotion of a more balanced and harmonious development of the Partner States are also envisaged in this article plus the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations;

Article 6 thereof, sets Fundamental Principles of the Community where these principles shall govern the achievement of the objectives of the Community by the Partner States that include: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness ; peaceful settlement of disputes; good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights; equitable distribution of benefits; and co-operation for mutual benefit among others.¹¹⁴

Regional integration and/or unification of regional states is a major development strategy for African countries who share the objective and aim of continent-wide economic, social and cultural integration by 2028.¹¹⁵ An important aspect of this is trade liberalization. To attain this trade liberalization which is a precursor to regional integration, regional leaders may achieve it through regional free trade areas creation and slowly progressing towards a customs union, a common market and ultimately monetary union.¹¹⁶ The East African Community (EAC) is a regional intergovernmental organisation of six Partner States though before they were five in number before admitting South Sudan, comprising Burundi, Kenya,

¹¹³ Article 5 of the Treaty for the establishment of East African Community Countries as amended on 14/12/2006 and 20/08/2007

¹¹⁴ Article 6 of the Treaty Establishing East African Community Countries as amended on 14th December ,2006 and 20th August 2007.

¹¹⁵ www.jstor.org/stable/10.1163/j.ctt1w76vj2.34, accessed on 11/04/2022

¹¹⁶ *ibid*

Rwanda, Tanzania and Uganda (the Partner States), headquartered in Arusha, Tanzania. Democratic Republic of Congo also has acceded to join the community with a few remaining protocols to be signed and join fully which will make them seven countries.

According to the treaty establishing EAC, the broad and central goal of the EAC integration is to widen and deepen cooperation among the Partner States. It is worth noting that the EAC is one of eight regional economic communities recognised by the African Union (AU), and the only one (according to scholars) that has a vision of the creation of a political federation within the EAC.¹¹⁷ Harmonisation therefore in this regard is necessary in order to ensure that within the EAC, no deterrent Partner States that have not been on the strongest footing in terms of legislation and those Partner States traditionally regarded as “legally safe” are both regarded equally.¹¹⁸

3.2 Harmonisation of laws in EAC

Harmonisation of laws in East African Community states is a requirement of the treaty for the establishment of EAC. In order to achieve one of the objectives of the community, which is cooperation in legal and judicial affairs, the Partner States under article 126(2) (b) undertook to harmonize all their national laws pertaining to the community.

Article 47 of the protocol of the establishment of East African Common market and article 22 of the establishment of East African Community monetary union more specifically oblige their Member States to align their national laws, rules and procedures in order to facilitate effective functioning of the common market and monetary union. This makes economic laws more important in the implementation of the common market and monetary union.

In an effort to effectively implement the above, the EAC member states established a sub-committee on the Harmonisation of national laws in EAC whose mandate is to harmonize domestic or national laws and this is spearheaded by the chairpersons of the law reform

¹¹⁷Ibid.

¹¹⁸Ibid.

commissions of the partner states. The genesis of this sub-committee can be traced back to 1997 before the treaty was concluded.¹¹⁹

It was during the East African cooperation meeting of Attorneys General held at Nyali Beach Hotel, Mombasa, Kenya that a precursor to the sub-committee was formed according to the report released by experts.¹²⁰ At that time, the meeting deliberated at length on the “identification and Harmonisation of Member States” legislation in the East African cooperation context and decided to form a tripartite committee of national experts on Harmonisation of laws consisting of ; the heads of legislative drafting departments in the three Attorneys –General chambers; the chairpersons of the Law Reform Commissions of Member States, the Permanent /principal Secretaries of the three Member States’ line Ministries whose sectors require Harmonisation of laws; and any additional members that the tripartite committee may decide to co-opt.¹²¹

That approach has continued to be used until recently when the Sub-Committee adopted “model laws” as another suitable approach to Harmonisation. A model law is a legislative text on a specific area of law that is recommended to the Partner States for adoption and enactment as part of their national law.¹²²The major objective of the approaches referred to above is to align the different national laws without necessarily coming up with a uniform piece of legislation.¹²³

3.3 Harmonisation of Business Laws

As mentioned above, the work of sub-committee is to review all the laws of the Partner States that have a bearing on the community as a whole.

¹¹⁹ Michel Ndakengurikiye, some observations on practical aspects pf the harmonization of economic laws in the EAC context, opening remarks from the EAC secretariat, at the Giraffe ocean view hotel, Dares salaam, 10th -11th August, 2015

¹²⁰Ibidem.

¹²¹Ibidem.

¹²²Ibid.

¹²³ Idem, p. 46

However, analysts have put on record that the EAC region is increasingly experiencing the emergence of a business environment supportive of cross-border investments, mergers and acquisitions according to experts. Capital markets are becoming vibrant in the region, and initial public offers are being opened to all East Africans. The movement of capital is also constrained by limited restrictions within the region which must be dealt with to ease doing business and lift these unnecessary bottle necks.¹²⁴

The East African Community secretariat has consequently observed a need to prioritize the Harmonisation of commercial and economic laws and submitted them to the sub-committee for adoption.¹²⁵ According to the author of the opening remarks from the EAC secretariat, the prioritized laws fall within the following nine broad clusters: banking laws; business transaction laws; finance and fiscal legislation; insurance and re-insurance legislation; standardization, quality assurance and metrology legislation; and trading laws.¹²⁶

However, upon interpretation the treaty is silent on which instrument shall be used to harmonize laws in the EAC context. On a case- by -case basis, the Council has been adopting proposals by Sectoral Councils to use EALA Acts or Protocols.¹²⁷ Nonetheless, it should be noted that Protocols are generally developed to implement areas of cooperation agreed upon in the treaty which is envisaged in Article 151(1) of the Treaty Establishing the East African Community Countries. The protocols sometimes contain a provision on Harmonisation of national policies, laws and systems. This is the case for the EAC Common Market Protocol and the EAC Monetary Union Protocol under Articles 47 and 22 respectively. If this is done speedily, laws on corporate governance among member states will be implemented with ease after approximation of each member state. In a bid to

¹²⁴Ibid.

¹²⁵ Ibid.

¹²⁶Ibid.

¹²⁷<https://www.eac.int/press-releases/626-1103-321-national-laws-in-need-of-speedy-approximation-to-regional-legislation-eala-says>, accessed on 9/4/2022

operationalise the implementation of the provisions Article 126 (2) (b) of the EAC Treaty,¹²⁸

From the reports on record, it was reported that “The Republic of Rwanda has amended 10 legislations. They are Law relating to Immigration and Emigration in Rwanda, Law Regulating to Labour in Rwanda; Law of Contracts; Law on sale of goods; Companies law and Laws relating to Commercial Recovery and Settling of Issues Arising from Insolvency. Other pieces of legislation are the Laws on the Protection of Intellectual Property; Private and Public Partnerships; Competition and Consumer Protection; and Law relating to Investment Promotion and Facilitation.”¹²⁹

In Kenya, the harmonized pieces include; “the Insolvency Act, 2015; Partnership Act and the Limited Liability Partnership Act, Kenya citizens and Foreign Nationals Management Act and the Kenya Citizenship and immigration Act as well as the Labour Institutions Act, the Labour Relations Act and the Work Injury Benefits Act.”¹³⁰

The United Republic of Tanzania is reported to have made amendment/enacted the following pieces of laws: “Amended the Immigration Regulation and the Immigration (Visa) Regulations; enacted the law on employment of non-citizens; enacted a new Companies law; and enacted the Business Names and Registration Act. United Republic of Tanzania has further gone ahead to amend the Forex Exchange Act, 2008; and the Capital Market and Securities Act.”¹³¹

In Uganda, another ten pieces of legislation have been amended. They include the Companies Act; Insolvency Act; Partnership Act; Business Names and Registration Act and the Accountancy Regulation Act. Others are the Trade Licensing Act; Airport Service Charges Act; Civil Aviation (Air Operator Certification and Administration) Regulations No.

¹²⁸ Article 126 (2) (b) of the Treaty for the establishment of EAC countries states “For purposes of paragraph 1 of this Article, the Partner States shall through their appropriate national institutions take all necessary steps to: harmonise all their national laws appertaining to the Community. ”

¹²⁹<https://www.eac.int/press-releases/626-1103-321-national-laws-in-need-of-speedy-approximation-to-regional-legislation-eala-says>, accessed on 9/4/2022

¹³⁰<https://www.eac.int/press-releases/626-1103-321-national-laws-in-need-of-speedy-approximation-to-regional-legislation-eala-says>, accessed on 09/04/2022

¹³¹<https://www.eac.int/press-releases/626-1103-321-national-laws-in-need-of-speedy-approximation-to-regional-legislation-eala-says>, accessed on 09/04/2022

26 of 2012; The Civil Aviation (Air Craft Regulation and Marking) Regulations; and the Financial Institutions Act, No. 2 of 2007.¹³²

Contributing to the debate in the House generally, legislators of the EALA called on Partner States to go the extra mile in Harmonisation of their laws to that of the EAC and stressed the need for sensitization on the importance of EAC laws which is critical to reckon with if we need to spur economic development.

¹³²<https://www.eac.int/press-releases/626-1103-321-national-laws-in-need-of-speedy-approximation-to-regional-legislation-eala-says>, accessed on 09/04/2022

GENERAL CONCLUSION AND RECOMMENDATIONS

Conclusion

Given Rwandan history of isolation because it was a French speaking country while other countries that border with it which touch on the Indian ocean that are used as a conduit for the supply of imports for the goods are English speaking like Kenya, Uganda and Tanzania, harmonization of business laws is of paramount importance for Rwanda. The advantages of such harmonization are enormous because under harmonization, Rwanda profits by using same laws equally with the neighbouring countries whether it is free movement of persons or goods and services. The bottlenecks associated with tariff barriers which consume time of supply of goods to the end users are eliminated, taxes are regulated equally *etcetera*. When it reaches corporate governance, the harmonisation of company laws in the EAC makes all laws uniform to the business community which eases doing business to the investors and opening companies in any country of one's choice easily. For the case of Rwanda that is still lagging behind in trade and investments, this will pave way for the direct foreign investment in any field of commercial business like mining, industrial work, transportation of goods, ICT and so on. Rwanda as a land locked country needs such arrangement with seriousness and sincerity to fight isolation in business. With the advent of Rwanda Development Board, a lot has been registered to this end and much more is still needed to ease doing business.

Academic analysts and political scientists have concluded that regional integration and harmonisation of business laws helps progressive states to overcome divisions and conflicts that impede the flow of goods, services, capital, people and ideas alike. These political dichotomies and divisions are a constraint to economic growth, especially in developing countries.¹³³ Experts maintain that the World Bank Group helps its client countries to promote regional integration through common physical and institutional infrastructure because of its positive trajectory. Dichotomy between states created by poor infrastructure, geography and inefficient policies are an impediment to economic growth.

¹³³<https://www.google.com/search?q=regional+economic+integration>, accessed on 27/05/2022

Regional integration and harmonisation of business laws in these member states can be a panacea to the above difficulties of individual state laws

because it allows countries to overcome these costly divisions integrating goods, services and factors' markets, thus facilitating the flow of trade, capital, energy, people and ideas.¹³⁴

It has been observed that regional integration can be a vehicle and a panacea to promoting common physical and institutional infrastructure. In the same respect, regional integration requires mutual respect and cooperation between individual countries in the following aspects :¹³⁵

- Investment , trade and domestic regulation;
- ICT, transport and energy infrastructure;
- Financial and Macroeconomic policy;
- The provision of other common public goods (e.g. shared natural resources, security, education).

It has been recorded that cooperation in these domains has taken different institutional forms, with different levels of policy commitments and shared sovereignty, and has had different priorities in different global regions as has been studied by experts. Regional integration therefore can lead to substantial economic gains and hence allow countries to:¹³⁶

- Share the costs of public goods or large infrastructure projects;
- Decide policy cooperatively and have an anchor to reform;
- Have a building block for global integration
- Improve market efficiency;
- Reap other non-economic benefits, such as peace and security.

¹³⁴Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

From the foregoing analysis however, there are reported encumbrances to regional integration that need to be identified and managed accordingly;¹³⁷

- Researchers have discovered that states may have different preferences on priorities for regional integration, depending on their connectivity gaps, economic geography, or preferences for sovereignty in specific areas.’
- From the above analysis, regional integration’s impact on trade and investment flows, allocation of economic activity, growth, income distribution are often difficult to assess.
- There might be lack of adequate complementary policies and institutions may lead to inefficient outcomes. For instance, policy barriers at the border may offset the gains transport infrastructure cooperation.
- Regional integration may create winners and losers, notably within countries. Policies and institutions are needed to ensure that regionalism is inclusive and social, environmental, governance risks are managed.

You cannot have harmonisation of laws in East African Community when you don’t have regional integration in socio-economic and political life. However, in order for all this to flourish there must be political will by member states to implement the treaty. The slow movement in the implementation of EAC treaty in its entirety has been blamed on the political will of member states and their leaders who sign protocols and fail to implement them. The spirit and letters of the treaty itself represent the will of the people as a whole, but leaders fall short of walking the talk.

Good corporate governance fosters a culture of integrity and leads to a positive performing and sustainable business. Good governance signals to the market that an organisation is well managed and that the interests of management are aligned with other stakeholders.¹³⁸

¹³⁷ Ibid.

¹³⁸ <https://www.google.com/search?sa=> accessed on 26/05/2022

Recommendations

In Rwanda, Governance structures and practices of corporate bodies should be designed by the board and position the board to fulfill its duties effectively and efficiently. The board of directors, as the central mechanism for oversight and accountability in our corporate governance system, is charged with the direction of the corporation, including responsibility for deciding how the board itself should be organized, how it should function, and how it should order its priorities.¹³⁹The board's fiduciary objective is long-term value creation for the corporation; governance form and process should follow.

The vividness and transparency is more important than strictly following any particular set of best practice recommendations. Boards should tailor governance structures and practices to the needs of the company in a practical search for what is most effective and efficient.¹⁴⁰ Every board should explain in proxy materials and other communications with shareholders why the governance structures and practices it has developed are best suited.

Rwanda has improved on its business environment given its steadfast leadership that gave priority to "Ease doing business" engineered by RDB because it enacted new company law of Law N° 007/2021 of 05/02/202 that will cope up with the current business issues.

Improved governance structures and processes help ensure quality decision making, encourage effective succession planning for senior management, and enhance the long-term prosperity of companies, independent of the type of company and its sources of finance.¹⁴¹Corporate governance is important because it creates a system of rules and practices that determine how a company operates and how it aligns the interest of all its stakeholders.¹⁴² Good corporate governance leads to ethical business practices, which leads to financial viability.

Recommending on the role of corporate governance in EAC community and Harmonisation of laws as well, nothing can take place in this community without political will of leaders.

¹³⁹Ibid.

¹⁴⁰Ibid.

¹⁴¹<https://www.google.com/search?q=Over+the+last+decade> , accessed on 26/05/2022

¹⁴²<https://www.google.com/search?sa=> accessed on 27/05/2022

Laws can be drafted and enacted in their respective countries to harmonise corporate governance, but if there isn't permanent solutions to their political problems then regional corporate governance suffers. Any laws to work well in any society or region; the political environment has to be conducive first to pave way for the national laws to flourish. We have had issues of colonialism where colonial masters left us with corporate systems that are tailor-made on their language and cultures (French-English) where Harmonisation becomes a challenge given the colonial aspirations of each individual state. Leaders have managed to address this at integration level of member countries, but when it comes to harmonizing the enabling laws, some member states fast track others move slowly because of different approaches towards this duality of laws (common law and civil law families).

However, leaders should urge their respective member states to work and perceive ahead of this confusion and champion for what is more useful to the entire community in doing business than being stuck in the colonial mentality of doing business. It doesn't add value or sense to integrate neighbouring countries and make enabling protocols like Community Customs Union, common market, political federation and others when corporate laws are not aligned to the spirit and letter of the treaty establishing the East African Community. A case in point is to spearhead and enhance the free movement of labour, work and business and harmonisation of corporate laws so that community members can approach business in equitable manner devoid of diversity in corporate laws.

My final recommendation is like that of the sub-committee above because it took empirical research and recommended that; ¹⁴³

1. Robust sensitization programs should be continuous to enhance awareness among the peoples at all levels.
2. Republics of Rwanda and Uganda need to be commended for fast tracking the approximation and harmonisation of their laws especially business laws.
3. There is need for Partner States to prioritize and increase the budget allocations on the harmonisation and approximation of laws.

¹⁴³ Idem

4. There is need to adopt streamlined mechanisms to improve on the coordination and information flow between different stakeholders at different levels.
5. United Republic of Tanzania should fast track the developing of policy relating to Intellectual Property according to experts because reports indicate that it is lagging behind in that domain.
6. There is need for the Sectoral Council on Legal and Judicial Affairs to prioritize and consider the Reports on Harmonisation of Laws in the Partner States.
7. All national stakeholders must be informed about all laws amended for the purpose of implementing the Community Laws.

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