

# ANATOMY OF THE GREAT DIVIDE – SEPARATING THE ROLES OF CHAIRMAN AND CEO

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*The corporate sphere, globally, has been known for its power tussle. There have been numerous instances where corporate enterprises have witnessed clashes within different ranks of its substructure, with a view to gain as much control as possible. The focus of corporate governance, in most cases, has been to curb the struggle between the management and the share/stake holders of the company by trying to even out the inherent imbalance between the two camps of the corporation. One of the key mechanisms to do the same has been the evolving concept of a separate Chairman of the board and a Chief Executive Officer. Traditionally, the role had been bestowed on a single individual who was to be the ultimate repository of power, but owing to some catastrophic financial failures witnessed in various nations, the distinction in the two functions was proposed. The present paper maps out the trajectory of advances in the said field of corporate governance in three nations, i.e. the United States, United Kingdom and India. The aim is to juxtapose the advancement in the three countries and analyse the justification advanced by regulators worldwide, in keeping the two positions separate. A cross-national study shall help demystify the corporate temperament in the aforementioned regard and shall present a broad sample space to base the observations. We have argued through the course of the paper that a functional leeway, if made available to the corporations, shall help them to realistically achieve profitability and shall also ensure compliance, in letter and spirit, with global corporate governance norms.*

## I. INTRODUCTION

The near-collapse of multiple financial institutions worldwide has necessitated the formulation of a concerted action plan towards making corporations more accountable to its share and stake holders. This concerted action plan has been witnessed through the growing urgency with which countries are formulating and implementing corporate governance laws and policies. Framing such policies required an astute understanding of the power dynamics in the company structure, at the apex of which was, almost always, one

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individual. In addition to regulators, even the investor base began to realize the ills of an individual being the ultimate repository of power without being accountable to a supervising body.<sup>1</sup> To remedy this situation, a strategy to separate the positions of the Chairman of the board and that of the Chief Executive Officer ('CEO') was floated in a number of nations.<sup>2</sup> There are various tangible benefits that arise from splitting the role of CEO and Chairman, including improvement in savings, boosting of performance and reduction in potential for intervention by activist investors.<sup>3</sup> From the point of view of shareholder returns as well, splitting the role has been found to reduce the compensation structure of CEO/Chairman and delimit the potential for management failures.<sup>4</sup>

Interestingly, the development of laws necessitating the divide between the CEO and Chairman, varied in different nations owing to their particular economic and financial realities.<sup>5</sup> Although a similar pattern has been observed in the way nations have answered the complex question of power struggle in the corporations,<sup>6</sup> the present paper is an analysis of the said separation of the two roles in the company. We have tried to comprehend the reasons that motivate or demotivate an enterprise in selecting its functional sphere and decisions regarding splitting the positions of management and executives.

Part I of the paper gives a brief insight into the distinction in the roles of CEO and Chairman. Part II then traces the trajectory of advances in the field of corporate governance mechanisms in the United Kingdom ('U.K. '), explaining the position of enterprises with regard to the management and executive roles attributed to the concerned individuals. Part III ventures into the

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<sup>1</sup> See Vinod Mahanta & Bhanu Pande, *Satyam fallout: Roles of chairman & CEO in most firms are still not split*, available at [http://articles.economictimes.indiatimes.com/2009-01-08/news/28395984\\_1\\_separate-chairman-roles-corporate-governance](http://articles.economictimes.indiatimes.com/2009-01-08/news/28395984_1_separate-chairman-roles-corporate-governance) (Last visited on December 13, 2015).

<sup>2</sup> Illoong Kwon, *Separating the Titles of CEO and Chairman: A Model of Leadership and Authority*, (Discussion Paper, Albany State University of New York, Department of Economics, Paper No. 6, 2008) available at <http://www.albany.edu/economics/research/workingp/2008/Leadership.pdf> (Last visited on February 10, 2015).

<sup>3</sup> Paul Hodgson, *Should the chairman be the CEO*, October 21, 2014, available at <http://fortune.com/2014/10/21/chairman-ceo/> (Last visited on January 24, 2016).

<sup>4</sup> Noam Noked, *The Costs of a Combined Chair/CEO*, June 13, 2012, available at <http://corpgov.law.harvard.edu/2012/07/13/the-costs-of-a-combined-chairceo/> (Last visited on January 24, 2016).

<sup>5</sup> See Stephen Prowse, *Corporate Governance in an international perspective: a survey of corporate control mechanisms among large firms in the United States, the United Kingdom, Japan and Germany*, 1994, available at <http://www.bis.org/publ/econ41.pdf> (Last visited on December 13, 2015).

<sup>6</sup> The governance structure has varied owing to the pattern of shareholding; where countries with concentrated shareholdings have tried to ensure accountability towards the minority shareholders, on the other hand – the nations where shareholding is largely well spaced, have tried to ensure that the board is made sufficiently answerable to the shareholders in general. Even with the said difference in ideology, the focus has been directed towards making the operations of the corporate entities more transparent and discernable for the concerned stakeholders.

treatment of the management structure in the United States ('U.S.'). where a string of corporate crashes have given rise to statutory prescriptions to separate the two roles. We have explained the follow-up of the legislative prescriptions through a case study of the experiences of two leading trans-national American corporations (Boeing and Apple), evaluating the feasibility of the separation. Part IV focuses on the developments of corporate governance mechanisms, particularly the distinction between various functionaries of an enterprise, in India. We have juxtaposed the international and Indian position with regard to the executive, non-executive and managerial functions, to draw out points of convergence or divergence. Part V concludes the paper, capturing prominent observations which corroborate our assertion that a functional leeway to corporate enterprises may go a long way in ensuring full compliance with the letter and spirit of the principles of corporate governance and the provisions that govern it.

## II. CORPORATE GOVERNANCE IN THE UNITED KINGDOM

The requirement of a 'sound' corporate governance sub-structure has been felt in the corporate sphere throughout the world and the U.K. has been no exception. The advancements in the field of corporate governance started back in the year 1992, with the much lauded Report of the Committee on the Financial Aspects of Corporate Governance, often referred to as the Cadbury Report.<sup>7</sup> This report made the unambiguous observation that "there should be a clearly accepted division of responsibilities at the head of the company".<sup>8</sup> It was felt that this would have the inevitable effect of curbing instances where an individual in a company is bestowed with unfettered power to administer and make decisions for the company.<sup>9</sup> The report was commissioned in the aftermath of a few major corporate scandals such as the collapse of Bank of Credit and Commerce International ('BCCI'), Polly Peck, Coloroll and Maxwell Publishing.<sup>10</sup>

### A. OBSERVING THE TRAIL OF GOVERNANCE MECHANISMS IN THE U.K.

The authors of the Cadbury report noted that the role of a CEO is a full-time job. He/she is responsible for the operational activities, formulation

<sup>7</sup> Sir Adrian Cadbury Committee, *Report of the Committee on the Financial Aspects of Corporate Governance*, December 1, 1992, available at <http://www.ecgi.org/codes/documents/cadbury.pdf> (Last visited on February 10, 2015).

<sup>8</sup> *Id.*, ¶1.2.

<sup>9</sup> A.C. FERNANDO, *CORPORATE GOVERNANCE: PRINCIPLES, POLICIES AND PRACTICES* 77 (2009).

<sup>10</sup> Dr. Andrew Kakabadse, Dr. Nada K. Kakabadse & Ruth Barratt, *Chairman and Chief Executive Officer (CEO): That Sacred and Secret Relationship*, 25 *JOURNAL OF MANAGEMENT DEVELOPMENT* 2 (2006), 8.

and eventual implementation of corporate strategies, as well as the overall performance of the company.<sup>11</sup> In contrast, the position of a Chairman was viewed as a part-time endeavour, and was visualised as being independent and responsible for the effective functioning of the board.<sup>12</sup> Thus, the Chairman's role was to assess the performance of the executive directors, including that of the CEO. Thus, such a role necessitated that the Chairman maintain a distance from the day-to-day operations of the company.<sup>13</sup>

The observation made in the Cadbury Report<sup>14</sup> was emulated by the recent Combined Code on Corporate Governance ('Combined Code'),<sup>15</sup> which crystallised the said divide by observing that "there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility."<sup>16</sup> The code made the intention of the legislature clear by explicitly stating that "the roles of Chairman and chief executive should not be exercised by the same individual".<sup>17</sup> It is imperative to note, however, that the said provisions are not mandatory in nature, but are only recommendatory.

The big corporations in the U.K., out of the best practice requirement and after giving due recommendation to commercial necessities, have adhered to the split in the position.<sup>18</sup> A combined role of the chair and the executive is hard to find in the U.K. corporate sphere. This division in the role has been attributed to pressure by institutional investors to keep the distinction in place, coupled with the voluntary guidelines under the Combined Code.<sup>19</sup>

<sup>11</sup> *Id.*, 9.

<sup>12</sup> FERNANDO, *supra* note 9.

<sup>13</sup> Kakabadse, Kakabadse & Barratt, *supra* note 10.

<sup>14</sup> Findings of the Cadbury Report are to be read in consonance with the 'Report of the Hampel Committee on Corporate Governance 1998' where once again the stress was on separation of the two said roles, as it noted that a "decision to combine these roles (Chairman and Chief Executive Officer) in one individual should be publicly explained" and demanded a balance of power in the structure of companies; See Sir Sydney Lipworth Committee, *Committee on Corporate Governance*, January 1998, available at <http://www.ecgi.org/codes/documents/hampel.pdf> (Last visited on December 18, 2015), ¶2.3; See also previous report by Sir Richard Greenbury, *Directors' Remuneration*, July 17, 1995, available at <http://www.ecgi.org/codes/documents/greenbury.pdf> (Last visited on December 18, 2015).

<sup>15</sup> The U.K. Corporate Governance Code, 2012, available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.aspx> (Last visited on December 31, 2014).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Financial Reporting Council, *Comply or Explain: 20th Anniversary of the UK Corporate Governance Code*, 2012, available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Comply-or-Explain-20th-Anniversary-of-the-UK-Corpo.aspx> (Last visited on December 18, 2015), 42.

<sup>19</sup> See Andrea Ovans, *The Cost of Combining the CEO and Chairman Roles*, June 25, 2014, available at <https://hbr.org/2014/06/the-cost-of-combining-the-ceo-and-chairman-roles/> (Last visited on January 24, 2016) (There have been some exceptions such as Marks and Spencer plc, where the roles have been combined).

## B. THE COMBINED CODE: TOO LIBERAL?

Despite these explicit recommendations to keep the roles separated, considerable wriggle room has been made available to companies under the Combined Code in this regard. The Combined Code has been structured in a three tiered format – the main principles, supporting principles and the code provisions.<sup>20</sup> The first two components have been included in the listing rules of the London Stock Exchange and thus have been mandated for all the listed companies. The code provisions, on the other hand, follow the ‘comply or explain’ rule, signifying that a company can avoid compliance with the code provisions if it informs its shareholders in advance. Thus, the company is required to lay their arguments for the deviation before the shareholders, who will then approve or disapprove the decision in the form of a resolution. The said distinction between the two roles has been succinctly addressed in the code provisions as well as the mandatory principles enumerated in the Listing Rules.

After having deciphered the regulatory compulsions and loopholes to splitting the roles of CEO/Chairman, it is essential to review the reasons that have motivated investors to pressurize boards for a split in the roles of chair of the board and the executive functionary. At the outset, it must be noted that any investor investing in an enterprise wants it to grow and in the process his/her own returns to grow. This notion dictates their actions towards the board and their constant emphasis on transparency and accountability. Thus, the first reason underpinning investor pressure is their belief that enterprises are more stable and exposed to minimal risks in the long run if it is able to resist the domination of a single CEO/Chairman who is the repository of all powers.<sup>21</sup> Second, there is an emerging belief among the institutional investors, especially in the U.K., that the role of a Chairman should be taken on by a non-executive director,<sup>22</sup> signalling the need for a split in the two functions.

In this regard, it is important to draw attention to the distinct practice of a ‘two tier board’ structure<sup>23</sup> followed in some European nations (such as Germany and the Netherlands). This system of governance requires a separation of roles of CEO/Chairman by law through the establishment of two separate boards. In the said structure, the supervisory board, comprises of and is chaired by non-executives, while the CEO (or its equivalent) leads the

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<sup>20</sup> Professor John Mellor, *The UK Combined Code on Corporate Governance and its applications to smaller quoted companies*, November 2, 2007, available at <http://www.foundationgre.com/IFA%20paper.pdf> (Last visited on December 19, 2015).

<sup>21</sup> Davis Global Advisors, *Leading Corporate Governance Indicators: 1996-2004* (2004) as cited in Kakabadse, Kakabadse & Barratt, *supra* note 10.

<sup>22</sup> Davis Global Advisors, *Leading Corporate Governance Indicators: 1996-2004* (2004) as cited in Kakabadse, Kakabadse & Barratt, *supra* note 10.

<sup>23</sup> Christine Ede, *Two Tier System and Best Practices in German Corporate Governance Code*, September, 2009, available at <http://www.uni-hamburg.de/fachbereiche-einrichtungen/handelsrecht/seminararbeitede.pdf> (Last visited on December 31, 2014), 3.

management board.<sup>24</sup> This two tier structure has not been legally adopted in the U.K., thereby making such compliance mechanism legally unenforceable. Thus, most firms in the U.K. have the unitary board structure where both executive and non-executive directors function on the same board.

### C. *THE CASE OF MARKS & SPENCER: WHY DID THE COMPANY CHOOSE TO DEVIATE FROM THE NORM?*

Interestingly, though the predominant trend in the U.K. has been to adopt the split in the roles of CEO and Chairman, there have been instances of corporate entities having defied the prescribed split. One such defiant company is Marks and Spencer plc (public limited company) ('M&S'). The corporation's declaration to appoint its CEO, Sir Stuart Rose, to the combined post of Chairman and chief executive for a span of three years was followed by furor.<sup>25</sup> This decision to deviate from the usual course of separation was also met with staunch opposition from the investors of the company.<sup>26</sup> The face of such challenge being Legal & General Investment Management, the largest institutional investor in M&S, holding about 5% of its shares.<sup>27</sup> The company officials met the opposing shareholders and stated that the decision to combine the roles was a stop gap measure undertaken to identify a new CEO from within the company.<sup>28</sup>

This explanation, however, did not fare well with the investor base. It was believed that although the argument was reasonable, this method of combining roles was not the only option available to the board. Their terse public statements further showed that they were not in support of a dilution of corporate governance standards, especially by a leading U.K. company.<sup>29</sup> Investors echoed similar sentiments, claiming that such a move would result in an undue concentration of power where the actions of the head of the company would go unchecked.<sup>30</sup>

Luckily for the company, the 'charm defence' seemed to work. It was a known fact in the market circles that Sir Stuart was the one who had

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<sup>24</sup> Kakabadse, Kakabadse & Barratt, *supra* note 10, 7.

<sup>25</sup> The Guardian, *Shareholder unease at the elevation of chairman Rose*, March 11, 2008, available at <http://www.theguardian.com/business/2008/mar/11/marksspencer.highstreetretailers> (Last visited on January 21, 2016).

<sup>26</sup> *Id.*

<sup>27</sup> Tom Nash, *Split Role for Rose threatens Combined Code*, May 2008, available at [http://www.director.co.uk/magazine/2008/5%20May/corp-gov\\_61\\_10.html](http://www.director.co.uk/magazine/2008/5%20May/corp-gov_61_10.html) (Last visited on December 31, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

turned the company around to its current state.<sup>31</sup> One of the major shareholding groups, Invesco Perpetual eventually backed the proposition, giving the company respite from its critics.<sup>32</sup> Sir Stuart went as far as to declare that “the board is paid to make the right decisions, not popular decisions”.<sup>33</sup> Thus, according to the M&S board, the move was a way to keep Sir Stuart around, which would help in maintaining the confidence of future investors. The reasoning may appear circular at best, given the shareholder opposition, but it seems to have gone well for the company. Finally, the prior announcement stating reasons for the deviation from the corporate governance provisions made the board’s action compliant with the Combined Code.<sup>34</sup> Thus, there was little that the critiquing shareholders could have done against the board’s ultimate prerogative to make decisions for the company.

Despite its stance, the enterprise made certain ‘concessions’, where it proposed to put in place new checks and balances to assuage the shareholders’ concerns. The said proposal envisaged a process where Sir Stuart would stand for re-election every year. Additionally, a new non-executive director, who would be groomed to eventually take over the present senior independent director, was appointed.<sup>35</sup> This response can be construed to be falling under the domain of the compliance mechanisms, which indirectly achieves the goal of decentralisation of power even though technically the roles are combined.

Interestingly, major market observers in the U.K. remark that occasion may arise where best interest of the company would dictate deviations from the code provisions, for example when the search for a CEO is underway.<sup>36</sup> Such companies must be allowed to explain its reasons for non-compliance in a manner that elaborates upon the nature of reasons for the divergence. Certain pressing economic externalities may make it necessary for a company to collate its resources and perform in a centralised manner to combat unforeseen exigencies. Additionally, the observers note that in a well-organised enterprise the succession planning is usually already in place and the necessity to combine the two roles, for how-so-ever short a time will not be necessary.<sup>37</sup> Further, even guidelines framed by organisations like Quoted Companies Alliance and National Association of Pensions Funds provide for combining the roles in exceptional situation after explaining to the shareholders how their interest is to be protected (e.g. by appointment of single independent director). Thus, the

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<sup>31</sup> The Telegraph, *Will Sir Stuart Rose transform Ocado’s Fortunes?*, January 26, 2013, available at <http://www.telegraph.co.uk/finance/9829173/Will-Sir-Stuart-Rose-transform-Ocados-fortunes.html> (Last visited on January 21, 2016).

<sup>32</sup> The Guardian, *This isn’t just any investor revolt*, April 6, 2008, available at <http://www.theguardian.com/business/2008/apr/06/marksspencer.retail> (Last visited on January 21, 2016).

<sup>33</sup> *Id.*

<sup>34</sup> Nash, *supra* note 27.

<sup>35</sup> Nash, *supra* note 27.

<sup>36</sup> Nash, *supra* note 27.

<sup>37</sup> Nash, *supra* note 27.

position that a company finds itself in may dictate its willingness to combine/split the roles and the U.K. regulators have provided ample room for the same through the recommendatory provisions of the Combined Code.

### III. POSITION IN THE UNITED STATES OF AMERICA: ANALYSING THE STATUTORY MANDATES

In the U.S., the issue of separating the role of the CEO and Chairman has stemmed from an array of complex factors that include a challenging economy, increased regulations as well as rising investor discontent.<sup>38</sup> The early 2000s witnessed the crashing of the stock markets as a consequence of depressed prices, accompanied by major scandals involving the promotion of false prices and trading practices.<sup>39</sup> High-flying stock prices were comforting for companies such as Enron and WorldCom, but soon their bankruptcy brought into the limelight the major accounting frauds and manipulations that had artificially inflated their prices. Companies like Tyco and Adelphia were found to be financially weaker than previously perceived because, among other things, their executives had engaged in large-scale self-dealing transactions and extraction of personal benefits.<sup>40</sup>

These scams brought to the forefront significant issues regarding conflict of interest pertaining to auditors, securities analysts, the lack of oversight of accountants and auditor independence. Weak corporate governance procedures and inadequate disclosure provisions were found to be the main reason for such failures.<sup>41</sup> Such gripping accounts of malfeasance generated widespread consternation and it became impossible to deny that revolutionary reforms were the need of the hour. Against this backdrop, shareholders and corporate directors began to consider if one executive, irrespective of efficiency or skill, could objectively and methodically handle the day to day management as well as governance of an organisation.<sup>42</sup> The question regarding the benefits

<sup>38</sup> Matteo Tonello, *Separation of Chair and CEO Roles*, September 1, 2011, available at <http://blogs.law.harvard.edu/corpgov/2011/09/01/separation-of-chair-and-ceo-roles/> (Last visited on December 31, 2014).

<sup>39</sup> Frederic S. Mishkin & Eugene N. White, *US stock market crashes and their aftermath: Implications for Monetary Policy*, NBER Working Paper Series, Working Paper 8992, available at <https://www0.gsb.columbia.edu/faculty/fmishkin/PDFpapers/W8992.pdf> (Last visited on January 22, 2016).

<sup>40</sup> Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too* 1, September 2005, available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Clark\\_525.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Clark_525.pdf) (Last visited on December 14, 2014).

<sup>41</sup> Bridget R. Hansen, *Effective Corporate Governance? Sarbanes-Oxley in the Courts*, available at <http://people.carleton.edu/~amonero/Bridget%20Hansen.pdf> (Last visited on December 31, 2014).

<sup>42</sup> Magdalena Smith, *Should the US follow the UK lead and split the dual CEO/Chairperson role*, November 25, 2014, available at <http://www.academia.edu/3290632/>



accruing to a company and its stakeholders from splitting CEO and chairperson gained momentum owing to the repercussions of this exigency, and continues to remain at the forefront of corporate governance debates in the U.S.<sup>43</sup>

As a response to the aforementioned problems, the U.S. government introduced certain statutory mandates with the intention of restoring public confidence. These mandates were designed to enhance the reliability of financial reporting and to improve audit quality by means of self-regulation, through the establishment of independent committees and stricter penalties for violation.<sup>44</sup>

## A. STATUTORY ANALYSIS

The statutes, the Sarbanes-Oxley Act, 2002 and the Dodd-Frank Act, 2010 stressed on the importance of having a corporate board of directors which shall comprise of a majority of independent directors, as well as the value of having key board committees.<sup>45</sup> The committees deal with the oversight of audits, executive compensation, and nomination of new and independent directors who endeavour to bring reform.<sup>46</sup> These act as proponents of good corporate governance, and are a result of the accumulated policy positions – premised on experience, anecdotes and other general policy based arguments.

### 1. The Sarbanes-Oxley Act, 2002

As discussed earlier, the Sarbanes-Oxley Act, 2002 (‘the SOX’) was passed in the wake of corporate scandals involving spectacular bankruptcies, inappropriate accounting practices, and audit firms that closed their eyes to such practices. The provisions of the SOX were designed to “protect investors by improving the accuracy and dependability of corporate disclosures made pursuant to the securities laws”.<sup>47</sup>

Title III, on Corporate Responsibility, includes measures designed to improve corporate governance by ensuring the performance of

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<sup>43</sup> *Id.*

<sup>44</sup> Ernst and Young, *The Sarbanes-Oxley Act at 10, Enhancing the reliability of financial reporting and audit quality*, November 25, 2014, available at [http://www.ey.com/Publication/vwLUAssets/The\\_Sarbanes-Oxley\\_Act\\_at\\_10\\_-\\_Enhancing\\_the\\_reliability\\_of\\_financial\\_reporting\\_and\\_audit\\_quality/\\$FILE/JJ0003.pdf](http://www.ey.com/Publication/vwLUAssets/The_Sarbanes-Oxley_Act_at_10_-_Enhancing_the_reliability_of_financial_reporting_and_audit_quality/$FILE/JJ0003.pdf) (Last visited on December 14, 2014).

<sup>45</sup> David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, July 7, 2010, available at <http://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/> (Last visited on January 22, 2016).

<sup>46</sup> *Id.*

<sup>47</sup> Lynn Stephens and Robert G. Shwartz, *The Chilling Effect of Sarbanes Oxley: Myth or Reality?*, June 2006, available at <http://www.nyssepa.org/cpajournal/2006/606/infocus/p14.htm> (Last visited on December 14, 2014).

specific actions by the company or its management, and designating activities that these entities are prohibited from pursuing.<sup>48</sup> Elaborating on similar principles, Title II, on Audit Related Changes, mandates that the audit committee consist of only external board members. It is thus implicit that no member of management, i.e. the coordinating body behind ensuring the accomplishment of objectives of the company, can sit on the audit committee, which is empowered to oversee financial reporting and other processes, for ensuring successful corporate governance. However, because the general practice involves selection of committee members from the board of directors, the committee becomes a sub-group of the board which reports to the chair.<sup>49</sup> Thus, having the CEO in the chair role will limit the potency of the committee and may trigger situations of conflict of interest.<sup>50</sup> This challenge becomes clearer when we look at §1514A or the whistleblower clause; as per the SOX, the audit committee is obligated to devise a procedure where employees and other connected individuals can report fraud and other forms of abuse directly to the committee, without fear of reprisal. When the board is led by the management, it is likely that employees may hesitate to report such activities directly to them. Further, it is also plausible that the audit committee will not take stringent action on such reports if the CEO heads it as the Chairman.<sup>51</sup> Thus, the audit committee needs to be, to the greatest extent possible, independent of the management to be able to effectively discharge its functions. The SOX, although was not able to withstand the test of times, most significantly – the 2008 Lehman Brother's collapse where a 164 year old firm collapsed due to financial crisis. This showed the inefficiency of the Act to take account of all corporate governance related issues.<sup>52</sup>

## 2. The Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010

Enacted in July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank') made significant amendments to the SOX, enhancing the protections accessible to whistleblowers belonging to the financial service industry. Dodd-Frank is applicable to both public and privately owned companies.<sup>53</sup> The Dodd-Frank Act does not mandate companies to split the roles; but it requires them to explain why it is in the company's best

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<sup>48</sup> *Id.*, 5.

<sup>49</sup> Angie Mohr, *3 Reasons To Separate the CEO and Chairman positions*, November 25, 2014, available at <http://www.investopedia.com/financial-edge/0912/3-reasons-to-separate-ceo-and-chairman-positions.aspx> (Last visited on December 14, 2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Rosalind Z. Wiggins, Thomas Piontek, Andrew Metrick, *The Lehman Brothers Bankruptcy: An Overview*, available at <http://som.yale.edu/sites/default/files/files/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf> (Last visited on January 22, 2016).

<sup>53</sup> Daljit Dhesi, *Where the Chairman and CEO are one*, November 26, 2014, available at <http://www.thestar.com.my/Business/Business-News/2014/07/05/Where-the-CEO-and-chairman-are-one/?style=biz> (Last visited on December 14, 2014).

interest for the same or different person to serve as the Chairman of the board and CEO.<sup>54</sup>

Pursuant to the provisions under the Dodd-Frank Act, the United States Securities & Exchange Commission ('SEC') amended Regulation S-K of the US Securities Act, 1993.<sup>55</sup> The regulation laid out reporting requirements for various SEC filings used by public companies. It applies to registration statements under the Securities Act as well as any other documents that are required to be filed under the Exchange Act – dealing with business, securities, financial data, management practices, to name a few, under various sections or items.<sup>56</sup> The amendment laid down the requisite conditions for public companies to choose the appropriate leadership structure of their board. According to the current SEC rules, if one person serves as both the CEO and Chairman, it is imperative for the company to disclose whether it has a lead independent director and the specific role undertaken by him/her in the leadership of the board.<sup>57</sup> In addition, the SEC also prescribes that a company must disclose the reason behind the company's decisions on the matter of establishing an appropriate leadership structure.<sup>58</sup>

## B. STATUTORY IMPLEMENTATION

Corporate directors and shareholders of various organisations have unanimously suggested the split in question. This division is a vital component of the statutes discussed and the idea of accepting this change has received a multitude of responses. Separating the Chairman and CEO roles has never been widely accepted in the U.S., mainly stemming from the financial concerns associated with the said split, where CEOs prefer autonomy and limited accountability.<sup>59</sup> Although a lead director does not equate to an independent Chairman, over the past decade the idea of an independent "lead director" has become a popular compromise. As of 2014, of the S&P's 500 boards surveyed, 284 have a director with such a title, indicating the dominant trend of combining the roles.<sup>60</sup>

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<sup>54</sup> The Dodd–Frank Wall Street Reform and Consumer Protection Act, 2010, §972.

<sup>55</sup> Code of Federal Regulations, Title 17, Chapter II, §229, Regulation S-K — Corporate Governance, Item 407.

<sup>56</sup> Code of Federal Regulations, Title 17, Chapter II, §229, Regulation S-K — Corporate Governance, Item 407.

<sup>57</sup> Securities Exchange Commission (Proxy Disclosure Enhancements) Final Rule, 2009 (effective February 28, 2010) as cited in Tonello, *supra* note 38.

<sup>58</sup> CFOzone, *Dodd-Frank punts on separating chair, CEO*, November 26, 2014, available at [http://www.cfozone.com/index2.php?option=com\\_content&do\\_pdf=1&id=7448](http://www.cfozone.com/index2.php?option=com_content&do_pdf=1&id=7448) (Last visited on December 14, 2014).

<sup>59</sup> Tonello, *supra* note 38.

<sup>60</sup> Nell Minow, *Independent Chairmen are smart investments*, November 26, 2014, available at <http://www.bloomberg.com/news/2012-07-17/independent-chairmen-are-smart-investments-nell-minow.html> (Last visited on December 14, 2014).

Although researchers offer conflicting data about the prudence of splitting the CEO and Chairman roles, as well as the reception to such a measure, the SOX and the Dodd-Frank have compelled CEOs and directors to re-evaluate the way they do business. Presently, more than ever, directors are taking their responsibilities seriously by striving for results and better return to all stakeholders.<sup>61</sup> However, in many cases, the evolving relationship between the company's executives and the board has not found the right symmetry.<sup>62</sup> The right symmetry is subjective, in the sense that what may suit one company's needs and strategies may not necessarily be applicable to another. Thus, it becomes essential to identify the perfect arrangement, by establishing a system of checks and balances which function to attain the ultimate objective of profits coupled with excellent governance.

### C. A COMPANY'S PERSPECTIVE – UNIFIED OR SEPARATED ROLE?

The lack of distinct positions places heavy reliance on an individual for virtually all organisational decisions, thus putting all its proverbial eggs in one basket. An independent existence of both roles provides an opportunity for the board to effectively address any abuse that may occur, as well as concerns about the performance of the CEO. On the other hand, the CEO as the manager of the corporation, has a superior knowledge of the operations of the business. When that role is unified with the role of a Chairman of the Board, he/she may be able to lead the corporation better and identify any problems that may arise. This unified leadership structure creates efficiency by allowing the unified executive to operate in both capacities at once.<sup>63</sup>

This section comprises of two case studies on companies that have opted to have the same person acting as the CEO and Chairman, as well as different individuals in distinct posts.

#### 1. Boeing: The curious case of shareholder support for combined role

The Boeing 787, Dreamliner, became operational in the year 2011 after a significant three-year delay occasioned by the supply-chain disruptions in assembly and a strike by the machinists. Several airlines, which included the

<sup>61</sup> Linda D. Henman, *Should the Role of Chairman and CEO be Split?*, 2013, available at <http://www.henmanperformancegroup.com/articles/Chairman-CEO-Split.pdf> (Last visited on December 14, 2014).

<sup>62</sup> *Id.*

<sup>63</sup> Michael Stockham, *Split Decisions: the Pros and Cons of Separating CEO and Chairman Roles*, July 9, 2013, available at <http://www.corporatecomplianceinsights.com/split-decisions-the-pros-and-cons-of-separating-ceo-and-chairman-roles/> (Last visited on December 14, 2014).

likes of Qantas Airways and Air India, sought compensation when the delivery of their respective planes was delayed.<sup>64</sup> Over the years the 787's troubles got worse, as all 50 of the delivered jets were grounded by the regulators after two faults were noticed in the battery.<sup>65</sup> While the company struggled to fix the grounded 787 Dreamliner, Ray Chevedden, a shareholder in the company, floated the idea of having a distinct position for the roles occupied by James McNerney.<sup>66</sup> He explained, in a letter to the SEC, that oversight was key to the improvement in any company's performance and when the CEO serves as a board Chairman, the ability of the board to monitor the CEO's functioning is hindered.<sup>67</sup> Hence, Boeing let investors vote on splitting the roles of CEO and Chairman to strengthen oversight as per SEC's directive.<sup>68</sup>

However, the investors rebuffed the directive by opting against splitting the roles of Chairman and CEO. About fifty nine per cent of holders voted to reject the proposal. According to an official statement released by the airline manufacturer, "implementing this proposal would impose a one-size-fits-all solution on Boeing that ignores the board's judgment and responsibilities in this area for no discernible benefit".<sup>69</sup>

Shareholders had previously rejected a similar initiative in 2011. According to an SEC filing, thirty five per cent of votes were cast for the proposal as opposed to 64.2 per cent against and there were less than one per cent of the shareholders abstaining.<sup>70</sup> In response to the shareholder approval, the company had stated that "it was in the best interest of the shareholders for the board to have the flexibility to determine the appropriate leadership structure."<sup>71</sup> The board had also considered McNerney as the best candidate for the Chairman's post because of his knowledge of Boeing's businesses as well as his extensive experience as a director and senior member of the management at other Fortune 100 companies.<sup>72</sup>

Interestingly, in Boeing the combining of roles has been accompanied by enforcement of strong corporate governance measures geared

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<sup>64</sup> Tim Catts, *Boeing Holders Vote on CEO-Chairman Split Amid 787 Woes*, December 5, 2014, available at <http://www.bloomberg.com/news/2013-03-01/boeing-holders-vote-on-ceo-chairman-split-amid-787-woes.html> (Last visited on December 14, 2014).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Thomas Black, *Boeing Holders Rebuff CEO-Chairman Split in SEC-Ordered Vote*, April 30, 2013, available at <http://www.bloomberg.com/news/2013-04-29/boeing-holders-rebuff-ceo-chairman-split-in-sec-ordered-vote-1-.html> (Last visited on December 14, 2014).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Joe Cahill, *Why Boeing should split the chairman and CEO roles*, March 6, 2013, available at <http://www.chicagobusiness.com/article/20130306/BLOGS10/130309892/why-boeing-should-split-the-chairman-and-ceo-roles> (Last visited on December 14, 2014).

towards increasing shareholder value. Except for McNerney, other directors were independent members as defined by the New York Stock Exchange Rules. The compensation committee, which decided McNerney's pay, was composed entirely of independent directors. Further, an independent lead director had been designated for the purpose of consulting with the Chairman on board meeting agendas and convening meetings with other independent directors.<sup>73</sup>

It can be inferred that the shareholders of Boeing prefer the status quo over a split that may or may not necessarily work in their favour. Logically, whether McNerney's dual role is reducing or aggravating the problem is a moot point as it is not certain if the division of his roles will ensure the end of 787 Dreamliner's battery woes.

## 2. Apple: What prompted the splitting of roles

Apple had decided to keep the roles of Chairman and chief executive split, when Tim Cook became chief in August 2011, leaving the ailing Steve Jobs running the board. The directors decided to appoint long-time Apple director Arthur Levinson as Chairman after the death of the company's co-founder and long-time leader Steve Jobs.<sup>74</sup>

The decision was appreciated by shareholders as it recognised that filling Jobs' shoes was difficult for any one person. The real importance of this separation lay in the fact that Cook could concentrate on running the most valuable technology company in the world, managing its incredibly complex multi-nation supply chain and coming up with new iconic devices. Levinson, on the other hand, could run the board, guide matters of strategy such as mergers & acquisitions. Moreover, this move was also lauded as an excellent corporate governance measure as Jobs' illnesses had taken a pronounced effect on his ability to run the company full time.<sup>75</sup>

On observing the profiles of these companies, it can be inferred that the respective circumstances of each company were as different as chalk and cheese. While in some companies shareholder pressure has made companies rethink leadership structure, in others the board itself has voluntarily split the roles. Thus, the decisions regarding choosing the same person for both roles varies from one company to another as there is no one-size-fits-all model vis-à-vis corporate governance. This analysis is making a strong case for the proposition that the choice for splitting roles should be left to the companies and their respective shareholders to judge the best alternative.

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<sup>73</sup> *Id.*

<sup>74</sup> Robert Cyran, *Double Top*, November 16, 2011, available at <http://www.breakingviews.com/apple-rightly-keeps-chairman-ceo-roles-split/1615919.article> (Last visited on December 14, 2014).

<sup>75</sup> *Id.*

## IV. MAPPING THE CEO – CHAIRMAN DIVIDE IN INDIA

There has been an increased demand to ‘discipline’ the top management of the company. As noted above, this appetite for better governance has been observed globally – which also includes India. Earlier, the practice of combining the titles of chief executive officer and Chairman of the board had found staunch support in the Indian corporate sector. With a concentrated shareholding often consisting of family members, there is relatively less scope for shareholders activism in the Indian commercial corridors when compared to countries like the U.S. or the U.K.<sup>76</sup> In the absence of such activism, there is limited possibility of a *suo motu* company adoption of a separated position of CEO and Chairman. Since India has been known for its notoriously informal corporate enterprises, a streamlined approach towards corporate governance was thought necessary by Indian policy makers.<sup>77</sup>

### A. INDIAN LEGAL FRAMEWORK: JUXTAPOSING THE OLD WITH THE NEW

With the Companies Act, 1956 (‘old Companies Act’) in place, for over five decades, the segregation between Chairman and the CEO did not find statutory mention. The provision related to the appointment of managers and/or whole time directors of the company was worded to accommodate only peripheral interests of the stakeholders of the company. §269 of the old Companies Act, for instance, provided for the regulation of the process of appointing a director or whole time manager and the related Government approval for prescribed categories of companies.<sup>78</sup> Even the subsequent provision<sup>79</sup> emphasised on the management substructure of the company, with little or no mention of the distinction between the board’s responsibilities and that of the chief executive personnel.

Given the elaborate treatment of the provisions related to managerial position, it is arguable that the policy makers were silent on splitting/combining of roles because it envisaged a strong board to address the interests of all the stakeholders. However, this assumption completely disregards the crucial

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<sup>76</sup> Tarun Khanna & Krishna G. Palepu, *The Evolution of Concentrated Ownership in India: Broad Patterns and a History of the Indian Software Industry*, available at <http://www.nber.org/chapters/c10272.pdf> (Last visited on January 23, 2016), 283.

<sup>77</sup> See Regional Training Institute, Allahabad, *Meaning and concept of corporate governance, evolution of corporate governance in India and other parts of world. Need and essence of corporate governance and role of CAG in this regard*, available at <http://rtiallahabad.cag.gov.in/rti-website/rti-allahabad/downloads/material/Background%20training%20materail%20on%20corporate%20governance.pdf> (Last visited on January 23, 2016).

<sup>78</sup> The Companies Act, 1956, §269 (2).

<sup>79</sup> *Id.*, §316.

obligations of a CEO of the company and the effect of this legislative silence on the long term profitability of a commercial enterprise. A CEO has the overall task of preserving the profit generating edge of the company. Early recognition of this function of the CEO could have led the legislature to incorporate a segregating provision in the old Companies Act. However, such an analysis was seemingly not on the radar at the time of drafting. The reason for such neglect has been attributed to the peculiarity of the Indian corporate structure.

## 1. Going Down the Memory Lane: Tracing the History of Corporate Governance Norms in India

The latter half of the 2000s saw the active questioning and restructuring of the corporate regulatory regime that had sustained over five decades. The move was in response to the changes in the commercial temperament caused by a decade long liberalised economy. These innovative statutory incorporations were a result of heavy lobbying by some of the leading industrial groups<sup>80</sup> and the Securities and Exchange Board of India ('SEBI'). Through the introduction of Clause 49 of the Listing Agreement of Stock Exchanges,<sup>81</sup> SEBI established the foundation for the developments in the structure of corporate boards in India. The primary beneficiaries of these reforms were the stakeholders in a company, which incidentally meant greater transparency and disclosure requirements for thousands of listed companies.<sup>82</sup>

The next step towards corporate governance policy was undertaken by SEBI through the appointment of the Birla Committee (1999). The report submitted to SEBI highlighted the need "to promote and raise the standard of Corporate Governance" for listed companies.<sup>83</sup> The Committee was thorough in its recommendations and covered all bases. It made recommendations to bridge the agency gap between the shareholders and management by setting up of audit committees which would make information available to shareholders in the form of quarterly reports and analysts' presentations.<sup>84</sup> The recommendations were adequately incorporated by SEBI in its subsequent

<sup>80</sup> See Confederation of Indian Industry, *Corporate Governance Recommendations for Voluntary Adoption*, available at <http://www.cii.in/PolicyAdvocacyDetails.aspx?enc=tY9RauqVx47h7V4G1rU6/jmCHSML2OwpVJtbLaE2vPFukhx566abX9jYjSpP+zUObymFCsRSpFalMSkgUR0vKQ==> (Last visited on January 23, 2016).

<sup>81</sup> Securities Exchange Board of India (Listing Agreement to the Indian Stock Exchanges), Clause 49; Afra Afsharipour, *Director Notes: A Brief Overview of Corporate Governance Reforms in India*, December 2010, available at <https://www.conference-board.org/retrievefile.cfm?filename=DN-020-101.pdf&type=subsite> (Last visited on September 9, 2014).

<sup>82</sup> Wilson Ng, Andrew Lock & S.R. Mehta, *Developments in India's Corporate Governance: Their Relevance for UK Financial Firms*, 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1949476](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949476) (Last visited on September 9, 2014).

<sup>83</sup> Shri Kumar Mangalam Birla Committee, *Report of the Kumar Mangalam Birla Committee on Corporate Governance*, 1999, available at <http://www.sebi.gov.in/commreport/corpgov.html> (Last visited on September 9, 2014).

<sup>84</sup> *Id.*, §§ 13.4, 14.7.



amendments to Clause 49 of the Listing Agreement.<sup>85</sup> Not being satiated by the said developments and concerned by the instability in the American markets, SEBI constituted the Murthy Committee which made further recommendations in this field. This second bout of discussion focused primarily on the role and structure of corporate board and the independence of the directors, with a view to address the nuisance of insider trading.<sup>86</sup> The subsequent two committee reports<sup>87</sup> also devoted attention to the intricacies associated with the independence of directors and auditing reforms. The aforementioned committees collectively worked to restructure the corporate governance landscape of the nation.

After a spate of reports on the infamous Satyam scandal, an in-depth analysis of the fiasco was undertaken by the Confederation of Indian Industries ('CII').<sup>88</sup> This was followed by other corporate governance and ethic committees being setup by various industrial groups to formulate an opinion on the impact caused by the scandal.<sup>89</sup> It is interesting to note that the CII, while adopting a defensive stance, termed the Satyam fiasco an 'off incident'; maintaining that the majority of Indian corporations were adequately regulated and legally sound.<sup>90</sup> In the aftermath of the scandal, the Indian government responded by instituting simultaneous inquiries by the SEBI and the Ministry of Corporate Affairs ('MCA'). It also took several interim measures, which included the substitution of company's directors with government appointed nominees.<sup>91</sup> SEBI and MCA took remedial steps, with the SEBI amending the Listing Agreement to include a provision on the appointment of the Chief Financial Officer by the audit committee and other material financial disclosures. The MCA notified the Corporate Governance Voluntary Guidelines

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<sup>85</sup> See Securities and Exchange Board of India, *Consultative Paper on review of Corporate Governance norms in India*, available at [http://www.sebi.gov.in/cms/sebi\\_data/attach-docs/1357290354602.pdf](http://www.sebi.gov.in/cms/sebi_data/attach-docs/1357290354602.pdf) (Last visited on January 24, 2016).

<sup>86</sup> N.R. Narayana Murthy Committee, *Report of the SEBI Committee on Corporate Governance*, February 8, 2003, available at <http://www.sebi.gov.in/commreport/corpgov.pdf> (Last visited on September 9, 2014), §3.10.14.

<sup>87</sup> In August 2002, the MCA formed the Chandra Committee, Chaired by Shri Naresh Chandra, a former Cabinet secretary to look into corporate auditing and independent directors; In December 2004, the MCA convened the Irani Committee, led by J.J. Irani, a director of Tata Sons, Ltd. The Irani Committee evaluated the Companies Act, while focusing on combining internationally accepted best practices in corporate governance with special attention to needs of the expanding Indian economy.

<sup>88</sup> PTI, *CII Sets Up Task Force on Corporate Governance*, BUSINESS STANDARD, January 12, 2009.

<sup>89</sup> PTI, *NASSCOM Announces Formation of Corporate Governance and Ethics Committee*, BUSINESS STANDARD, February 11, 2009.

<sup>90</sup> Naresh Chandra, *Report of the CII Task Force on Corporate Governance*, November 2009, available at [www.mca.gov.in/Ministry/latestnews/Draft\\_Report\\_NareshChandra\\_CII.pdf](http://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf) (Last visited on February 15, 2016).

<sup>91</sup> Press Trust of India, *Satyam Fraud: Raju Sent to Central Prison; CFO Vadlamani Arrested*, THE ECONOMIC TIMES, January 10, 2009.

(2009).<sup>92</sup> However, they were merely recommendatory in nature and the need for having in place more binding guidelines was felt.

### B. *DELVING INTO THE PRESENT: ANALYSING THE LAWS SUGGESTING A SPLIT IN THE ROLES OF CEO AND CHAIRMAN*

Having ventured into the general trends on corporate governance in the Indian scenario, it is essential at this juncture to focus on the practical treatment of the position of a CEO and Chairman in India. As discussed above, the focus of Indian policy makers has never been on creating a distinction between the functionaries in the executive and on the board. The two positions have been consolidated. A significant step towards the split was the SEBI Consultative Paper on Corporate Governance ('Consultative Paper'), which increased focus on internationally acceptable practices. The Consultative Paper stressed upon the need to separate the positions of Chairman and the Managing Director and made references to various international reports on best practices. The most important reference made was to the OECD report on 'Corporate Governance and the Financial Crisis – Conclusions and emerging good practices to enhance implementation of the Principles.' By making such a reference it highlighted the explanation requirement envisaged in the OECD report. The OECD report stated that combining the roles of the CEO and Chairman in a large and complex enterprise would bind the corporation to explain the measures taken to avoid conflicts and preserve the integrity of the Chairman.<sup>93</sup> The report also highlighted the lack of 'objectivity' in the decisions of the board, therefore necessitating the need to provide support to the board of directors.<sup>94</sup> In the subsequent part of the report, special importance has been given to the challenge that the board faces while taking a decision, given the lack of independence and critical enquiry emanating out of an overlap in the two named positions.<sup>95</sup>

The report, while analysing the key findings, concluded that the separation of CEO and Chair of the board is a good practice but should not be mandated. It states that the "separation of the two posts may be regarded as good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board's capacity for decision making

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<sup>92</sup> Ministry of Corporate Affairs, Government of India, (Corporate Governance Voluntary) Guidelines, December 14-19, 2009, available at [http://www.mca.gov.in/Ministry/latestnews/CG\\_Voluntary\\_Guidelines\\_2009\\_24dec2009.pdf](http://www.mca.gov.in/Ministry/latestnews/CG_Voluntary_Guidelines_2009_24dec2009.pdf) (Last visited on September 9, 2014).

<sup>93</sup> Organisation for Economic Cooperation Development, *Corporate Governance and the Financial Crisis – Conclusions and Emerging Good Practices to Enhance Implementation of the Principles*, February 24, 2010, available at <http://www.oecd.org/corporate/ca/corporate-governanceprinciples/44679170.pdf> (Last visited on September 9, 2014), ¶6.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*, 17.

independent of management.”<sup>96</sup> Despite the importance highlighted by the OECD report, proponents of the bifurcation have shied away from making the said position mandatory. At the most, a company is required to explain why it has chosen an alternate course of action and has not adhered to the proposed bifurcation.

The SEBI, in its Consultative Paper, has employed terminology that can be interpreted in two completely distinct ways: first, as a suggestion for a mandatory separation of roles that highlights the inherent conflict the two posts entails, thereby necessitating a split in the role. Alternatively, since SEBI has derived its inspiration from the OECD report, it could be interpreted that this primarily highlights the optional nature of the said separation. Hence it may be pre-empted that even when the regulations shall be passed in their conclusive form, the same shall encompass a regime that will not require the said posts to be separated mandatorily. This stand can be further corroborated by the fact that the Guidelines issued by the MCA are also voluntary in nature, therefore making it optional for corporations to segregate the two positions. The Guidelines, being a step towards making the Indian corporate structure compliant with global corporate governance norms, note that:

“To prevent unfettered decision making power with a single individual, there should be a clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/Chief Executive Officer (CEO). The roles and offices of Chairman and CEO should be separated, as far as possible, to promote balance of power.”<sup>97</sup>

A major positive upheaval was brought about by the passing of the Companies Act 2013 (‘the Act’). For the first time the Indian legislature has made a clear and unequivocal mention of the proposed separation in the position of a CEO and a Chairman of the Board. The statutory recognition comes in the form of §203 of the Act, where the proviso to sub-section (1) states that the companies, as may be prescribed, shall appoint an individual as the Chairman but the said individual cannot hold the position of a CEO at the same time. Interestingly, it must be noted that the statutory restriction is not absolute in its scope and the legislature has provided for certain exclusionary instances when the companies do not have to adhere to the proposed split in its structure. The proviso further reads that the split may be bypassed if the Articles of the company provide otherwise; or if the company is not involved in multiple businesses.<sup>98</sup> The latter observation is only reasonable, since in a company carrying on a single line of business, the opportunity cost in the proposed split by appointing two different individuals will usually surpass the increased gains to the

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<sup>96</sup> *Id.*

<sup>97</sup> Ministry of Corporate Affairs, *supra* note 92, 11.

<sup>98</sup> The Companies Act, 2013, §203.

stakeholders involved. However, the first exclusionary clause gives an option to companies to bypass the separation criteria by mentioning the position as a combined entity in its Articles. Hence sub-proviso (a) might be exploited by companies to evade the necessity of maintaining a sacrosanct division between the executive officials and the board of the company without adequate cause.

The legislature anticipating the abuse of the said exclusionary provision, has provided that such exceptions shall be inapplicable to companies engaged in multiple businesses and have already appointed one or more CEOs for the businesses undertaken by each entity.<sup>99</sup> Further, the legislature has been able to justifiably pre-empt the economic necessity of specialised roles of a Chairman and an executive officer in a highly layered form of corporate structure. Thus, where a business entity is engaged in a broad range of operations, often pertaining to diverse categories of undertakings, a clear ‘policy formulating’ and a ‘follow-up’ structure ought to be in place. Having a different Chairman and a CEO may well be a positive step in identifying the complex requirements of a branched corporate entity, for example for identification of future marketable opportunities, regulatory approvals, and internal corporate governance mechanisms.

## 1. Clause 49 of the Listing Agreement: Confusing Matters?

Since the ramifications of any violation of corporate governance principles are far-reaching in the case of a public listed company, it becomes necessary to look at the Listing Agreement (‘the Agreement’) and compare it with the Act. Clause 49 of the Agreement, pertaining to Corporate Governance requirements that a company has to fulfil, states the following:

“Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.”<sup>100</sup>

Thus, although the clause recognizes the fact that there has to be a clear distinction between the executive and non-executive members of the company, the provision has not criticised the exercise of role of Chairman by an executive member which includes the CEO. Thus, it has failed to adopt a nuanced outlook towards the finer distinction between the roles of the Board of the Company as well as the responsibilities undertaken by the executive officials. This position of the Agreement is almost contrary to the Act which does not envision the CEO as Chairman of the company. The SEBI Consultative Paper

<sup>99</sup> The Companies Act, 2013, §203.

<sup>100</sup> Securities Exchange Board of India (Listing Agreement to the Indian Stock Exchanges), Clause 49 (I)(A)(ii).

has duly noted that the requirements under Clause 49 of the Agreement are not in sync with the statutory provisions in the Act and thus the alignment process has to be initiated at the earliest.<sup>101</sup> However, there has not been an amendment to the Agreement in this regard by SEBI. Thus, a glaring lacuna exists that may give rise to speculation and confusion in the corporate sector, where the listed companies may seek an opportunity to dodge requirements of §203 of the Act. Although, given the growing debate that the Consultative Paper has triggered, it may be only a matter of time before the clause is amended to mirror the intention of the legislature as gauged from the Act. But until such amendment is forthcoming, clause 49 has created a *prima facie* concession for the listed entities to combine the role of CEO/Chairman after complying with the requirements of clause 49.

Closely related to the aforementioned discussion is the often addressed issue of the presence of independent directors on the board. The term ‘independent director’ has been referred at multiple occasions in the Act; the definitional clause<sup>102</sup> refers the readers to §149(6) where the term has been defined. It means a director other than a managing director or a whole time director or a nominee director, not being related to the parties mentioned therein,<sup>103</sup> or having a pecuniary relationship with the company, its subsidiaries, associate companies, members et al.<sup>104</sup> The said mandate to appoint a certain number of independent directors has been echoed in the Listing Agreement,<sup>105</sup> hence the

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<sup>101</sup> Securities Exchange Board of India, *Consultative Paper on Review of Corporate Governance Norms in India*, January 4, 2013, available at [http://www.sebi.gov.in/cms/sebi\\_data/attach-docs/1357290354602.pdf](http://www.sebi.gov.in/cms/sebi_data/attach-docs/1357290354602.pdf) (Last visited on September 9, 2014), ¶11.14.

<sup>102</sup> The Companies Act, 2013, §2 (47).

<sup>103</sup> *Id.*, §149 (6)(b) (The provision reads as follows:

- (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;
- (ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;
- (d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent).

<sup>104</sup> *Id.*

<sup>105</sup> Securities Exchange Board of India (Listing Agreement to the Indian Stock Exchanges), Clause 49 (I)(A)(ii)

(The provision reads as follows:

“Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors. Provided that where the non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent directors.”)

presence of an individual in the aforementioned category on the board is not a novel proposition.

It may be proposed that inclusion of more independent directors on the board shall help the corporations in India in being open towards the notion of a distinct Chairman and a CEO. Since it is assumed that the independent directors are least affected by the internal dynamics of the company, they can be banked upon to truly analyse the long term goals and aspirations of the company, and the welfare of the minority shareholders. The primary task for them will be to give their assent for decisions that shall help improve upon the overall efficiency of the organisation. This objectivity presumably stems from the fact that the independent directors are not representing the vested interests of only the majority shareholders. In this regard, the independent directors have been mandated by the Act<sup>106</sup> to specifically address the concerns of the minority shareholders, which shall materialize into a board structure that is more amenable to a split in the two positions. Further, independent directors may also be significant from the point of view of compliance with the Agreement, because on combination of the roles at least half of the board is to consist of independent directors. Thus, as followed in U.S. companies where roles are combined, the presence of independent directors helps maintain the balance of power and the interest of different stakeholders.

### C. TESTING WATERS: DECIPHERING THE CORPORATE TEMPERAMENT

Having laid out the legal intricacies of the Indian regulatory regime, it will be beneficial to try and gauge the reaction of the corporations to these regulations. The proposition made by the concerned regulators has found many takers in the Indian corporate corridors where directors of corporate establishments have shown their acceptance of the fact that the appointment of two distinct individuals helps in improving the governance of the corporation.<sup>107</sup>

The view of the corporates has been succinctly summarised by the managing director of AT Kearney.<sup>108</sup> He has reiterated the notion that the board's job is to monitor and evaluate the performance of a company, while a CEO is representative of the managerial interest.<sup>109</sup> Hence, if the two roles are performed by the same individual, the person ends up evaluating himself,

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<sup>106</sup> The Companies Act, 2013, Schedule IV, II (5).

<sup>107</sup> Govindkrishna Seshan, *India Inc for chairman, CEO role separation*, December 20, 2007, available at [http://www.business-standard.com/article/companies/india-inc-for-chairman-ceo-role-separation-107122001102\\_1.html](http://www.business-standard.com/article/companies/india-inc-for-chairman-ceo-role-separation-107122001102_1.html) (Last visited on September 9, 2014).

<sup>108</sup> A global management consultancy firm based in United States, having dominant India presence.

<sup>109</sup> See A.T. Kearney, *'Home-Grown' CEO*, available at [http://www.atkearney.in/paper/-/asset\\_publisher/dVxv4Hz2h8bS/content/home-grown-ceo/10192](http://www.atkearney.in/paper/-/asset_publisher/dVxv4Hz2h8bS/content/home-grown-ceo/10192) (Last visited on January 24, 2016).

making the process redundant. Where the roles are separate, the CEO is made accountable and directly answerable to the board, which represents the interest of the stakeholders, thereby ensuring that the individualistic goals of the CEO do not overshadow the stakeholder's interest. Most Indian companies being 'proprietor-driven', fall in the category where the corporation often bestows both the aforementioned responsibilities to a single individual. It necessarily gives rise to an assumption that in India, the board evaluates itself – whereas in theory, it has to create ways to ensure better evaluation of the individuals following up on its policy decisions.

## V. CONCLUSION

On a study of the legal framework and company reactions to corporate governance in the U.K., U.S. and India, it can be concluded that the global corporate sector has shifted from being insensitive of these norms to complying with them for the benefit of the stakeholders. There is a clear thread of commonality running through the three jurisdictions, where the regulators have largely left the decision on the companies to frame their respective distinctions and divisions in the board structure. As recognised internationally, the division in the two posts has to be in accordance with the structure of the corporation, and sensitive to the demands of the stakeholders whose interests are affected directly. Thus, any move affecting their interests requires their approval.

Further, the standing of the company, its areas of operations, economic sensibilities, diversity and magnitude of undertakings *inter alia* are to be given due consideration before prescribing a management structure for a company. As discussed earlier, the German corporations are mandated to divide the managerial and executive roles, whereas companies based in the U.K. or the U.S. are not – showing that a functional leeway is available to the enterprises. Due recognition of the long and short term goals of the company, the socio-economic temperament of the nation where the company is operating and financial factors are crucial to fully fathom the nuances of the split in management and executive roles. Thus, there cannot be a universal and all pervasive mandate necessitating a particular *modus operandi*. Even where a CEO and Chairman position is held by one individual, thereby giving the impression that the CEO is grading himself, a split in the two positions may not be the most feasible option. The economic and financial realities of a corporation shall play a significant role in ascertaining if two distinct positions may be set up by the firm.

However, as compared to the U.K. and the U.S. where shareholders and companies are left to decide what sort of leadership structure they must follow after making appropriate shareholder disclosures, the Indian policy makers are more paternalistic. This is why the Act makes it compulsory for prescribed companies to maintain a split in role unless the articles of association

are to the contrary or in case of a single unit business. Although these narrow exceptions and the ambiguity created by clause 49 of the Agreement give room for companies to combine the roles, Indian law does not unequivocally recognize the company's freedom to make the choice after appropriate disclosures/discussions with shareholders. Thus, the Indian legislature should acknowledge that one size fits all may not be best when complying with this specific aspect of corporate governance. An exception which allows companies to combine roles with shareholder disclosure and approval should be provided.