

THE LEGISLATIVE VACUUM ON THE HONORARY POSITION OF A CHAIRMAN EMERITUS: ASSESSING THE NEED TO INTRODUCE STATUTORY REGULATIONS

*Priya Garg & Vishal Hablani**

In India, where its companies, including the listed ones, face a 'Type 2' agency problem of corporate governance, the honorary position of a Chairman Emeritus created by a company has far greater potential to influence the company and its governance than hitherto understood. However, unfortunately and interestingly, there is no provision in India under corporate law or other related areas of law to formally regulate this post. This creates a legal lacuna, a loophole which is prone to be misused by the Chairman Emeritus or a company's promoters or its controlling shareholders against the interests of its minority shareholders and/or other stakeholders. Further, in the absence of legal regulations with respect to the position of a Chairman Emeritus, the existing provisions under corporate law may also turn ineffective in certain instances, in keeping a check on the aggravation of the Type 2 agency problems in Indian companies. This is because the berth of a Chairman Emeritus, in absence of direct legal regulations governing this designation, may be used to allow the Chairman Emeritus and other persons/groups/entities in the company to do indirectly what they may not have done directly under law. Hence, we suggest that we should regulate the burgeoning post of a Chairman Emeritus. Further, we touch upon the ways in which such regulations can be introduced.

I. INTRODUCTION

There has been an emerging trend among the companies in India of designating their retiring Chairperson or any other key official as 'Chairman Emeritus'¹ ('Emeritus')—an honorary berth.² This practice has been in existence outside India for a much longer period. However, the idea came to be embraced by Indian companies recently.³ It is crucial to note that, for all practical purposes, an

* 5th and 3rd year BA., LL.B (hons.) students at the W.B. National University of Juridical Sciences, Kolkata.

¹ Sometimes also referred to as the 'Director Emeritus'.

² Srinivas Gunta & N. Ravichandran, *Infosys: Transition at the Top*, Vol. 3, No. 2, IMJ, 43-44 (July-September, 2011).

³ The Times of India, *Chairman Emeritus: India Inc's Timeless Transition*, May 3, 2011, available at <https://timesofindia.indiatimes.com/business/india-business/Chairman-emeritus-India-Incs-timeless-transition/articleshow/8147491.cms> (Last visited on December 24, 2018).

Emeritus is either one among the company's founders or among the non-founding members who have been the key personnel and have served the company for a significant period of time while contributing immensely to its growth.⁴ In the Indian context thereby, wherein companies (including the listed companies) usually have concentrated shareholdings,⁵ an Emeritus' position is ordinarily held by one of the company's promoters who has also once held any of the key positions such as that of a Chairman, Chief Executive Officer ('CEO'), Managing Director ('MD') among others.⁶ In the paper, the precise implications of this pattern in the Indian companies will be discussed in detail.

While the creation of this position is gaining prevalence, in India there are no legal provisions whatsoever specifically enumerating the rights, duties, liabilities, responsibilities, powers and disabilities of an Emeritus.⁷ These aspects of the designation of an Emeritus are instead dealt with solely under the terms of the contract privately entered into between the designating company and its Emeritus. Hence, the precise role, responsibilities, rights and accountability of an Emeritus may vary across companies depending on the terms and conditions of his contract with the appointing company.⁸ This implies that aspects such as

⁴ For instance, some companies like the Tata Group, Raymond, Godrej etc. have appointed their Chairman, instead of their promoter, as their Emeritus. Similarly, companies like the Max Group, the Rane Group, Mahindra, etc. have appointed their founders and retiring Chairman or Chief Executive Officer as their Emeritus; The Times of India, *Chairman Emeritus: India Inc's Timeless Transition*, May 3, 2011, available at <https://timesofindia.indiatimes.com/business/india-business/Chairman-emeritus-India-Incs-timeless-transition/articleshow/8147491.cms> (Last visited on December 24, 2018); GUNTA & RAVICHANDRAN, *supra* note 2.

⁵ Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, Vol. 21, No. 1, NATIONAL LAW SCHOOL OF INDIA REVIEW 1 (2009).

⁶ *Supra* note 3; GUNTA & RAVICHANDRAN, *supra* note 2.

⁷ Aish M. Ghana, *Emeritus Chairman vs Chairman*, February 3, 2017, available at: <https://aishmghrana.me/tag/chairman-emeritus/> (Last visited on January 18, 2018); *supra* note 3; *see*, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2015; *see*, Companies Act, 2013; Gunta & Ravichandran, *supra* note 2.

⁸ *E.g.*, HearUSA, *Corporate Governance Guidelines*, February 25, 2008, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjM4MTd8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1> (Last visited on December 24, 2018); *e.g.*, Sabre Corporation, *Corporate Governance Guidelines*, February 6, 2018, available at <https://investors.sabre.com/static-files/ba156d98-5007-4540-87ff-4ffdf8476ef7> (Last visited on December 24, 2018); *e.g.*, *Amended and Restated Corporate Governance Guidelines of HealthSouth Corporation*, February 17, 2017, available at http://s2.q4cdn.com/500379385/files/doc_downloads/gov_docs/2017/AMENDED-AND-RESTATED-CORPORATE-GOVERNANCE-GUIDELINES-OF-HEALTHSOUTH-CORPORATION.pdf.

his mode of appointment,⁹ tenure,¹⁰ remuneration,¹¹ process of removal,¹² primary duties,¹³ rights,¹⁴ etc. are determined completely as per the negotiation arrived at between both an Emeritus and his company.

Against this backdrop, in our paper, we argue that given the authority and most importantly the position of influence that an Emeritus 'may' enjoy at his appointing company's discretion,¹⁵ it becomes crucial to incorporate legal provisions for regulating this position in the interest of better corporate governance. However, we also believe that the provisions should determine only the duties, disabilities and liabilities of an Emeritus while leaving the determination of their rights, privileges and powers to the contractual arrangement between the appointing company and its Emeritus.

In Part II of the paper, we begin by elaborating upon the key attributes of this position while simultaneously highlighting how it is distinct from the numerous other related positions. In Part III, we examine the possible benefits of and the strategies behind the creation of this position from the point of view of a company. Finally, in Part IV, we highlight the lacuna that exists presently under corporate law¹⁶ in India when it comes to regulating the conduct of an Emeritus. In Part V, we present justifications for and counter the possible counter-arguments

⁹ E.g., HearUSA, *Corporate Governance Guidelines*, February 25, 2008, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjM4MTd8Q2hpbGRJRd0tMXxUeXBIPtM=&t=1> (Last visited on December 24, 2018); e.g., *Amended and Restated Corporate Governance Guidelines of HealthSouth Corporation*, February 17, 2017, available at http://s2.q4cdn.com/500379385/files/doc_downloads/gov_docs/2017/AMENDED-AND-RESTATED-CORPORATE-GOVERNANCE-GUIDELINES-OF-HEALTHSOUTH-CORPORATION.pdf (Last visited on December 24, 2018); e.g., TVS Motor Company Limited, *Draft Articles of Association*, Art. 81.

¹⁰ E.g., XPO Logistics, *Corporate Governance Guidelines*, March 20, 2016, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=62272&p=irol-govguidelines> (Last visited on December 24, 2018); HearUSA, *Corporate Governance Guidelines*, February 25, 2008, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjM4MTd8Q2hpbGRJRd0tMXxUeXBIPtM=&t=1> (Last visited on December 24, 2018).

¹¹ E.g., XPO Logistics, *Corporate Governance Guidelines*, March 20, 2016, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=62272&p=irol-govguidelines> (Last visited on December 24, 2018); e.g., PR Newswire, *Weatherford Names Dr. Bernard J. Duroc-Danner as Chairman Emeritus*, November 26, 2016, available at <https://www.prnewswire.com/news-releases/weatherford-names-dr-bernard-j-duroc-danner-as-chairman-emeritus-300364534.html> (Last visited on December 24, 2018).

¹² E.g., PR Newswire, *Weatherford Names Dr. Bernard J. Duroc-Danner as Chairman Emeritus*, November 26, 2016, available at <https://www.prnewswire.com/news-releases/weatherford-names-dr-bernard-j-duroc-danner-as-chairman-emeritus-300364534.html> (Last visited on December 24, 2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The Hindu, *Narayan Murthy Says No to 'Chairman Emeritus'*, May 23, 2016, available at <http://www.thehindu.com/business/Industry/narayana-murthy-says-no-to-chairman-emeritus/article6489654.ece> (Last visited on December 24, 2018).

¹⁶ This term has been used in its broad sense throughout the paper as for the purpose of this paper, it includes the company law of India, secretarial standards as well as the country's securities law regulations. This term has been used as being synonymous to the term business law.

that may be advanced against statutorily regulating certain aspects of this berth. In Part VI, we will put forth some of the ways in which this post can be regulated. In Part VII, we will present our conclusion.

II. A COST-BENEFIT ANALYSIS OF THIS POSITION AND THE LEGAL FRAMEWORK

Since the creation of this honorary berth is neither required nor governed by a direct legal provision, this post is carved out at the company's discretion for achieving certain objectives. The aims and goals may vary across companies. Hence, we will first put forth a non-exhaustive account of the widely identified strategies behind and the benefits of designating someone as a company's Emeritus.

A. COMMON STRATEGIES AND ADVANTAGES OF APPOINTING AN EMERITUS

1. From the perspective of the corporate governance principles and theories
 - a. Ensures better succession planning

While the meaning and scope of the phrase 'succession planning' remains open to debates and discussions,¹⁷ as a concept it focuses on the board of directors' ('the board') systematic, strategic and futuristic approach towards the selection, appointment and appraisal of a company's senior executives.¹⁸ Succession planning is as significant in relation to a company's directors as it is for its senior managerial personnel.¹⁹ It is one of the essential functions of a company's board.²⁰ For instance, it has been so identified under the Security and Exchange Board of India's ('SEBI') Listing Obligations and Disclosure Requirements Regulations ('LODR').²¹ There are five major aspects of succession planning. They include—identifying a pool of the potential successors for the board as well as the C-suite level employees, appointing the next successor, ensuring successful and smooth

¹⁷ Australian Institute of Company Directors, *Succession Planning*, available at <http://aicd.companydirectors.com.au/resources/all-sectors/selection-and-appointment/succession-planning> (Last visited on December 24, 2018).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ For example, the Securities and Exchange Board of India ('SEBI') significantly revised the Code of Corporate Governance for the listed companies to bring it in line with the Companies Act, 2013. SEBI has mandated the need for a succession policy and planning as a key function of the board of directors. Regulation 17(4) of the SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015 requires a company to put in place a policy on succession planning for the board of directors and the senior management and display the policy on the website of the company.

²¹ Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 4(2)(f)(ii)(2).

transition, appraising the performance of a company's directors and senior managerial employees, and having in place some back-up for smooth succession in the situation of emergency succession.²²

Some of these matters are taken care of by creating the position of an Emeritus.²³ For instance, carving out this post encourages and enables a company to formally or informally fix the retirement age for its Chairman, CEO or/and other Key Managerial Personnel²⁴ ('KMPs'). This is because if such a position exists in a company, some of its key retiring officials can be designated as an Emeritus. In such a case, there would be no need as such to retain such officials in an active or full-time position like that of a Chairman, CEO or any other KMP. Resultantly, this is likely to create an organised and systematic mechanism for injecting new blood into a company's board or management.²⁵ As a corollary, the creation of this post may motivate the founder Chairman or CEO or any other KMP to retire from the company's active management to assume the chair of an Emeritus.²⁶ They would then be vested with some lighter responsibilities and a significantly lesser level of liability and accountability.²⁷ Additionally, when an experienced and influential senior level managerial personnel or a prominent board member assumes the position of an Emeritus thereby allowing a new person to take over the reins of the company, this ensures a smooth transition for the company from the old to the new guard.²⁸ This is because during the transition period, an Emeritus, while staying within his mandate, can provide constant guidance, training and mentorship to the newly appointed official(s).²⁹ He can ensure continuity of the investors' confidence despite there being a transition at the top level of the company.³⁰ In addition to this, the creation of an honorary position is advantageous, as it allows a company to maintain a backup option in the form of its Emeritus and this option could be utilised in the situations of emergency exit of the senior level employee.³¹

²² WILLIAM J. ROTHWELL, *EFFECTIVE SUCCESSION PLANNING: ENSURING LEADERSHIP CONTINUITY AND BUILDING TALENT FROM WITHIN*, 6 (4th ed., 2010).

²³ E.g., The Economic Times, *Nisaba Godrej elevated as Godrej Consumer's Chairman*, May 10, 2017, available at <https://economictimes.indiatimes.com/news/company/corporate-trends/nisaba-godrej-elevated-as-godrej-consumers-chairman/articleshow/58591426.cms> (Last visited on December 24, 2018).

²⁴ This term is used as per the common parlance understanding of the word 'key managerial personnel' and hence is not confined to the meaning and the scope accorded to it under the company law in India and the SEBI regulations.

²⁵ See, e.g., Torrent Pharmaceuticals Limited, *Notice of 41st Annual General Meeting*, available at http://www.thehindubusinessline.com/multimedia/archive/01982/Click_here_for_pdf_1982958a.pdf (Last visited on December 24, 2018).

²⁶ *Supra* note 24.

²⁷ Though the latter prong may entirely depend on the contract entered into between the Emeritus and his company.

²⁸ GUNTA & RAVICHANDRAN, *supra* note 2.

²⁹ GUNTA & RAVICHANDRAN, *supra* note 2; e.g., *supra* note 24.

³⁰ GUNTA & RAVICHANDRAN, *supra* note 2.

³¹ The vacancy so created is called a casual vacancy. Under §161(4) of Companies Act, in case of a public company, casual vacancy of a director, in default of and subject to any regulations in the articles of association of a company, can be filled in by the board of directors at the board meeting. Casual vacancy created by vacation of the post of Chairman can also be filled up in the same way.

For instance, recently in the Tata-Mistry dispute, after the sudden departure of the then Chairman, Mr. Cyrus Mistry, the Emeritus, Mr. Ratan Tata, was designated as the interim Chairman of the Tata Sons.³² Further, an Emeritus can contribute towards an effective succession planning by pushing the company's board to formulate and implement a succession plan for the company which in reality usually occupies a back-seat specifically in family-run businesses.³³

b. Justification offered by the Resource Dependence Theory

Different theories exist on the practice of corporate governance.³⁴ Each of them variedly defines the role that the board or an individual director ought to serve in a company.³⁵ Each theory hints at the adoption of a distinct strategy for effectively carrying out the business operations.³⁶ Therefore, each theory presents different ideas about the ideal composition of the company's board, the eligibility criteria for a company's directors, the extent of authority that any director should wield and the degree of accountability he should be subjected to.³⁷

The resource dependence theory places emphasis on the economic reality of an organisation's constant need for resources and its large-scale dependence on the external business environment to obtain them.³⁸ Resultantly, the theory proposes that for an entity to be successful, it is essential that it makes arrangements for ensuring an uninterrupted supply of the scarce resources at feasible terms and conditions in the long run.³⁹ These resources may include information, skills, and access to the key constituents like supplier of raw material, buyer of outputs, policy makers and social groups.⁴⁰ Therefore, as per the theory, a major role of a company's board is to ensure a stable supply of the essential resources to the company.⁴¹ Consequently, the board should comprise of and retain such members who can exercise influence over and arouse confidence in the external

However, the Act is silent with respect to the mode of filling the vacancies in case of the KMPs. Therefore, the matter is dealt with by the Articles of Association. Thus, such vacant positions may be filled up by an Emeritus if the companies so decides, for instance in its articles of association.

³² The Economic Times, *Big Shakeup! Cyrus Mistry Removed as Tata Sons Chairman, Ratan Tata Steps In*, October 25, 2016, available at <https://economictimes.indiatimes.com/news/company/corporate-trends/big-rejig-ratan-tata-to-replace-cyrus-mistry-as-tata-sons-chairman/article-show/55031245.cms> (Last visited on December 24, 2018).

³³ Josey Puliyeenthuruthel, *Cut the Cord, Please*, April 20, 2015, available at <https://www.outlookindia.com/magazine/story/cut-the-cord-please/293996> (Last visited on December 24, 2018).

³⁴ Haslinda Abdullah & Benedict Valentine, *Fundamental and Ethics Theories of Corporate Governance*, MIDDLE EASTERN FINANCE AND ECONOMICS - ISSUE 4 (2009).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Talat Afza & Mian Sajid Nazir, *Theoretical Perspective of Corporate Governance: A Review*, Vol. 119 No. 2, EUROPEAN JOURNAL OF SCIENTIFIC RESEARCH (February, 2014).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

environment players in possession of such resources.⁴² These external players can be government bodies and officials, policy makers, suppliers, creditors, etc.⁴³ This theory justifies and espouses the appointment of an Emeritus in a company.

The creation of this position ensures that the senior managerial personnel, who by virtue of his experience, expertise and market standing, commands influence in the external business environment, remains associated with his company despite his retirement from his hitherto formal and full-time position. Further, since the resource dependence theory identifies the expertise, experience and knowledge of a company's board as a resource in itself, therefore the retention of an experienced and skilled key employee for some years even post his retirement appears justified enough.

2. Other Business Strategies

One of the widely prevalent strategies is to honour the person appointed as an Emeritus for his distinguished services rendered in the past.⁴⁴ The honorary position is sometimes also created in response to the legal regulations, for instance the one prescribing the maximum age limit for the KMPs.⁴⁵ Further, the existence of this position enables a company to voluntarily impose a maximum age limit for its directors or Chairperson, for instance by incorporating a clause to this effect in its articles of association. Furthermore, carving out this post ensures that a company's past official, whose continued association with the company is the company's asset, continues to remain connected with it even after his age-bound retirement. The last point has been highlighted by us in the preceding sections of the paper as well. Moreover, a company may transfer its present official to the position of an Emeritus, when it intends to sideline its present Chairman, for any reason whatsoever, which it could not do directly due to the strategic reasons such as the market standing of such a key official.⁴⁶ Likewise, a company may be inclined to designate its estranged Chairman, who has retired, its Emeritus to ensure his reconciliation with the company's present board.⁴⁷ Similarly, in some instances, a company may offer its past Chairman the position of an Emeritus, when it discovers that in the absence of its specific Chairman it is facing tumultuous

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Open Street Map Foundation, *Minutes of the Board of Directors' Meeting held on August 14, 2012*, available at https://wiki.osmfoundation.org/w/images/e/eb/Osmf_board_minutes_20120814.pdf (Last visited on December 24, 2018).

⁴⁵ The Companies Act, 2013, §196(a).

⁴⁶ XPO Logistics, *Corporate Governance Guidelines*, March 20, 2016, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=62272&p=irol-govguidelines> (Last visited on December 24, 2018); The New York Times, *Best Buy Suffers for Lack of a Plan*, August 9, 2012, available at <http://www.nytimes.com/2012/08/10/business/best-buy-suffers-for-lack-of-a-succession-plan.html> (Last visited on December 24, 2018).

⁴⁷ Star Tribune, *Founder Richard Schulze rejoins Best Buy as Chairman Emeritus*, March 25, 2013, available at <http://www.startribune.com/founder-richard-schulze-rejoins-best-buy-as-chairman-emeritus/199841841/> (Last visited on December 24, 2018).

times in the market;⁴⁸ in such cases, the return of the former Chairman to the board as an Emeritus might enable the company to restore its market goodwill.⁴⁹

Another rationale behind carving out this position is to avoid the imposition of onerous duties on a company's official, which would have been placed on him otherwise by virtue of him being the company's director or other key official.⁵⁰ Coupled with this relief from weighing obligations, assuming the post of an Emeritus allows such an official to continue or begin enjoying several such rights, privileges and powers which belong to a director under law or by convention.⁵¹ This strategy can be resorted to by the companies having concentrated shareholdings to benefit their promoter Chairman or KMP. However, the dark side of this business strategy comes into picture when the honorary position is created solely to circumvent the legal provision(s). For instance, a company may create this position, when its Chairman or any other official, holding a key position in the company becomes bound to vacate his office because of the legal disqualification imposed on him as per company law.⁵² This is because the position of an Emeritus is not regulated by a statute. Hence, there is no legally prescribed disqualification criterion for an Emeritus unlike that existing in case of a company's director⁵³ and KMP.⁵⁴ In a similar manner, since the position of a Chairman can attract the onerous duties that come attached with the office of a director, in some situations, the Chairman of a company may wish to relieve himself of such responsibilities temporarily by assuming the position of an Emeritus. Subsequently, such a Chairman can return, as per his convenience, to resume his full-time post. This strategy can be employed by the Chairman, for instance, when his company begins to face the turbulent times and he wishes to wash off his hands from the responsibility that comes attached with the challenging circumstances.

⁴⁸ E.g., HearUSA, *Corporate Governance Guidelines*, February 25, 2008, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjM4MTd8Q2hpbGRJRd0tMxXUeXB IPTM=&t=1> (Last visited on December 24, 2018); e.g. Coca-Cola, *George A David named as Chairman Emeritus of the Company*, June 27, 2017, available at <https://coca-colahellenic.com/en/media/news/george-a-david-named-as-chairman-emeritus-of-the-company/> (Last visited on December 24, 2018); e.g. Setco Automative Limited, *Articles of Association*.

⁴⁹ *Id.*

⁵⁰ This point will be substantiated and discussed in greater detail in the next section of the paper.

⁵¹ This point will be substantiated and discussed in greater detail in the next section of the paper.

⁵² David Lieberman, *Best Buy Founder Gives Up Chairman Role After Mishandling Former CEO's Affair*, May 14, 2012, available at <http://deadline.com/2012/05/best-buy-founder-gives-up-chairman-role-after-mishandling-former-ceos-affair-271856/> (Last visited on December 24, 2018) (In this example, Richard Schulze the founder of Sound of Music Store was asked by the company's Audit Committee to vacate his office as Chairperson and instead assume the office of Chairman Emeritus. The step was taken because he allegedly helped to cover up former CEO Brian Dunn's "inappropriate relationship" with a female employee); e.g., V. Natarajan v. SEBI, 2011 SCC OnLine SAT 156.

⁵³ The Companies Act, 2013, §164 (This provision deals with the disqualification of directors. It does not mention the position of an Emeritus).

⁵⁴ The Companies Act, 2013, §196(3) (This provision deals with the disqualification of KMPs. It does not mention the position of an Emeritus).

These points would be further elaborated upon in Part III of the paper where we highlight the lacuna presently existing under law when it comes to regulating the post of an Emeritus and explain the need to statutorily regulate this position.

B. THE PRESENT LEGAL POSITION WITH RESPECT TO THE RIGHTS, DUTIES, POWERS AND DISABILITIES OF AN EMERITUS

1. Law governing an Emeritus who is an invitee

Despite difference in companies and surrounding circumstances in the matters of the rights, duties, powers, privileges and disabilities that an Emeritus has, there is still some pattern to each of these aspects of the position of an Emeritus. For instance, an Emeritus is usually⁵⁵ granted the right to attend the board meetings⁵⁶ which but for such permission only a company's directors⁵⁷ can attend.⁵⁸ This conferment is legally permissible because under the Companies Act, 2013 ('the Act') and the Secretarial Standard on Meetings of the Board of Directors ('the secretarial standards'), in addition to a company's directors, its invitees can attend the board meetings upon invitation.⁵⁹ Hence, practically any person can attend the board meetings upon either receiving the board's invitation multiple times *i.e.* one for each meeting or a standing invitation for more than one such meeting. In case of an Emeritus, usually standing invitations allowing him to attend more than one board meetings are extended.⁶⁰ Hence, an Emeritus attends the board meetings as an invitee.⁶¹ Therefore, his rights, duties and the other aspects of his

⁵⁵ *Scrutiny Drives Growth in Emeritus Positions*, 8(10) Board Alert 1, 9 (2004), available at <http://www.law.harvard.edu/faculty/bebchuk/pdfs/BoardAlert.10.04.pdf> (Last visited on December 24, 2018).

⁵⁶ Board meetings is the place where the directors' decisions and discussion take place.

⁵⁷ And companies secretary (See, ICSI, *Secretarial Standard on the Meetings of the Board of Directors*, available at <https://www.icsi.edu/media/website/SS-1%20Final.pdf> (Last visited on December 24, 2018).

⁵⁸ See, The Companies Act, 2013, §173; See Rule 3(2)(e) and Rule 3(3); See, Question 4/5, The Institute of Company Secretaries of India ("ICSI"), *Responses to Queries Received on Secretarial Standard on Board Meetings (SS-1)*, available at https://www.icsi.edu/docs/Website/Final%20FAQ_onSS-1.pdf (Last visited on December 24, 2018); See ICSI, *Guidance Note on Meetings of the Board of Directors*, available at <https://www.icsi.edu/Docs/Website/Final%20Guidance%20Note%20On%20Meeting%20Of%20the%20Board%20of%20Directors.pdf> (Last visited on December 24, 2018).

⁵⁹ Secretarial Standard On Meetings of The Board of Directors, 2015 (Such a proposition can only be inferred as it has not been directly stated in the source. It can be inferred by looking at the definition of 'invitee' or by looking at the Secretarial Standards 4.1.3 and 7.2.1.2).

⁶⁰ Henk Hoff, *Board Grants Project Founder The Title of "Chairman Emeritus"*, August 16, 2012, available at <https://blog.openstreetmap.org/2012/08/16/board-grants-project-founder-the-title-of-chairman-emeritus/> (Last visited on December 24, 2018).

⁶¹ See, e.g., The Times Group, *Tata Chief May Outline Plan to Revitalise Group at Board Meet*, June 28, 2017, available at <http://epaperbeta.timesofindia.com/Article.aspx?eid=31818&articlexml=Tata-Chief-May-Outline-Plan-to-Revitalise-Group-28062017007014> (Last visited on December 24,

position are governed by the regulations applying to any invitee. However, besides the requirements that have been laid down under the secretarial standards that an invitee is required to sign the attendance register while attending a board meeting and that the minutes of such a meeting should record his presence,⁶² there is no other legal provision governing the role, rights and responsibilities of an invitee.⁶³ Hence, these aspects are governed by the terms and conditions stated in invitation sent out by a company to an invitee and/or in his contract with the inviting company; so is the case with a company's Emeritus.⁶⁴ Depending upon the contractual arrangement arrived at between an appointing company and its Emeritus, he as an invitee, may be granted the right to participate or speak at one or more board meetings or in relation to certain matters therein. This privilege to speak can be left undefined and unregulated thereby leaving enough discretion to an Emeritus. Alternatively, it can be limited by fixing the number of times he can speak in any such meeting. It is a different issue that the latter form does not usually exist in case of an Emeritus as the anecdotal evidence suggests.⁶⁵ Further, given that the position of an Emeritus is not recognised explicitly under company law and that he attends the board meetings merely as an invitee, he is barred from casting his vote in such meetings.⁶⁶

Although theoretically the position of an Emeritus, while he participates in the board meetings is that of an invitee, practically, formally and/or informally, he can exercise the level of influence and control, substantially greater than that exercised by an invitee typically, if his private contractual arrangement

2018); e.g., Chembond Chemicals Limited, *41st Annual Report 2015-16*, 38-39, available at <http://www.chembondindia.com/pdf/Audit-Report/2016-annual-report> (Last visited on December 24, 2018); e.g., DIGJAM Limited, *Annual Report 2013/14*, 9, available at http://www.moneycontrol.com/bse_annualreports/5037960314.pdf (Last visited on December 24, 2018).

⁶² Secretarial Standard On Meetings Of The Board Of Directors, 2015, Rules 4.1.2, 4.1.3, 7.2.1.1., 7.2.1.2 & 7.2.2.1 (f).

⁶³ See, Secretarial Standards 1 and Secretarial Standards 2 (There is no mentioning of any of the duties or the standard code of conduct applicable to all invitees).

⁶⁴ E.g., Clearcorp Dealing Systems (India) Limited, *Notice of the Sixth Extra-Ordinary General Meeting*, available at https://www.ccilindia.com/Documents/ClearCorpDocs/Other_Information/6th%20EGM%20NOTICE.pdf (Last visited on December 24, 2018); E.g., Hulamin Limited, *Notice of Annual General Meeting*, available at <http://hulamin.com/iar2015/pdf/hulamin-ar2015-notice-agm.pdf> (Last visited on December 24, 2018); e.g., Tea Board, *Notice of 219th Meeting of the Board and its various Standing Committees*, May 25, 2012, available at <http://teaboard.gov.in/pdf/notice/Notice%20to%20Spl%20Invitees%20for%20219th%20Meeting%20of%20Board%20&%20Committees%20at%20Kumarakom,%20Kerala%20on%2022-06-2012.pdf> (Last visited on December 24, 2018).

⁶⁵ E.g., Wendy's, *Corporate Governance Guidelines*, February 28, 2017, available at http://ir.wendys.com/phoenix.zhtml?c=67548&p=irol-govguidelines_pf (Last visited on December 24, 2018); E.g., News Corp, *Statement of Corporate Governance*, available at <https://newscorp.com/corporate-governance/statement-of-corporate-governance/> (Last visited on December 24, 2018).

⁶⁶ *Supra* note 3; The Institute of Company Secretaries of India ("ICSI"), *Guidance Note on Meetings of the Board of Directors*, available at <https://www.icsi.edu/Docs/Website/Final%20Guidance%20Note%20on%20Meeting%20of%20the%20Board%20of%20Directors.pdf> (Last visited on December 24, 2018).

with the company so provides.⁶⁷ For instance, if his appointing company decides, an Emeritus can participate in its affairs even outside its board meetings.⁶⁸ For instance, he can act as an ‘advisor’ to its board or management or can be made its face or spokesperson in certain matters or can perform the liaising function for the company. This proposition regarding the extent of power, functions and privileges that an Emeritus can practically enjoy at his appointing company’s discretion would be dealt with in sufficient detail in the next section. In fact, this is exactly where the lacuna in corporate law by not providing for regulation of this position would become clear.

2. Other features of the position of an Emeritus

So far the appointment process is concerned, an Emeritus can be appointed by a simple majority by his company’s board if that is mutually agreed upon by him and the company.⁶⁹ Alternatively, there may be numerous variations to this process of his designation as an Emeritus. After all, the terms and conditions attached to this post are privately negotiated by the parties to the contract. Therefore, similarly, his tenure may be a fixed one⁷⁰ or the one extending to lifetime if he and his appointing company so deem fit.⁷¹ In a similar manner, they may or may not be a provision for the renewal of his tenure in his agreement with the company. Likewise, the process of his removal may also vary across companies. In some cases, the removal process may be similar to that of his appointment. In others, the former can be more cumbersome than the latter.⁷² For example, if

⁶⁷ The Hindu, *Narayan Murthy Says No to ‘Chairman Emeritus’*, May 23, 2016, available at <http://www.thehindu.com/business/Industry/narayana-murthy-says-no-to-chairman-emeritus/article6489654.ece> (Last visited on December 24, 2018). See, Financial Express, *Cyrus Mistry Says He Was Reduced to A “Lame Duck” Chairman: Full Text of His Letter to The Tata Sons Board*, October 26, 2016, available at <http://www.financialexpress.com/industry/cyrus-mistry-sacked-letter-to-tata-sons-board-full-text-ratan-tata/431150/> (Last visited on December 24, 2018); Michael Zakkour, *When Alibaba Met Stadium Goods: The Case For Foreign SMEs To Try And Crack Chinese E-Commerce*, January 22, 2018, available at <https://www.forbes.com/sites/tod-dixon/2012/09/06/get-value-from-board-observers/#62334a0a1531> (The article asserts that the board observers, by virtue of their right to participate in the meetings, can exercise some influence. Therefore, we believe that by analogy, the same proposition can be advanced about the Chairman Emeritus).

⁶⁸ E.g., PI Industries Limited, *Postal Ballot Notice*, available at <https://www.piindustries.com/Media/Documents/Postal%20Ballot%20Notice%20-%2028%203%2017.pdf> (Last visited on December 24, 2018).

⁶⁹ E.g., HTMT Global Solutions, *Notice of Twelfth Annual General Meeting*, available at <https://www.teamhgs.com/sites/default/files/downloadables/agm-notice-07.pdf> (Last visited on December 24, 2018).

⁷⁰ E.g., RSWM Limited, *Notice of Extra-ordinary General Meeting*, available at <http://www.rswm.in/investor/pdf/RSWM-EOGMNotice-2014.pdf> (Last visited on December 24, 2018).

⁷¹ E.g., XPO Logistics, *Corporate Governance Guidelines*, March 20, 2016, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=62272&p=irol-govguidelines> (Last visited on December 24, 2018); HearUSA, *Corporate Governance Guidelines*, February 25, 2008, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjM4MTd8Q2hpbGRJRd0tMXxUeXBIPtM=&t=1> (Last visited on December 24, 2018).

⁷² *Supra* note 73 (In this example, the appointment of an Emeritus requires the approval of the board of directors by an ordinary majority whereas his removal can take place by the board of directors’

the appointing company and an Emeritus so decide, his removal may require the shareholders' approval in their general meeting even when his appointment may have happened through the votes of the board.⁷³ In the matters of his perks and remuneration, yet again, the contractual provisions rule the roost.⁷⁴ Hence, in some cases, an Emeritus can agree to dedicate his services to his appointing company without expecting any remuneration or perk, while in other instances, his position may have some remuneration attached.⁷⁵

After this, it is crucial to understand the distinction that exists between the post of an Emeritus and certain other positions mentioned⁷⁶ under the Act and the SEBI regulations. These are the posts of a director (both a *de-facto* and a shadow director), a key managerial personnel, a promoter and an officer. This is because it is by virtue of this distinction that exists among these different positions that the provisions regulating the latter type of positions cannot be automatically extended to govern the designation of an Emeritus, thereby highlighting the loopholes presenting existing under corporate law in India. However, it is equally true that there could be some overlap in one or more of the above-mentioned positions, among others, and that of an Emeritus.⁷⁷ In such cases, the statutory provisions that exist in relation to any of these positions would be triggered and would begin applying to an Emeritus. However, their application is only to the extent and for the purposes an Emeritus acts in some additional capacity (like a key managerial personnel) and they do not apply otherwise.

C. *DISTINCTION BETWEEN THE POSITION OF AN EMERITUS AND OTHER RELEVANT POSITIONS*

1. Emeritus versus director

The minimum difference between the post of a director and that of an Emeritus is decided by company law whereas the maximum distinction is determined by the terms and conditions that an appointing company and its Emeritus agree upon in relation to his role at the company.⁷⁸ This is because the Act and its rules, as well as the SEBI regulations, impose certain rights, duties, powers,

consent by a special majority).

⁷³ *Id.*

⁷⁴ *E.g.*, *supra* note 73.

⁷⁵ *E.g.*, Sabre Corporation, *Corporate Governance Guidelines*, February 6, 2018 available at <https://investors.sabre.com/static-files/ba156d98-5007-4540-87ff-4ffdf8476ef7> (Last visited on December 24, 2018).

⁷⁶ Certain other positions are mentioned directly or indirectly.

⁷⁷ *Supra* note 73; *E.g.*, Setco Automotive Limited, *Whistleblower Policy*, November 11, 2014, available at http://www.setcoauto.com/admin/Reports/statutorypolicy/AOA_Setco_Auto_Draft.pdf (Last visited on December 24, 2018).

⁷⁸ *E.g.*, XPO Logistics, *Corporate Governance Guidelines*, March 20, 2016, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=62272&p=irol-govguidelines> (Last visited on December 24, 2018).

disabilities, responsibilities and liabilities on a company's director. These include his right to receive a notice of meetings,⁷⁹ his duty to disclose in every meeting his interest in a transaction being discussed and voted upon,⁸⁰ his power to inspect the company's books of accounts,⁸¹ his restrictions on his taking of loan or guarantee from his company,⁸² his disqualification from being an auditor⁸³ or independent director⁸⁴ etcetera positions, the prohibition on his entering into forward dealings in the securities transactions of his company,⁸⁵ the limits on his remuneration as a managing director in case his company incurs losses,⁸⁶ among others. These rights, duties, powers, disabilities, responsibilities and liabilities can also be granted to or imposed upon an Emeritus under his contract with his appointing company.⁸⁷ Therefore, to this extent and in this manner, a company may choose to bridge the gaping gap that originally exists between the position of a director and that of an Emeritus.⁸⁸

However, there are two kinds of limits to the company's bridging of this gap. First, under corporate law, there are certain powers, rights and privileges that statutorily exist for a director and cannot be contractually extended to an Emeritus. For instance, by way of a contractual provision, an Emeritus cannot be granted the authority to a) cast a vote in the board meetings as the voting right in case of the board meetings remains the prerogative of a director,⁸⁹ b) execute bills of exchange on the company's behalf,⁹⁰ c) issue share certificate or dispose of excess shares in case of bonus or rights issue on his company's behalf,⁹¹ among other matters. Hence, to this 'minimum' extent, the post of an Emeritus and that of a director cannot completely overlap.

Second, even as a matter of practice, the difference between the two positions exist at the appointing company and its Emeritus's own wish. This is because they like to insure themselves against any risk of an Emeritus qualifying as either a shadow or a *de facto* director and thereby becoming subject to the liabilities, duties and disabilities applicable to a director.

In order to make our proposition clearer, we would first explain in brief the meaning and implications of being a *de facto* director and a shadow director. There are three kinds of directorship - *de jure*, *de facto* and shadow

⁷⁹ The Companies Act, 2013, §173(3).

⁸⁰ The Companies Act, 2013, §184.

⁸¹ The Companies Act, 2013, §128(3).

⁸² The Companies Act, 2013, §185.

⁸³ The Companies Act, 2013, §141.

⁸⁴ The Companies Act, 2013, §149(5).

⁸⁵ The Companies Act, 2013, §194.

⁸⁶ The Companies Act, 2013, §197.

⁸⁷ SATISH KUMAR TUTEJA, CORPORATE MANAGEMENT STRUCTURE IN INDIA (1992).

⁸⁸ *Id.*

⁸⁹ *Supra* note 3.

⁹⁰ The Companies Act, 2013, Proviso to §2(22).

⁹¹ Companies (Share Capital and Debentures) Rules, 2014, First Proviso to Rule 5(3).

directorship.⁹² A *de jure* director is the one who acts as such by virtue of his due and formal appointment to that position. Hence, it is an unambiguous post to be identified. However, on the other hand, the precise meaning of the terms shadow and *de facto* directors and the distinction between them continue to remain debatable across different jurisdictions.⁹³ As per the majority view, a *de facto* director is an individual who holds himself out as a director or/and who the third party reasonably perceives to be acting as a company's director by virtue of the nature of the functions he performs as well as his conduct. However, in reality such person may not have been formally appointed as a director.⁹⁴ On the other hand, a shadow director exercises real but clandestine control over a company's affairs.⁹⁵

We will now delve into the provisions under the Act governing, if at all, the position of *de facto* and shadow director. Under the Act, unlike the Companies Act, 1956 ('the 1956 Act'), the concept of shadow director and *de facto* or deemed director has not been recognised as such under the definition of director. This is because unlike in case of the jurisdictions such as the United States ('US'), the United Kingdom ('UK') and South Africa, under the Act, a director is defined as a person 'appointed' to the board. Hence, this definition includes within its ambit only a *de jure* director.⁹⁶ A shadow director has been statutorily recognised as an 'officer',⁹⁷ 'officer who is in default'⁹⁸ or/and a 'promoter'⁹⁹ under the definition section of the Act. This is because the terms 'officer' and 'officer who is in default' respectively include a person in accordance with whose directions or instructions the board or any one or more of the directors are accustomed to act.¹⁰⁰ Similarly, under the Act, a promoter includes a person who has control, direct or

⁹² Caroline M. Hague, *Directors: De Jure, De Facto, or Shadow*, 28 HONG KONG L.J. 304-305 (1998).

⁹³ *Id.*, Hogan Lovells, *Guidance On The Concept of De Facto and Shadow Director*, August 5, 2014, available at <http://www.hoganlovells.com/en/publications/guidance-on-the-concept-of-de-facto-and-shadow-director> (Last visited on December 24, 2018); Fieldfisher, *What Is a De Facto Director?*, February 11, 2011, available at <http://www.fieldfisher.com/publications/2011/02/what-is-a-de-facto-director#sthash.ybbUEB9D.LizTEts5.dpbs> (Last visited on December 24, 2018); Cases such as *Re Kaytech International Plc* and *Secretary of State v. Deverell* deliberating upon the difference between de facto and shadow directors; Natania Locke, *Shadow Directors: Lessons From Abroad*, 14 S. AFR. MERCANTILE L.J. (2002).

⁹⁴ Christina Cavallaro & Mark Dobbie, *Can An Advisor to a Company Be a Shadow Director?* August 27, 2013, available at <https://www.eakin.com.au/images/Can-an-adviser-to-a-company-be-a-shadow-director-title.pdf> (Last visited on December 24, 2018).

⁹⁵ *Id.*

⁹⁶ Compare it with South African law under which §1 of the Companies Act, 1973 has defined director as "in this Act, unless the context otherwise indicates director includes any person occupying the position of director or alternate director of a company, by whatever name he may be designated as". §60 of Corporations law in Australia includes both de facto and shadow directors within its definition of directors. The same can be observed with the English law. Section 251(1) of the Companies Act 2006 (UK) defines 'shadow director' as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act."; A. RAMAIA, *GUIDE TO THE COMPANIES ACT*, Vol. 1 53 (14th ed., 2000).

⁹⁷ The Companies Act, 2013, §2(59).

⁹⁸ The Companies Act, 2013, §2(60).

⁹⁹ The Companies Act, 2013, §2(69).

¹⁰⁰ The Companies Act, 2013, §2(69).

indirect, over his company's affairs or a person in accordance with whose advice, directions or instructions the company's board is accustomed to act.¹⁰¹ Therefore, be it by virtue of his formal authority or on account of his own persona, influence and company's shareholding pattern, wherever an Emeritus begins acting in a manner that he can be said to be behaving as an 'officer', an 'officer who is default' and/or a 'promoter', the regulations applying to each of these positions begin applying to him.

2. Emeritus versus other non-statutory positions

a. Emeritus versus board advisor

The position of an Emeritus is also distinct from that of a board advisor though there may be an overlap between the two positions to the extent a company decides. Like the position of an Emeritus, the position of a board advisor has not been created by, defined or mentioned under corporate company law.¹⁰² Resultantly, as is the case with the position of an Emeritus, there is no universal or all-encompassing definition of a board advisor.¹⁰³ Hence, as it happens with the berth of an Emeritus, the precise role and the powers of a board advisor are determined by the contract negotiated between his appointing company and him.¹⁰⁴ Usually, he is selected by his company to obtain from him an expert opinion regarding the company's affairs.¹⁰⁵ This position is different from that of an Emeritus because as a matter of practice an Emeritus is appointed to discharge a wider range of functions.¹⁰⁶ For instance, in case of certain transactions, an Emeritus can represent his company before the third parties and can thereby negotiate on its

¹⁰¹ The Companies Act, 2013, §2(59) & 2(60).

¹⁰² See Indian Companies Act, 2013 (the law solely has definition of 'experts', not of board advisors or advisory board. Though the role of 'experts' as defined under Companies Act, 2013 and advisors may overlap, yet the two positions are not synonymous); See SEBI Regulations; However, if the advisor is an identified professional such as chartered accountant, cost accountant, etc. which renders him subject to the laws applicable to him as qualified professional and the rules of the concerned professional body will apply; Australian Institute of Company Directors, *SME Business Owners/Directors: The Benefits of An Advisory Board – Mentoring for Growth*, available at http://www.companydirectors.com.au/~media/Resources/Director%20Resource%20Centre/Directorship%20in%20your%20organisation/00660_SME_FY_The_Benefits_of_an_Advisory%20Board_web.ashx (Last visited on December 24, 2018) (position of law in Australian jurisdiction); Manitoba Family Service and Housing, *The Roles, Responsibilities and Functions of a Board*, available at https://www.gov.mb.ca/fs/childcare/resources/pubs/board_development_guidelines.pdf 1 (similar position of law in another jurisdictions outside India as well).

¹⁰³ Erik Lewis Kantz, *Considerations in Drafting Board Advisor Arrangements*, BUSINESS LAW TODAY.

¹⁰⁴ John Mark Zeberkiewicz, *Considerations in Drafting Board Observer Arrangements*, available at https://www.americanbar.org/publications/blt/2014/04/05_zeberkiewicz.html (Last visited on December 24, 2018); Jeff Golfman, *Board of Directors v. Advisory Board*, April 13, 2016, available at <https://www.entrepreneur.com/article/273977> (Last visited on December 24, 2018); *Id.*

¹⁰⁵ Clement Law Firm, *Board Observer v. Board Advisor*, June 9, 2014, available at <https://www.eclementlaw.com/evas-legal-blog/2014/6/9/board-observer-v-board-advisor> (Last visited on December 24, 2018). (This article also elaborates upon the difference between board advisor and board observer); GOLFMAN, *supra* note 104; KANTZ, *supra* note 103.

¹⁰⁶ As also highlighted previously in this Section.

behalf. Likewise, he can serve as its spokesperson. Further, by virtue of his industry-standing and past performance in the company, he can practically exercise a greater level of influence upon the company's board and management as compared that exercised by a board advisor.¹⁰⁷

b. Emeritus versus board observer

The position of board observer is yet another non-voting position which has become a commonplace specifically among the start-ups, the small companies and/or the new companies.¹⁰⁸ Unlike that of an Emeritus, the position of 'board observer' is not a statutorily defined or identified post.¹⁰⁹ Hence, all the aspects of this position, like is the case with the position of an Emeritus, are contractually determined.¹¹⁰ As a concept, a board observer is a nominee¹¹¹ of the company's investors¹¹² for the purpose of the company's meetings.¹¹³ Since he is not a director, unlike a nominee director, he cannot exercise a voting right in the meeting he attends.¹¹⁴ He is instead appointed to enable the investors appointing him have a say in and access to the real-time information about the matters of their investee company.¹¹⁵ As is the case with an Emeritus, a board observer can attend the board meetings and can voice his opinion as an 'invitee'.¹¹⁶ Yet both the positions are not synonymous. While an observer is viewed as the investors' representative,¹¹⁷ at least theoretically, an Emeritus does not typically represent any one faction of a company's stakeholders. Instead he is expected to act in the best interest of the entire company.

There is another point of distinction between the post of an Emeritus and those of a board observer and a board advisor. While an observer and an advisor are likely to be viewed by the inviting company's board and management as the

¹⁰⁷ For example, Narayan Murthy's appointment as Emeritus and Ratan Tata's designation as Emeritus.

¹⁰⁸ Tony Lettich, *Board Observer Rights: What Are They and Why Are They Important to Investors?* March 3, 2016, available at: <http://fundingsage.com/what-are-board-observer-rights-and-why-are-they-important-to-investors/> (Last visited on December 24, 2018).

¹⁰⁹ Kandace W. Richardson, Samantha Horn & Francesco Portolano, *Board Observers Beware: A Discussion of Liabilities and Risks Facing Board Observers from A United States, Canadian, and Italian Law Perspective*, available at: <http://apps.americanbar.org/buslaw/committees/CL930000pub/newsletter/200503/20050314100100.pdf> (Last visited on December 24, 2018).

¹¹⁰ LETTICH, *supra* note 108.

¹¹¹ Not nominee directors.

¹¹² Such as angel funds, crowd-funding companies, venture capitalists and others.

¹¹³ VC Adventure, *Board Observer v. Board Member*, January 18, 2005, available at: <http://www.sethlevine.com/archives/2005/01/board-observer-vs-board-member.html> (Last visited on December 24, 2018); LETTICH, *supra* note 108.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ KANTZ, *supra* note 103 ("while observers may provide valuable advice and perspective to the board and company management similar to advisors, they may face greater scepticism or hostility from directors or mnagement because they primarily protect the investor group they represent.")

outsiders,¹¹⁸ an Emeritus by virtue of his past position, role and demeanour may be considered by such a company as a person insider to or a part of the appointing company itself. Resultantly, while it is understandable for a company to make serious attempts to regulate the powers, privileges and rights of a board observer or a board advisor, this may not be the case in a company's dealings with its Emeritus. This is more so given that in almost all the cases, an Emeritus has proven his mettle, character and sense of dedication towards the appointing company by working with it for years and has thereby earned a strong goodwill and market standing for him.¹¹⁹ In India, this can also happen due to the existence of the concentrated shareholding pattern in the majority of Indian companies,¹²⁰ coupled with the fact that as a matter of practice, a company's promoter is designated as its Emeritus upon his retirement from some key post held priori.

Hence, while as is the case with the post of an Emeritus the positions of a board advisor and a board observer are non-statutory and are thereby regulated as per the private contractual agreement between the company and the appointees; nevertheless, the latter set of positions do not require to be statutorily governed as much as the post of an Emeritus does. This would become clearer in the next Section.

III. HIGHLIGHTING THE PROBLEMS WITH THE STATUS QUO

Depending upon an appointing company's discretion, its Emeritus can enjoy any amount of formal powers.¹²¹ Even without these formal powers, an Emeritus can have exercise a significant amount of influence. This is because under the principles of corporate governance, power wielding can be of two types— institutional or organisational power and personal power.¹²² Institutional power exists in relation to a person by virtue of his formal position in an organisation.¹²³

¹¹⁸ *Supra* note 119; Clement Law Firm, *Board Observer v. Board Advisor*, June 9, 2014, available at <https://www.eclementlaw.com/evas-legal-blog/2014/6/9/board-observer-v-board-advisor> (Last visited on December 24, 2018); KANTZ, *supra* note 103.

¹¹⁹ Simon Atkinson, *Tata Sacking: Cyrus Mistry was 'Lame Duck' Chairman*, October 26, 2016, available at <https://www.bbc.com/news/business-37775458> (Last visited on December 2, 2018); e.g. GUNTA & RAVICHANDRAN, *supra* note 2.

¹²⁰ See Rakesh Pandey, *Effects of Controlling Family Status, Family-Impacted Governance and Top Management Characteristics on Financial and Social Performance of Listed Companies in India*, May 11, 2016 available at <https://researchbank.rmit.edu.au/eserv/rmit:161632/Pandey.pdf> (Last visited on December 2, 2018); see Mohandas Pai, 'Superstar chairmen across corporate India don't want to give up power', November 3, 2016, available at <https://www.rediff.com/business/special/superstar-chairmen-dont-want-to-give-up-power/20161103.htm> (Last visited on December 24, 2012).

¹²¹ We have explained this proposition in the preceding Section.

¹²² James H. Davis, F. David Schoorman & Lex Donaldson, *Towards a Stewardship Theory of Management*, Vol. 22 No. 1, ACADEMY OF MANAGEMENT REVIEW 31 (Jan., 1997).

¹²³ *Id.*

However, on the other hand, personal power, which is an inherent part of an individual in the context of the interpersonal relationship, is not affected by his formal position.¹²⁴ The expert and the referral powers are the two forms of personal power.¹²⁵ The latter works through the identification of one person in an organisation with the other person thereby allowing the latter to wield influence on the former, while the former allows the exercise of power and influence by a person by virtue of his expertise in his profession.¹²⁶ Unlike organisational power, personal power is developed over time and is not affected by the formal role or powers of a person in an organisation.¹²⁷ Though slower to develop, this kind of power can stay over a long period of time.¹²⁸

An Emeritus, who is usually a past key official of a company, is likely to possess both the expertise and the referral powers.¹²⁹ Hence, it is likely for him to possess a significant amount of personal power.¹³⁰ Further, specifically in the Indian context, an Emeritus can possess immense institutional powers as well. This is because in India, as the anecdotal evidence suggests, the companies which creating this position, are the ones having a single, strong and clear promoter or promoter group, either possessing a significant shareholding or exercising influence via other formal and informal arrangements.¹³¹ Further, in Indian companies, the insider model of corporate governance¹³² is the norm even in case of listed

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See PANDEY, *supra* note 120; GUNTA & RAVICHANDRAN, *supra* note 2.

¹³⁰ PAI, *supra* note 120; *see e.g.* ATKINSON, *supra* note 119; *see e.g.* GUNTA & RAVICHANDRAN, *supra* note 2, 44.

¹³¹ PANDEY, *supra* note 120. (“In India, it is a common practice that a founding family member, a patriarch, holds the position of non-executive Chairperson or Chairman emeritus after his retirement, but technically he is still involved with the company in a role which is beyond that of a visionary and strategist (Piramal, p.14). For example, Piramal (1997) reports that although Dhirubhai Ambani, founder of Reliance Group, passed the baton to the next generation in the 1990s, in practical terms he was still working as the CEO of the company. When asked about his retirement, he responded “Never. Till my last breath I will work. To retire there is only one place—the cremation ground”. Therefore, especially in the Indian context, the impact of the role of the chairman is expected to be significant.”); *e.g.*, XPO Logistics, Corporate Governance Guidelines, March 20, 2016, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=62272&p=irol-govguidelines> (Last visited on December 24, 2018).

¹³² There are two systems of corporate governance—the insider model and the outsider model. “The insider model is characterized by a cohesive groups of “insiders” having a closer and a more long-term relationship with the company. These insiders are the single largest group of shareholders, with the rest of the shareholding being diffused and held by the institutions or individuals constituting the “public.” The insiders typically tend to have a controlling interest in the company. These controlling shareholders tend to be business family groups or the State. In this regime, the minority shareholders do not have much of a say as they do not hold sufficient number of shares in the company to be in a position to outvote or even veto the decisions spearheaded by the controlling shareholders. The outsider model displays dispersed share ownership with large institutional shareholdings.” There is therefore a “separation of ownership and control” in which the individual interest of shareholders is made subservient to that of managers who are in control of a company.” The model is referred to as the “outsider” model because shareholders typically have no interest

companies.¹³³ This may be the additional reason that the company appointing an Emeritus may want to confer on its Emeritus a significant amount of formal authority on the top of the informal authority that he can enjoy for the reasons explained by us.¹³⁴ In a sharp contrast to this, in other jurisdictions, such as the UK or the US, even when a company's promoter or his relative is designated as an Emeritus, this step may not have the above-mentioned implications in terms of the authority and influence he can exercise because in these countries there is an outsider model of corporate governance.¹³⁵

In addition, we serve a caveat here. The power and the influence that an Emeritus can potentially exercise in the Indian context cannot be undermined only on account of his lack of voting authority in board meetings. This is because mere participation of a person in the deliberations of such meetings can have an impact on the overall decision making, as is also evident, for instance by the fact that under §184 of the Act, in case of related party transactions ('RPTs'), in a board meeting, an interested director is prohibited not only from voting upon the matters in which he stands as an interested party but also from participating in any other manner in the proceedings of the meeting.¹³⁶

It is against this entire backdrop that the present Section highlights the vacuum that exists under corporate law in India by virtue of the non-regulation of the position of an Emeritus. While establishing our point, we will occasionally draw comparison with other common-law countries like the UK and Australia. This would be to highlight how these jurisdictions are better equipped to deal with the possibility of a company's misusing the position of an Emeritus to evade the corporate law provisions or otherwise negatively affect its governance despite them not have an explicit and direct regulations for an Emeritus as is the case with India.

in managing the company and retain no relationship with the company except for their financial investments - the separation of ownership and control is at its best.⁷⁷

¹³³ VAROTTIL, *supra* note 5.

¹³⁴ See PANDEY, *supra* note 120.

¹³⁵ VAROTTIL, *supra* note 5.

¹³⁶ Companies Act, 2013, §297 & §184(2)(a); See Jay Levy, *Why Board Observer Seats are better than actual Board Seats?* April 25, 2016, available at <https://medium.com/@zelkovavc/why-board-observer-seats-are-better-than-actual-board-seats-28ca0bf360d3> (Last visited on March 24, 2019); See also Mark Suster, *Why you should avoid adding 'Board Observers' to your Startup's Board*, February 25, 2019, available at <https://www.inc.com/james-ledbetter/mentor-program-invitation-founders-project.html> (Last visited on March 24, 2019); See also Amit Garg, *Board Observers: What to do and What not to do*, May 23, 2017, available at: <https://medium.com/@amitgarg/board-observers-what-to-do-and-what-not-to-do-c3f49ce91914> (Last visited on March 24, 2019).

A. IN INDIA, AN EMERITUS CANNOT BE HELD LIABLE AS A DE JURE DIRECTOR EVEN WHEN HE ACTS AS A SHADOW OR A DE-FACTO DIRECTOR

In other jurisdictions such as the UK,¹³⁷ the US¹³⁸, Canada,¹³⁹ and Australia,¹⁴⁰ unlike is the scenario with the Act in India, there is a direct legal recognition of the positions of a shadow and a *de facto* director under their corporate laws?. Further, not only are these jurisdictions recognising the concept of the shadow and the *de facto* directors but also are some of them interpreting these terms broadly to cover within their ambit a wide variety of situations that can arise in case of companies' operations.¹⁴¹ However, even among these jurisdictions recognising these two positions, the precise nature of duties, liabilities and disabilities imposed on such directors may vary. For instance, in Australia¹⁴² the shadow as well as the *de facto* directors have the duties, liabilities and disabilities like those of the *de jure* directors.¹⁴³ On the other hand, under the UK's Companies Act, 2006, while the *de facto* directors are treated as the *de jure* directors, the shadow directors are subject to only some of the liabilities, duties and disabilities that the *de jure* directors are subject to under the law.¹⁴⁴ Similarly, in the UK's Companies Act, 2006, the nature and the scope of the fiduciary duties of a shadow director are also limited when compared to those of a *de facto* director.¹⁴⁵

¹³⁷ Fieldfisher, *What is a De Facto Director?* February 11, 2011, available at <http://www.fieldfisher.com/publications/2011/02/what-is-a-de-facto-director#sthash.ybbUEB9D.qmfoSuLQ.dpbs> (Last visited on December 24, 2018); Natania Locke, *Shadow Directors: Lessons from Abroad*, 14 S. AFR. MERCANTILE L.J. (2002) 421 (Both the Australian and the UK law explicitly define shadow directors. This definition states that a shadow director is a person in accordance with whose directions or instructions the directors of the company are accustomed to act).

¹³⁸ RICHARDSON, HORN & PORTOLANO, *supra* note 109.

¹³⁹ *Id.*

¹⁴⁰ Christina Cavallar & Mark Doble, *Can An Adviser To A Company Be A Shadow Director?* August 27, 2013, available at <https://www.eakin.com.au/images/Can-an-adviser-to-a-company-be-a-shadow-director-title.pdf> (Last visited on December 24, 2018).

¹⁴¹ Kathy Idensohn, *The Regulation of Shadow Directors*, 22 SA MERC LJ, 328-30 (2010).

¹⁴² Corporations Act, 2001.

¹⁴³ *See*, IDENSOHN, *supra* note 148 (This is because the Australian Corporations Act 2001 includes shadow directors in its definition of a 'director' instead of having a separate definition of shadow directors and de facto directors. Hence, wherever the duties of directors have been mentioned all the duties etc will also be applicable for shadow directors and de facto directors).

¹⁴⁴ AO Hall Advocates, *Shadow Directors- Power And Influence Bring Responsibility*, February 25, 2014, available at [https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwiQm7Dzy_XXAhVJuo8KHVIGAOlQFghlMAQ&url=https%3A%2F%2Fwww.lexology.com%2Flibrary%2Fdetail.aspx%3Fg%3Dcf359cdc-31f8-410a-a789-e1620e1f5f91&usg=AOvVaw28eekolPmHoYyjb4-WX4vQ](https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwiQm7Dzy_XXAhVJuo8KHVIGAOlQFghlMAQ&url=https%3A%2F%2Fwww.lexology.com%2Flibrary%2Fdetail.aspx%3Fg%3Dcf359cdc-31f8-410a-a789-e1620e1f5f91&usg=AOvVaw28eekolPmHoYyjb4-WX4vQ;); (Last visited on December 24, 2018); Walker Morris, *Shadow Directors and Their Duties*, February, 2014, available at <https://www.walkermorris.co.uk/publications/brief-february-2014/shadow-directors-and-their-duties/>, (Last visited on December 24, 2018); Ultraframe (Uk) Ltd. v. Fielding And Ors, MANU/UKCH/0213/2005, ¶1279-1280.

¹⁴⁵ *Id.*

Resultantly, against this backdrop, an Emeritus and the company appointing him may be apprehensive of him wielding the authority and exercising the influence similar to that commanded by a director. This is because, an Emeritus would then be held liable as a *de facto* or a shadow director, as the case¹⁴⁶ may be.

However, in case of India, under the Act, there is a shortfall under the law. Under the Act, an Emeritus who begins acting as a shadow director is not identified as such. Instead, he may be termed as a ‘promoter’,¹⁴⁷ an ‘officer’¹⁴⁸ and/or an ‘officer who is in default’.¹⁴⁹ There are two problems with this situation.

First, under the Act, the threshold has been kept high for a person to qualify as a ‘promoter’, an ‘officer’ or an ‘officer who is in default’ as there is a requirement that he should be a person upon whose advice, directions or instructions the board is accustomed to act.¹⁵⁰ We argue that this is a difficult condition to meet as under §60(v) and §69 of the Act, it is required that the board (instead of merely an individual director) is accustomed to act upon the advice, directions or instructions of an Emeritus.¹⁵¹ Further, the board can be stated to having become ‘accustomed’ to act on the advice, directions or instructions of an Emeritus only if it act as such more frequently than merely as a matter of casualty.¹⁵² Some element of habit in obeying the advice, directions or instructions is required to be established.¹⁵³ In addition, it is crucial to note that even in cases where an Emeritus begins wielding some ‘influence’ over his company’s affairs, provided he is not a promoter beforehand, he cannot qualify as a promoter under §2(69)(b) of the Act and cannot thereby be subject to the duties and the liabilities fastened on a promoter under the Act. This is because under the definition of a promoter,¹⁵⁴ there can be two types of promoters—one who has been formally named as such and the other whose overall conduct and the manner of performing his duties contribute to his qualifying as promoter. Under such a definition, a person wielding ‘control’ over his company’s affairs can be termed as a promoter by virtue of his conduct, roles and responsibilities. At this juncture, it is important to note that there is a difference between someone exercising ‘influence’ and wielding ‘control’. This distinction exists because of the difference in the legal meaning and implications of

¹⁴⁶ It depends upon the terms of his contract with the appointing company and his manner of exercising his influence.

¹⁴⁷ The Companies Act, 2013, §2(69); Standing Committee on Finance, *Fifty-seventh Report on the Companies Bill, 2011*, 27, (June 26, 2012), available at http://www.prsindia.org/uploads/media/Company/Companies_Bill_%20SC%20Report%202012.pdf (Last visited on December 24, 2018).

¹⁴⁸ *Id.*; *Ionic Metalliks v. Union of India*, 2014 SCC OnLine Guj 10066 (‘Ionic’); Joginder Singh Juneja v. State of Gujarat, Criminal Misc. Application No. 3237 of 2017, decided on 19-4-2017.

¹⁴⁹ Standing Committee on Finance, *supra* note 154; *Ionic Metalliks v. Union of India*, 2014 SCC OnLine Guj 10066.

¹⁵⁰ The Companies Act, 2013, §2(69)(c), 2(59) & 2(60)(v).

¹⁵¹ The Companies Act, 2013, §60(v); *Kuwait Asian Bank v. National Mutual Life Nominees Ltd.*, (1990) 3 All ER 404.

¹⁵² A. RAMAIA, *GUIDE TO THE COMPANIES ACT*, Vol. 172-173 (14th ed., 2000).

¹⁵³ *Id.*; *Ultraframe (UK) Ltd. v. Fielding And Ors.*, [2005] EWHC 1638(Ch), ¶1273.

¹⁵⁴ The Companies Act, 2013, §2(69).

the terms ‘control’ and ‘influence’. The term ‘control’ has been explicitly defined under the Act. Despite the word having an inclusive definition, it has been defined as the ‘right’ to appoint the majority of directors or control the management or policy decisions in a company.¹⁵⁵ It is the usage of the term ‘right’ which is important. An Emeritus usually commands soft power in the company and over its officials instead of doing so as a matter of his ‘right’.¹⁵⁶ Hence, the influence he commands may not qualify as ‘control’, as per the Act, for him to be termed as a promoter.¹⁵⁷

Second, even when an Emeritus qualifies as such *i.e.* as an officer, an officer who is in default or/and a promoter under the Act, the extent of the liabilities, duties or disabilities that can be fastened on him thereby are not equivalent or comparable, in terms of their onerous nature, to those imposed on a *de jure* director. For instance, under the Act, qualifying as an officer does not impose fiduciary duties on an Emeritus.¹⁵⁸ This is unlike the case, for instance, with the law in Australia, where an officer, like a company’s director, does owe fiduciary duties under the country’s company law.¹⁵⁹

Similarly, even when a company’s promoter is designated as its Emeritus, being a promoter does not impose on him the fiduciary duty under the law. While it is true that the fiduciary duties were imposed upon the promoters in the past under the common law developed in India,¹⁶⁰ the verdicts do not apply to impose the fiduciary obligations upon a company’s promoters in relation to its operations.¹⁶¹ This is because as per the amended definition of the promoter under the Act¹⁶² as well as under the SEBI’s LODR¹⁶³ Regulations, the meaning of this

¹⁵⁵ The Companies Act, 2013, §2(27) (Other aspects of the inclusive definition of control which have not been included explicitly in the definition itself have not been discussed via case law yet).

¹⁵⁶ See Paula J. Dalley, *Shareholder (and Director) Fiduciary Duties and Shareholder Activism*, 8 HOUS. BUS. & TAX L.J. 305, 327-328 (2008).

¹⁵⁷ *Id.*

¹⁵⁸ This is because officers’ duties under company law exist to the extent they are provided with under the statutory regime of company law. Under the statutory regime, officers’ fiduciary duty has nowhere been mentioned explicitly.

¹⁵⁹ Fran Barber, *Indirectly Directors: Duties Owed below the Board*, 45 VICTORIA U. WELLINGTON L. REV. 29 (2014).

¹⁶⁰ The Institute of Company Secretaries of India (ICSI), *Executive Programme Company Law*, 62-64, available at <https://www.icsi.edu/Docs/Webmodules/Publications/1.%20Company%20Law-Executive.pdf> (Last visited on December 24, 2018).

¹⁶¹ Harpreet Kaur, *Promoters and Corporate Governance under the Companies Act, 2013*, 3 J. NAT’L L. U. DELHI (2015-2016) (“It is submitted that fiduciary relationship is true for all categories of promoters whether they are involved in formation and incorporation of the company or financing and making the company a going concern. Such fiduciary relationship comes to end when a promoter ceases to have the relationship of promotorship with the company.”); Anthony O. Nwafor, *Company Promoters and the Enforcement of Pre-Incorporation Contracts*, 22 S. AFR. MERCANTILE L.J. 69 (2010) (“Upon incorporation, though, the promoter stands in a fiduciary position towards the company that relates retrospectively to the beginning of the act of promotion and ends after the company is formed or the promotional plan is completed”).

¹⁶² The Companies Act, 2013, §2(69).

¹⁶³ Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 2(1)(w).

term has been extended to include within its ambit not only a person who has been instrumental at the stage of a company's formation but also the one who is responsible for controlling its affairs while it is a going concern.¹⁶⁴ This expanded notion of the term 'promoter' is unprecedented for the Indian corporate law because previously the definition of a promoter arrived under common law included only the person who has been instrumental in a company's formation and has been active only upto the stage of its commencement of its business.¹⁶⁵ Hence, it would be incorrect to infer that under the Act and the SEBI's LODR Regulations, the mere expansion of the definition of promoter has *ipso facto* imposed the fiduciary duties on all the present categories of promoters for all purposes. First, the imposition of the fiduciary duties upon a promoter as defined under the Act when he is a promoter merely by virtue of being a controlling shareholder would run against the common law principle of not imposing fiduciary duties upon a company's controlling shareholders.¹⁶⁶ Second, the law of fiduciary duties itself suggests that equity demands the imposition of fiduciary duties only on a limited number and categories of people¹⁶⁷ and only upon the satisfaction of certain pre-conditions.¹⁶⁸ One of the preconditions has been that a fiduciary relationship arises only when a person 'justifiably' reposes confidence, good faith, reliance and trust in the other party, on account of which in such kind of relationship the good conscience demands that the latter acts at all times for the sole benefit and interest of the former.¹⁶⁹ It is due to this reason that in case of an Emeritus who happens to be the company's promoter, the simultaneous reposition of confidence, good faith, etc. upon him so as to leave him entirely to control the company may not be 'justified' in itself. Third, fiduciary duties cannot be imposed upon someone when the exercise of role, power and influence by the person does not have its roots in the pre-existence of any right, but merely in discharge of soft powers and influence.¹⁷⁰

¹⁶⁴ KAUR, *supra* note 161.

¹⁶⁵ *The Liability of Corporation Promoters to Account for Profits*, 54(2), THE AMERICAN LAW REGISTER (1898-1907) (1906); See, Kaur, *supra* note 161; E.g., *Bosher v. Richmond Land Co.*, Va 455:16 SE 360; *Gomba Holdings UK Limited v. Homan*, [1986] 3 All ER 94 & *Twycross v. Grant*, (1877) 2 CPD 469, (Defined the term promoter purely in relation to the incorporation stage); E.g., In USA, the Securities Exchange Commission Rule 405(a) defines promoter as a person who, acting alone or in conjunction with other persons directly or indirectly takes the initiative in founding or organizing the business enterprise.

¹⁶⁶ Paula J. Dalley, *Shareholder (and Director) Fiduciary Duties and Shareholder Activism*, 8 Hous. Bus. & Tax L.J 302, 327-328 (2008).

¹⁶⁷ Larry E. Ribstein, *Fencing Fiduciary Duties*, Vol. 91: 899, BOSTON UNIVERSITY LAW REVIEW, 899-900, 903-06 (2011) (Fiduciary duties being of onerous and sacrosanct nature cannot be imposed so easily upon a host of people. Therefore, they are placed solely on those persons who can be expected to possess the level of integrity and competence as the discharge of these duties require).

¹⁶⁸ *Id.*

¹⁶⁹ Zipora Cohen, *Fiduciary Duties of Controlling Shareholders: A Comparative View*, 12(3), U. PA. J. INT'L BUS. L. 381-87 (1997).

¹⁷⁰ DALLEY, *supra* note 166 (Relevant excerpt: "To give rise to a fiduciary duty, the fiduciary's power over the beneficiary must be a legal one. 23 That is, it must create legal liability on the part of the beneficiary. 24 Many relationships are characterized by one person's ability to affect the life and behaviour of another without the ability to legally bind the other. 25 I call this "moral control").

Further, as a different argument altogether, we also highlight that under the law, fiduciary duties do not exist for a controlling shareholder qualifying as a promoter due to the new definition of the promoter under the Act as some scholars and experts who have written on the Act have implicitly suggested the same. This is because even after the enactment of the Act, there has been debate on whether corporate law in India should 'begin' imposing fiduciary duties upon the controlling shareholders (who happen to be the promoters as per the new definition of promoters given under §2(69)(b) of the Act).¹⁷¹

Hence, even when an Emeritus begins exercising an influence and control prominent enough to start being categorised as an officer, an officer who is in default or a promoter, his obligations, liabilities and disabilities would not be similar to those of a *de jure* director as stated under the Act. Therefore, unlike other jurisdictions, where a *de facto* or a shadow director or both have same or similar obligations, duties and liabilities as those of a *de jure* director, in India, there may be a lack of sufficient deterrence for an Emeritus against acting as a full-fledged director for all practical purposes. Hence, there is a need to explicitly regulate the honorary position of an Emeritus for more transparent and improved corporate governance.

B. ABSENCE OF A MANDATORY CODE OF CONDUCT OR A MINIMUM LEVEL OF DUTIES FOR AN EMERITUS

As stated in Part II, the authority of an Emeritus to attend meetings emanates from being merely an invitee. However, the Act, the secretarial standards and the SEBI regulations, do not prescribe duties of or code of conduct for invitees.¹⁷² Resultantly, the statutory minimum standard of duties for an Emeritus are not prescribed and such duties only exist to the extent prescribed by the company while inviting or entering into a contract with its Emeritus. Therefore, an Emeritus while providing his advice or opinion in the meetings is not mandatorily

¹⁷¹ Umakanth Varottil, *Conversion of Tata Sons into a Private Limited Company: In Whose Interest?*, September 18, 2017, available at <https://indiacorplaw.in/2017/09/conversion-tata-sons-private-limited-company-whose-interest.html> (Last visited on December 24, 2018); Vikramaditya Khanna & Umakanth Varottil, *Regulating Squeeze Outs in India: A Comparative Perspective* (NUS Law Working Paper Series 2014/009, July 2014) available at https://law.nus.edu.sg/wps/pdfs/009_2014_Umakanth%20Varottil.pdf (Last visited on December 24, 2018) (Mr. Varottil in his 2014 paper stating that fiduciary duty is not owed by majority shareholders under the present law).

¹⁷² See Secretarial Standards 1 and Secretarial Standards 2 (Nowhere has any code of conduct or minimum duties been mentioned for invitees. This is reasonably so because the range of invitees that may be invited by the company throughout its life may be too diverse to lay down their obligations or code of conduct at one place. Further, by virtue of their very positions, invitees' conduct can be effectively regulated by companies by way of their contract with the invitees. Furthermore, earlier when the category of people called upon as invitees was traditionally confined to experts or professionals, these invitees by virtue of being professionals were guided by the professional code of conduct and ethics imposed on them by their respective professional bodies or association).

required under law to disclose the existence of his prior interest, if there exists any, in the transaction constituting the subject matter of the discussion.¹⁷³ Similarly, unlike in the case of directors,¹⁷⁴ it has not been clarified under the 2013 Act if the position of an Emeritus is assignable. Additionally, the law does not clarify if an Emeritus owes allegiance to the company or the shareholders,¹⁷⁵ or if he owes any duties to stakeholders like directors do under §166 of the Act. Resultantly, directors mandatorily hold duty of care, loyalty and skill, duty to avoid conflict of interest and the onerous fiduciary obligation towards the company, and stakeholders.¹⁷⁶ Similarly, under the Act, Schedule IV¹⁷⁷ has been incorporated, enlisting the duties of and code of conduct for independent directors. This is also in sharp contrast to the legal provisions that exist in relation to the positions of senior managerial personnel. For listed companies, a code of conduct exists for senior managerial personnel in addition to directors.¹⁷⁸

In light of the potential authority, both personal and institutional, that an Emeritus may enjoy within his appointing company, we are concerned about the existence of this vacuum.

C. VACUUM REGARDING THE REGULATIONS RELATING TO RPTS

Another area where a legal lacuna exists in relation to an Emeritus is with respect to the regulation of his conduct in cases of Related Party Transactions (RPTs).

The 2013 Act has unveiled a new era in the Indian corporate scenario, wherein greater emphasis has been placed on having in place disclosure norms rather than laying down the pre-requisites of obtaining regulatory approvals.¹⁷⁹

¹⁷³ Compare with S. 184 (directors' obligations in relation to RPTs) and S. 188 (members' obligations and conduct in relation to RPTs) under Companies Act, 2013.

¹⁷⁴ Companies Act, 2013, §166(6).

¹⁷⁵ An expert in the field of commercial and corporate laws, Mr. Umakanth Varottil, in his article, '*Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*', published in the Hastings Business Law Journal highlighted this problem in relation to independent directors before the 2013 Act came. He highlighted how the lack of code of conduct and specification of pre-identified duties can pose problems in effective discharge of duties. It gains significance if the Emeritus owes duties to the company or a particular set of shareholders because company being a separate legal entity is distinct from its members. When a person owes a duty to the company, it is owed to each stakeholder of the company, and not a particular faction of the shareholders. Such a person becomes bound to act in the company's interest whenever the interest falls in conflict with that of shareholders.

¹⁷⁶ These duties existed under 1956 Act as well; however they have been codified for the first time under the 2013 Act.

¹⁷⁷ Even if these are non-binding in nature.

¹⁷⁸ Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 17(5)(a).

¹⁷⁹ Megha Kapoor & Shefali Shukla, *India: Related Party Transactions: Companies Act, 2013*, October 14, 2014, available at <http://www.mondaq.com/india/x/346678/Contract+Law/Related+>

The law relating to RPTs is only an illustration of this approach.¹⁸⁰ While the 1956 Act required the approval of the Central Government for proceeding with an RPT by large cap companies,¹⁸¹ the Act instead calls for greater disclosure and need for the approval by the members of the company.¹⁸²

A related party has been defined under §2(76) of the Act. Under this definition, a company's promoter is not explicitly recognised as a related party in relation to his company. However, specifically in the Indian scenario, where shareholding is concentrated and hence an insider model of corporate governance exists, he can often qualify to be one by virtue of him being a relative of the company's directors or key managerial personnel. This also applies in case of listed companies, because the definition of related party is same under the LODR as it is under the Act.¹⁸³ However, in all such instances, despite being a related party, on account of lacuna in law he can perform several acts or can conduct himself in the manner that he could not otherwise had he been the company's related party by virtue of being its director.

For instance, under §184(1) of the Act, a company's director is required to disclose his interest in any company(ies), body(ies) corporate, firm(s), or other association(s) of individuals when the company is considering entering into a business relationship or transaction with the latter entity. However, no such obligation on exists in law on an Emeritus, unless it has been incorporated by the appointing company in its contract with the Emeritus.

Further, under §184(2) of the Act, a director, whenever he is directly or indirectly interested in a contract or arrangement entered into or to be entered into with a body corporate, in which he either on his own or in association with any other director holds more than 2% shareholding or is a promoter, manager, Chief Executive Officer of that body corporate or with a firm or other entity in which he is a partner, owner or member, is required to disclose the nature of his concern or interest at the board meeting in which such contract or arrangement is to be discussed and he cannot participate in such meeting.¹⁸⁴ However, when a person is appointed as an Emeritus, company law does not bar him from participating in the deliberations at the board meeting in which such transaction is discussed in relation to which he stands as a related party. Hence, unless the appointing company imposes such a bar on an Emeritus under its contract with him, there will be no prohibition on his participation. This omission can on its own be harmful for company's corporate governance, in context of the influence that an Emeritus can enjoy by sheer participation in a meeting, specifically in case of companies having insider model of corporate governance. Further, this dearth of legislation may defeat the purpose

Party+Transactions+Companies+Act+2013 (Last visited on December 24, 2018).

¹⁸⁰ *Id.*

¹⁸¹ Companies Act, 2013, §297 & §314.

¹⁸² KAPOOR & SHUKLA, *supra* note 179.

¹⁸³ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 2(zb).

¹⁸⁴ The Companies Act, 2013, §184(2).

for which the bar has been imposed under §184¹⁸⁵ on directors as related parties. This is because specifically in closely knit Indian companies,¹⁸⁶ an Emeritus may often share relations with one or more directors of the appointing company, who are themselves barred as per §184¹⁸⁷ from participating on resolutions discussing the RPTs. Hence, on behalf of or while acting in concert with the directors who happen to be related to the Emeritus, he may, by his act of participation in such board meetings, influence the opinions of others present therein.

In addition, there are numerous other provisions under the Act, wherein either restraints have been imposed on multiple forms of RPTs likely to be entered into or entered into between the company and its directors or disclosure requirements have been laid down in relation to such transactions. For instance, there are restrictions on loan that can be granted by the company to its directors,¹⁸⁸ there is a need to maintain a register of contracts or arrangements in which directors are interested parties.¹⁸⁹ No such corresponding provisions exist in relation to company's transactions with its Emeritus. This is yet another vacuum in the law given the position of influence that the Emeritus usually enjoys specifically in case of Indian companies.

D. DEARTH OF REGULATIONS REGARDING THE TERMS AND CONDITIONS OF THE SERVICE CONTRACT EXECUTED TO APPOINT AN EMERITUS

Under the Act, several prominent positions such as those of director, auditor, company secretary, KMP, have been statutorily regulated with respect to some aspects. The rationale is that corporate law regulates those aspects of the contract privately entered into between a company and a third party which may not be sufficiently and effectively regulated privately by the parties on their own.

The issue of remuneration to company's officials is one such aspect.¹⁹⁰ On this front, a company may be eager to make inflated payment through

¹⁸⁵ The Companies Act, 2013, §184.

¹⁸⁶ Closely knit companies refer to those having concentrated shareholdings and an insider model of corporate governance.

¹⁸⁷ The Companies Act, 2013, §184.

¹⁸⁸ CS S. Dhanpal, *Loan to Directors and Other Entities under the New Regime*, April 3, 2014, available at <https://taxguru.in/company-law/loan-directors-entities-companies-act-2013.html> (Last visited on December 24, 2018).

¹⁸⁹ Divesh Goyal, *Related Party Transaction Under Companies Act, 2013 (Section- 184,188 & 189)*, July 8, 2014, available at <https://taxguru.in/company-law/related-party-transaction-companies-act-2013-section-184188-189.html> (Last visited on December 24, 2018).

¹⁹⁰ The Companies Act, 2013, §142; Companies (Audit and Auditors) Rules, 2014, Rule 14 (Schedule V); The Companies Act, 2013, §26(xiii) (Indirect regulation through requiring disclosure in company's prospectus in cases where the company opts for public issue of shares); The Companies Act, 2013, §92 (Indirect regulation by requiring disclosure of remuneration paid in company's annual returns), The Companies Act, 2013, §178 (Role of nomination and remuneration committee in case of prescribed companies in fixation of remuneration).

remuneration - whether in order to confer undue favour on or to extract undue benefit from such officials. Hence, to regulate this aspect, company law fixes the ceiling amount as remuneration,¹⁹¹ and requires disclosure of the amount paid as remuneration,¹⁹² shareholders' approval with respect to the quantum of remuneration to be paid in certain circumstances,¹⁹³ among other things. As explained in previous parts of the paper, due to the context in which an Emeritus is appointed in Indian companies, the possibilities of inflated remuneration cannot be eliminated but this aspect remains unregulated.¹⁹⁴

Similarly, under the Act there have been disqualifications from being a director.¹⁹⁵ However, no such concept exists under the company law in relation to an Emeritus, and we apprehend that this loophole is prone to being exploited by promoter-driven companies to appoint the person as an Emeritus who stands disqualified from being their director.

Likewise, while in relation to the company's directors, employees and managerial personnel, under the Act as well as the Regulations, the company's Nomination and Remuneration Committee ('the Committee') is obliged to determine the eligibility criteria for directors, employees and managerial personnel, and formulate policies for reviewing their performance.¹⁹⁶ Nevertheless, nowhere has the Committee's role or obligation been described in relation to the prominent position of the company's Emeritus. If such a provision existed, the Committee¹⁹⁷ which comprises of non-executive as well as independent directors among others could have dealt with the several aspects of the contract entered into with an Emeritus, more fairly than the ordinary board of the company as the Committee provides for increased impartiality.

¹⁹¹ The Companies Act, 2013, §197 & §200.

¹⁹² As per Schedule VI – Part II (4), the Profit & Loss Account shall contain by way of note, the detailed information with respect to remuneration, commissions payable, other allowances and commission, perquisites or benefits in cash or in kind, pension, etc. Irrespective of the nature of remuneration paid to the Directors, the same needs to be disclosed under the Notes to Accounts of the Final Accounts.

¹⁹³ EY Global, *Companies Amendment Act 2017: an overview of key changes*, available at [http://www.ey.com/Publication/vwLUAssets/ey-companies-amendment-act-2017/\\$FILE/ey-companies-amendment-act-2017.pdf](http://www.ey.com/Publication/vwLUAssets/ey-companies-amendment-act-2017/$FILE/ey-companies-amendment-act-2017.pdf) (Last visited on December 24, 2018).

¹⁹⁴ In India, the issue of executive compensation as a crucial subject under corporate governance received due recognition for the first time after the turf war arose between Narayan Murthy and Vishal Sikka. This led to the introduction of significant amendments relating to executive compensation under 2017 Companies Amendment Act. However, the possibility of regulating the compensation size and the structure of an Emeritus has not left uncovered in these amendments as well.

¹⁹⁵ The Companies Act, 2013, §164 (Deals with disqualification of directors); The Companies Act, 2013, §167 (Deals with vacancy of office of directors).

¹⁹⁶ The Companies Act, 2013, §178; SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Schedule II, Part D, Sub-part A.

¹⁹⁷ The Companies Act, 2013, §178.

However, at this juncture, we also clarify that it is significant to note that an Emeritus does not *ipso facto* fall under the ambit of the Committee's mandate by virtue of his service contract with the appointing company. This is because we cannot assume that an Emeritus will always be the company's employee within the legal definition thereof. In order to dissect this assertion, we need to revisit the meaning of the term 'employee' as used in relation to the Committee under the Act. Under the Act or the Regulations, this term has not been defined. Nevertheless, there are other statutes, specifically the labour legislations, where the term has found its meaning.¹⁹⁸ Under it, among other indicative tests, a person is said to be an employee if his contract can be said to be a contract of service with the alleged employer instead of being termed as a contract for service. In other words, for being considered as an employee, a person is required to work under the control and supervision of the appointing company.¹⁹⁹ Company law has borrowed this broad test to determine the existence of the relation of employment for its own purposes.²⁰⁰ Therefore, whether or not an Emeritus can be called the appointing company's employee depends upon the precise terms and conditions of his contract of employment with the company. However, it is likely that an Emeritus may not qualify as an employee in the legal sense of the term because he usually discharges his functions autonomously and at his own discretion.²⁰¹

However, at the same time, it is crucial to note that if an Emeritus qualifies as a 'related party' as per §2(76) of the Act and if thereby his contract with the appointing company becomes an RPT,²⁰² its terms and conditions can be indirectly regulated by imposition of the requirement to disclose the quantum of the remuneration paid, justifications for entering into the contract of employment

¹⁹⁸ Dharangadhra Chemical Works Ltd. v. State of Saurashtra, AIR 1957 SC 264; Balwant Rai Saluja v. Air India (2014) 9 SCC 407; State of Gujarat v. Vogue Garments, 1982 SCC OnLine Guj 195 : (1982) 23 (2) GLR 449; Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments, (1974) 3 SCC 498.

¹⁹⁹ *Id.*

²⁰⁰ The Institute of Chartered Accountants of India, *The Company Audit*, available at <http://www.icaiknowledgegateway.org/littledms/folder1/chapter-6-the-company-audit.pdf> (Last visited on December 24, 2018) In relation to company's auditor, the term employee has been interpreted. It has been held that employee contract of service and otherwise contract for service); Ya-fan Wong, *Are Directors Also Employees?*, available at <https://dommisseattorneys.co.za/blog/directors-also-employees/> (Last visited on December 24, 2018) (It is due to this reason non-executive directors are not treated as employees while executive directors are).

²⁰¹ See, The Times of India, *Bring back Narayana Murthy as Chairman Emeritus, Says Ex-CFO Of Infosys*, August 11, 2017, available at <https://timesofindia.indiatimes.com/business/india-business/bring-back-narayana-murthy-as-chairman-emeritus-says-ex-cfo-of-infosys/article-show/60022678.cms> (Last visited on December 24, 2018) ("*My personal view is Narayana Murthy should come back as Chairman Emeritus,*" he told PTI in an interview, noting that the role is not a legal position nor has it something to do with strategy-related matters. "*As Chairman Emeritus, people can look up to him to give his views...these are (views on) governance, nothing to do with management, strategy and all that. May be Murthy should come back as Chairman Emeritus, where he has no operational responsibility*").

²⁰² The Companies Act, 2013, §188(1)(f).

and revelation of the essential terms of the contract, among other details. This is by virtue of §188 and the rules dealing with RPTs under the Act.²⁰³

However, there are exceptions to this form of regulation as well. First, the appointment would fall under the ambit of the regulation imposed by §188 only if the appointment can be termed as having been made to any office or place of profit within the company.²⁰⁴ However, the phrase ‘office of profit’ is limited in its scope. A person is said to hold a place of profit when he performs certain functions for the company, is remunerated for it and if while exercising these functions he acts under the control and direction of the company’s management.²⁰⁵ Regarding the latter aspect, it can be stated that in other words, unless an obligation is imposed upon the person holding the office to perform his duties or functions under the instructions of his company, the office cannot be stated as office or place of profit.²⁰⁶ This implies that a mere contractual arrangement entered into between an appointing company and its Emeritus under which some monetary benefit flows to the latter does not *per se* amount to holding an office or a place of profit by him.²⁰⁷ This is because in relation to the position of an Emeritus, there is discretion left to him regarding the performance of his functions and the manner of discharging them.²⁰⁸ Further, where an Emeritus receives no remuneration, his office again cannot be termed as an office or a place of profit.²⁰⁹ In circumstances like these, in case of a listed company, the transaction involving the appointment of an Emeritus would not be subject to the regulations governing the RPTs under the LODR Regulations. Although these Regulations cover the regulation of RPTs irrespective of the involvement of the payment of a monetary sum under an RPT,²¹⁰ the provisions of the LODR in relation to RPT should not apply to the appointment of a person to an office or a place of profit transaction because the transaction by its very nature²¹¹ requires the element of the flow of some monetary consideration in order to be termed as defined in the Regulations, as elaborated upon above as well.

Second, even if it is assumed that the event of the appointment of an Emeritus can be stated as an appointment to a place or an office of profit, then the elaborate procedure requiring the non-interested shareholders’ approval to the transaction would continue to not apply to the appointment at hand if the transaction can be said to have been made in the ordinary course of business and on

²⁰³ Companies (Accounts) Rules, 2014, Rule 8(2), Form AOC-2 [Pursuant to §134(3)(h)].

²⁰⁴ The Companies Act, 2013, §188.

²⁰⁵ A. RAMAIA, GUIDE TO THE COMPANIES ACT, Vol. 2 3376-3378 (18th ed., 2015).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*, 3358; § 188 explanation a of the 2013 Act defines “of profit” in case such office is held by an individual other than a director as the office or place held in which the office holder obtains from the company anything by way of remuneration whether as salary, fees, commission, perquisite, the right to occupy free of rent any premises as a place of residence, or otherwise.

²¹⁰ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 2(zc).

²¹¹ The phrase an office or place of profit uses the term profit, implying the necessity to involve monetary element for the office to qualify as an office or a place of profit.

an arms' length basis.²¹² It is more difficult to determine if the appointment of a person as an Emeritus is on an arms' length basis is more difficult than deciding this question in relation to the company's contract with its employees or directors. This is because the latter positions are occupied by more persons than one. Hence, drawing comparison in the context of terms and conditions of the company's contract with the position holder is simpler and carries more objectiveness. On the other hand, in case of an Emeritus, since usually a single position is created, determining if his transaction with the appointing company is on the arms' length basis is relatively more difficult and involves a relatively greater element of subjectivity. Further, his appointment itself may fall under the exception, as stated above, of being the transaction carried out in the ordinary course of business. A transaction can be stated as being carried out in the ordinary course of business if it pertains to the usual operations of the business and is carried out by a company as a matter of custom.²¹³ Resultantly, where the appointment of an Emeritus can be termed as a regular or a routine affair for the appointing company, either by virtue of it having been repeated as a practice for years or due to the industry trends, the event of the appointment would automatically cease to require the approval of non-interested shareholders, as stated above.²¹⁴

For these reasons, thereby, the regulation of the transaction involving the appointment of an Emeritus, where he is a related party, the manner in which RPTs are regulated under the Act and the LODR Regulations, may be inadequate to ensure sound corporate governance in a particular company.

E. MISCELLANEOUS POINTS NARRATING THE TALE OF LACUNA IN LAW

We have hitherto discussed the corporate governance issues that may arise due to non-regulation of the position of an Emeritus in instances where he is either the appointing company's promoter or relative or past key official. However, it is equally possible for an outsider to be designated as an Emeritus for no law has laid down any eligibility criteria for being an Emeritus. Company may appoint an outsider as an Emeritus when, for instance, it intends to diversify into a new venture and thereby need a unique and dynamic executive for its new unit. Similarly, this may also happen if the company's key personnel in the past, or its present or past promoters are unsuitable due to which the company chooses to hire an

²¹² The Companies Act, 2013, §188(1).

²¹³ Institutional Investor Advisory Services, *A Framework to define 'Ordinary Course of Business'*, May 25, 2015, available at <http://iiias.in/ArticleBlog.aspx?title=Nothing-out-of-the-ordinary.aspx> (Last visited on December 24, 2018).

²¹⁴ THE INSTITUTE OF COMPANY SECRETARIES OF INDIA ('ICSI'), *SEBI (LODR) Regulations, 2015 and Companies Act, 2013 – A Comparison*, available at https://www.icsi.edu/Webmodules/CompaniesAct2013/Final_LODR.pdf (Last visited on December 24, 2018) (However, in case of listed companies where LODR Regulations apply, this can be better taken care of because LODR Regulations do not create an exception for transactions carried out on arm's' length basis. LODR Regulations instead have blanket coverage of all RPTs).

outsider as its Emeritus to modify and revamp the perception of the company and thereby ride over his goodwill in the industry. Likewise, mid-cap or small-sized companies may like to designate a complete outsider as their Emeritus in an attempt to appoint a stalwart in the industry as their Emeritus. Company may decide to appoint an outsider as its Emeritus even when it simply finds that an external individual possesses skills, which equip him to discharge his role.²¹⁵

Against these kinds of scenarios, i.e. when an outsider is designated as an Emeritus, yet again corporate governance issues can arise due to the lack of regulations in relation to the position of an Emeritus. However, since in such cases the role, power, influence, among other things, of an Emeritus may vary from those in case the Emeritus happens to be the appointing company's promoter or his relative or/and its key official in the past. As a result, the lacunae in law reflect differently in such cases.

For instance, §26 of the Act enlists matters which are required to be stated by a company in its prospectus in case it opts for undertaking the public issue of its securities. Under §26(5),²¹⁶ prospectus cannot include a statement purporting to be made by an expert unless the expert is a person who is and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus among other requirements. This requirement has been put in place to ensure the independence of the expert. An Emeritus, who has been an outsider and upon whose appointment the role has not been defined by his company in the manner that his participation in the company's affairs could be termed to be his participation in the company's management, can technically issue an 'expert' statement despite his probable allegiance to the issuer company. However, this is subject to the fulfilment of the pre-condition that his qualifications are such that he can be stated to be an expert under §2(38)²¹⁷ of the Act wherein the section defines expert as any person who has the power or authority to issue a certificate in pursuance of any law for the time being in force and it includes an engineer, accountant among others.²¹⁸

Similarly, there are other ways in which the dearth of regulations regarding the position of an Emeritus can have adverse consequences for concerned company's corporate governance. For instance, under §149(6) of the Act, the eligibility criteria for being an independent director has been stated. It is a negative criterion instead of being a positive one, because it defines the eligibility in terms

²¹⁵ Sankalp Phartiyal & Suvashree Choudhary, *India's Infosys Taps Capgemini Executive Parekh As CEO*, December 2, 2017, available at <https://www.reuters.com/article/us-infosys-ceo/indias-infosys-taps-capgemini-executive-parekh-as-ceo-idUSKBN1DW0A7> (Last visited on December 24, 2018) (The recent CEO at Infosys is an outsider to the company. He has been hired apparently for his expertise, talent and global experience. This goes on to show that an outsider can also be appointed as Chairman Emeritus by company if he seems to be the most suited to do the job).

²¹⁶ The Companies Act, 2013, §26(5).

²¹⁷ The Companies Act, 2013, § 2(38).

²¹⁸ *Id.*

of disqualifications, laying down when a person is ineligible to act as an independent director. In case of an unlisted company, if the Emeritus is a complete outsider, he may not fall under any of these disqualifications. Therefore, technically he can simultaneously be the company's Emeritus and its independent director. In light of the eligibility criteria laid down for an Emeritus, this is subject to the condition, that he by virtue of being an Emeritus either does not draw remuneration or draws it in a manner that his this transaction with the appointing company falls under the exception of the arms' length relationship.²¹⁹ The latter matters because as per §188,²²⁰ which brings the transactions undertaken in the ordinary course of business and at arm's length price outside the purview of RPT, an independent director will not be said to have the 'pecuniary relationship' with the company as required under §149(6)(c)²²¹ for a person to act as an independent director.²²² Hence, in such cases he will not be disqualified from acting as an independent director.²²³

However, in case of listed companies, the LODR Regulations prescribe relatively more stringent eligibility criteria for independent directors.²²⁴ Hence, one of the disqualifications from being one is being the company's employee.²²⁵ Despite this even in case of listed company, an Emeritus who is a complete outsider can simultaneously hold the position of independent director. This is because as explained above²²⁶ there may be cases where the terms and conditions of his contract with the appointing company may be such that he does not qualify as the company's employee. However, we believe that this is very unlikely to legally take place in case of any listed company, because the LODR Regulations have explicitly been stated to be principle based regulations.²²⁷

Further, this lacuna under the company law, in the case of an Emeritus simultaneously holding the position of independent director also *mutatis mutandis* exists in relation to some other independent positions as well, such as those of debenture trustee.²²⁸

There is another vacuum in law. Under Schedule IV of the Act, a code for the independent directors has been prescribed. Under this code, they are

²¹⁹ The Companies Act, 2013, §149(c); Ministry of Corporate Affairs, *Clarifications on Rules prescribed under the Companies Act, 2013 – Matters relating to appointment and qualifications of directors and Independent Directors*, General Circular No. 14/2014 (Issued on June 9, 2014).

²²⁰ The Companies Act, 2013, §188.

²²¹ The Companies Act, 2013, §149(6)(c).

²²² Ministry of Corporate Affairs, *Clarifications on Rules prescribed under the Companies Act, 2013 – Matters relating to appointment and qualifications of directors and Independent Directors*, General Circular No. 14/2014 (Issued on June 9, 2014).

²²³ *Id.*

²²⁴ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 16(1)(b).

²²⁵ *Id.*, Reg. 16(1)(b)(vi).

²²⁶ Already explained in Part II of the paper.

²²⁷ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Chapter II – Principles Governing Disclosures and Obligations of Listed Entity.

²²⁸ The Companies (Share Capital and Debenture) Rules, 2014, Rule 18(2)(c).

required to hold at least one meeting in a year, “*without the attendance of non-independent directors and members of management*”.²²⁹ The meeting is aimed at reviewing the performance of non-independent directors, company’s board and its Chairperson, among its other objectives.²³⁰ The provision does not however explicitly bar the presence of an Emeritus in his capacity as an invitee in such meetings in cases where he is not among the company’s member or directors.

IV. ADDITIONAL JUSTIFICATIONS FOR REGULATING POSITION OF EMERITUS

Having highlighted the lacuna under the company law in India in the matter of regulating the position of an Emeritus and given the recent sprouting of these positions in Indian companies, we propose that law must intervene to regulate these positions. However, the intervention must be limited to a reasonable extent and in the manner suited to the unique nature of these positions. The present section elaborates upon the justifications behind regulating the honorary position of an Emeritus through law.

A. *INADEQUACY OF LAW OF CONTRACTS IN CREATING THE NEED FOR CORPORATE LAW PROVISIONS*

We will begin with explaining the need for corporate law which in turn would provide justification behind having provisions under the corporate law to regulate the position of an Emeritus instead of leaving it entirely to the contract entered into between the company and the designee.

If viewed from the lens of law and economics, the need for corporate law can be explained by considering the distinct roles played by mandatory rules, default rules and guidelines.²³¹ However each of these serves the purpose of overcoming the deficiencies and inefficiencies of contract law.²³²

Under corporate law, mandatory rules cannot be contracted out by the private parties.²³³ Therefore, the two important functions played by these rules are, the paternalistic function and the function of regulating externalities.²³⁴ Under its paternalistic function, law intervenes when the transacting parties are not on

²²⁹ The Companies Act 2013, Schedule IV, Code for Independent Directors, Code No. VII(1); Members of the management can alternatively be called managers. The term ‘manager’ has been defined under § 2(53) of the Companies Act, 2013.

²³⁰ The Companies Act 2013, Schedule IV, Code for Independent Directors, Code No. VII(3).

²³¹ John Armour *et al.*, *Foundations of Corporate Law*, (Law Working Paper No. 336/2017, January 2017).

²³² *Id.*

²³³ *Id.*

²³⁴ Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121:2031, THE YALE LAW JOURNAL (2012).

an equal footing, and hence, there is scope of exploitation of either of them at the hands of the others.²³⁵ In such cases, the aim of legal provisions under corporate law is to restrict the enforcement of such agreements that are perceived to be injurious to either of the parties which is too weak to protect itself.²³⁶ One such example is the existence of the provisions under the Act, such as the one providing for the establishment of the vigil mechanism by a company's audit committee to facilitate whistle blowing and to protect the interests of the whistle-blower,²³⁷ or the one making the process of the removal of auditor cumbersome.²³⁸ On the other hand, the function of regulating externalities implies providing for an interventionist mechanism in the interest of non-parties to the contract wherever it is suspected that the parties to the contract on their own will either harm the interests of a non-party or would be unable to protect such interests.²³⁹ Legal provisions under the Act laying down the non-waivable eligibility criteria for the appointment of independent directors are an illustration of the function of the mandatory rules of regulating externalities.²⁴⁰

Under corporate law, default rules on the other hand present a contractarian view of this branch of law.²⁴¹ These rules are legal presumptions that govern the situation wherever parties have remained silent on the matter and there is no agreement between/among them to oust the application of such rules.²⁴² Hence, the parties have the autonomy of altering these rules through their private agreement.²⁴³ Therefore, default rules provide the parties with the flexibility of opting out in favour of supposedly more favourable or economical terms and transaction(s).²⁴⁴ Further, these rules reduce transaction costs for the parties while they enter into their contract by laying down the default mechanism as the guiding principles for the parties.²⁴⁵ In that sense, default rules represent a public contract and can be termed as public good in economics.²⁴⁶ Furthermore, default rules also perform the gap filling role in the parties' contract.²⁴⁷ In several cases contracting parties do not provide for all the eventualities that may arise under their contract.²⁴⁸ To that extent, this aspect becomes ungoverned which may be intentional or forced.²⁴⁹ It may be a matter of compulsion due to the long-term nature of their contract.²⁵⁰ An illustration of the gap filling role performed by default rules can

²³⁵ *Id.*

²³⁶ *Id.*; Omar M. Dajani, *Contractualism in the Law of Treaties*, 34 MICH. J. INT'L L. 1 (2012).

²³⁷ The Companies Act, 2013, §177.

²³⁸ The Companies Act, 2013, §140.

²³⁹ AYRES, *supra* note 234.

²⁴⁰ Companies Act, 2013, §149(6).

²⁴¹ ARMOUR *et al.*, *supra* note 231.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

be located under the Act in the form of Table F, for instance, which provides for model articles of association for company limited by shares. Hence, where the company omits to provide for any eventuality mentioned under the Table, default rules mentioned therein govern the scenario unless the parties have agreed otherwise.²⁵¹ Existence of Table F is simultaneously an illustration of playing the role of lowering the transaction costs that exists in case of default rules.

Like default rules, provisions in the form of guidelines under corporate law also perform the function of reducing the transaction costs associated with drafting the contractual provisions in private arrangement of parties, gap filling and providing flexibility to the contracting parties.²⁵²

It has been a bone of contention among law and economics scholars, as to whether corporate law should comprise solely of mandatory rules, or solely of default rules, or if it should contain a mixture of both.²⁵³ The scope of our paper does not extend to delving into this never ending debate. Instead we move forward and construct our arguments in this section assuming that it is a settled proposition that corporate law ought to be a mixture of default rules, mandatory rules and guidelines.²⁵⁴

Due to the above-mentioned roles played by the mandatory rules, default rules and guidelines under corporate law, intervention by corporate law is required in regulating the burgeoning position of an Emeritus. In relation to an Emeritus, mandatory provisions governing his role, disabilities, duties, and liabilities are needed. This is for regulating the externalities that may exist in case of private contract between the Emeritus and the appointing company. This is because this contract simultaneously has bearing on other stakeholders of the company such as its employees, creditors, investors, regulators, among others whose interests the parties to the contract may not sufficiently guard on their own. Additionally, default provisions under corporate law are also required in case of an Emeritus for performing the function of gap filling function, reducing the transaction costs associated with entering into a private contract, and ensuring automatic updating of the privately negotiated contractual provisions with the elapse of time on account of subsequent updating of legal provisions through amendments. The last function would be specifically important in cases where an Emeritus is appointed as such for his lifetime²⁵⁵ due to which his long-term contract would require automatic updating. Moreover, guidelines are also required to be incorporated under corporate law to regulate an Emeritus. Their role will be even more crucial at the juncture

²⁵¹ The Companies Act, 2013, §5(6) & §5(7).

²⁵² ARMOUR *et al.*, *supra* note 231.

²⁵³ Brett McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007).

²⁵⁴ Even the OECD guidelines on the Corporate Governance are in support of the view that ideal corporate law must be the mixture of these.

²⁵⁵ GUNTA & RAVICHANDRAN, *supra* note 2.

where the regulations to regulate this position are freshly introduced and thereby their precise impact requires prior assessment.

However, we anticipate some of the defences that may be raised against our proposition suggesting the need to regulate an Emeritus under corporate law. We will discuss and attempt to rebut them.

First, it may be stated that regulations do not exist under corporate law specifically for governing an Emeritus; nevertheless there is a check against the misuse of these positions under the country's corporate law provisions. This is because duties and obligations have been imposed by corporate law upon other officials or entities within the company. These include the duty to act in good faith and with care for directors,²⁵⁶ and other duties imposed on KMPs,²⁵⁷ officers²⁵⁸ and promoters.²⁵⁹ This should suffice to ensure that the role and the powers of an Emeritus remain regulated. This is because conferring undue authority on an Emeritus and not incorporating required type of regulatory clauses in the appointing company's contract with its Emeritus in absence of statutory provisions can amount to the breach of statutory and/or contractual duties such as duty of good faith/care/skill, etc. of these officials. However, we believe that this possible contention overlooks that law as a matter of its strategy, keeping in mind the fragility of human nature, existence of bounded rationality and present bias among humans and self-interested nature of human beings as rational economic agents, may impose duties and obligations simultaneously on both parties to a transaction or an event instead of fastening them on solely one of them. For instance, under the SEBI's Prevention of Insider Trading Regulations, 2015, the law in order to introduce a stringent check against the illicit practice of insider trading imposes not only a bar on the communication of unpublished price sensitive information by the party in possession of such information but also simultaneously prohibits the party on the receiving end against procuring or instigating the receipt of such information. Similarly, another example can be traced back under §184 of the Act. The provision imposes duties on directors to abstain participating in or/and make disclosure of their personal interest when they are interested directors in relation to the proposed resolution. This provision itself is nothing but the reiteration of the broader duties²⁶⁰ of company's directors as mentioned under §166.²⁶¹ Despite this, in order to ensure effective regulation of directors' conduct in case they are interested parties, an explicit obligation of disclosure and restraint has been laid

²⁵⁶ The Companies Act, 2013, §166.

²⁵⁷ A KMP is included within the meaning of "Officer in Default" under the Act. Hence, liabilities for contravention of statutory duties may make them liable as officer who is in default. Further, unlike in case of directors, the 2013 Act is silent on the duties of the KMP, but they may have a contractual duty of care, good faith, duty to act in best interests of the company etc.

²⁵⁸ The Companies Act, 2013, §2(59).

²⁵⁹ The Companies Act, 2013, §2(69).

²⁶⁰ Their broader duties of acting in good faith, avoiding conflict of interest and acting with care.

²⁶¹ The Companies Act, 2013, §166.

down separately under §184.²⁶² Similarly, under the Act, though the duty to act independently, without bias and prejudice, has been imposed on independent directors, nevertheless in order to assist them in discharging their legal obligation, the law separately prescribes detailed eligibility criteria to enhance the likelihood of their independence.

Therefore, likewise, for ensuring effective implementation of the already existing corporate law provisions and for the establishment of effective corporate governance within companies, legal regulations may be needed to separately regulate the position of an Emeritus.

B. STRENGTHENING THE JUSTIFICATION – THE TRANSPLANT EFFECT OF LAW

While developing corporate governance norms in any country, including India, law and policy makers must be mindful of the negative implications of the transplant effect of law.²⁶³

As highlighted before, there are two systems of corporate governance - insider and outsider systems.²⁶⁴ The former faces the type 2 and the latter has to deal with the type 1 agency problems.²⁶⁵ Countries like India facing type 2 agency problems ought to devise new and different mechanisms for solving their corporate governance problems. Mere importation of corporate governance norms from the tools deployed in the jurisdictions like the US or the UK to solve their type 1 agency problems would be inadequate.²⁶⁶ As a result the presence of independent directors on the company's board as a 'monitoring' force as opposed to being merely a mentoring force has not been as effective in the Indian scenario as it has been in case of the UK or the US.²⁶⁷ Similarly, in the jurisdictions facing the type 2 agency problems, the existence of a strong audit committee and a mechanism for ensuring the independence of auditors may not be as useful as they are in the nations dealing with the type 1 agency problem.²⁶⁸ Therefore, it is often argued that India could solve its type 2 agency problems by imposing fiduciary duties on controlling shareholders of company,²⁶⁹ or by ensuring that minority shareholders have a greater or more reasonable say in the appointment of their company's

²⁶² The Companies Act, 2013, §184.

²⁶³ VAROTTIL, *supra* note 5.

²⁶⁴ Towards the beginning of Section IV of the paper.

²⁶⁵ VAROTTIL, *supra* note 5.

²⁶⁶ *Id.*

²⁶⁷ See Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, Vol. 6, No. 2, HASTINGS BUSINESS LAW JOURNAL (2010).

²⁶⁸ VAROTTIL, *supra* note 5.

²⁶⁹ *Id.*

independent directors,²⁷⁰ or by enhancing the remuneration and perks that are paid to independent directors,²⁷¹ among other measures.

Likewise, in relation to the creation of the honorary position of an Emeritus in case of promoter driven companies, in countries facing the type 2 agency problems, existence of such a position without regulation by the State can possibly aggravate the problems that exist in such companies.²⁷² This is because, as stated above, in promoter-driven companies, an Emeritus is, more often than not, the company's promoter himself or a relative who in turn is often related to the company's Chairperson, MD, CEO, or/and majority of executive directors who are ultimately always likely to informally owe allegiance to the majority or controlling shareholders. Resultantly, this faction of promoters or controlling shareholders can, if desired, become even stronger against the interest of minority shareholders in case of the existence of this honorary post.

Hence, unlike in case of other jurisdictions having the outsider system of corporate governance, in countries like India, which have insider system of corporate governance, regulating the position of an Emeritus becomes even more significant.

C. NEED FOR COUNTERING AS WELL AS PRE-EMPTING AGAINST THE TACTIC OF EVADING STRINGENT CORPORATE GOVERNANCE LAWS

With the advent of the Act and some of the freshly introduced SEBI regulations, several stringent corporate governance norms have been introduced.²⁷³

Under the Act, directors' role has been made more onerous.²⁷⁴ The approach in the new regime has been to impose stiffer penalties in case of a

²⁷⁰ VAROTTIL, *supra* note 267.

²⁷¹ *Id.*

²⁷² E.g., LiveMint, *Raymond Minority Shareholder Alleges Misuse Of Funds*, March 2, 2017, available at <http://www.livemint.com/Companies/nH0cHXSGjLn3oWBYzaCBfL/Raymond-minority-shareholder-alleges-misuse-of-funds.html> (Last visited on December 24, 2018) (A minority shareholder of Raymond Ltd. alleged that company funds were utilised for the personal use of chairman and managing director. A letter which was published in a business daily was addressed to this chairman cum managing director, as well as the chairman emeritus together with board of directors and auditors of the company. The shareholder claimed that the funds were used for the development of a property belonging to the promoters of the company, without informing the minority shareholders, in violation of corporate governance norms); The Economic Times, *Usha Martin Lenders Strip Basant Jhavar Of Special Powers*, April 27, 2017, available at http://economictimes.indiatimes.com/articleshow/58376025.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on December 24, 2018).

²⁷³ Vaish Associates Advocates, *Corporate Governance Framework in India*, January 8, 2016, available at <http://www.mondaq.com/india/x/456460/Shareholders/Corporate+Governance+Framework+In+India> (Last visited on December 24, 2018).

²⁷⁴ The Hindu Business Line, *Some Directions for Directors*, January 27, 2015, available at <http://www.thehindubusinessline.com/opinion/some-directions-for-directors/article6827162.ece> (Last

criminal offence.²⁷⁵ Further, under the new law, directors' duties have been codified for the first time.²⁷⁶ The duty is owed not only to the shareholders but also apparently²⁷⁷ to the stakeholders.²⁷⁸ Additionally, the practice of directors absenting themselves from meetings and sending proxy has been placed under check.²⁷⁹ The Act prohibits directors from buying, selling, leasing or disposing of any property, appointment of an agent and appointment in place of profit in the company or associate/subsidiary.²⁸⁰ Further, greater disclosures are needed under the board's report.²⁸¹ Even prior to the 2013 Act, the role of directors was onerous. However, it has been made more onerous under the Act and with the mandatory nature of the LODR Regulations that have been laid down to govern listed companies.²⁸²

Similarly, recently on account of the enactment of the Companies (Amendment) Act, 2017, the issue of the executive compensation has come under increased scrutiny.²⁸³ As a result, the remuneration of executives such as managing directors, CEOs, whole time directors, etc. has been subject to stricter regulations.²⁸⁴ On similar lines, other provisions have been incorporated under the Act, as well as the SEBI's regulations imposing greater regulations on company's directors and KMPs.²⁸⁵ This can generate tendency among companies and their key officials to instead occupy the absolutely non-regulated position of an Emeritus. This tendency has already been evidenced. For instance, it has been noticed that some of the stakeholders have begun appointing board observers which, is a non-regulated

visited on December 24, 2018).

²⁷⁵ R&A Associates, *Fraud and The Companies Act, 2013*, available at <http://www.rna-cs.com/fraud-and-the-companies-act-2013/> (Last visited on December 24, 2018).

²⁷⁶ RAMAIA, *supra* note 205, 2963-2964 (18th ed., 2015).

²⁷⁷ Mihir Naniwadekar & Umakanth Varottil, *The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis I* (NUS Centre for Law & Business Working Paper 16/03, August 2016).

²⁷⁸ *Id.*

²⁷⁹ Companies Act, 2013, §167(1)(b).

²⁸⁰ Companies Act, 2013, §188.

²⁸¹ CS Deepak Banga, *Contents To Be Disclosed in Board's Report In Terms of Companies Act, 2013*, January 24, 2015, available at <https://taxguru.in/company-law/disclosure-boards-report-companies-act-listing-agreement.html> (Last visited on December 24, 2018).

²⁸² Arya Tripathy, *India: New Listing and Disclosure Obligations: An Analysis*, October 30, 2015, available at <http://www.mondaq.com/india/x/439426/Securities/New+Listing+and+Disclosure+Obligations+An+Analysis> Last visited on December 24, 2018); NSE, *Directors' Duties and Liabilities in the New Era*, April 2014, available at https://www.nseindia.com/research/content/res_QB5.pdf (Last visited on December 24, 2018) ("*The Companies Act, 2013 has brought about a paradigm shift by considerably enhancing directors' duties and liabilities*").

²⁸³ EY, *Companies Amendment Act 2017: An Overview of Key Changes*, pg. 34-35, available at [http://www.ey.com/Publication/vwLUAssets/ey-companies-amendment-act-2017/\\$FILE/ey-companies-amendment-act-2017.pdf](http://www.ey.com/Publication/vwLUAssets/ey-companies-amendment-act-2017/$FILE/ey-companies-amendment-act-2017.pdf) (Last visited on December 24, 2018).

²⁸⁴ *Id.*

²⁸⁵ TRIPATHY, *supra* note 283. (The 2015 Regulations incorporate a stricter approach towards the issues of board composition, composition of board committees and duties of directors... Further, the 2015 Regulations give statutory status to the contractual clauses of listing agreements and thus, breach of the 2015 Regulations will invoke penalty clauses under the SEBI Act);

post, in place of nominee directors as was the practice earlier.²⁸⁶ This provides yet another justification for regulating the position of an Emeritus in India.

D. HANDLING THE PROSPECTIVE DEFENCE OF STEWARDSHIP THEORY AGAINST THE NEED FOR REGULATING AN EMERITUS

Out of the several theories of corporate governance that exist,²⁸⁷ stewardship theory is a prominent one.²⁸⁸ This theory is often understood in contradistinction with the agency theory of corporate governance.²⁸⁹ The key difference between both the theories lies in the difference between the perception of and understanding of humans in each theory.²⁹⁰ Stewardship theory believes that man is self-motivated, possesses extrinsic motivation and maximises his utility by improving the welfare of the organisation he works for. Agency theory, on the other hand, assumes human being to be a rational, self-interested economic agent who is individualistic and self-serving.²⁹¹ It is due to these differences in their assumption about humans that both the theories propose completely distinct methodology for regulating the conduct of the personnel working within business organisations.²⁹²

In context of an Emeritus, who is often a person in the advanced stage of his career, it can be argued that his position does not require regulation under corporate law. This is because it can be contended that such a person by virtue of being successful in his career already has reached the stage of highest order of needs as per the Maslow's hierarchy of needs theory.²⁹³ The highest order of need is the need for self-actualisation.²⁹⁴ Hence, it may be contended that an Emeritus

²⁸⁶ ZEBERKIEWICZ, *supra* note 104; Business Standard, *Where PEs Fear to Tread*, May 11, 2014, available at http://smartinvestor.business-standard.com/market/technical-240811-technical-det-Where_PEs_fear_to_tread.htm#WiPrIEqWbIU (Last visited on December 24, 2018); See, LiveMint, *Boards Raise Scrutiny As Infosys and Wipro Bet Big On Start-Ups*, December 23, 2015, available at <http://www.livemint.com/Industry/xHu8EcgFGO5PAfZpJeealM/Boards-raise-scrutiny-as-Infosys-and-Wipro-bet-big-on-start.html> (Last visited on December 24, 2018); Nishant Sharma, *Exclusive: Snapdeal Gets a Put Option to Exit Go Javas; Nominees Vacate Board*, August 29, 2016, available at <https://www.vccircle.com/exclusive-snapdeal-gets-put-option-exit-go-javas-nominees-vacate-board/> (Last visited on December 24, 2018); RICHARDSON, HORN & PORTOLANO, *supra* note 109.

²⁸⁷ Wan Fauziah Wan Yusoff & Idris Adamu Alhaji, *Insight of Corporate Governance Theories*, Vol. 1, No. 1, JOURNAL OF BUSINESS & MANAGEMENT (2012).

²⁸⁸ *Id.*, 59.

²⁸⁹ See, e.g. DAVIS, SCHOORMAN & DONALDSON, *supra* note 122; See.g., Lex Donaldson, James H. Davis, *Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns*, Vol. 16, No. 1, AMERICAN JOURNAL OF MANAGEMENT (June 1991).

²⁹⁰ DAVIS, SCHOORMAN & DONALDSON, *supra* note 122.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Avneet Kaur, *Maslow's Need Hierarchy Theory: Applications and Criticisms*, Vol. 3 No. 10, GLOBAL JOURNAL OF MANAGEMENT AND BUSINESS STUDIES 1062 (2013).

²⁹⁴ *Id.*

is likely to act as a steward.²⁹⁵ Hence, self-regulation and facilitative environment would be more appropriate for him in discharging his functions.²⁹⁶

However, we believe that this line of reasoning is a slippery slope argument. This is because as per this argument, even aged directors and KMPs may not require to be governed by corporate law. Further, this reasoning takes into account only few factors such as age and stage in one's career for assessment, if one has reached the topmost step in the ladder of the Maslow's need hierarchy theory. Whereas, there are numerous other factors which cumulatively operate to determine if an individual is likely to act as a steward or an agent.²⁹⁷ These factors can be philosophical factors such as feeling a sense of identification with the organisation itself, as well as situational factors such as a person being brought up in or exposed to collectivist and low powered culture since his early years.²⁹⁸ Therefore, determining whether or not a person would act as a steward requires a personal or micro-level analysis. Hence, claiming that as a function of age and the advanced stage of one's career would compel behaviour reminiscent of stewards is an instance of hasty generalisation. Further, agency theory and stewardship theory are not mutually contradictory.²⁹⁹ They can co-exist because the same person can simultaneously act as steward with certain set of people, while acting as an agent with others.³⁰⁰ Therefore, an Emeritus may act as steward with respect to his family members or promoter shareholders in the company while acting as an agent with respect to the minority shareholders or other stakeholders of the appointing company.³⁰¹

Therefore, we argue that this line of defence is not sturdy enough to oppose our suggestion that the position of an Emeritus requires regulation under corporate law.

E. REBUTTING THE PROSPECTIVE DEFENCE OF DISINCENTIVISING EFFECT OF LEGAL REGULATIONS

As we have elaborated in Part III of our paper, the creation for the post of an Emeritus can be beneficial for the appointing company, its stakeholders as well as the Emeritus himself. If this post is carved out with good intentions, it can also lead to improved corporate governance. It is logically implied that people

²⁹⁵ DAVIS, SCHOORMAN & DONALDSON, *supra* note 122.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Kristen Joie Madison, *Agency Theory and Stewardship Theory Integrated, Expanded, and Bounded by Context: An Empirical Investigation of Structure, Behavior, and Performance within Family Firms*, available at http://trace.tennessee.edu/cgi/viewcontent.cgi?article=3955&context=utk_graddiss (Last visited on December 24, 2018).

³⁰¹ *Id.*

who were hitherto key and active officials of the company agree to occupy a relatively lukewarm position of a Director Emeritus because of the element of freedom involved with the role – be it in the sense of responsibilities towards and control of the company or in terms of legal regulations. Hence, an obvious concern that can be raised against regulating these positions is that it will disincentivise the creation of these positions itself.

However, we believe it may not be true. This is because disincentivisation will happen only if there will be over-regulation or arbitrary regulation. Regulation *per se* may not necessarily disincentivise the creation of this position, provided such a position was carved out by the company for some ethical objectives in the first place. Further, we propose that to address this concern, the burden of regulations that would be imposed on an Emeritus should not be a fixed one; instead it should be proportional to the level of participation or interference he chooses to demonstrate. Hence, for instance, instead of imposing on him the duty of acting in good faith or making necessary disclosures in general as it happens in case of directors, KMPs or company's officers, it is suggested that these duties are imposed on him only if and to the extent he decides to participate in a certain meeting and voice his opinion.

Therefore, we believe that given the potential influence and powers, an Emeritus can enjoy in Indian companies which face the type 2 agency problems, regulation of this position may still be a necessary evil in the interest of improved corporate governance.

V. SUGGESTED PROVISIONS FOR REGULATING AN EMERITUS

We would now like to suggest some provisions that could be introduced for regulating the position of an Emeritus. An illustrative list of these recommendations has been mentioned in this Section.

A. DEFINITION

There is likely to be further criticism to our proposal of regulating these positions. It could be that anecdotal evidence suggests that in the past an Emeritus managed to wield authority and influence in his company not by virtue of his occupying an honorary berth but instead by virtue of the stronghold he enjoys as a function of the shareholding pattern of the company. Hence, it may be suggested that regulating these positions would not solve the problem because even if the honorary position gets regulated the promoter despite not being elected to such position can influence the operations of its promoted company. This is because India has insider model of corporate governance.

However, we believe that this concern can be addressed by defining an Emeritus carefully. Unlike in case of the definition of directors provided under Companies Act, definition of an Emeritus should include within both *de jure*, and shadow and *de facto* Emeritus. In absence of such broad definition, as provided for in case of manager under the Act, yet again there would be a risk that the some companies may try circumventing the legal provisions regulating this position.

B. IMPOSITION OF CERTAIN DISCLOSURE OBLIGATIONS

In the interest of improved corporate governance, obligations can be imposed on the company to make certain minimal disclosures regarding its relationship with an Emeritus. For instance, currently, a contract entered into with an Emeritus by the company may be kept as confidential if the company so desires. Since an Emeritus's position can turn out as a significant one from the corporate governance perspective, law should require compulsory disclosure of certain crucial aspects of the Emeritus's contract with the company to general public or at least to the company's members. These crucial aspects can be the remuneration paid, details of his tenure, process of his appointment and removal, disclosure of his interest in other companies or business entities. This would be similar to the company's disclosure obligations under the Act in relation to its contract with its directors.³⁰² This disclosure requirement itself would discourage such practices by the company which can be counterproductive to corporate governance standards.

C. REGARDING RPTS

As analysed by us in the preceding Section, there may be scope for an Emeritus to exercise undue influence in case of RPTs by virtue of their sheer participation in the concerned meetings. While it is true that ultimately in case of unlisted companies - the prescribed RPTs and in case of listed companies - all RPTs, prior approval of audit committee is required which examine the genuineness of the RPTs and their impact on the company and the shareholders.³⁰³ Despite this the preventive measures in the form of mandatory bar that should exist on an Emeritus from participating in deliberations of the meetings or resolutions where he is an interested person and the disclosure requirements will have their own significance. This is more so given that under secretarial standards, in relation to an Emeritus, disclosure is needed only of their attendance or presence in the meeting as a whole, instead of recording their presence or absence on specific agenda items.³⁰⁴ This is in sharp contrast with directors regarding whom minutes should disclose the detailed particulars such as the individual agenda items in which they

³⁰² Companies Act, 2013, §170 & § 171 (to be read together).

³⁰³ OECD, *Improving Corporate Governance in India - Related Party Transactions and Minority Shareholder Protection* (2014).

³⁰⁴ Secretarial Standard on Meetings Of The Board Of Directors, 2015, Rule 4.1.3.

had participated.³⁰⁵ As a result, the audit committee, while scrutinising an RPT, may not even have information regarding whether the Emeritus was present on the agenda item in which he was an interested party. This reduces the efficacy of the scrutiny. Therefore, in cases where an Emeritus or his relatives is an ‘interested party’ as per the Act, he should not be permitted to participate in such agenda item in the meeting if the value of the transaction at hand crosses the prescribed monetary value. The exception against the barring provision should be made for private companies provided the Emeritus chooses to make disclosure of his interest (like it happens in case of interested directors under §184 of the Act).

D. PROVISIONS FOR DISQUALIFICATIONS

Under the Act, the eligibility criteria have been laid down for certain positions which demand integrity and independence from their position holders. These positions are those of independent directors,³⁰⁶ debenture trustees,³⁰⁷ external auditors³⁰⁸ etc. These can also be the statement made by experts in company’s prospectus in case of public issue of securities by the company. In order to assure independence of the position holders, as a matter of preventive measure, the prospective designees are barred from holding positions which create the possibility of a compromise with their independence. Currently, in relation to some of these positions, disqualifications have been laid down such that an Emeritus who is a complete outsider to the company upon his appointment and is not the company’s promoter or a prominent member can simultaneously hold either of these independent positions. Hence, an explicit disqualification is needed against an Emeritus simultaneously occupying such berths.

Further, under company law, there should be a provision stating that certain mandatory conditions can lead to automatic disqualification of a person from continuing as an Emeritus.³⁰⁹ One such condition can be in case of conviction for offences involving moral turpitude and leading to fine up to a certain prescribed amount or imprisonment up to a specified number of years.

E. NEED TO LAY DOWN DUTIES AND CODE OF CONDUCT

Laying down a minimum set of duties for an Emeritus such as the duty to avoid conflict of interest, the duty to maintain confidentiality, among

³⁰⁵ Secretarial Standard on Meetings Of The Board Of Directors, 2015, Rules 7.2.2.1(k), 7.2.2.1(l), 7.2.2.1(m).

³⁰⁶ Companies Act, 2013, §149(6).

³⁰⁷ Companies (Share Capital and Debentures) Rules, 2014, Rule 18(2)(c); YUSOFF & ALHAJI, *supra* note 300.

³⁰⁸ Companies Act, 2013, §141.

³⁰⁹ E.g., Southern Company, *Corporate Governance Guidelines*, Rule 4, available at https://s2.q4cdn.com/471677839/files/DownloadList/Tab-5-Corp-Gov-Guidelines_10202014-draft3_v001_c3rz4s_v002_i3b4pt.pdf (Last visited on December 24, 2018).

others, will provide clarity to the Emeritus regarding his role. This was the reason behind the espousal of the suggestion by experts and corporate law scholars in the past, to introduce duties or an explicit code of conduct for independent directors when such a code did not exist under the Indian corporate law.³¹⁰ However, as we have highlighted before, the imposition of duties instead of being a fixed obligation should be proportionate to an Emeritus's participation in the meetings and other affairs of the company. Further, a code of conduct should be laid down for an Emeritus. However, the nature of the code should be facilitative instead of being regulatory. This implies that its provisions should be a sincere attempt to guide an Emeritus as well as the appointing company regarding the manner in which duties of an Emeritus can be effectively discharged. The code should offer an understanding of where the thin line between the interfering and the interventionist role of an Emeritus lies. These regulations will not only reduce the possibility of fraudulent transactions, but they can also guide an Emeritus regarding how to work in coordination with the other top officials of the company such as the chairman, company's present directors etc. This is the issue which was found as existing in the case of Tata Mistry dispute as well as in case of the Infosys controversy.³¹¹ Hence, code explaining this fine line is required more in jurisdictions facing the type 2 agency problems.

As it exists in the case of directors, the position and role accorded to an Emeritus should be made non-assignable. The role of the Committee in relation to the position of an Emeritus needs to be clarified.

While some of the regulations should be introduced as mandatory rules, some need to be incorporated as default rules and the others as voluntary guidelines.

VI. CONCLUSION

There has been increasing concern about the need for introducing effective measures for holding those persons accountable, who exercise a significant degree of actual influence or control over the management of companies. The formulation of appropriate mechanisms for doing so is particularly problematic where the influence or control is indirect in nature. The position of an Emeritus is 'potentially' an influential one. Since, in India, unlike in case of other jurisdictions such as the UK and US, where these positions have been prevalent much before, type 2 agency problems is the norm. Specifically in the Indian context, the power

³¹⁰ Shinoj Koshy, Preetha S. and Vandana V., *The Responsibilities, Rewards and Liabilities of Independent Director will be transformed by the new Companies Act*, Vol. 7, No. 6, INDIA BUSINESS LAW JOURNAL (2014).

³¹¹ The Tribune, *Reduced to Being 'Lame Duck' Chairman: Cyrus Mistry*, October 26, 2016, available at <http://www.tribuneindia.com/news/business/reduced-to-being-lame-duck-chairman-cyrus-mistry/315108.html> (Last visited on December 24, 2018).

and significance of this position and thereby the possibility of its misuse or its adverse impact of good corporate governance practices must not be undermined.

We acknowledge that as of now, in the Indian context, no particular instance has been reported for the misuse of these positions (except the allegation of excessive interference in the case of Tata-Mistry battle³¹² or argument of excessive interference against Narayan Murthy³¹³ in the case of Infosys in media). However, there can be two reasons for this pattern. First, mere non-reporting of a formal case of non-passing of verdict in the matter does not necessarily imply that the misuse does not take place. Second, hitherto the practice of creating the discretionary position of an Emeritus has been embraced by topmost companies in the country. In 1990s when the Indian economy opened up, corporate governance norms were introduced to the Indian landscape for the first time. When in the beginning these norms were kept as mere guidelines,³¹⁴ while there was rampant disregard for these norms,³¹⁵ yet the companies coming in the creamy layer of the Indian Inc (also known as blue chip companies) became an exception to the instances of disregard.³¹⁶ This goes on to show that the activities and the demeanour of the top listed and unlisted companies cannot be the basis to abstain from introducing changes to corporate law to ensure better corporate governance practices in the country. Comparison with other jurisdictions like the US, the UK and Australia where these positions are not regulated cannot be drawn because as highlighted by us, the surrounding circumstances, be it in terms of the prevalent corporate ownership structure, or in terms of the level of shareholders' activism, or in terms of drafting of corporate law such as recognition of the concept of shadow and *de facto* directors among other factors, are substantially different.³¹⁷

History across the globe, including India has testified that introduction of any form of corporate governance norm or variation in the existing norm

³¹² *Id.*

³¹³ Financial Express, *Infosys CEO Vishal Sikka Resigns: What Narayana Murthy said from Day One about Infosys CEO to how it Changed; Know Here*, Financial Express, August 18, 2017, available at <https://www.financialexpress.com/industry/infosys-ceo-vishal-sikka-resigns-what-narayana-murthy-said-from-day-one-about-infosys-ceo-to-how-it-changed-know-here/813359/> (Last visited on December 2, 2018) (The news article quotes a statement released by the company, Infosys, wherein the company mentioned that Narayana Murthy's assault was the primary reason behind the resignation of its then Chief Executive Officer, Vishal Sikka); Simon Mundy, *Former Infosys chief Murthy counters complaints of interference*, September 4, 2017, available at <https://www.ft.com/content/a939410e-913a-11e7-a9e6-11d2f0ebb7f0> (Last visited on December 20, 2018).

³¹⁴ Santosh Pande, Kshama V. Kaushik, *Study on the State of Corporate Governance in India: Evolution, Issues and Challenges for the Future*, INDIAN INSTITUTE OF CORPORATE AFFAIRS 2.

³¹⁵ VAROTIL, *supra* note 5.

³¹⁶ VAROTIL, *supra* note 277.

³¹⁷ While it is equally true that the possibility of and the need for regulating the honorary position of Emeritus even in these jurisdictions cannot be ruled out. This is simply because regulations need not be merely reactive, they can be pro-active as well. However, discussing about the need for such regulations in other jurisdictions is beyond the scope of our paper. Hence we have not indulged in that discussion apart for the ancillary purposes.

takes place only as a reactive measure to some giant scandal in companies that matter.³¹⁸ In that sense, the development of the corporate governance practice and its law is reactive in nature. We believe we can carve out an exception to this trend by beginning to regulate the crucial position of Emeritus as a preventive measure instead of waiting for the reason to come to make us ‘react’ in this direction.

³¹⁸ James McRitchie, *Corporate Governance in India*, May 12, 2015, available at <https://www.corpgov.net/2015/05/corporate-governance-in-india/> (Last visited on December 24, 2018).