A RECURRENT QUEST FOR CORPORATE GOVERNANCE IN INDIA: REVISITING THE IMBALANCED SCALES OF SHAREHOLDERS' PROTECTION IN TATA- MISTRY CASE

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ABSTRACT

Corporate governance exists as a notional fragment in the overall mechanism of a company for which different set of standards, procedures and codes are adopted. The objective criterion set forth in the legislation and regulatory authorities' leaves scope for subjective enactment of procedures by the companies which raises concerns for unethical practices. Articles of Association (hereinafter referred to as "AoA") carries enormous significance in a corporate set-up as it contains rules and regulations for the entire management of a company. Extant loopholes and inadequate provisions in AoA cause a burgeoning effect on the poor governance system. The legal tangle involved between Tata and Mistry presented a set of procedural problems incorporated in AoA affecting substantive rights of the members of a company. National Company Law Appellate Tribunal comprehensively dealt with provisions of AoA, minority shareholders' right and removal of chairman, however, on appeal the Supreme Court delved into the matter with a different legal tangent recognizing the corporate governance norms. Through this paper, we discuss the decision rendered by Supreme Court in Tata-Mistry case by placing emphasis on the conundrum of clustered concentration of power among the directors, procedures involved in the removal of chairman and shareholders' transfer of shares exhibiting the derailment of minorities' protectionist regime. A critical analysis is drawn on the position of corporate governance in the epoch of majority shareholders' hegemony.

Keywords: Corporate Governance, Tata-Mistry case, Shareholders' Protection.

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I. INTRODUCTION

Corporate governance is a system providing a set of principles or norms which deploys the governance structure of a company. Sir Adrian Cadbury has defined corporate governance as *"the system by which companies are directed and controlled."*.[1] It essentially emphasizes the separation of ownership and control which also forms the bedrock for subsistence of trust between the shareholders and the company.[2] This whole mechanism is intended to ensure that horizons of management are conducted in a transparent manner and interests of all the stakeholders are protected which furthers the objectives of a company.

In the case of *Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd.,*[3] the Supreme Court dealt with validity of removal of Mr. Cyrus Mistry from the chairmanship of Tata Sons Limited through separate resolutions passed in the company. The legal battle between Tata and

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[1] *See* CADBURY, A., COMM. FIN. ASPECTS CORP. GOVERNANCE, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (1992), https://ecgi.global/sites/default/files/codes/documents/cadbury.pdf.

[2] Silvia Ayuso & Antonio Argandona, Responsible Corporate Governance Towards a Stakeholder Board of Directors, (IESE Bus. Sch. U. Navarra, Working Paper No. 701, 2007), http://www.iese.edu/research/pdfs/DI-0701-E.pdf.

[3] Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd, (2021) SCC OnLine SC 272.

Mistry presented a cloud of uncertainties with respect to perseverance of corporate governance principles. And casted serious aspersions on functioning of the board, dominance of majority shareholders, procedure involving removal of chairman, organizational culture and overall management of the company. Through placing emphasis on AoA in the case of *Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd,*[4] this article aims to explore the background of the case and focus on the issues pertaining to observance of due procedure, lack of corporate governance, power concentration, procedural irregularities, shareholders abuse etc. and lastly proffer suggestions along with concluding remarks.

II. BACKGROUND OF THE TATA-MISTRY CASE

Cyrus Mistry was appointed as the chairman of Tata Sons Group in 2012 through a selection procedure.[5] In the instant twist of corporate tales, Mr. Cyrus Mistry was sacked from the position of chairman by majority of the board of directors by invocation of the provisions of AoA. Subsequently, a suit was filed by Mr. Cyrus Mistry under Sections 241, 242 and 244 of the Companies Act, 2013 before National Company Law Tribunal Mumbai (*hereinafter* referred to as "**NCLT**") alleging oppression of minority shareholder rights and operational mismanagement. The core issues delved into by the Tribunal were exercise of control, procedure for removal of chairman, oppression and mismanagement by the company, rights of minority shareholders. NCLT in 2018 validated the procedure adopted by Tata sons to remove Cyrus Mistry from the post of chairman and lay aside all the charges against Tata Sons.[6] However, in 2019, the National Company Law Appellate Tribunal (*hereinafter* referred to as "**NCLAT**") overturned the NCLT judgment and determined the removal as 'illegal'. Further, NCLAT also ordered reinstatement of Mr. Cyrus

[4] *Id.*

[5] Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Ors, (2019) SCC OnLine NCLAT 858 ¶ 79.

[6] Cyrus Investment Private Limited and Ors. v. Tata Consultancy Services Limited, (2018) SCC OnLine NCLT 24460.

Mistry as the chairman of Tata Sons.[7] The matter went to appeal before Supreme Court in 2020 wherein decision was rendered in favour of Tata Group and a stay was granted against NCLAT order to reinstate Cyrus Mistry.[8]

III. POWER ASYMMETRY WITHIN THE COMPANY

The pillar of a good governance structure nestles on transparency, accountability, efficiency, and equitable treatment of all stakeholders. The wheels of governance instrumentality of a company lie under the helm of board of directors which must adopt major policy decisions for the benefit of a company. The Companies Act, 2013 has extensively provided for duties of the directors which subsumes overseeing the operations, promoting the objectives of a company and acting as a shield against the interests of shareholders.[9] However, if AoA is crafted in a way which impedes the board of directors to perform its duties, then it should be considered antithetical to shareholders and the company as a whole. The question of adherence of corporate governance has been hit by a storm in the Tata-Mistry case wherein Article 121 of the AoA of the Tata Sons Ltd was challenged on its validity. Article 121 was added as a precursor to require Tata Sons to seek affirmative voting of majority of nominee directors on any matter associated with the company pursuant to which the matter shall be presented to board of directors.[10]

However, the right to appoint nominee directors vested with Tata Trusts was subject to aggregate paid up shareholding of 40% of the

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[7] Krishnadas Rajagopal, *Supreme Court backs Tata Sons, sets aside NCLAT order to reinstate Cyrus Mistry as chairman*, THE HINDU (Mar. 26, 2021) https://www.thehindu.com/news/national/sc-rules-in-favour-of-tata-sons-sets-aside-nclat-judgment-restoring-cyrus-mistry-as-chairman/article34167867.ece.

[8] *Id.*

[9] Companies Act, No.18 of 2013, §166 (Ind.).

[10] Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Ors, (2019) SCC OnLine NCLAT 858 ¶ 26.

company.[11] Further, the only provision to change the shareholding of Tata Trusts as enshrined under Article 121A(g) was through the decision taken in Board meeting which again required affirmative vote of Nominee Directors to tread this matter before Board of Directors.[12] It shows the presence of cast iron rule engrafted in AoA wherein decisions of a company are absolutely dependent on affirmative vote of nominee directors and no majority decision can be taken by board of directors or in the general meeting of shareholders. Nowhere does the Companies Act, 2013 provide that affirmative vote of a particular person or group can be a pre-condition for passing a resolution. Conversely, the Act nowhere stipulates that a resolution shall fail when a person, having affirmative vote, fails to cast the vote.[13] However, in this case, Justice S.J Mukhopadhaya quoted *"The affirmative vote of the directors nominated by Tata Trusts has an overriding effect and renders the majority decision subservient to it".*[14] The preeminent provisions manifest the concentration of power in the form of veto exercised by nominee directors over the rights of board of directors.

Board of directors is considered as the visionary light in the mainstay of an organization. The Corporate Governance Report issued by Cadbury Committee highlighted that corporate board plays a significant role in defining a company's purpose, subsequent alignment of strategies and formulation of plans to achieve that purpose.[15] In light of administration of such functions, a well-settled principle is that Board of Directors acts

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[11] *Id.,* ¶ 109.
[12] *Id.,* ¶ 111.
[13] Padmanabhan Iyer, *Veto Rights Relating to Quorum and Voting on Resolutions - Whether Enforceable Under the Indian Companies Act, 1956,* MONDAQ (July 25, 2003) https://www.mondaq.com/india/corporate-and-company law/22063/veto-rights-relating-to-quorum-and-voting-on-resolutions--whether-enforceable-under-the-indian-companies-act-1956.
[14] Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Ors, (2019) SCC OnLine NCLAT 858 ¶ 154.
[15] *Supra* note 1 at ¶ 2.5 ("The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship.").

as fiduciaries of shareholders' and other stakeholders' interest.[16] Board propels 'horizontal governance' in an organization wherein it acts as a median between dominant stockholders and management and prevents expropriation of other dispersed shareholders.[17] Though AoA may limit the power of the Board to regulate and oversee the affairs of an organization, however, any delegated power or constitution of an upper layer group among directors should not strip off the ultimate authority of board to ensure corporate oversight or governance.

The social psychological experiment by Stanley Milgram depicts that an individual is inclined to adopt inimical strategies and defy ethical standards to show his loyalty to the authority figure. Sense of loyalty often drives a 'reflexive obedience' among directors in an organisation towards the CEO which may guarantee unfettered support to the CEO's decision even at the cost of a director's fiduciary duty to the shareholders.[18] Drawing an analogy from Milgram's experiment, in the present case nominee directors owe their allegiance to Tata Trust by virtue of their appointment, hence, independent judgment and critical acumen would be seldom found even for the protection of minority shareholders and wellbeing of an organization.

Further, family-owned companies manage to have a dominant decision-making power with substantial ownership and controlling rights which raises concerns for expropriation of minor shareholders and self-

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16 Martin Lipton et al., *Stakeholder Governance and the Fiduciary Duties of Directors,* HARV. LAW SCH. F. CORP. GOVERNANCE (Aug. 24, 2019) https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors/.

17 Mark J Roe, *The Institutions of Corporate Governance* (Harv. John M. Olin Ctr. L., Econ., & Bus., Discussion Paper No. 488, 2004), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Roe_488.pdf.

18 *See* Randall Morck, Behavioral Finance in Corporate Governance - Independent Directors, Non-Executive Chairs, and the Importance of the Devil's Advocate (Nat'l Bureau Econ. Res., Working Paper No. 10644, 2004), https://www.nber.org/papers/w10644.

serving tactics thereby leading to severe governance problems.[19] In order to eliminate such obstacles, independent directors were flung on board to keep a tab on the behaviour of controlling shareholders and have a perspective independent of inside management. Independent Directors are deemed to be 'watchful monitors' of management and treasury of strategic guidance to steer an organization towards its vision.[20] Section 149(4) of the Companies Act, 2013 provides that one third of the total number of directors should be appointed as independent directors in a listed public company[21] and it has further been substantiated under section 149(6) of the Companies Act, 2013 that nominee directors should not be considered as independent directors. However, nomination of upper echelons in a committee without the presence of independent directors evidently shows the concentration of power held by Tata Trusts indirectly. Presence of such provisions constitutes flagrant violation of corporate governance norms which has stirred serious questions on ethical standards followed in the company.

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[19] *See* Jayati Sarkar, *Board Independence & Corporate Governance in India: Recent Trends & Challenges Ahead,* 44 IND. J. INDUS. REL. 576-592, (2009) (Emphasis on the governance problem prevalent in continental Europe, Japan, East Asian economies including India, where family-owned corporations dominate and family members occupy superior positions with significant ownership and controlling rights with the intent to control the firm).

[20] *See* Vikramaditya S. Khanna & Shaun J. Mathew, *The Role of Independent Directors in Controlled Firms in India Preliminary Interview Evidence,* 22 NAT'L L. SCH. IND. REV. 35-66, (2010) ("Independent directors may be seen as watchful monitors of promoters and management on behalf of public shareholders or independent directors may be viewed as reservoirs of strategic advice intended to aid promoters and managers in maximizing overall firm value"), *See also* Jeffrey.N. Gordon, *The Rise of Independent Directors in the United States, 1950- 2005: Of Shareholder Value and Stock Market Prices,* 59 STAN. L. REV. 1465-1568, (2007).

[21] *See also,* Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, pt. III sec. 6(1), Clause 49 (Sept. 2, 2015).

IV. UNMASKING THE PROCESS OF REMOVAL OF CHAIRMAN

Cyrus Mistry was elected to the post of Executive Chairman by the selection committee on 29th December 2012.[22] NCLAT in its judgment held that appointment of Mr. Cyrus Pallonji Mistry as an Executive Chairman with substantial powers of management was akin to that of a Managing Director and will be considered as Key Managerial Personnel (*hereinafter* referred to as "**KMP**").[23] The KMP is entrusted with substantial power of management and the same powers were entrusted by Cyrus Mistry. The power to appoint or remove a KMP has been entrusted to the board as provided under Section 203(2) of the Companies Act, 2013 read with Rule 8 of the Companies (Meeting of the Board and its Powers) Rules, 2014. Since, the AoA of Tata Sons Limited under Article 118 provide for 'Constitution of a Selection Committee' for the purpose of selecting a new chairman of the board, it also specifies that the same process shall be followed for the removal of the chairman.[24] The Supreme Court observed that the sentence *"the same process shall be followed for the removal of incumbent Chairman"* is only applicable to the last limb of the article i.e., affirmative voting right under Article 121.[25] However, there has been no clarity on the meaning of 'same process' as the drafted Article 118 makes room for ambiguity and different interpretations.

It was also contended that advance notice of Mistry's removal was not given and an agenda item has also not been placed as required under Article 121B. The Supreme Court discarded the applicability of Article 121B by affirming that it is relevant only when the director decides to set

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[22] Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Ors., (2019) SCC OnLine NCLAT 858 ¶ 79.
[23] *Id.*, at ¶ 88. (§2(51) of the Companies Act, 2013 provides key managerial personnel to include managing director).
[24] *Id.*, at ¶ 74.
[25] Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd, (2021) SCC OnLine SC 272 ¶ 16.34.

forth any matter or resolution before the Board. However, it fails to address that this substantial matter concerning the removal of Mistry was taken up by the board of directors of Tata Sons under the residuary "any other matters". In a company like Tata which has high repute and brand values, any major procedural irregularity or divergence from accepted practices will not only affect a single person but all the persons associated with the company. It is not merely a boardroom tussle between the two shareholders but in reality, it raises a big question mark on corporate governance norms in Indian companies which affect general investors at large. Though, corporate democracy also holds equal value but it should not be used to overrun corporate governance.

V. PROCEDURAL IRREGULARITIES IN TRANSFER OF SHARES

One of the primordial features of a company is the free transferability of shares and Section 44 of the Companies Act, 2013 provides that "*the shares, debentures or other interest of the member of a company are moveable property and hence are transferable in the manner as provided in the company's articles of association."* However, the present case illustrates unreasonable fetters on the share transfer procedure as a draconian provision in the form of Article 75 of AoA empowered the 'Tata Sons Limited' at any time to transfer 'ordinary shares' of any of the shareholders by passing of special resolution with affirmative voting of nominee directors and without observance of due procedure of transfer.[26]

On the contrary, Article 121A(g) of AoA provides that the shareholding of Tata Trusts cannot be reduced without the resolution of 'Board of Directors'.[27] However, directors of 'Tata Trusts' by virtue of being nominee directors themselves exercises the right to affirmative voting. Implication of such a provision in AoA include tacitly non-

[26] Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. & Ors., (2019) SCC OnLine NCLAT 858 ¶ 114.
[27] *Id.*, at ¶ 113.

enforcing such decision which affect the interests of Tata Trusts. As any collision course with Tata Trusts would reduce nominee directors' ordinary share capital below 40% aggregate and may result in their exit. This provision in AoA draws a corollary with the recognized principle of "no one can be a judge in his own cause." As per the majority rule, decisions of majority shareholders of a company are binding upon the minority shareholders.[28] However, dominant majority shareholders exert significant control and misuse their power to subdue the interests of minority. The principles of corporate governance envisage equal treatment of all shareholders wherein a proper balance of the rights of majority and minority shareholders must be drawn for smooth functioning of the company.[29] The exercise of power through majority rule must not act as prejudicial vice to minority rights or fulfilment of personal agendas.[30] The essence of shareholders democracy signifies that power of majority must be prevalent within reasonable bounds and should not impinge upon minority rights.

Though presence of Article 75 in AoA has not vitiated shareholders' protection in actuality, however, it raises a reasonable apprehension. Any action can be taken against them without conduct of fair play which may eventually lead to case of prejudice or oppression to any member or members or welfare of company. Non-controlling position of some shareholders causing dependency on the decisions of majority shareholders triggers the dominant shareholders' activism which may not be healthy for the welfare of minorities and the company. Board of directors cannot effectively exercise control over dominant shareholders as 'power cannot bite the source of power itself'. Thus, the powerless position of board of directors leads to glaring violations of corporate

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[28] Foss v. Harbottle, (1843) 67 Eng. Rep. 189.

[29] *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], PRINCIPLES OF CORPORATE GOVERNANCE, G20/OECD (2015), https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf.

[30] Manjeet Kumar Sahu, *Rights of Minority Shareholders in India Under the Companies Act, 1956*, SOC. SCI. RES. NETWORK ELEC. J. (2013), https://ssrn.com/abstract=2564925.

governance which cannot be remedied inside the companies' management.

VI. TREADING TOWARDS A TRANSFORMATIONAL PATH

Corporate governance "*concerns the relationships between a company's owners, managers, board of directors* (*hereinafter* referred to as "**BOD***"*) *and other stakeholders*".[31] The system of enhancing the governance among these co-relators springs at the root of a sound governance mechanism.[32] Shareholders are considered the owners of company and owing to its status, a right-oriented principle must be deeply embedded in the structure of an effective corporate governance mechanism to ensure their protection. Endeavours include close scrutinisation of the management so that the functioning is concentrated towards maximization of shareholder's wealth.[33]

Law in corporate matters must aim at incorporating such norms wherein an effective in-house redressal mechanism consisting of non-interested or non-executive directors would ensure that the legality of decisions made by majority can be challenged without undue influence. Adequate number of non-executive directors who are independent of the company are required to be maintained for formulation of efficient company's strategy, risk management performance etc.[34] Non-executive directors should also be the members of board so that an independent judgment can be ascertained on key issues and their views also reflect on

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[31] EDMUND T. GOMEZ et al., THE GOVERNANCE OF EAST ASIAN CORPORATIONS: POST ASIAN FINANCIAL CRISIS (F. Gul & J. Tsui eds., 1st ed. 2004).

[32] Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance* 21 NAT'L L. SCH. IND. REV. 1-41, (2009).

[33] Naveen Kumar & J.P Singh, *Corporate Governance in India: Case for Safeguarding Minority Shareholders Rights,* 2 INT'L J. MGMT. & BUS. STUD. 7-11, (2012).

[34] DEREK HIGGS COMM., DEPT. BUS., ENTERPRISE REG. REFORM U.K, REPORT ON INDEPENDENT REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS (2003), http://www.ecgi.org/codes/documents/higgsreport.pdf.

overall board's decision.[35] Further, they can also act as parallel power centre in the board meetings to digress from considering any anti-governance practices in the company.[36]

Further, a reasonable process must be effectuated by the directors where shareholders have a right to say and such mechanism must be in accordance with Clause 49 of the Listing Agreement which mandates listed companies to have a "Shareholder Grievance Committee". Further, SEBI regulations must also place considerable emphasis on securing transparency as it has been clearly mandated under SEBI Listing Obligations and Disclosure Regulations, 2015 that equitable treatment must be ensured for all shareholders.[37] A company is an entity which follows the democratic process and the operations are implemented through the resolution passed by the majority shareholders.[38] It has been strengthened in the case of *Mathrubhumi Printing & Publishing Co. Ltd. v. Vardhaman Publishing Ltd,*[39] that any alteration which results in benefit of the majority shareholders and the company as a whole would be bad and must not attempt any discrimination between the majority and minority shareholders to give an undue edge over the latter.

Though an inherent dilemma exists with respect to protection of minority shareholders and principle of shareholders democracy, however,

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[35] *Supra* note 1 (The committee highlights significance of non-executive directors on a board so that their views influence the decisions of board).

[36] FIN. REPORTING COUNCIL, THE U.K. CORPORATE GOVERNANCE CODE (2003). (The code emphasizes on the need to include both executive and non-executive directors in the board so that "that no individual or small group of individuals can dominate the board's decision taking")

[37] *See* Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, pt. III sec. 6(1), Reg. 4(2)(c)(i) (Sept. 2, 2015).

[38] MINISTRY CORP. AFFAIRS IND., REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW (2005), http://reports.mca.gov.in/Reports/23Irani%20committee%20report%20of%20the%20expert%20committee%20on%20Company%20law,2005.pdf.

[39] Mathrubhumi Printing & Publishing Co. Ltd. v. Vardhaman Publishing Ltd., (1991) SCC OnLine Ker 453.

a balance must be maintained between the two as it has also been established by Palmer *that a proper balance of rights of majority and minority shareholders is essential for the smooth functioning of the company.*[40] Incorporation of AoA must be in conformity with the Companies Act, 2013.[41] Further, amendments must also be made after passing of a special resolution.[42] However, the legislation only provides a mechanism to check oppression against minority while it has happened in the past or is continuing in nature and does not provide specific provisions that must be incorporated in AoA to ensure adequate safeguards against minority interests. The legislation is remediless in some areas where AoA itself lapses in ensuring corporate governance. Sound corporate governance principles involve enhancing the confidence of minority investors where a suitable mechanism is made viable to them in order to approach the appropriate forum not only when their rights are being violated or have been violated but also when a reasonable apprehension of violation exists in the future.

It must be ensured that AoA must not confer any weapon in the hands of board of directors or nominee directors to employ any means which might hinder shareholders' cause in future. The 'potential to exploit' the rights of shareholder must be considered to avert a substantial injury and the cannons of corporate law must expand its horizons to discourage incorporation of such article which might have an unfavourable effect on shareholders' protection in the long run. Any form of superior rights granted to only a group of shareholders to the exclusion of others must not be sustainable in law as it has been established in the case of *Needle Industries*[43] that "*oppression is a lack of probity and fair dealing in the affairs of the company to the prejudice of some portion of its members."* In the instant case, Article 75 in its substance intends to present an example of 'lack of probity and fair dealing' which is prejudicial to some members.

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[40] *See* FRANCIS BEAUFORT PALMER, PALMER'S COMPANY LAW 492 (T.P.E Curry & Clive Macmillan Schmitthoff eds. 20th ed. 1959).
[41] Companies Act, No.18 of 2013, §6 (Ind.).
[42] *Id.*, §14.
[43] Needle Industries (India) Ltd. & Ors. v. Needle Industries Newey (India) Holding Ltd. & Ors., (1981) 3 SCC 333.

A company is an entity where a group of persons are entitled to work together and make mutual decisions which are beneficial to them as well as the company. However, the imposition of decisions made by majority shareholders leaves no scope for minority shareholders say in relevant matters. The introduction of entrenchment provision has eased down some hardships faced by the shareholders as it dictates that provisions of AoA are not subject to alteration by mere passing of special resolution and requires a cumbersome process.[44] However, introduction of this clause can only be made during a company's incorporation or an amendment brought about by special resolution.[45] In the pertinent case of Tata-Mistry, special resolution is itself controversial due to existence of affirmative voting of nominee directors and therefore, incorporation of such clause becomes redundant as the power to introduce it is still wielded under the helm of nominee directors. In such scenarios, protection of minority shareholders against the dominance of majority and prevention of corporate tyranny can only be assured when incorporation of entrenchment clause is not made voluntary. The discretionary power of a company weakens the regulatory mechanism and thereby affects the position of minorities. Therefore, there is a dire need to make entrenchment provision mandatory in AoA which would further create a room for privilege of minorities consent in critical matters.

AoA is considered a part of constitution of a company and their structuring plays an important role in ensuring shareholders' interests, corporate governance principles and overall effective functioning of a company.[46] Though various measures have been taken including appointment of independent directors, however, there is a need to create

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[44] Sandeep Nath Modi, *Entrenchment Provision: A boon for minority shareholders,* 6 INT'L J. SCI. TECH. & MGMT. (2017).

[45] Companies Act, No.18 of 2013, §5(4) (Ind.).

[46] *See* NEW YORK STOCK EXCHANGE RULES, §303A.04 (2019), https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-66.

a committee which may form a second layer among all for the purpose of appointment of CEO, board member and management of companies etc. In order to ensure more transparency and protection of minorities, different committees may work independently to approve the appointments or resignation of various members. This requirement is closely synced with NYC listing requirements wherein there's a stipulation to have a Nomination Committee constituting entirely of independent directors for performing various functions including providing qualification to board members and regulating the management.

In order to achieve efficient corporate governance standards, there is a need to make the practice of Monarch (Raja) Model redundant as it focuses on precedence of self-interest over the interest of 'praja' i.e., another stakeholder. A drastic change is required to shift to the Custodian Model which empathizes on Gandhian principles wherein the promoters act as trustees and take such actions which behold the interest of minority shareholders.[47] Notwithstanding the existence of legislations, a concerted effort needs to be made to change the mindset and belief of stakeholders in a company towards adoption of corporate governance principle.

The concept of '*opinio juris sive necessitatis'* is one of the components to prove existence of custom under international law which emphasizes on the psychological belief that one is under a legal obligation to act in a certain way.[48] The same approach must be adopted to stir the conscience of stakeholders in a manner which makes them obligated to abide by the belief of fostering corporate governance in a company. In order to effectuate a better corporate governance mechanism, India should follow the example of Malaysia as it has established 'Minority Shareholders Watchdog Group' (*hereinafter* referred to as '**MSWG**') which monitors the corporate conduct and advises on issues pertaining to minority

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[47] *See* KOTAK COMM., SEBI, REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (2017), https://www.sebi.gov.in/reports/reports/oct2017/report-of-the-committee-on-corporate-governance_36177.html.

[48] FRANÇOIS GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, ¶ 110 (2nd ed., 1899).

shareholders' rights.[49] MSWG has adopted an 'internal consultative' approach by engaging in deliberation to achieve a higher standard of corporate governance and thereby dispensing away with the need of approaching regulatory authorities or courts in the first place.[50] As India faces a huge backlog of cases, such approach must be welcomed to render speedy disposal of fundamental corporate issues. Embodiment of a corporate governance spirit requires an unyielding commitment towards preservation of shareholders' interest in the long run. As good corporate governance norms are indispensable for maintaining the integrity of a company, a bottom-down approach must be ensured to align the practices with the ethos and values of a corporate culture.

VII. CONCLUSION

Transparency, accountability and protection of the right of all shareholders are the stanchion of corporate governance.[51] The governance of a company must be viewed from the lens of stakeholder's perspective to maintain effective control over the board and ensure proper corporate governance.[52] Family dominated stakeholders act as the highest echelons of power establishing unwavering dominance in an organizational culture. The extent of control exerted by the dominant shareholders shrinks the concept of equality or level playing field to a mere abstract theory.[53] Further, the dominance also enables them to transfer assets or carry preferential allotments of shares to themselves. However, in the case of

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[49] *See* Varun Bhat, *Corporate Governance in India: Past, Present, and Suggestions for the Future*, 92 IOWA L. REV. 1429 (2007).
[50] *Id.*
[51] *Supra* note 29 at 3.
[52] *See* KUMAR MANGALAM BIRLA COMM., SEBI, REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE (1999), http://www.nfcg.in/UserFiles/kumarmbirla1999.pdf. See also, ALAN DIGNAM & JOHN LOWRY, COMPANY LAW, (5th ed., 2009).
[53] *See* Chee Keon Low, *A Road Map for Corporate Governance in East Asia,* 25 NW. J. INT'L L. BUS. 174 (2004).

Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd.[54], the Supreme Court primarily centred its decision on Cyrus Mistry's removal and other factual matters. This case propelled a myriad of issues but the court failed to take a nuanced approach towards protection of minority shareholders. Without any independent assessment of oppression and mismanagement, the court reasoning was deficient on larger principles of corporate governance. Therefore, this case provides a new tangent to intricate corporate governance issues which must be worked upon to facilitate better functioning of the company in order to safeguard larger interests.

[54] Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd, (2021) SCC OnLine SC 272.