

Abhyudaya Yadav & Anshita Dave, *Dilating the Scope of Oppression and Mismanagement under the Companies Act, 2013: A Measure to Fortify Corporate Governance*, 9(2) NLUJ L. REV. 33 (2023).

**DILATING THE SCOPE OF OPPRESSION AND
MISMANAGEMENT UNDER THE COMPANIES ACT, 2013: A
MEASURE TO FORTIFY CORPORATE GOVERNANCE**

*~Abhyudaya Yadav & Anshita Dave**

ABSTRACT

Corporate governance is essential for ensuring the stability of all stakeholders in a corporation. One key aspect of this is the remedies against oppression and mismanagement, which are designed to protect the interests of shareholders. However, in today's fast-changing business environment, corporations are expected to play a multi-dimensional role, and the interests of other stakeholders such as creditors, employees, board of directors, and society at large cannot be ignored. The current legislative approach in India, which focuses solely on protecting the interests of shareholders, falls short in addressing the concerns of these other stakeholders. Additionally, the integration of Environmental, Social and Governance (“ESG”) considerations in corporate governance

* Abhyudaya Yadav is currently an LLM Candidate at National Law School of India University, Bangalore. He can be reached at abhyudayyadav0211@gmail.com. Anshita Dave is currently an Associate at The Law Point, Mumbai. She can be reached at anshita17-2018@mpdnlu.ac.in.

is increasingly being recognized as crucial for long-term sustainability and value creation for all stakeholders.

This paper takes a critical stand against the restrictive approach of the legislature in India by confining the ambit of remedies against oppression and mismanagement to protect the interests of only shareholders. The paper argues that by stretching the provisions of these remedies and incorporating ESG considerations, the Indian model of corporate governance can be made more robust and inclusive, and better aligned with global ESG standards and larger stakeholder perspective. The authors delve into the provisions on the subject and the issues embattling the Indian model of corporate governance as it still relies on the conventional shareholder model. As mitigating solutions, the authors propose certain policy changes in the extant system, to make the Indian model of corporate governance more robust and ironclad to protect the interest of every stakeholder involved.

TABLE OF CONTENTS

I. INTRODUCTION	37
II. EVOLUTION OF CORPORATE DEMOCRACY AND MINORITY PROTECTION: A HISTORICAL ANALYSIS OF MAJORITY RULE AND REMEDIES AGAINST OPPRESSION AND MISMANAGEMENT	41
A. DEVELOPMENTS CONCERNING MINORITY PROTECTION IN ENGLAND	42
B. WHOLESALE ADOPTION OF ENGLISH LAW IN INDIA	44
III. EXAMINING THE MEMBER-SPECIFIC REMEDY FOR OPPRESSION AND MISMANAGEMENT UNDER THE COMPANIES ACT, 2013: AN EXPLORATION OF JURISPRUDENCE.....	45
A. “OPPRESSION”	45
B. MEMBER RESTRICTIVE APPROACH OF THE REMEDY	48
C. MISMANAGEMENT.....	50
D. PREJUDICE CLAIMS.....	53
IV. CORPORATE GOVERNANCE IN TRANSITION: ADDRESSING THE ISSUES AND CHALLENGES OF STAKEHOLDER PROTECTION.....	55
A. NAVIGATING THE CORPORATE GOVERNANCE DIVIDE: A COMPARISON OF SHAREHOLDER PRIMACY AND STAKEHOLDER THEORY IN UK, US AND INDIA.....	56
B. IMPACT OF OPPRESSION AND MISMANAGEMENT ON ENVIRONMENT, SOCIAL AND GOVERNANCE RISKS IN COMPANIES	

C.	INDIAN COMPANY LAW: LEGAL TRANSPLANTATION GONE WRONG?	62
D.	REJUVENATING CREDITOR MONITORING SYSTEM.....	65
E.	ROLE OF POWER DYNAMICS OF CORPORATION IN DISRUPTING CORPORATE GOVERNANCE	66
V.	BEYOND SHAREHOLDER PRIMACY: A STAKEHOLDER-CENTRIC APPROACH TO CORPORATE GOVERNANCE AND OPPRESSION AND MISMANAGEMENT REMEDIES	68
A.	INCAPACITY OF EXTERNAL STAKEHOLDERS TO MOVE UNDER SECTION 244 OF THE COMPANIES ACT, 2013: PARADOX OF QUALITATIVE AND QUANTITATIVE PARAMETERS	69
B.	INCORPORATING A WIDER STAKEHOLDER PERSPECTIVE IN THE PROPOSED CORPORATE GOVERNANCE REGIME: A ROADMAP FOR CHANGE	70
VI.	CONCLUSION: THE WAY FORWARD.....	73

I. INTRODUCTION

In order to afford protections to minority shareholders from majority rule, as propounded in *Foss v. Harbottle*,¹ the corporate laws have provided provisions for remedies against oppression and mismanagement. The remedies against oppression and mismanagement were incorporated under Indian Law for the first time in 1951 by an amendment in the 1913 Companies Act which was further transposed in the Companies Act, 1956.² Now, Chapter XVI of the Companies Act, 2013, lays down the remedies against oppression and mismanagement.³ The provisions for oppression and mismanagement emanate from equitable relief under Common Law.⁴ In the 18th century, in all likelihood, equity courts would grant these kinds of equitable reliefs to other stakeholders of the company as these courts run on the principles of good faith, justice and good conscience without strictures of legislation.⁵ However, the contemporary company statutes in Common law jurisdictions provide this remedy only to shareholders.

In a democratic world where governments are aspiring towards achieving immaculate corporate governance standards and best practices,⁶

¹ *Foss v. Harbottle*, [1843] 2 Hare 461.

² 3 A. RAMAIYA, GUIDE TO COMPANIES ACT 3879 (Lexis Nexis 2014).

³ *Id.*

⁴ Prof. R K Verma, *Prevention of Oppression and Mismanagement*, UNIVERSITY OF LUCKNOW (Dec. 11, 2022), https://www.lkouniv.ac.in/site/writereaddata/siteContent/202004282035363249rkverma_Company_Law_1.pdf.

⁵ David Williams, *Court of Equity- A brief history*, PRESTO SERVERS (Dec. 12, 2022), <https://prestoservers.com/blog/courts-of-equity-a-brief-history/>.

⁶ *Indian Inc. Needs to Follow Global Standards of Corporate Governance: Kumar Mangalam Birla*, BLOOMBERG QUINT (Dec. 17, 2019), <https://www.bloomberquint.com/business/india-inc-needs-to-follow-global-standards-of-governance-kumar-mangalam-birla-on-indian-economy>.

the provisions for remedies against oppression and mismanagement seem to be outdated and antiquated to confine the ambit of protections offered merely to shareholders. Unlike a sovereign state, a company has stakeholders other than its members, the protection of whose interests is the paramount role of corporate regimes. Whenever corporate democracy is discussed in India, it is mostly discussed in the reference to the rights of shareholders while voting for the selection of directors and not in reference to the rights of other stakeholders of the company.⁷ The corporate governance mechanism of India is still unable to provide adequate protection to these other stakeholders and, to an extent, also to its members.

The remedies against oppression and mismanagement operate as derivative actions by shareholders, if board fails to bring an action against the company. In changing dimensions of corporate governance models, Indian corporate regime has witnessed the transition from Corporate Social Responsibility (“**CSR**”) to Environmental, Social and Governance (“**ESG**”). Oppression and Mismanagement can lead to lack of accountability and transparency within a company, which can result in negative impacts on environment and society. Additionally, companies that engage in oppression and mismanagement may not be in compliance with laws and regulations related to environmental and social issues, leading to additional risks. ESG risks can also negatively impact a company’s financial performance, making it concern for potential investors.

⁷ Vaibhav Sonule & Prof. Bindu Ronald, *The Eclipse of Corporate Democracy in India*, 6 IJGSSI L. REV. 1, 5 (2017), [http://www.ijhssi.org/papers/v6\(7\)/Version-3/A0607030108.pdf](http://www.ijhssi.org/papers/v6(7)/Version-3/A0607030108.pdf) .

The legislative policy as consolidated under Section 166(2) of the Companies Act, 2013 indicates that there exists positive obligation on the directors of the company to take business decisions keeping in mind the interests of various stakeholders. Boards are expected to consider ESG matters regardless of their financial implications. However, owing to the overarching enforcement conundrum of the director's duties to ensure ESG compliance, the question arises as to whether a shareholder can initiate a derivative action for the breach of director's duty on the account of stakeholders' interest even in cases where shareholders' rights are unaffected, if so, then whether they will? Contemporary legal scholarships assert that any form of expansion of the *locus standi* for claims under a derivative action can-not be ruled out.⁸

Recently in the Tata-Mistry dispute when Cyrus Mistry was unfairly ousted from the post of Director and Interim Chairman of the Tata Group, it was the Shapoorji Pallonji family who filed a petition before National Company Law Tribunal (“**NCLT**”) concerning the case of oppression and mismanagement. Nonetheless, the Apex Court decided the case in favor of Tata group. The incident, however, shed light on corporate governance issues since, although the alleged oppressive act was committed against Mr. Mistry in his capacity of Director, it was the minority group Shapoorji Pallonji who knocked on the doors of NCLT in their capacity of being a

⁸ UMAKANT VAROTIL, THE LEGAL AND REGULATORY IMPETUS TOWARDS ESG IN INDIA: DEVELOPMENTS AND CHALLENGES (NUS Law, Working Paper No. 2023/003, January 2023), https://law.nus.edu.sg/wp-content/uploads/2023/01/03_UmakanthVarottil.pdf.

shareholder. Had the Shapoorji Pallonji group not approached the NCLT and instead the Supreme Court for the interests of Mr. Cyrus Mistry, he would have arguably been left remediless under the existing legal framework.

Against this backdrop, this piece attempts to point out certain policy flaws in the Companies Act, 2013 *vis-a-vis* the chapter on oppression and mismanagement under the Companies Act. *Firstly*, the author has traced the legislative history of the remedy of oppression and mismanagement under English and Indian law. *Secondly*, the author critically analyses the chapter on the prevention of oppression and mismanagement by exposing the flaws in the approach of the lawmakers in granting protection only to the shareholders or members and not to other stakeholders of the company. *Thirdly*, the paper discusses how other stakeholders are incapacitated from filing a petition under this chapter, thereby frustrating the whole idea of ideal corporate governance. *Fourthly*, this piece examines the issues and challenges grappling the corporate governance mandate due to outdated and antiquated provisions owing to a restrictive approach, inclination towards shareholder primacy theory, the role of power dynamics in corporate houses in the Indian corporate environment and a paradigm shift of the corporate profit maximization theory. *Lastly*, the authors have proposed certain policy changes in the chapter governing oppression and mismanagement for effective corporate governance to protect the rights and provide remedies to each stakeholder of the company.

II. EVOLUTION OF CORPORATE DEMOCRACY AND MINORITY PROTECTION: A HISTORICAL ANALYSIS OF MAJORITY RULE AND REMEDIES AGAINST OPPRESSION AND MISMANAGEMENT

Similar to a sovereign democracy, a corporate democracy is operationalized at the will of the greater part of stockholders, the majority stockholders.⁹ The majority rule was first laid down in the 19th century by the Court of Chancery in United Kingdom (“UK”) in the case of *Foss v. Harbottle*.¹⁰ This rule in its original form states that courts generally would not intervene in the management and internal administration of the company at the instances of shareholders, so long as it has been acting within the power conferred upon it by the Articles of Association and the law of the land.¹¹ Moreover, it was held that a company has its own separate legal entity, distinct from its members, and it is only the company that can institute a suit against wrongdoers and shareholders as such do not have *locus standi*.¹²

The rule whose foundation was laid down in the aforementioned case was re-affirmed in subsequent judicial pronouncements of *Edward v. Halliwell*¹³ and *Mac Dougall v. Gardiner*.¹⁴ Lord Mellish in the latter case went

⁹ UMAKANT VAROTTIL, UNPACKING THE SCOPE OF OPPRESSION, PREJUDICE AND MISMANAGEMENT UNDER COMPANIES ACT, 2013 (NUS Law, Working Paper no. 20, July 2020), <https://ssrn.com/abstract=3659751>.

¹⁰ *Foss v. Harbottle*, [1843] 2 Hare 461.

¹¹ *Id.*

¹² GK KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE 752 (Taxman, 24th ed. 2019).

¹³ *Edwards v. Halliwell*, [1950] 2 All ER 1064.

¹⁴ *Macdougall v. Gardiner*, [1875] 1 ChD 13.

on to explain the principle in its widest amplitude by stating, “*A thing complained of is a thing which, in substance, the majority of the company is entitled to do or, if some irregularity persists which majority is entitled to ratify or something has been done illegally which majority is entitled to do legally, no cause of action will arise.*”¹⁵

Minority shareholders endured significant injustice for more than a century as a result of this rule and the lack of an efficient remedy.

A. DEVELOPMENTS CONCERNING MINORITY PROTECTION IN ENGLAND

In 1943, the English government set up the Cohen Committee for amendments in the company law of England.¹⁶ One of the major issues placed before the Cohen Committee was to devise more effective measures, for the protection of minority shareholders against the oppression by the majority, than available under the then-existing law of England.¹⁷ Two instances were taken into consideration in the final report, *firstly* the ‘Restriction on transfer of shares’, where the Cohen Committee observed that the provisions which were inserted in the articles of the private company for the restriction on transferability of shares have caused hardship, especially when the legal representatives of the minority shareholders have to raise money to pay estate duties because the directors of the company, who are principal shareholders of the company, refuse to

¹⁵ *Id.*

¹⁶ COHEN COMMITTEE, REPORT OF COMMITTEE ON COMPANY LAW AMENDMENT, 1945, 30 (UK). *See also* Shanti Prasad Jain v. Kalinga Tubes Ltd., (1965) 2 SCR 720.

¹⁷ BHABHA COMMITTEE, REPORT OF COMPANY LAW COMMITTEE, ¶199, (1952), <http://reports.mca.gov.in/Reports/22-Bhabha%20committee%20report%20on%20Company%20law%20committee,%201952.pdf>.

register the shares of the company to outsiders.¹⁸ And *secondly*, the abuse caused due to absorption of an undue portion of profits of the company in remuneration of their services after which nothing or a meager amount was left for the dividends.¹⁹

The Cohen Committee acknowledged that the two examples above are merely illustrative in character since it is not possible to design suggestions that address every potential circumstance that may oppress the minority.²⁰ It was further contended that in many of the cases the winding up of the company will not benefit minority shareholders primarily due to the fact that the break-up value of assets would be so small or possibly that the purchaser available would be the majority whose oppression has driven the minority to seek redressal before the court.²¹

Consequently, in order to resolve this issue, the Cohen Committee recommended that in addition to the power of winding-up the company, the courts must have the power to impose upon parties to the dispute whatever settlement that the court considers just and equitable,²² so as to put an end to the act of oppression by majority.²³

As a result, Section 210 was inserted in the English Companies Act, 1948. As per the aforementioned provision, on the petition of aggrieved member or class of members if the court is satisfied that affairs of the

¹⁸ *Id.* at 59.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Shreyas Jayasimha and Rohan Tigadi, *Arbitrability of Oppression, Mismanagement and Prejudice Claims in India: Need for Re-Think*, 11 NUJS LAW REV. 547, 563 (2018).

company is being conducted in a manner that are oppressive to minority shareholders and an order of winding-up would not do justice to such member or class of members, which in ordinary course is just and equitable to do so, the court may make an order as it deems fit. The order of court in such cases may include provisions for exit opportunities to such member or class of members or regulation of affairs of company in a certain manner or any other mode that the court would deem fit.²⁴

B. WHOLESALE ADOPTION OF ENGLISH LAW IN INDIA

Mirror imaging English model was not a new phenomenon, we can simply trace the evolution of corporate laws in India being modelled on parallel developments in England. Colonial linkages and legal transplantations of corporate laws have resulted into great reliance of Indian corporate regime on English laws, at least in the initial decolonization period.²⁵ To freshly review the pre-existing Indian Companies Act, 1913, the Bhabha Committee was set up in 1951 by the Government of India. The Bhabha Committee in its report recommended that the provisions of English law can not only be suitably adapted but its scope must also be amplified in order to cover not only the cases of oppression of minority shareholders but also the cases of gross mismanagement.²⁶ The Bhabha Committee further recommended in explicit terms that the law in India must provide a remedy for the

²⁴ Companies Act 1948, 11 and 12 Geo 6, c.38, § 210 (UK).

²⁵ UMAKANTH VAROTIL, THE EVOLUTION OF CORPORATE LAW IN POST-COLONIAL INDIA: FROM TRANSPLANT TO AUTOCHTHONY (NUS Law, Working Paper 2015/001, January 2015), https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varottil.pdf.

²⁶ Bhabha, *supra* note 17, ¶198-200.

oppression of minority shareholders on the lines of Section 210 of the UK Companies Act, 1948.²⁷

Consequently, the provision for remedy against oppression was materially incorporated in the Indian Companies Act, 1913 by the way of an amendment and subsequently in the Companies Act, 1956 in addition to the provision concerning cases of mismanagement. Later on, when the Companies Act, 1956 was repealed and succeeded by the Companies Act, 2013, the provisions in respect of remedy for oppression and mismanagement were adopted under Chapter XVI of the 2013 Act with minor modifications.

III. EXAMINING THE MEMBER-SPECIFIC REMEDY FOR OPPRESSION AND MISMANAGEMENT UNDER THE COMPANIES ACT, 2013: AN EXPLORATION OF JURISPRUDENCE

Sections 241 and 244 of the Companies Act, 2013 outline the remedies against oppression and mismanagement. The aforesaid provisions accord the courts overarching powers and constitute a complete code in itself for evaluating whether a claim for oppression and mismanagement lies.²⁸ In this part, authors shall extensively deal with the jurisprudence revolving around the subject so as to explicate the ambit of the provisions.

A. “OPPRESSION”

²⁷ *Id.*

²⁸ Gopal Shamser v. Jagadish Chandra, 1981 TaxLR (NOC) 151(Cal).

Section 241(1)(a) of the Companies Act, 2013 (“**the Act**”) addresses the complaints regarding the affairs of the company being oppressive to a member or members.²⁹ To make an order under Section 241 of the Act, court must adopt a threefold test. *Firstly*, the facts of the case must justify that affairs of the concerned company are being conducted in a manner oppressive to any member or class of members.³⁰ *Secondly*, the facts of the case must justify making of an order of winding-up.³¹ *Thirdly*, the order of winding up would unfairly prejudice the applicant.³²

By not expressly defining the term ‘oppression’, the Act gives a very wide discretion in the hands of the courts to determine the facts and circumstances of each case.³³ Since the Indian Company law regime finds its jurisprudential underpinnings in the English law, Indian courts have not been hesitant in adopting the broad tests emanating from English precedents.³⁴

The Hon’ble Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.*,³⁵ attempted to define the term ‘*oppression*’ relying on leading English and Scottish authorities. In this case, court found that issuance of new shares by the majority shareholders to their friends or outsiders (in the absence of any express right under articles of the company regarding right to first refusal) would not amount to oppression. The Court then referred

²⁹ 3 A RAMAIYA, GUIDE TO COMPANIES ACT 3978 (Lexis Nexis 2014).

³⁰ *In Re: Five Minutes Car Wash Service Ltd.*, (1966) 1 All ER 242: (1966) 2 Comp LJ 68.

³¹ *Id.*

³² *Id.*

³³ Jayasimha & Tigadi, *supra* note 23.

³⁴ Varottil, *supra* note 9.

³⁵ *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (1965) 2 SCR 720.

to the *Harmer case*,³⁶ the term ‘*oppression*’ was explained as something burdensome, harsh and wrongful. Lord Cooper has stated that for claiming the remedy against oppression, “*the circumstances of the case must suggest an inference that there had been, at least an unfair abuse of powers and an impairment of confidence in probity with which the affairs of the company are being conducted.*”³⁷ Further, English case of *Elder v. Elder & Watson*,³⁸ has established that the phrase ‘Oppressive of some part of members’ suggests that the conduct complained of must involve, at lowest, a visible departure from the standards of fair dealing and a violation of condition of fair play on which a shareholder has entrusted his money.

After having an exhaustive discussion on these leading authorities, the Court in *Shanti Prasad Jain*³⁹ has affirmed the law laid down in these cases and explained the jurisprudence in following words, “*It is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397 (Section 241 of the Companies Act, 2013). It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be*

³⁶ *In Re: H R Harmer*, (1958) 3 ALL ER 689.

³⁷ *Id.*

³⁸ *Elder v. Elder & Watson*, 1952 Scottish Case 49.

³⁹ *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (1965) 2 SCR 720.

enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder." Hence, a mere loss of confidence and resentment on the part of the minority in a deadlock situation would not come within the purview of oppression.⁴⁰

Efforts were also made by the judiciary in subsequent cases, to expand the scope of remedy against oppression. In *Needle Industries (India) Ltd.*,⁴¹ Hon'ble Supreme Court held that in order to get relief under this provision "*a conduct which lacks exercise of his legal and proprietary rights as a shareholder*" must be shown to exist. Subsequently, in *TN Raghunath (Dr.) v. Lake Side Medical Centre Ltd.*,⁴² it was held that legality or illegality, in the affairs of the company, shall not be examined but only its probity and fairness toward shareholders. Hence, illegality is not a *sine qua non* for oppression.⁴³

B. MEMBER RESTRICTIVE APPROACH OF THE REMEDY

One fundamental issue that always remained unaddressed in the academic discussions governing remedies against oppression is that such remedy is available to petitioners only in their capacity of being a member

⁴⁰ *Id.* See also *M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja*, (2008) 143 Com Cases 97.

⁴¹ *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*, (1981) 3 SCC 333.

⁴² *TN Raghunath (Dr.) v. Lake Side Medical Centre Ltd.*, (2007) 137 Com Cases 741.

⁴³ *Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd.*, AIR 1965 Guj 96.

or shareholder of the company.⁴⁴ In the *Harmer case*,⁴⁵ it was held that oppression dealt under this Section is only restricted to the oppression of members. It is in such and only in such a capacity that a person can invoke the remedy. Thus, oppression of a person in any other capacity distinct from a member, a director for instance, is outside its purview.⁴⁶ Similarly, in *Needle Industries Ltd.*⁴⁷, it was held that to get relief, conduct which lacks exercise by a shareholder of his legal, proprietary and equitable rights, or other legitimate expectations must be shown to exist.

The legislative background of this remedy stems from shareholder or member-oriented locus, more specifically minority shareholders, as discussed previously. Due to this, the remedy against oppression is unavailable to other stakeholders of the company. Through passage of time, however, the scope of oppression has been explored, expanded and supplanted, to a certain extent by the courts. Yet, the approach seems to be restrictive and bereft of any legitimate justification in modern legal landscape.

In *Rashmi Seth v. Chemin Ltd.*,⁴⁸ it was held that illegal issuing of shares to turn majority shareholders into a minority is oppressive in itself justifying the invocation of Section 241 by the majority shareholders. A

⁴⁴ K.R.S. Narayana Iyengar v. T.A. Mani, AIR 1960 Mad 338.

⁴⁵ *In Re: H R Harmer*, (1958) 3 ALL ER 689.

⁴⁶ Ramaiya, *supra* note 29, at 3783. *See also* VM Rao v. Rajeshwari Ramakrishnan and Ors., (1987) 61 Comp Case 20 (MAD).

⁴⁷ *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*, (1981) 3 SCC 333.

⁴⁸ *Rashmi Seth v. Chemin Ltd.*, (1992) SCC OnLine CLB 6. *See also* *Piercy v. Mills & Co.* (1920) 1 Ch 77.

similar ruling was given in *Jaladhar Chakraborty*⁴⁹ wherein it was held that an increase and decrease in the capital of the company shall not be termed oppression unless it alters the 'Pattern of Shareholding' and turns majority into minority. Further, it was held by the Kerala High Court⁵⁰ that the provisions of remedy against oppression are intended to protect the interest of the minority. Ordinarily, the majority is sufficiently empowered to protect its interest but in cases where the majority is prevented from so doing and turns into an artificial minority, then it is entitled to seek protection under this provision. Subsequently, the Delhi High Court⁵¹ and Punjab & Haryana High Court⁵² have also held that a petition preferred by the majority against the minority under this Section, is maintainable.

Although, the scope of Section 241 has been expanded by diluting the distinction between minority and majority shareholders, the fundamental issue remains to be unaddressed. Thus, the approach has remained restricted in not including other stakeholders of the company to enable them to file petition for oppression in any capacity distinct from a member or shareholder.

C. MISMANAGEMENT

⁴⁹ *Jalandhar Chakraborty v. Power tool and appliance Ltd.*, (1994) 79 Comp Cas 505 Cal.

⁵⁰ *Dr. V. Sebastian v. City Hospital (P) Ltd.*, 1982 SCC OnLine Ker 236.

⁵¹ *Radhe Shyam Gupta v. Kamal Oil & Allied Industries Limited*, 2005 SCC OnLine Del. 617; (2005) 82 DRJ 530.

⁵² *Amit Gupta v. J.K. Gupta*, [2002] 38 SCL 112.

Remedy against mismanagement provided under Section 241 of the Act is peculiar to India⁵³ and has no English counterpart.⁵⁴ The expressions ‘oppression’ and ‘mismanagement’ have been left undefined by the lawmakers,⁵⁵ however the attributes of mismanagement can be ascribed by the phraseology used in the provision. While interpreting the scope of ‘Remedy against mismanagement’, authors and commentators, have restricted its scope by limiting the source of law to only Section 241(b). However, Section 241(1)(a) of the Act has correspondence to Sections 397(1) and 398(1) of erstwhile Companies Act of 1956 and hence, it would mean that the aspect of mismanagement is inherent under Section 241(1)(a) of the Act.

It is pertinent to note that the term ‘mismanagement’ does not find mention in the title to Section 241 which is “*Application to Tribunal for relief in cases of oppression, etc.*”. The legislative drafting policy of the Act, regrettably, does not elucidate the legislative intent behind such omission, therefore left us bereft of any insights regarding rationale behind such deliberate legislative action.⁵⁶ In the opinion of the authors, legislative enactment, as consolidated under Sections 241(1)(a) & (b), presumes the incorporation of the essence of mismanagement thereby negating the hypothesis of ‘mismanagement’ falling only under Sections 241(1)(b) of the Act.

⁵³ Shreyas Jayasimha and Rohan Tigadi, *Arbitrability of Oppression, Mismanagement and Prejudice Claims in India: Need for Re-Think*, 11 NUJS LAW REV. 547, 563 (2018).

⁵⁴ Ramaiya, *supra* note 29, at 4097

⁵⁵ Palghat Exports Private Ltd. v. T.V. Chandran, 1993 SCC OnLine Ker 441.

⁵⁶ Varottil, *supra* note 9.

The conditions for maintaining a petition against an act of mismanagement⁵⁷ are that the affairs of the company are conducted in a manner prejudicial to public interest⁵⁸ or, that the affairs of the company are being conducted in a manner prejudicial to the interest of company⁵⁹ or, that due to any material change which has taken place in the management and control of the company in the manner set out in the section and due to that reason it is likely that affairs of company will be conducted in a manner prejudicial to the interest of company and prejudicial to member or members.⁶⁰ As per the Bhabha Committee Report, provisions prescribing remedy in cases of mismanagement was to be made to protect the interest of the company⁶¹ and not its members. It is through subsequent developments in the law that the interest of shareholders or class thereof was incorporated within the ambit of mismanagement.⁶²

Although, the remedy for mismanagement in India has no English counterpart, the object of this remedy, as envisaged by the Bhabha Committee Report, has been frustrated. Primarily due to the aforementioned reasons, besides the power to file a petition against mismanagement in NCLT has been given only to members of the company (as specified under Section 244 of the Act).⁶³ It is obvious that even when the grounds for considering the case of mismanagement have been

⁵⁷ GK KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE 752 (Taxman, 24th ed., 2019).

⁵⁸ Suresh Kumar Sanghi v. Supreme Motors Ltd., 1981 SCC OnLine Del. 199.

⁵⁹ Companies Act, 2013, § 244, No. 18, Acts of Parliament, 2013.

⁶⁰ *Id.*

⁶¹ Bhabha, *supra* note 17.

⁶² *In Re: Five Minutes Car Wash Service Ltd.*, (1966) 1 All ER 242: (1966) 2 Comp LJ 68.

⁶³ Companies Act, 2013, § 244, No. 18, Acts of Parliament, 2013.

expanded to protect the interest of the company and the public, if only members are entitled to approach the court then the company's interest and public interest would most likely be member-interest driven. Although, government is empowered to file a petition before the NCLT against such cases, the question here arises as to how far the government will go for protecting the public interest. The government will, perhaps, intervene only in certain high-profile cases whereas, in many cases, stakeholders will be left remediless.

D. PREJUDICE CLAIMS

Companies Act, 2013 introduced a new ground for invoking Section 241 of the Act, as per which members can approach NCLT if the affairs of company have been conducted in a manner prejudicial to member or class thereof.⁶⁴ This remedy was absent from provisions of the erstwhile Companies Act of 1956. The question which needs to be determined here is that whether the remedy of prejudice is to clarify, explicate or substantiate the already existing remedy of oppression or it operates on standalone basis *de hors* oppression.⁶⁵ It is quite evident from the phraseology used in this provision that the remedy of prejudice stands on its own footing distinct from the remedy of oppression.

In order to determine the scope of this remedy, it is expedient to explore its genesis. The legislative intent behind incorporating such remedy is still unknown.⁶⁶ However, *prima facie* it seems that it is inspired by

⁶⁴ Companies Act, 2013, § 241(1), No. 18, Acts of Parliament, 2013.

⁶⁵ Ramaiya, *supra* note 29.

⁶⁶ Ramaiya, *supra* note 29.

developments in the English Company Law.⁶⁷ After two decades of the Cohen Committee Report, the England Government set up a new committee under the chairmanship of Lord Jenkins in order to evaluate the functioning of the English Companies Act, 1948. The Jenkins Committee observed that the remedy of oppression has not produced expected results⁶⁸ and the term ‘oppressive’ is too strong to be appropriate in all cases.⁶⁹ Consequently, the remedy of oppression prejudice was devised to overcome the inefficiencies of the remedy of oppression.

Despite having similar legislative intent, the scope of remedy in both the jurisdictions, i.e. India and England, is not *pari materia*. The legislative policy of England incorporates the phrase ‘Unfairly Prejudicial’⁷⁰ while the Indian law only incorporates the term ‘Prejudicial’ and does not expressly mention the term ‘Unfair’.⁷¹ While determining the scope of this remedy, English Court *In Re: Saul D. Harrison & Sons plc.*,⁷² has held that the conduct must be both prejudicial and unfair. A conduct may be prejudicial but not unfair and similarly it may be unfair but not prejudicial. However, to claim the remedy, it must satisfy both the tests.

The term ‘Unfair Prejudice’ was first considered by the House of Lords in *O’Niell v. Phillips*,⁷³ wherein Lord Hoffman after relying on *Re Saul D Harrison & Sons Plc.*, held that unfairness may consist in breach of the

⁶⁷ Bhabha, *supra* note 17.

⁶⁸ JENKINS COMMITTEE, REPORT OF COMPANY LAW COMMITTEE, ¶ 74 (June 1962).

⁶⁹ *Id.*

⁷⁰ Companies Act, 2006, § 994, c. 46 (UK).

⁷¹ Companies Act, 2013, § 241(1), No. 18, Acts of Parliament, 2013.

⁷² *In Re: Saul D. Harrison & Sons plc.*, [1995] BCLC 14.

⁷³ *O’Niell v. Phillips*, [1999] UKHL 24.

rules or using of rules in a manner that would distort the principles of equity. Equitable consideration is the criterion which makes it unfair for those conducting the affairs of the company to rely upon their strict legal powers.

Till now no Indian case has determined the scope of this remedy in Indian context. Recently, in *Cyrus Investment Pvt. Ltd. v. Tata Sons Ltd. & Co.*,⁷⁴ the aspect of this remedy has been taken into consideration however no discussion took place in this regard.⁷⁵

IV. CORPORATE GOVERNANCE IN TRANSITION: ADDRESSING THE ISSUES AND CHALLENGES OF STAKEHOLDER PROTECTION

Corporate governance includes a set of mechanisms which ensures that companies are redirected and managed in a way so as to create maximum value for their owners and simultaneously fulfilling their responsibility towards other stakeholders.⁷⁶ In this changed scenario, corporations must be fair and transparent towards their shareholders and other stakeholders.⁷⁷ As noted by the Kumar Mangalam Birla Committee,⁷⁸

⁷⁴ *Cyrus Investment Pvt. Ltd. v. Tata Sons Ltd. & Co.*, Company Appeal No. 254/2018.

⁷⁵ Prateek Kumar Singh, *Indian Company Law making way for unfair prejudice remedy*, RMFRL (June 2021, 11:45 PM), <https://www.rfmlr.com/post/indian-company-law-making-way-for-unfair-prejudice-remedy>.

⁷⁶ Onyekachi .E. Wogu, *Corporate Governance: The Stakeholders Perspective*, 4 IJBM 45, 48 (2016), <https://www.eajournals.org/wp-content/uploads/Corporate-Governance-The-Stakeholders-Perspective.pdf>.

⁷⁷ Prof. Mamta Sawakar, *Corporate Governance in India- Evolution and Challenges*, 6 IJCRT 1, 6 (2018), <https://ijcrt.org/papers/IJCRT1893330.pdf>.

⁷⁸ KUMAR MANGALAM BIRLA COMMITTEE, REPORT OF KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE, 1999, ¶4.1.

corporate governance has several claimants like shareholders and other stakeholders including suppliers, customers, creditors, bankers, employees of the company, government, and society at large. Good corporate governance mechanisms help to ensure that corporations take interest of larger constituents and communities within which they operate.⁷⁹

The role of national corporate statutes is to protect the interest of every stakeholder of a corporation. As discussed in previous chapters, the remedy against oppression, mismanagement and prejudice has been restricted to shareholders. Though, it is the cardinal principle of corporate governance that an organization is duty-bound to provide just and equitable treatment to its shareholders,⁸⁰ however, while protecting the rights of internal stakeholders (who are mostly shareholders), external stakeholders (stakeholders other than shareholders) of such organization cannot be ignored with due consideration to their rights as well as their impact on the activities of the organisation.⁸¹ The primary reason for the aforementioned issue is the inclination of legislature towards shareholder primacy, non-judicious transplantation of English laws, ESG risks and dysfunctional role of power dynamics in corporate governance.

A. NAVIGATING THE CORPORATE GOVERNANCE DIVIDE: A COMPARISON OF SHAREHOLDER PRIMACY AND STAKEHOLDER THEORY IN UK, US AND INDIA

⁷⁹ NR NARAYAN MURTHY COMMITTEE, REPORT ON THE SEBI COMMITTEE ON CORPORATE GOVERNANCE, 2003, ¶1.1.5.

⁸⁰ Lai Oso and Bello Semiu, *The Concept and Practice of Corporate Governance in Nigeria: The need for Public Relations and Effective Corporate Communications*, 3 JOURNAL OF COMMUNICATIONS, 1, 5 (2012), <https://www.researchgate.net/publication/321204620>.

⁸¹ Singh, *supra* note 75.

Shareholder primacy is one of the cardinal principles of English Corporate law.⁸² This theory is based on the widely accepted proposition that the primary objective of a company is the maximization of shareholders' profit.⁸³ The broad canvas in this paradigm affirmatively expounds the corporation as wealth producing socio-economic legal construct that should profit shareholders. This theory espouses a shareholder-centric approach which focuses on maximizing shareholders' value before considering the interests of other stakeholders.⁸⁴ Whereas, the stakeholder theory, as the words suggests, goes a step ahead and takes into consideration the interests of other stakeholders, unlike shareholder primacy whose primary objective is profit maximization and protection of interests of the shareholders. Advocates of this theory suggest that the management of the corporation owes a duty towards both shareholders and other stakeholders who have contributed to the wealth creation of such corporation.⁸⁵

If we closely examine the corporate governance regime in UK, it reveals that the participation of stakeholders can be facilitated by empowering stakeholders in their role as shareholders.⁸⁶ Despite having a

⁸² P. L. DAVIS & SARA WORTHINGTON, *GOWER & DAVIES: PRINCIPLES OF MODERN COMPANY LAW* 560 (Sweet & Maxwell, 9th ed. 2012).

⁸³ Robert J. Rhee, *A Legal Theory of Shareholder Primacy* 102 (Minnesota Law Review, Working Paper 2017), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1004&context=working>.

⁸⁴ *Id.*

⁸⁵ James E. Post, Lee E. Preston & Sybille Sachs, *Managing the Extended Enterprise: The New Stakeholder View*, 45 CAL. MANG. REV. 6, 45 (2002).

⁸⁶ Katharine Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HAST. BUS. L. J. 309, 347 (2011), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1165&context=hastings_business_law_journal.

close resemblance with its American counterpart, a major difference between the corporate governance regime of United States (“US”) and UK is that UK affords much power to its shareholders than other stakeholders.⁸⁷ UK corporate laws still maintain the shareholder primacy tradition.⁸⁸

Contrastingly, UK’s commitment to stakeholder protection is arguably as vigorous as that of Germany, which follows a stakeholder-oriented model of governance.⁸⁹ It is this commitment to social welfare which accounts for differences in the models followed by UK and US.⁹⁰ The divergence between the protective devices in protecting interest of investors (shareholders) arises from the different manner in which their external regulatory mechanisms relate to its protective mechanisms, affecting the relationship among stakeholders in a corporate enterprise.⁹¹ Illustratively, protections afforded to employees in social safety laws and employment protection laws are strong enough to diminish the need of including their voice in corporate governance.⁹² Therefore, UK sets a new example as to how the interests of stakeholders can be accommodated in a shareholder centric corporate governance regime.⁹³ Nonetheless, a critical evaluation of ‘Enshrined Shareholder Value’ suggests the inference that

⁸⁷ *Id.*

⁸⁸ Kingsley O. Mrabure & Alfred Abhulimen-Iyoha, *Corporate Governance and Protection of Stakeholders Rights and Interests*, 11 BEJ. LAW REV 292, 297 (2020).

⁸⁹ Christopher M. Bruner, *Power and Purpose in the ‘Anglo-American’ Corporation*, 50 VIR. J. INT’LL. 579, 609 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1575039.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

other stakeholders of the company have not been granted the same status as that of a shareholder and hence no considerable change has been effected from what existed prior to 2006.⁹⁴

Consequently, much like US and UK, the right of stakeholders in enforcing their claims is missing in Indian laws as well.⁹⁵ One such instance can be recorded in the recommendations given under the JJ Irani Committee Report⁹⁶ wherein it was stated that the protections afforded to the minority against oppression and mismanagement are sufficient.⁹⁷ Furthermore, it was recommended that terms ‘minority’ and ‘majority’ should be defined so as to make ‘minority’, a qualification for initiating action against affairs of the company in cases of oppression and mismanagement.⁹⁸ Similarly, a number of committees have been set up in order to study the corporate governance norms in India. It is pertinent to note that most of the recommendations of these reports are driven by shareholders’ interest.

In 1999, Birla Committee, recognized the fact that the issue of corporate governance involves protection besides the shareholders, of all other stakeholders. However, the recommendations of the Committee looked at the issues essentially involving shareholder interest, since shareholders form the *raison d’etre* of corporate governance and the chief

⁹⁴ Shubhra Wadhawant, *Upholding Stakeholder Interest: What way is best way- A comparative analysis across diverse jurisdiction*, SCC ONLINE (Oct. 23, 2022), <https://www.sconline.com/blog/post/2019/06/14/upholding-stakeholder-interest-what-way-is-the-best-way-a-comparative-analysis-across-diverse-jurisdictions/>.

⁹⁵ *Id.*

⁹⁶ JJ IRANI COMMITTEE, REPORT OF COMPANY LAW COMMITTEE (May 2005).

⁹⁷ 3 A RAMAIIYA, GUIDE TO COMPANIES ACT 3856 (Lexis Nexis 2014).

⁹⁸ *Id.*

constituents of SEBI.⁹⁹ Similarly, committees studying the aspects of corporate governance norms in India majorly focus on the interests of shareholders exclusively. One such inference can be drawn from the Uday Kotak Committee on corporate governance, 2017, where the report explicitly stated that well governed companies need to focus on fulfilling two major roles, *firstly*, focusing on long term value creation and *secondly*, protecting the interest of shareholders by applying proper care, skills and diligence in business decisions.¹⁰⁰ If we peruse the recommendations of given by the Kotak Committee, we barely find any of the recommendations concerning protection of any other stakeholders.

On meticulous examination of all these reports on corporate governance, we would find that they majorly focus on resolving agency problem and maintain the tradition of shareholder primacy in the Indian context. Therefore, legislative instrumentalities have also been molded in systemic bottlenecks of shareholder primacy thereby undermining the larger stakeholder perspective. Authors firmly believe that shareholders are primary stakeholders of the company however, considering the changing dimensions of corporate governance norms where corporations have multi-dimensional role, departure from shareholder primacy is imperative.

B. IMPACT OF OPPRESSION AND MISMANAGEMENT ON ENVIRONMENT, SOCIAL AND GOVERNANCE RISKS IN COMPANIES

⁹⁹ KUMAR MANGALAM BIRLA COMMITTEE, REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE (2000).

¹⁰⁰ UDAY KOTAK COMMITTEE, REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (October 2017).

Oppression and mismanagement within a company can have wide ranges of negative impacts. For example, when management is not accountable to shareholders and other stakeholders, it can lead to lack of transparency in the company's operations, including its environmental and social practices. This can result in negative environmental impacts, such as pollution or deforestation, and negative social impacts, such as human rights violations. Additionally, when a company is engaging in oppression and mismanagement, it is more likely to be in non-compliance with laws and regulations related to environmental and social issues, which may lead to imposition of fines, legal actions, and reputational loss.

When it comes to ESG risks, some examples of risks that can arise due to oppression and mismanagement include:

- (i)* **Environmental risks:** poor management of environmental risks may result into accidents, spills, and other incidents that can harm the environment and people living nearby. It can also lead to non-compliance with environmental regulations, resulting in fines and other penalties.
- (ii)* **Social risks:** mismanagement of social risks can lead to labor disputes, human right violations, and community conflicts. It may also lead to non-compliance with laws and regulations related to human rights, labor rights, and other social issues.
- (iii)* **Governance risks:** oppression and mismanagement can be a cause for poor corporate governance, which might result in lack of transparency and accountability. This can further give rise to

difficulties for investors and other stakeholders in assessing the company's performance and making informed decisions.

Oppression and mismanagement can lead to a wide range of ESG risks for companies, which can negatively impact the environment, society, and company's financial performance as well. Therefore, it is important for companies to address and manage these risks. Doing so will minimize negative impacts and improve their overall sustainability.

C. INDIAN COMPANY LAW: LEGAL TRANSPLANTATION GONE WRONG?

The contemporary legal scholarship emphasizes on the influence of 'legal origin' while discussing comparative corporate laws.¹⁰¹ Genesis or Source of corporate law in any legal system plays a significant role in its evolution and relative success.¹⁰² While the concept of legal transplantation of corporate laws has been received affirmatively, it has been viewed with caution.¹⁰³ In this backdrop, learned author Konrad Zweigert has rightly pointed out that, mere importation of a legal rule or legal system without proper adaptation of such rule or system to find compatibility with the local needs is susceptible to failure.¹⁰⁴ This is due to the fact that social, economic and geo-political situations may not be present in the host country in

¹⁰¹ UMAKANTH VAROTIL, THE EVOLUTION OF CORPORATE LAW IN POST-COLONIAL INDIA: FROM TRANSPLANT TO AUTOCHTHONY (NUS Law, Working Paper 2015/001, January 2015), https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varotil.pdf.

¹⁰² *Id.*

¹⁰³ Pierre Legrand, *The Impossibility of Legal Transplant*, 4(2) MJECL 111, 117 (1997), <https://doi.org/10.1177/1023263X9700400202>.

¹⁰⁴ See K. ZWIEGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (3rd edn, Oxford University Press 1998).

identical manner or even if present it may substantially vary which might impair the success of the legal transplant.¹⁰⁵

As stated earlier, the provisions concerning remedies against oppression and mismanagement emanate from an adopted idea which reflects the colonial continuity in Indian corporate laws. This is due to over-insistence and over-reliance of the Indian parliament on British laws. Despite the transition of Indian corporate law regime from legal transplant to autochthony in the past two-three decades, the provisions relating to oppression and mismanagement find its allegiance to the British laws and that too with inconsistencies. The inconsistency with the British laws and ambiguities in present Companies Act, 2013 have perplexed the legal scholarship.

As mentioned earlier, the Jenkins Committee in 1962 recommended the replacement of the term 'Oppression' with 'Unfairly Prejudicial' in English law.¹⁰⁶ Thus, the remedy of 'Unfairly prejudicial' in English jurisdiction has been incorporated in place of the remedy of oppression while in India the remedy of prejudice has been incorporated to supplement the existing remedy of oppression.¹⁰⁷ The English law was changed in the 1960s whereas the Indian regimes still carry 'oppression' in their company statutes. Analogous to the other two remedies of oppression and mismanagement, the incorporation of this remedy also suggests the inference that legislative policy is confined to the protection of shareholders

¹⁰⁵ Varottil, *supra* note 101.

¹⁰⁶ Jenkins, *supra* note 68.

¹⁰⁷ Varottil, *supra* note 9.

primarily due to the fact that the remedy of prejudice is introduced to widen the scope of shareholder protection.

In addition to this, the Companies Act, 2013 has induced the concept of “*class action suit*”, however, the same has still not been notified yet. It is pertinent to note that India has borrowed the concept of “*class action suit*” from US which is more or less similar to the remedies against oppression and mismanagement. However, the ambit of “*class action suit*” is little wider than the remedies for oppression and mismanagement as it empowers depositors in addition to members to file a petition if the affairs of the company are being conducted in a manner prejudicial to the interest of the company or depositors.

However, that is not the issue, it is pertinent to note that legal transplants are ubiquitous and not so unique, at least, in common law countries. The efficacy of these legal transplantations varies across jurisdictions on account of differentiated social, political, and economic factors.¹⁰⁸ The efficacy of corporate regulatory regime does not rely merely on how efficiently its company laws have been enacted. There are external regulatory factors that act as a catalyst in the smooth functioning. Such external factors may include the interplay and effectiveness of its labour, environmental and insolvency laws. Nexus theorists argue that stakeholder interests are best addressed through external contracts and negotiations, however, if this English approach is to be followed then the corporate landscape is going to be in dire traits. One such instance that best illustrates this remark is the plight of the creditors in this country.

¹⁰⁸ Varottil, *supra* note 101.

D. REJUVENATING CREDITOR MONITORING SYSTEM

Creditors have an intrinsic preference for financial prudence and ability of the company to not only make timely repayment of debts but also to maintain predictable and stable credit risk profile.¹⁰⁹ Credit monitoring is a routine task of creditors to mitigate risks of default¹¹⁰ however infirmity of credit monitoring system in India is reflected through ever rising Non-Performing Assets. Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (“**RDDB&FI Act**”) and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI Act**”) have attempted to secure the right of creditors, albeit both of them remained overly inadequate. Consequently, with the enactment of Insolvency and Bankruptcy Code, 2016 (“**the Code**”), Indian business landscape has entered into new age of creditor governance. The Code attempts to balance the interests of shareholders and creditors and thus enhances creditor governance in Indian context.¹¹¹

However, it is pertinent to note that the Code is in nature of *ex post* regulatory regime as opposed to *ex ante* regulations which essentially means that creditors will come into play only after default has occurred. When we

¹⁰⁹ Dallas G., *The Role of the Creditor in Corporate Governance and Investor Stewardship*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (13 Nov 2022), <https://corpgov.law.harvard.edu/2019/10/09/the-role-of-the-creditor-in-corporate-governance-and-investor-stewardship/>.

¹¹⁰ Tomas Jandik and William R. McCumber, *How Creditors affect Corporate Governance*, THE CLS BLUE SKY BLOG, (29 September 2022), <https://clsbluesky.law.columbia.edu/2018/08/13/how-creditors-affect-corporate-governance/>.

¹¹¹ Gireesh Chandra Prasad, *Bankruptcy code has balanced rights of creditors and debtors*, LIVE MINT (Dec. 21, 2020), <https://www.livemint.com/news/india/-bankruptcy-code-has-balanced-rights-of-creditors-and-debtors-11608515416489.html>.

talk about provisions of remedies against oppression and mismanagement, it is in the nature of *semi- ex ante* regulations which means that aggrieved party may approach for judicial reliefs either before the commission of act/omission which will take place in future or for act/omission that already took place and has potential to fall within the contours of Section 241 of the Act. Thus, if the provisions of remedies against oppression and mismanagement are stretched to protect creditor rights pre-maturely (i.e. before the default), it will significantly enhance the credit monitoring system *vis-à-vis* the insolvency regime in India.

E. ROLE OF POWER DYNAMICS OF CORPORATION IN DISRUPTING CORPORATE GOVERNANCE

It has been pointed by corporate experts that power dynamics play a significant role in market efficiency while at the same time certain other thinkers have criticized today's form of capitalism which has been proved to be problematic at many levels.¹¹² The challenge before corporate governance in India is its conventional dominance of majority stakeholders which are individual-family dominated,¹¹³ which disturbs the distinct ownership-control structure of a corporation.¹¹⁴ In most of the cases,

¹¹²Emily Vogels, Lee Rainie & Janna Anderson, *Power Dynamics Play a Key Role in Problems and Innovation*, PEW RESEARCH CENTRE: INTERNET AND TECHNOLOGY (Sept. 29 2022) https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2020/06/PI_2020.06.30_digital-innovation_REPORT.pdf.

¹¹³Pankaj Kumar Gupta and Singh Shallu, *Evolving Legal Framework of Corporate Governance in India – Issues and Challenges*, 4 JURIDICAL TRIB 239, 249 (2014), <http://www.tribunajuridica.eu/arhiva/An4v2/20%20Gupta.pdf>.

¹¹⁴Shruti Nandwana, *A Need for Stricter Accountability of Promoters in Corporate Governance Regime in India: In the Context of Majority Shareholding of Promoters*, 9 ILI LAW REV. 1, 2 (2020), <https://ili.ac.in/pdf/sn.pdf>.

promoters make their way up to the management of the company. Thus, holding of shares in majority and management in the affairs of company gives immense power to affect the decisions of the company.¹¹⁵ Martin Gelter argues that shareholder centrism and excessive corporate stakeholder protections are interrelated, however, he concluded that the pre-existing ownership structure in any given country will ultimately determine the fate of the legal regime which is to be adopted.¹¹⁶

The control of promoters can be portrayed through a pattern of shareholding. In a family-dominated corporate landscape like India, promoters are dominant shareholders and hence they have the power to influence the board. Promoters become emotionally attached with the company and decide to manage the affairs of the company for their personal interests which are often prejudicial to the interest of company and of other stakeholders and hence lead to failure of corporate governance.¹¹⁷ As a result, India's corporate environment is more prone to abuse where promoters of the company prioritize their interests over the interests of other stakeholders of the company.¹¹⁸ The contemporary example of Tata-Mistry dispute highlights the instance of oppression and mismanagement due to such shareholding structures.

¹¹⁵ *Id.*

¹¹⁶ Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, (2009) 50(1) HARV. INT'L L.J. 129, 135 (2009), <https://core.ac.uk/download/pdf/144231823.pdf>.

¹¹⁷ Nandwana, *supra* note 114.

¹¹⁸ Nandwana, *supra* note 114.

V. **BEYOND SHAREHOLDER PRIMACY: A STAKEHOLDER-CENTRIC APPROACH TO CORPORATE GOVERNANCE AND OPPRESSION AND MISMANAGEMENT REMEDIES**

At the outset, it is evident from the above discussion that the corporate governance model that India has adopted prioritizes the protection of the interest of shareholders, albeit not ignoring, the interests of other stakeholders. As noted earlier, apart from shareholders there are other stakeholders who, by investing their resources, contribute to the wealth of the corporation.

In a corporation there are board members, employees, workmen, and other stakeholders including creditors, depositors and society at large. Acts or omissions of certain nature may prejudicially affect its stakeholders in any form, illustratively, not providing a proper work culture to employees and workmen can also be considered oppression. Turning decisions of the company in order to defraud its creditors by legal means is also a form of oppression on creditors. Unjust removal of directors is oppression on directors, conducting affairs of the company in a manner prejudicial to its employees, workmen and board members due to which their salaries are not credited is also a form of oppression.

All these instances severely affect the interests of such stakeholders requiring redressal. The justification behind the above-mentioned arguments is primarily the inefficiency of laws which are alternative remedies in such instances. However, the law does not provide remedy under the provisions of oppression and mismanagement.

A. INCAPACITY OF EXTERNAL STAKEHOLDERS TO MOVE UNDER SECTION 244 OF THE COMPANIES ACT, 2013: PARADOX OF QUALITATIVE AND QUANTITATIVE PARAMETERS

Section 244 of the Companies Act, 2013 prescribed certain qualifications for filing a petition under Section 241 of the Act. This Section provides for qualitative and quantitative restrictions with regards to the capacity of the applicant to file a petition on the grounds enumerated under Section 241 of the Act. When we read Section 244, in conjunction with Section 241 of the Act, it results into two-folded qualitative restrictions. *Firstly*, that the affairs of the company must justify that order for winding up and that such order would unfairly prejudice the applicant. *Secondly*, the application under Section 244 of the Act is filed by a member or class of members. Thus, when a non-member filed a petition under Section 244 of the Act, NCLAT in *India Awake for Transparency v Hasham Investment and Trading Company Pvt. Ltd.*¹¹⁹ held that the proviso only enables dispensing with the eligibility requirement but does not dispense with the requirement that the person seeking waiver must be a member.

Quantitative restrictions, in this regard, envisage the numeric threshold enumerated under Section 244 of the Act. It states that in case of a company having share capital, not less than 100 members of the company, or not less than 1/10th of the members of the company, or member or members having not less than 1/10th of the issued share capital, and in the

¹¹⁹ *India Awake for Transparency v. Hasham Investment and Trading Company Pvt. Ltd.*, (2018) SCC OnLine NCLAT 583.

case of company not having share capital, not less than 1/5th of total members may file an application under Section 244 of the Act.

In essence, it can't be again said that one simply can't find its locus unless it satisfies, both qualitative and quantitative, parameters and that's where the problem lies. In the changing dimensions of corporate governance, the interests of external stakeholders are, though not identical, at par with the internal stakeholders. It would be imperative if we dilate the scope of remedies against oppression and mismanagement to provide greater protection to external stakeholders of the corporations. However, such a step would have theoretical and pragmatic ramifications as it is easier to propound qualitative and quantitative parameters for limited class (i.e., shareholders), primarily because of shareholders' quantifiable pecuniary stake. Thus, if we somehow boiled down to the qualitative parameters, quantitative parameters will still persist.

Illustratively, in case certain actions of management of the company result in unfairly prejudicing the interest of employees of the company. It is indisputable fact that employees are also stakeholders of the company, however, in such situations there will exist a functional overlap of labor laws and company law. In addition to this, it would also be difficult to provide for numeric threshold as currently exists for shareholders.

B. INCORPORATING A WIDER STAKEHOLDER PERSPECTIVE IN THE PROPOSED CORPORATE GOVERNANCE REGIME: A ROADMAP FOR CHANGE

This paper proposes modifications in the provisions for remedies against oppression and mismanagement to effectuate the concerns raised herein. The proposed regime shall be elucidated in following manner:

- (i) **Altering Qualitative Criteria for Oppression and Mismanagement Claims:** it is pertinent to note that remedies against oppression and mismanagement are a kind of derivative action where members are considered as class. There is an imperative need to whittle down qualitative parameters from the provisions of oppression and mismanagement. Thereby, the requirement that affairs of the company must justify the order of winding up may be dispensed with. Instead, the only qualitative requirement in this regard shall be that the affairs of the company are being conducted in a manner that is “*unfairly prejudicial or oppressive*”. Thus, if the affairs of the company are conducted in a manner that is “*unfairly prejudicial or oppressive*” to any person or class of persons, they may file a petition for reliefs, if they have significant stake in the company and the alleged conduct substantially affects such interest.
- (ii) **Modifying quantitative parameters for Oppression and Mismanagement Claims:** quantitative parameters should still be relevant in the proposed regime, since it is a significant funneling technique to filter petty applications whose recourse may be taken in alternative remedies. In the existing framework only a specific number of members are capable of filing a petition under Section 244 of the Act. The proposed regime envisages the ability of non-

shareholder members to file a petition. Thus, for members, creditors, depositors or any class of stakeholders whose pecuniary relationship with the company is based on a financial instrument of like nature, the quantitative parameters in existing framework are sufficient and may be adopted in the proposed regime.

Furthermore, for protection of environment and consumers, the members of society or targeted consumer base whose interests may prejudicially be affected due to such affairs of the company may file a petition, if it exceeds 100 members. However, for board members, employees and workmen, if affairs of the company are conducted in a manner which is unfairly prejudicial and oppressive to aforementioned persons, a threshold of 2/5th of total number of such persons, creating a class, would suffice. The reason for higher numeric threshold is that these classes of stakeholders are lesser in number as compared to members, creditors or depositors, or for that matter, members of society or consumers. Thus, 2/5th of such class would be entitled to file a petition in such cases.

- (iii) **Onus of proof** - The onus of proving the fact that affairs of the company are being conducted in a manner which is prejudicial to the petitioner lies on such petitioner. The petitioner has to place such evidence on record to the subjective satisfaction of the tribunal.
- (iv) **Interpretation of the term “*Unfairly prejudice and oppressive*”** - In deciding the petitions, the Tribunal shall be guided by the jurisprudence developed so far, in this regard. The tribunal shall

maintain neutrality in interpreting “*unfairly prejudicial and oppressive*” which, so far, has been interpreted with shareholder centric approach. The dimensions of the terms may differ on facts and context of every case. Thus, Tribunals should be cautious and decide the cases accordingly. The tribunal shall aspire to develop the jurisprudence keeping in mind larger stakeholder perspective.

- (v) **Provisions for frivolous and malicious petitions** - In the existing regime, there are no provisions for dealing with frivolous and malicious petitions. The only recourse that the Tribunal may opt for is to dismiss the petition. However, the enlarged scope of the proposed regime will lead to floodgates of petitions, majorly in instances where petitions are filed by members of the society. Such frivolous and malicious petitions must be dealt with iron hands. Therefore, the regime proposes the provisions for penalties and fines in cases where petitions have been brought forward with ulterior motives for securing personal interests.

VI. CONCLUSION: THE WAY FORWARD

The recent shift in focus upon ESG risks has highlighted the need for a more inclusive and dynamic approach to corporate governance. The traditional shareholder primacy model, which prioritizes the interests of shareholders over those of other stakeholders, is struggling to keep up with the changing business landscape and the need to balance the interests of

multiple stakeholders.¹²⁰ In order to address this, lawmakers must find a way to reconcile the interests of shareholders with those of other stakeholders, such as employees, creditors, and the society at large, in order to create a more integrated and inclusive corporate governance model.

The incorporation of ESG considerations in corporate governance mechanisms has become increasingly important in recent times. ESG risks can have a significant impact on a corporation's operations and financial performance, and failure to properly address these risks can lead to negative consequences for shareholders and other stakeholders. By amending the provisions of remedies against oppression and mismanagement, corporations can be held liable for failing to properly address ESG risks. This will serve as a powerful incentive for companies to integrate ESG considerations into their decision-making processes and operations. Additionally, by providing a legal remedy for stakeholders affected by a corporation's failure to address ESG risks, the proposed amendments will help to promote greater accountability and transparency in corporate governance through enhanced risk management mechanism.

One of the key mechanisms for protecting the interests of stakeholders in a corporation is the remedy against oppression and mismanagement. However, the legislative approach to this issue has typically been confined to the protection of shareholders only, with relatively less attention paid to the interests of other stakeholders. In light

¹²⁰ Lyudmila Plamenova Petkova, *From Shareholder Primacy Towards Stakeholder Primacy: Why Corporate Governance Needs to Change its Focus in Order to Survive Modern Business Environment*, TILBURG UNIVERSITY (MAY 2019), <https://arno.uvt.nl/show.cgi?fid=149464>.

of this, it is necessary to revisit and expand the scope of these remedies in order to provide greater protection to other stakeholders.

One way to achieve this is through the introduction of “*class action suits*,” a mechanism commonly used in the US to allow a group of shareholders to bring a legal action on behalf of the company. The concept of class action suits has been adopted by India; however, the provisions are yet to be notified. Instead of introducing a new mechanism, India can amend the existing provisions of remedies against oppression and mismanagement to include matters that would typically fall under class action suits. This would provide a wider scope for these remedies and allow for greater protection of other stakeholders.

In addition to this, the legislature can also amend the provisions to afford protection to other stakeholders from ESG risks. As the statute does not define the terms ‘oppression’ and ‘mismanagement’, the judicial determination of these terms is very general in nature. Therefore, an expansion in the scope of these remedies would not make the provisions ambiguous and would instead contribute to the evolving jurisprudence of company law. Through dilating the scope of remedies against oppression and mismanagement, we can hold management of the company liable if it fails to tender ESG risks, thereby bridging the enforcement gap. The *ex-ante* nature of the remedy will essentially inculcate the enhanced protection mechanism and thus will attempt to protect the plight of other stakeholders.