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Corporate Governance and Chairmanship: The Legislative Lacuna Concerning The Position of Chairman in Indian Scenario

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ABSTRACT

With the meteoric expansion of the corporate world in India, the Indian economy has fostered in great velocity but also raised several issues which need immediate attention of the legislature. One such area is the hustle to become a top-level executive in the company. The conflict in recent years involving the role of chairman in the company with the board of directors has been one of the major concerns. This article highlights the lack of provisions for the eminent position of Chairman and its misuse. Sometimes the excessive power that the chairman exercises by having additional posts like Managing Director and Chief Executive Officer of the company impact the balance of power and creates an environment which leads to a conflict-of-interest situation. Further, the role of emeritus chairman and its power has raised some disturbance and confusion in the corporate world. Not only the emeritus chairman, the provisions like the chairman for life has been some practices which are not only arbitrary but also create an unhealthy environment to work on. One of the major events that highlight such problem is of WeWork, where the founder Adam Neumann has been alleged for committing fraud, gross misevaluation of profit and arbitrary provisions in the article of association. The article also discusses a hypothetical scenario which states the consequences if the WeWork controversy would have happened in India. Are Indian statues ready to deal with such a situation? Lastly, the article deals with the impact on the Indian corporate structure if the position of Chairman is included in the exhaustive list of Key Managerial Personnel in Companies Act, 2013

Keywords: *Corporate Governance, Chairman, Key Managerial Personnel (KMP), Conflict of Interest.*

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1. INTRODUCTION

As once quoted by Ann Crotty in Newspaper day, *'It is essential that the activities of corporate executives are under constant, vigorous and public scrutiny, because those activities are crucial to the economic well-being of the society.'* The recent case of *Cyrus Mistry*[1] raises some concern about the structure and relationship that should be shared by the Emeritus Chairman with the rest of the Board members. Further, instances like WeWork where enormous powers are held by one person raise some serious concerns and situation of distress in the corporate world. These recent developments around the corporate world have shown the need for more comprehensive laws for regulating the top corporate executives in the company.

The existing loopholes in the law are taken as an advantage generally by top corporate executives of the firm to assert their authority and dominance over the board. In India, these top corporate executives can be found in *Section 2 (51)* of the Companies Act[2] in the name of Key Managerial Personnel. It consists of four executives: *'CEO/ MD, Company Secretary, Whole-time Director, and Chief Financial Officer.'* But the one corporate executive which is of utmost importance and is still missing from this exhaustive list is Chairman.

This article will deal with the misuse of the post of Chairman because of the insufficiency of laws in India dealing with it. The article is divided into two parts through which this legislative vacuum will be addressed with rationale. Firstly, the article will deal with the need for separation of the role of Chairman from other Key Managerial Personnel such as CEO or MD. Even though the current SEBI mandate to the companies for such demarcation, the issue has not been taken seriously by some major corporate firms. It is one of the most common practices in the corporate world to appoint a single person as both Chairman and CEO or MD of the company. It is a well-known certitude that both the posts have separate roles and functioning, which in due course introduces uncertainty in the functioning of top-level executives. Part one shows how the unified role of the Chairman and other key managerial personnel of the company is disturbing corporate governance and balance of power.

Part two of the article will deal with another flawed practice of appointing Chairman for life or Emeritus Chairman. The appointment and functioning of such Chairman remains unclear. Further, their influence over the board seems to go against the very spirit of

1 *Cyrus Investments Pvt. Ltd. & Anr.* v. *TATA Sons Ltd. & Ors.,* 2016 CP No. 82 (MB).

2 The Companies Act, 2013 (Act 18 of 2013), s. 2 (51).

corporate governance. The article goes on to substantiate the fallacy by applying rationale and take some illustrative examples such as WeWork which shows that a similar situation is possible to happen and can violate several major provisions of Companies Act. This part shows that if the person is appointed as a Chairman for life, it eventually makes its removal as a director of the company difficult, violating Section 169 of the Companies Act, 2013[3]. Therefore, the appointment of a Chairman for life goes against the spirit of Act and hence is a flawed practice.

2. "SEPARATION OF THE ROLE OF CHAIRMAN FROM OTHER KEY MANAGERIAL PERSONNEL OF THE COMPANY IS VITAL FOR THE IMPLEMENTATION OF CORPORATE GOVERNANCE"

:Chairman means the Chairman of the Board or the Chairman appointed ***or elected for a*** *Meeting.*"[4] The term *Chairman* is not defined anywhere under Companies Act, 2013. However, in general parlance, the chairman is the head of the company's board of directors. As per the judicial interpretation of the post, it has been observed that *'the primary function of the Chairman would, therefore, be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for smooth transaction of business.'*[5] According to the general rationalization established on agency theory, the demarcation of the CEO and Chairman of a firm substantiates the independence of company's board from management and give rise to finer surveillance and monitoring. Because the Chairman leads the board in supervising (hiring, compensating, dismissing as necessary), the CEO on behalf of shareholders and the CEO manages the company and its overall operations.[6] As it is apparent that the functions and duties of a Chairman are different from other key managerial personnel of the company, hence, there should be a clear demarcation between them which would eventually lead to better governance and insignificant concentration of power with a view to nourish the integrity of the company which is further discussed in the article"

3 The Companies Act, 2013 (Act 18 of 2013), s. 169.

4 Institute of Company Secretaries of India, *Provisions of Secretarial Standard on General Meetings*, 2015, *available at:* https://www.icsi.edu/media/webmodules/Final_SS-2.pdf. (last visited on April 22, 2024)

5 *T. N. Seshan* v. *Union of India,* 1995 4 SCC 611.

6 Matteo Tonello, 'Separation of Chair and CEO Roles' *Harvard Law School Forum on Corporate Governance*, Sept. 1, 2011.

2.1 "The Position of Chief Executive Officer and Chairman of The Company Should Essentially be Held by Separate Entities"

"Chief Executive Officer means an officer of a company, who has been designated as such by it.'[7] The Chief Executive Officer (CEO) is a top-level executive of a corporation, who is responsible for devising and executing tactics, taking various corporate decisions, administering the overall resources of an organization. A noticeable trend is followed in some of the companies where both the positions of Chairman as well as the CEO of the company are held by a single entity. Numerous benefits arise from segregating the role of Chairman and CEO such as a reduction in the potential for intervention in the corporate activities by activist investors, improvement in savings and boosting the overall performance of the firm.[8] From the point of view of shareholders as well, the splitting of roles has been found to reduce the compensation structure of Chairman/CEO and minimize the potential for management and operational failures.[9] That's why such a trend is not successful in the long run as it somehow hampers corporate governance and substantiates concentration of power, which will be further elaborated"

The recommendations of the *Uday Kotak Committee*[10] focused on better Corporate Governance practices provided for demarcation in the position of Chairman from the CEO of the corporation for good governance. The report states that: *'The separation of powers of the chairperson (i.e., the leader of the board) and CEO/MD (i.e., the leader of the management) is seen to provide a better and more balanced governance structure by enabling better and more effective supervision of the management.'* Focusing on the same issue, *Cadbury Committee* as well as the *Hampel Committee* stated that: - *'Given the importance and the particular nature of the chairmen's role, it should in principle be separate from that of the chief executive. If the two roles are combined in one person, it represents a considerable concentration of power.'*[11]

The U.K. Corporate Governance Code, which crystallized the said division of power by observing that '*there should be a clear division of responsibilities at the head of the company between running of the board and the executive responsibility. The roles*

7 Companies Act, 2013 (Act 18 of 2013).

8 Paul Hodgson, 'Should the chairman be the CEO' *Fortune*, Oct. 21, 2014.

9 Noam Noked, 'The Costs of a Combined Chair/CEO' *Harvard Law School Forum on Corporate Governance*, June 13, 2012.

10 Government of India, Report: *Committee on Corporate Governance* (Ministry of Corporate Affairs, 2011).

11 Sir Adrian Cadbury Committee, *Financial Aspects of Corporate Governance* (1992).

of chairman and chief executive should not be exercised by the same individual.'[12] The *Corporate Governance Voluntary Guidelines, 2009,* which was an initial step towards strengthening the Indian corporate sphere and bringing it in consonance with global corporate governance practices. The guidelines stated that: *'To prevent unfettered decision-making power with a single individual, there should be a clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/Chief Executive Officer (CEO). The roles and offices of Chairman and CEO should be separated, as far as possible, to promote the balance of power.'*[13]

The Organisation for Economic Co-operation and Development (OECD) report on *'Corporate Governance and the Financial Crisis – Conclusions and emerging good practices to enhance implementation of the Principles'* stressed on the call for segregation of the roles of Chairman and the CEO/Managing Director. The OECD report stated that combining the roles of the Chairman and CEO in a major corporation would bind the enterprise to explain the measures taken to steer clear of the disputes and safeguard the probity of the Chairman. The report also highlighted the lack of 'objectivity' in the discussions as well as in the decisions of the board, therefore necessitating the requirement to dispense support to the company's board of directors.[14]

a. An Insight On The Global Scenario Concerning The Separation Of Roles.

To remedy such a situation, a strategy to segregate the positions of the Chief Executive Officer (CEO) and the Chairman of the company's board was floated in several nations. The big corporations in the United Kingdom, out of the best practice requirement and after giving due recommendation to commercial necessities, have adhered to the split in the position. A combined role of the Chairman and the executive is hard to find in the U.K. corporate sphere. This division in the role has been attributed to pressure by institutional investors to keep the distinction in place, coupled with the voluntary guidelines under the Combined Code[15]

12 The U. K. Corporate Governance Code, *Financial Reporting Council* (June 2010).

13 Ministry of Corporate Affairs, *Corporate Governance Voluntary Guidelines*, 2009, *available at:* http://www.nfcgindia.org/pdf/CG_Voluntary_Guidelines_2009_Final.pdf. (last visited on April 22, 2024)

14 Organisation for Economic Cooperation Development, *Corporate Governance and the Financial Crisis – Conclusions and Emerging Good Practices to Enhance Implementation of the Principles, 2010, available at:* http://www.oecd.org/corporate/ca/corporategovernanceprinciples/44679170.pdf (last visited on April 22, 2024).

15 Financial Reporting Council, *Comply or Explain: 20th Anniversary of the UK Corporate Governance Code*, 2012, *available at:* https://www.frc.org.uk/Our-Work/Publications/ Corporate-Governance/ Comply-or-Explain-20th-Anniversary-of-the-UK-Corpo.aspx (last visited on April 22, 2024).

The main highlight of the British model which strengthens corporate governance is that a separate Chairman liberates the board of directors vis-à-vis the CEO. The board has an undisputed leader for whom its performance is a top priority without paying attention to the regular affairs of the organisation. Also, the working load of the Chief Executive Officer can be reduced up to a great extent through such a model because of a separate Chairmen who can help represent the company externally.[16]

But in the United States, the situation is quite different as major public firms are inclined towards the unified model. This framework can be perceived as a tangible expression of their belief in a unified leadership, which excludes any sort of confusion concerning the person in charge of the corporation. However, the major corporations that retained the unified model also need to implement certain measures to ensure corporate governance. Numerous regulations, including the *Sarbanes-Oxley Act* of 2002 and *the new stock exchange listing requirements* are monitoring the corporations so that the unified model doesn't reduce corporate governance practices by ensuring ample amount of power in the hands of independent directors.

Various scandals in the U.S. corporate sphere brought to the forefront some significant issues concerning weak corporate governance and a substantial concentration of power. High-flying stock prices were comforting for companies such as Enron and WorldCom, but soon their bankruptcy brought into the limelight the major accounting frauds and manipulations that had artificially inflated their prices. Companies like Tyco and Adelphia were detected to be economically weaker than earlier noticed because their representatives had involved in large-scale self-dealing transactions and extraction of resources for personal welfare.[17] Weak corporate governance procedures and inadequate disclosure provisions were found to be the main reason for such failures.

b. Why The 'Two Job – One Person' Model Should Concern The Shareholders And Investors.

The main problem which the corporate sphere witnesses due to 'Two Job – One Person' model is that it can hamper the quality of the board's discussion, compromising the company's crisis management strategies. Also, segregating the Chairmen and CEO roles amongst two persons can assist in building up the standard of queries pertaining to

16 Jay W. Lorsch and Andy Zelleke, 'Should the CEO Be the Chairman?' 46 (2) *MIT Sloan Management Review* 70-74 (2005).

17 Robert Charles Clark, "Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too" *Harvard John M. Olin Center for Law, Economics and Business,* Sept. 1, 2005.

various transactions and management affairs. When such queries and doubts remain feeble, the corporation is not likely to establish tactics that might alleviate any sort of peril. Let's analyse some cases which substantiates the same.

Firstly, Dennis Muilenburg, the former CEO and Chairman of Boeing, which is the 28th largest corporation in the United States. The organisation tried to limit some expenses by implementing a variety of its principal airliner with a distorted and inaccurate system which is essential for flight control. The board somehow lobbied to soften the inspection and review process of the latest aeroplane models as Dennis was having enough power and influence over the board to do so. The enterprise then failed to notify the pilots and the Federal Aviation Administration (FAA) about the flawed control system, in spite of knowing about the flaws and inaccuracy. *'These choices were part of a chain of events that is suspected to have led to two plane crashes and the tragic loss of 346 lives, the grounding of almost 500 planes worldwide, and company losses that will exceed $18 billion.'*[18]

Secondly, Adam Neumann, who served as the CEO and Chairman for three and a half years since the inception of WeWork, which was selected as one of three unicorns to be bet against by the fortune and the company's valuation was 47 billion dollars. The company witnessed numerous questionable transactions which further impacted its financial growth. The financial reports of the company constantly displayed it spending two dollars for every dollar earned.[19] According to media and analysts, the company misled various investors by showing gross overvaluation, and company is actually suffering from heavy losses. This was done to oversize the investment in the start-up. *'The corporation's vision and other decisions during those years resulted in operating losses that exceeded $4 billion.'*

And lastly, Chanda Kochhar, the former CEO and MD of ICICI Bank, has been afflicted with accusations of supposedly exercising partisanship and nepotism while authorizing loans in 2012 to Videocon group investing in NuPower Renewables, a corporation managed and lead by Mr. Deepak Kochhar, her husband. Although a different chairman may have been designated by ICICI Bank, but this questionable arrangement depicts that Mrs. Kochhar somehow sustained to be the *'de facto Chairman'* and exceeded the *'LODR Regulations relating to conflict of interest'* to get the loan authorized effortlessly. If the

18 Joseph Mandato and William Devine, "Why the CEO Shouldn't Also Be the Board Chair" *Harvard Business Review*, Sept. 4, 2011.

19 S-1(IPO) WeWork Company, *The United States Securities and Exchange Commission*, 2019, *available at:* https://www.sec.gov/Archives/edgar/data/1533523/000119312519220499/d781982ds1.htm#toc781982_10 (last visited on April 22, 2024)

credit committee had been headed by a separate and independent chairman, the transaction might never have been authorized or even if it was authorized then too Mrs. Kochhar would have been subjected to a stringent regulatory review process.

The positive news is, plethora of enterprises are going ahead with the new model, keeping the positions of Chairman and CEO segregated. '*Between 2005 and 2019, according to Institutional Shareholder Services, the percentage of companies in the S&P 500 who split the CEO and board chair jobs between two people rose from 30 per cent to 53 per cent.*'[20] This trend towards the demarcation of roles clearly suggests that Two Job – One Person model impact corporate governance as well as the financial performance of an organisation. A company aiming to construct a successful future should ponder cautiously about such instances while deciding the leadership structure for itself.

3. "HOW THE UNIFIED ROLE OF CHAIRMAN AND KEY MANAGERIAL PERSONNEL OF THE COMPANY IS DISTURBING BALANCE OF POWER"

"Nowadays, this controversial issue has picked up the attention in the corporate world which eventually seeks separation and balance of power amongst the top-level executives. To address this issue and to ascertain good corporate governance strategies, the '*Securities and Exchange Board of India (SEBI)'* has directed a clear demarcation in the positions of Chief Executive Officer and Chairperson in an enterprise. This regulation which pertains to the top - 500 Indian companies by market capitalisation, mandates that the two offices don't converge and should be separated from each other. As per the opinion of experts, the key intention behind the SEBI directive could be to get a substantial number of legitimate executives into the corporate workspace instead of letting families operate the entire firm based on nepotism. *'Nseinfobase.com (run by Prime Database) numbers show that currently, of the top 500 companies, the chairperson and MD/CEO are the same individual in 162 entities while the remaining 338 entities do not prefer the unified model"'*

The rationale for such an immense need for demarcation of roles and to avoid severe concentration of power is three folded:

i. **Executive level operations.** The board has a considerable hold over the hiring and firing of the Chief Executive officer and, not only this but also have the power to take major corporate decisions, have general surveillance over the corporation's

20 Joseph Mandato and William Devine, "Why the CEO Shouldn't Also Be the Board Chair" *Harvard Business Review*, Sept. 4, 2011.

management and its daily affairs. Hence, establishing the CEO, the one who is directly liable for the management as Chairman of the company may indicate a *conflict of interest* and a significant concentration of power.

ii. **Establish corporate governance.** The mandate of an enterprise and the aspiration of the shareholders are of utmost importance and the board must ensure these. With an aim that the company is run in consonance with these objectives, the board appoints a managing director. The Managing director holds the responsibility for driving those operations. But by merging the two positions one will definitely end up in supervising oneself, which further can be used to act arbitrarily. A Chairman, who is independent and duly appointed by the board, will verify and monitor such transactions and operations of the firms. Also, when the Managing Director is the Chairperson of the company, the votes of other directors can simply be swayed away which would hamper the functioning of the company.

iii. **Independence of audit committee.** The *Sarbanes-Oxley Act* along with *The Dodd-Frank Act*[21] legislated that the audit committee consists solely of external board members. This indicates that none of the representatives of administration should be a part of the audit committee to ensure independent functioning. However, because the committee is a subset of the board of directors and reports to the chairperson, having a combined model of CEO and Chairman can curb the effectiveness of the committee and additionally the committee might be reluctant to take a certain action on such reports.

4. "PREDICAMENT CONCERNING THE CURRENT STATUS OF CHAIRMAN WITH REFERENCE TO COMPANIES ACT, 2013"

"Chairman means 'the chairman of the Board or its Committee, as the case may be or the Chairman appointed or elected for a meeting'.[22] *'Clause 45 of Model Articles of a company [as mentioned in Table-F of Schedule I of Companies Act, 2013]'* states that 'Chairperson, if any, of Board shall preside as Chairperson at every general meeting of the company.' Thus, if a company has adopted model Articles (or have adopted this Article) and if the Board of Directors has appointed a Chairperson, that Chairperson, if present, will preside as Chairperson of the meeting. Chairman has an imperative role in the Board meetings and it is the Articles of Association of the company which provide the appointment

21 The Dodd–Frank Wall Street Reform and Consumer Protection Act, 2010.

22 Secretarial Standards on General Meetings 2017, Pg.2.

and removal of Chairman. Further, considering the hierarchy of a company, Chairman occupies position and power which need to be scrutinized regularly. The Companies Act, however, seems to be limited to the role, tenure and functioning of the Chairman"

The Chairman is generally defined in loose parlance in India, majorly because of lack of provisions in the Companies Act. In WeWork, Founder Adam Neumann appointed himself as Chairman for life and this led to an amount of discretion with one person and discrepancy in the company. A similar situation can be observed in India in the case of *Tata Sons v. Cyrus Mistry*. When Ratan Tata, the Emeritus Chairman of the Tata Sons, due to his *displeasure* over the functioning of Cyrus Mistry used his power to remove Cyrus Mistry from the position of Chairman[23]. This led to some serious concern over corporate governance. The issue that emerged was what relationship should exist between a company's top-level executive and its Emeritus should share, where the article of association or contract plays a supreme role in the case of absence of a provision in the Act.[24] These situations raise some serious concerns, which will be further discussed.

4.1 The Differing Roles of Chairman In Corporate Structure

Corporate governance is a set of rule and regulations through which a firm is navigated and always shaped in a fair place to work. It essentially entails stabilizing the interest of the company and the top-level executive and stakeholders, such as investors, management, purchaser, distributor, financiers, government authorities and various societal norms. The diversion in the role of chairman during his tenure and after retirement is creating ruckus in the corporate world. One such role is Emeritus chairman. Most countries like the UK and the US have standard rules and regulations governing the same as there is an outsider model of corporate governance for Emeritus Chairman.

The position of emeritus chairman in general parlance is the appointment of a person even after his or her retirement to remain a crucial part of the Company's meetings and decisions. Some companies like Tata Group, Godrej etc. have appointed their Chairman as emeritus chairman and companies like the Max Group, the Rane Group, Mahindra, etc. have appointed other managerial persons as their Emeritus. Although there are no eligibility criteria for the appointment but mostly the founder or the person who helped in the company's growth in its initial phase is appointed for this post. But more and more appointments of such positions, the situation has become more complex. One of such

23 Simon Atkinson, "*Tata Sacking: Cyrus Mistry was 'Lame Duck' Chairman*" *BBC News*, Oct. 26, 2016.

24 Srinivas Gunta and N. Ravichandran, "*Infosys: Transition at the Top*" 38 *The Indore Management Journal 43 (2011)*.

incidents is excessive use of power by Ratan Tata and removal of Raymond's emeritus chairman Vijayapat Singhania merely by notice and on personal grudges with the directors. The role and power of the emeritus chairman are generally governed by the private contract and such contracts are generally according to whims and fancies of the person in power.

4.2 What If The Situation Analogous To WeWork Would Have Happened In India?

WeWork is the most controversial business model across the globe. The business model of the company is based on the concept of long-term leases from the commercial real estate owners and further redesigning these spaces into an aesthetic manner suiting the needs of the modern companies. Later, these were further sub-leased. In 2010, Adam Neumann and Miguel Mckaley, after their successful venture at the green desk, started another venture called We Company.[25] Adam Neumann was the Chairman and CEO of the company whereas Miguel Mckaley was the Chief Culture Officer of the company.

The WeWork gained a lot of attention in 2016 because of its new concept and immense success. In fact, WeWork was selected as one of three unicorns to be bet against by the fortune.[26] At this time the company's valuation was 10 million dollars. The controversy started beginning in 2019 when after increasing pressure from the investors, Adam Neumann decided to go public and file IPO (Initial public offering). On 29 April 2019, WeWork filed IPO confidentially, which further received backlash from various media reporters and analysts. According to media and analysts, the company mislead various investors by showing gross overvaluation and company is actually suffering from heavy losses.[27] This was done to oversize the investment in the start-up. Further, issues like sexual harassment, nepotism and related party transactions forced the company to withdraw from the IPO.

The situation of conflicts of interest could also be seen in the company internally. Softbank, one of the investors in the company, started raising question over the article of association and potential of Adam Neumann to serve as Chairman and CEO both. Also, one of the clauses in the Article of Association providing chairman for perpetuity raises concern over corporate governance. These all resulted in the resignation of Adam Neumann from the post of CEO.

25 Sheftell Jason, "WeWork gives alternative to working at home with swanky buildings across NYC" *New York Daily News,* July 22, 2011.

26 Andrew Nusca, "Three Unicorns to Bet On, Fortune" *Fortune*, Jan. 21, 2016.

27 Takenori Miyamoto and Wataru Suzuki, "WeWork's IPO filing reveals heavy losses in Asia" *Nikkei Asian Review*, Aug. 15, 2019.

Due to the lack of provisions concerning Chairman in Companies Act, a situation similar to WeWork is not difficult to come up in India. Consider someone who is director, CEO and Chairman for the life of a company like Adam Neumann. Firstly, a clause like Chairman for life in the article of association is against the idea of the three principles of corporate governance that are accountability, transparency and fairness.[28] This led to the concentration of power with Chairman which disrupts the board structure, is counterproductive and harms the company's corporate governance. Further, it goes against the legislative intent behind the Companies Act, 2013. Also, as Madras High Court once pointed out, 'the provisions of the Companies Act and the articles of the company do not contemplate the appointment of a permanent chairman.'[29]

Further, clauses like chairman for life means director for a lifetime because generally in most companies, the chairman has to be director firstly. Also, the chairman is appointed with the responsibility of setting up the agenda of the meeting and is the head of the meeting of the board of directors. This makes his removal as a director of the company difficult and thus violates Section 169 of Company Act 2013 i.e. Removal of Director. The apex court highlighted in *LIC of India v. Escorts Ltd*.[30] that, 'Shareholders cannot be restrained from calling an extraordinary general meeting for the removal of a director.'[31] It is very important to highlight the fact that the exception of Section 284 of Company Act, 1956 provided for the validity of the Chairman for life. However, the Company Act of 2013 has excluded such exception from Section 169, which is a replica of the previous section. This shows the clear intention of the legislature. Also, as held in *Cyrus Mistry v. TATA*[32], 'Likewise, an executive chairman will continue as long as he/she enjoys the pleasure of the Board. The Tribunal held that the concept of 'freehand rule' is an antithesis to collective responsibility and collective decision making.'

In *Tarlok Chand Khanna v Raj Kumar Kapoor,* [33] the Court noted that 'any restriction upon the power of removal of the director would be void. Moreover, even a permanent director in terms of the articles of association, who is not liable to retire by rotation, can be removed.' Through various judgment, it can be inferred that the rights given under Section 169 of Company Act are 'Statutory Rights' and if these rights are taken by any articles, memorandum or any form of contract or document, these will be held null and void.

28 *Shanti Prasad Jain* v. *Kalinga Tubes Ltd.,* AIR 1965 SC 1535.

29 *V. M. Rao and Ors.* v. *Rajeswari Ramakrishnan and Ors.,* (1987) 61 Comp Cas 20 (Mad).

30 AIR 1986 SC 1370.

31 *Chevalier I. I. Iyyappan* v. *Dharmodayan Co. Trichur,* AIR 1966 SC 1017.

32 *Cyrus Investments Pvt. Ltd. & Anr.* v. *TATA Sons Ltd. & Ors.,* 2016 CP No 82 (MB).

33 (1983) 54 Comp Cas 12 (Delhi).

While fear of removal is an important concern and for the proper functioning of the company. The contribution of Director in the company's progress and his participation in the board meetings are necessary, it is their duty as an administrator to act in a manner that it helps the company's interest.[34] Not only section 169 of Companies Act but also Section 166 (2) and 166 (3) of the Act seems to be violated as because of the clause, the rest of the directors are not able to discharge their duties provided in the section. Despite having various misadventures and conflict of interest situations, the directors are not able to remove the chairman because of such a clause.

4.3 Critical Analysis Of The Impact On Indian Corporate Structure If The Chairman Is Included In Key Managerial Personnel

The most viable solution to the problem is inducting the chairman in Section 2 (57) of the Companies Act under Key Managerial Personnel. Key Managerial Personnel are the important top-level executives of the company, who work under set framework and provisions mandated in Companies Act. These provisions restrict such executives to act arbitrarily. Chairman, along with the other key managerial personnel, perfectly fits in section 2(59) of the Act under the definition of 'Officer' because chairman plays a similar role as an officer, which is providing instructions and direction to the boards. The induction of Chairman in key managerial personnel will fulfil three major components of corporate governance: Transparency, Accountability and Standard framework. Each of them is discussed below in detail.

i. **Transparency.** The lack of transparency in the position of the Chairman has been the major criticism. On the other hand, the position of key managerial personnel can be considered transparent, which are further reflected from provisions in Company Act. One of the sub-sections in Section 170 of the Act which provides that, 'The key managerial personnel has to provide all their details regarding their securities in the company or any it's holding, subsidiary, and a subsidiary of company's holding company or associate companies.' Further, this is needed to be put on record in the distinct register as mentioned in Section 170 and rules made thereunder. The key managerial personnel are further prohibited to do any inside trading of securities or any information exclusive to the person.[35] The key managerial personnel has to be answerable to the board regarding all the dealings and information important for the company.

34 Knight, 'The Removal of Public Company Directors in Australia: Time For Change' 25 *Company and Securities Law Journal* 351-369 (2007).

35 Companies Act, 2013 (Act 18 of 2013).

ii. **Accountability.** Another essential element in corporate governance is accountability. The key managerial personnel has to disclose the nature of the transaction and all their interest in the deal by writing an explanatory note before the meeting.[36] Further, the key managerial personnel has to provide his interest and concern in the other company or any information about himself after being appointed in the company or resignation from his office within thirty days.[37] The key managerial personnel cannot join or provide services for any other company during his tenure in the company other than the company's subsidiary. [38]

iii. **Standard framework.** The post of chairman is generally misused owing to the lack of proper legislation. The ambiguity in the appointment and removal remains the prominent criticism of chairman. Although the procedure for the appointment and removal of the key managerial personnel [39] and Chairman are generally similar. Both are appointed through the board meeting. The role of the chairman has changed and they exercise considerable control over board decision therefore they should be inducted within the term 'Officer at default' in section 2(60) of the Act. That would make them more responsible for their actions. However, the court has held that the chairman cannot be liable until he held some dual responsibility.[40] Bringing them under Key managerial personnel would automatically include them in 'Officer at default'. Also, the term and conditions of the service are previously decided after approval by board resolution.[41] The vacancy of key managerial personnel cannot be left vacant for more than six months. Chairman now has become an important part of the company. The post cannot be left vacant for a longer time and has to be filled up.

5. CONCLUSION

The corporate world has been known for its profound and deep-rooted power tussle. There have been numerous situations where various corporate firms have witnessed conflicts within different executives of its substructure, intending to gain as much control and power as possible. This article meticulously brings forth such issues and their correlation with

36 Companies Act, 2013 (Act 18 of 2013).
37 Companies Act, 2013 (Act 18 of 2013).
38 Companies Act, 2013 (Act 18 of 2013).
39 Companies Act, 2013 (Act 18 of 2013).
40 *Shamanur Shivashankarappa* v. *India Sugars and Refineries Ltd.,* 2014 CRL P Nos 100576.
41 Companies Act, 2013 (Act 18 of 2013).

the inadequacy of law concerning chairman of a company. As it can be deduced through this article, Chairman and his relationship with the company is not just limited to being a shareholder or a director but extends to act as the guardian and protector of the company.

It can be concluded that the concentration of powers will disrupt board structures and is counterproductive and harms the company's corporate governance. These complications can be managed by the demarcation of the role of Chairman of the company from other Key Managerial Personnel which would further ensure better corporate governance and maintain the balance of power. As discussed earlier, there is a shift in the global corporate world promoting the separation of roles for various reasons. Also, the suggestions of the '*Uday Kotak Committee'* as well as the '*Corporate Governance Voluntary Guidelines'* along with the '*Securities and Exchange Board of India (SEBI) Guidelines'* in India has mandated the same as it will reinstate the balance of power in the corporate structure which is decreasing apparently.

On a study of the legal framework, it can be concluded that the major loophole concerning such issue is the inadequacy of law with respect to the Chairman of a company. In the absence of any provisions in the Companies Act, the role and functioning of the Chairman solely depends upon the articles of association which further leads to concentration of power and eventually discrepancy in the company's affairs. As discussed in the article, the position of Emeritus Chairman also disrupts the model of corporate governance. There have been numerous instances such as in the case of *Tata group* or *Raymond group* which shows that leading firms are insensitive towards these corporate governance norms and avoid complying with them. To avoid such a state of affairs, a comparative analysis has been done keeping in mind the scenario of *WeWork*. If a situation analogous to WeWork would have happened in India then it will violate various provisions such as section 169 and section 166 of the Companies Act, 2013.

Corporate governance is primarily to have transparency of operation, accountability towards shareholders and fairness in dealings, establishing the framework for reaching the company's goals and maintain the decorum in the company. The focus of corporate governance, in the majority of instances, has been to limit the struggle between the management and the shareholders of the company by trying to level the inherent imbalance between the two pillars of the corporate structure.

Thus, the Indian legislature should recognize the fact that one size fits all may not be best when complying with this particular facet of corporate governance. The solution urgently required is creating a statutory office of a dynamic Chairman under the Companies

Act, 2013 by giving him/her adequate and balanced powers not only for the company's progress but also to meet the guidelines of fair corporate governance. As it is quite rightly said-

'Governance and leadership are the yin and the yang of successful organizations. If you have leadership without governance you risk tyranny, fraud and personal fiefdoms. If you have governance without leadership you risk atrophy, bureaucracy and indifference.'