THE EVOLUTION OF CORPORATE LAW IN POST-COLONIAL INDIA: FROM TRANSPLANT TO AUTOCHTHONY

UMAKANTH VAROTTIL*

* Associate Professor, Faculty of Law, National University of Singapore. I thank (i) Rohit De, Arif Jamal, and Arun Thiruvengadam for helpful conversations on the subject matter of this paper, (ii) Priya Gupta, Anil Kalhan, and other participants at the Law and South Asia Studies section entitled "The Postcolonial Lives of Colonial Law in South Asia" at the 2015 Annual Meeting of the Association of American Law Schools in Washington, D.C. on January 3, 2015 for comments, and (iii) Shreya Prakash and Upamanyu Talukdar for research assistance. I acknowledge the financial support of the Centre for Asian Legal Studies, Faculty of Law, National University of Singapore. Errors or omissions remain mine alone.

I. INTRODUCTION

Contemporary scholarship in comparative corporate law places emphasis on the influence of "legal families" or "legal origins," in that the source of corporate law in any legal system plays a significant role in the evolution of such law and its relative success in protecting the interests of shareholders or other stakeholders. In doing so, contemporary scholarship divides legal systems into the common law family and the civil law family. One strand of this scholarship posits that if a jurisdiction provides better legal protection to investors (both in terms of the law and its enforcement), it will lead to capital markets, which are broader and better valued as compared to systems with lower protection.[1] A comparison of the common law system to various civil law systems concludes that common law provides better protection to equity finance than civil

1. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Legal Determinants of External Finance*, 42 J. FIN. 1131 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); and Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000) (attributing the scope of the capital market to the type of legal system used in a country and the level of legal protection for investors: common law countries have the strongest legal protections of investors, while civil law countries have the weakest protections).

law.[2] Although this theory has come under severe criticism,[3] the bifurcation of legal systems into common law and civil law and its influence in the evolution of corporate law has demonstrated persistence. Further work in this area has suggested that such a categorization cannot be viewed in absolute terms and must be subjected to nuanced analysis, as there could be considerable variation in corporate law in systems within each type of legal family.[4]

The diffusion of corporate law on the lines of legal families can be attributed to the phenomenon of "legal transplants," particularly during the colonial times in the eighteenth and nineteenth centuries where entire systems of law migrated from the empires to the

2. La Porta et. al., *Legal Determinants of External Finance*, *supra* note 1, at 1137; La Porta et. al., *Law and Finance*, *supra* note 1, at 1116 (finding that common law countries have a higher percentage average ratio of outsider held stock market to gross national product as compared to civil law countries, as well as a higher number of firms).

3. *See* John Armour & Priya Lele, *Law, Finance and Politics: The Case of India*, 43 LAW & SOC'Y REV. 491, 493-95 (2009) (finding that at the same time, various alternative theories have evolved to explain the differences between corporate law systems; these explore matters beyond the law, such as history, politics, interest groups and even anthropology and culture); *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) at xiii-xv [hereinafter Strong Managers]; MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003) [hereinafter Political Determinants]; Raghuram G. Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5, 5 (2003) [hereinafter *The Great Reverals*]; RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY (2004); Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001) (stating that financial reform through cross-cultural reform of corporate governance systems can help regulate self-dealing, insider trading, and disclosure).

4. Katharina Pistor et. al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 791 (2002); *see also* Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1813 (2009); Mathias M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55, 55 (2007) (finding that origin countries in both types of law families have substantially changed or adapted over time, specifically corporate finance provisions, while legal transplants have not changed as a result of the diffusion processes of the law).

colonies.[5] While legal scholarship has affirmed the concept of legal transplants considerably, it has also viewed this concept with caution.[6] Mere importation of a legal rule or a statutory code without proper adaptation to local conditions is susceptible to failure.[7] This is due to several social, political, and economic factors, that are present in the legal system of origin, but that may not be present in the host country or may be present with substantial variations, making the importation a fairly complex exercise.[8] While legal transplants have been ubiquitous, their efficacy and stickiness may vary across jurisdictions as experiences have differed. Despite an evolved scholarship in this field, it is hard to identify a coherent theory that explains the utility and impact of legal transplants.

Given the colonial linkages of legal transplants, one potential avenue to measure their efficacy and acceptability would be to explore the evolution of the transplanted law in the host country during the colonial period and following its decolonization.[9] It may

5. Spamann, *supra* note 4, at 1812-13; Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51. AM. J. COMP. L. 163, 165 (2003) (European states brought their laws and judicial structure during the period of colonization, causing a diffusion of legal models in this time period).

6. A seminal book represents the leading scholarship in the field. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993). *But see* Pierre Legrand, *The Impossibility of Legal Transplant*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 112 (1997) (quoting "change in the law is independent from social, historical, or cultural substratum" and therefore transplanted laws are isolated from society).

7. *See* K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 68-69 (1992) (legal structures are based off of historical, economic, and societal factors and laws must fit into those structures within a country in order to be successful).

8. *See* Berkowitz, Pistor & Richard, *supra* note 5, at 168 (observing that if the law was not adapted to local conditions or was imposed via colonization and the population was not familiar with the law, there would be a weak initial demand for using these laws. Countries receiving the law in this fashion are subject to the "transplant effect," meaning that their legal order would function less effectively than origins or transplants that either adapted the local law to local conditions and/or had a population familiar with the transplanted law).

9. Iza Hussin, *Circulations of Law: Colonial Precedents, Contemporary Questions*, 2 ONATI SOCIO-LEGAL SERIES 18, 22 (2012); J.N. Matson, *The Common Law Abroad: English and Indigenous Laws in the British Commonwealth*, 42 INT'L & COMP. L.Q. 753, 753 (1993) (using India as an example: incorporating British law led to numerous conflicts over authority, legality, and power, resulting in the incorporation of British laws to matters of economy and order only, leaving the issues of religion, culture, and private law to

be reasonable to hypothesize that if a law that has been transplanted into a host country during the colonial period does not fit with local conditions, then the post-colonial free state may start the process of radically departing from the transplanted law. Similarly, if the economic and social conditions alter significantly following the decolonization, one may expect changes to the law. It is only when there are legal and institutional similarities in the colonial and postcolonial period that inertia creeps in, resulting in continuity in the transplanted law.[10] It may also be the case that colonial continuities may arise from the insistence of the post-colonial state to rely upon the transplanted laws to advance its own interests, often at the cost of the rights and liberties of its citizens.[11]

In this theoretical backdrop, this article tests these phenomena by examining the evolution of corporate law[12] in India since its inception during the colonial period, through India's emergence as an independent state, and until the current period where it is growing to be one of the leading economies in the world.[13] The study of Indian corporate law is appealing on several counts that are intrinsic to the aforesaid analysis. India is uncontrovertibly a member of the "common law" family, given its colonial origins as part of the larger British Empire.[14] It offers an elegant platform for the study of legal

India itself).

10. *See e.g.*, Moiz Tundawala, *On India's Postcolonial Engagement With the Rule of Law*, 6 NUJS L. REV. 11 (2013)

11. Rohit De, *'Commodities Must Be Controlled': Economic Crimes and Market Discipline in India (1939-1955)*, 10 INT. J. LAW CONTEXT 277 (2014) (using Indian economic controls as an example, which were created as an emergency measure but were unpopular and criticized by various nationalists groups for negatively affecting the population by creating criminal offences for trivial actions); Anil Kalhan, et. al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93 (2006).

12. The use of the expression "corporate law" in this article merits some explanation. While it essentially refers to companies' legislation and regulation and judicial decisions relating to company law, it also includes securities laws and regulations that deal with investor protection and corporate governance when relevant.

13. *See e.g.*, Dominic Wilson & Roopa Purushothaman, *Global Economics Paper No. 99*, *Dreaming With BRICs: The Path to 2050* (Oct. 1 2003), http://www2.goldmansachs.com/ideas/brics/book/99-dreaming.pdf (showing that India will have the fastest growth rates by 2050, and additionally India's economy could be one of the largest in the world in merely thirty years).

14. M.C. SETALVAD, THE COMMON LAW IN INDIA 3-4 (1960); M.P. JAIN, OUTLINES OF INDIAN LEGAL & CONSTITUTIONAL HISTORY (6th ed.) 364-67 (2007);

transplants given that the inception of corporate law in India resulted from the replication of English company law.[15] Finally, given that India has existed as an independent state following decolonization for nearly seventy years now, it is an apt test case for determining whether company law in that jurisdiction continues to demonstrate strict adherence to its colonial origins or whether it has instead departed radically from the corporate law of its source country.

The evolution of corporate law in India can be traced back to the colonial era with several previous companies legislation modeling with parallel English legislation.[16] The influence of colonial laws continued even after decolonization in 1947 when the most significant piece of corporate legislation, the Companies Act, 1956, was modeled on the English Companies Act of 1948.[17] Although the Companies Act, 1956 was the result of a classic legal transplant, its evolution thereafter took on a different trajectory. Constant amendments to the Act were necessary due to legislative requirements that arose from local conditions and problems that were unique to the Indian corporate setting.[18] Moreover, Indian courts also refused to accept English judgments without adjusting and adapting the legal principles to suit the conditions of Indian society.[19]

The divergence between Indian corporate law and its English counterpart became clearer with India's economic liberalization in 1991. With the expansion of foreign investment and the development of India's capital markets, the focus of corporate law extended

V.D. KULSHRESHTHA, LANDMARKS IN INDIAN LEGAL HISTORY AND CONSTITUTIONAL HISTORY ch. XIII (1972); PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 127-29 (2d ed. 1995).

15. *See infra* Section II (discussing examples of such transplant).

16. Shraddha Verma & Sid J. Gray, *Development of Company Law in India: The Case of the Companies Act 1956* (2006), http://eprints.whiterose.ac.uk/2580/.

17. Robert C. Rosen, *The Myth of Self-Regulation or The Dangers of Securities Regulation Without Administration: The Indian Experience* 2 J. COMP. CORP. L. & SEC. REG. 261, 262 (1979) [hereinafter *The Myth of Self-Regulation*] (noting that although the Indian Companies Act of 1956 was modeled after the United Kingdom's Companies Act of 1948, many differences are evident).

18. Verma & Gray, *supra* note 16.

19. Laguna Holdings v. Eden Park Hotels, (2013) 176 Comp. Cas. 118 (Del.) (noting that in Hind Overseas, the court selected out principles given by English Courts and found that some provisions must be read together in order to ensure a just and equitable order, an example being that a court can refuse to order a "winding up" if another remedy is available).

beyond the Companies Act, 1956 and into securities laws pertaining to/or promulgated by the securities regulator, the Securities and Exchange Board of India.[20] In this phase, while some influence of English laws did subsist, the Indian Parliament and regulators began to either look to other jurisdictions such as the United States (U.S.) to draw inspiration for legal reforms or they indulged in soul-searching to mold customized solutions to India's unique problems.

The transition from legal transplant to autochthony[21] culminated in the recent enactment of the Companies Act, 2013 and its enforcement in parts to replace the Companies Act, 1956. The 2013 legislation is not only the result of nearly two decades of debates and discussions, but also a reaction to corporate law and governance problems that have plagued India more recently.[22] The transition away from English company law is nearly complete as the reforms are almost entirely tailored to suit local needs.

This article argues that while Indian corporate law began as a legal transplant from England, it has been progressively decoupled from its source with subsequent amendments and reforms focusing on either finding solutions to local problems or borrowing from other jurisdictions such as the United States. To that extent, decolonization has had a significant effect of radically altering the course of Indian corporate law. Although the shift was not evident in the period immediately following decolonization, it began to take shape about a decade thereafter. Current Indian corporate law not only represents a significant departure from its colonial origins, but the divergence between Indian law and English law as they have developed since independence has been increasing. In that sense, decolonization can be metaphorically signified as a "fork in the road" when the Indian

20. Verma & Gray, *supra* note 16 (finding that in addition to the Companies Act, 1956, India also implemented the Capital Issues (Control) Act of 1947 to control securities and the Securities Contracts (Regulation) Act of 1956 to regulate stock exchange and securities trading, along with numerous other legislation to regulate securities).

21. *See* Goh Yihan, *Tort Law in the Face of Land Scarcity in Singapore*, 26 ARIZ. J. INT'L & COMP. L. 335, 353 (2009); Linda Bosniak, *Soil and Citizenship*, 82 FORDHAM L. REV. 2069, 2074 (2014) (generally associating autochthony with something indigenous or "born from the soil" and contrasting autochthony with the connotation of a transplant).

22. *See infra* Section IIE.

Parliament, after initial hesitation, sought to move away from the colonial origins and develop the law in a trajectory that is substantially different from the developments in the United Kingdom (U.K.). While the Indian lawmaking process indulged in close cross-referencing of English legal provisions during the colonial period and immediately thereafter, the more contemporary legislative reforms pay scant regard to corporate law in the origin country that initially shaped Indian corporate law.

The evolution of corporate law in post-colonial India offers valuable lessons. First, even though India is considered to be part of the "common law" family, corporate law in India has evolved somewhat differently from the origin country, England. In that sense, it casts significant doubt on the assumption that all countries within a legal family bear similarities. On the contrary, each host country may follow a different trajectory for corporate law than what the origin country follows. This necessitates a more involved understanding of corporate law in the legal families. Second, the evolution of corporate law in post-colonial India supports the proposition that handling legal transplants can be challenging unless the local conditions in the host country are similar to that in the origin country. Variations in economic, social, political and cultural factors may bring about dissonance in the operation of a transplanted legal system. Third, a comparison of the historical colonial experience in the functioning of the transplanted legal system and the more contemporary experience in the post-colonial period indicates fragility in the foundations of the transplant. This article seeks to demonstrate that the radical shift in the trajectory of corporate law in the post-colonial period suggests that the transplant of English corporate law in colonial India was perhaps not consistent with the desires of the local populace, thereby indicating problems of reception.

While there exists a burgeoning body of scholarship in the field of post-colonial theory specifically referenced to India,[23] the focus on

23. *See generally* Kalhan et. al, *supra* note 11; De, *supra* note 11; *Tundawala*, *supra* note 10; Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 LAW & HIS. REV. 631 (2005); Marc Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, 14 COMP. STUD. SOC'Y & HIST. 53 (1972); Rina Verma Williams, Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State 2-4 (2006).

corporate and commercial laws is scanty despite the prominence of these laws in the contemporary period. This article attempts to fill this gap. The article also intended to supplement the growing body of research that seeks to determine the influence of colonial corporate laws in the post-colonial era, both in former colonies of the British Empire[24] as well as other jurisdictions.[25] The historical and comparative analysis herein might provide a better understanding of contemporary corporate law in India.[26]

Section II contains a detailed historical discussion of the evolution of Indian corporate law from the colonial period to its current position. This will identify trends that can be gleaned from the impact that decolonization had on shaping corporate law in India. Section III analyzes the changes that Indian corporate law experienced in the post-colonial period across several key aspects such as corporate personality and structure, corporate finance and capital structuring, and corporate governance and the corporate law enforcement machinery. This analysis also demonstrates the increasing divergence between English and Indian corporate law over time. Section IV concludes by correlating these findings with

24. ROB MCQUEEN, A SOCIAL HISTORY OF COMPANY LAW: GREAT BRITAIN AND THE AUSTRALIAN COLONIES 1854-1920 8-9 (2009); Rob McQueen, *Company Law as Imperialism*, 5 AUST. J. CORP. L. 46 (1995) [hereinafter *Company Law as Imperialism]*; Phillip Lipton, *A History of Company Law in Colonial Australia: Economic Development and Legal Evolution*, 31 MELB. UNIV. L. REV. 805, 805 (2007); L.C.B. Gower, *Company Law Reform*, 4 MAL. L. REV. 36, 36 (1962); Walter Woon, *Regionalization of Corporate and Securities Law: The Singapore and Malaysia Experience*, 5 AUST. J. CORP. L. 356 (1995); Petra Mahy & Ian Ramsay, *Legal Transplants and Adaptation in a Colonial Setting: Company Law in British Malaya*, 2014 SING. J.L.S. 123 (2014); Ron Harris & Michael Crystal, *Some Reflections on Transplantation of British Company Law in Post-Ottoman Palestine*, 10 THEORETICAL INQUIRIES L. 561, 561 (2009). *See* Christopher Chen, *Measuring the Transplantation of English Commercial Law in a Small Jurisdiction: An Empirical Study of Singapore's Insurance Judgments Between 1965 and 2012*, 49 TEX. INT'L L.J. 469 (2014) (detailing examples of colonies in Australia, Afro-Asian countries, British Malaya, Palestine, and Singapore).

25. Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 377 (2013); Mariana Pargendler, *Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil*, 60 AM. J. COMP. L. 805, 805 (2012); Pistor, et. al. *supra* note 4; Spamann, *supra* note 4 (referencing Indonesia, Brazil, Chile, Colombia, Israel, Japan, Malaysia, Spain, and France as examples).

26. *See* JOHN W. HEAD, GREAT LEGAL TRADITIONS 22 (2011) (referring in similar vein to comparative law as a "reflective exercise").

existing theoretical debates across different planes including comparative corporate law and post-colonial theory.

II. HISTORICAL EVOLUTION OF CORPORATE LAW IN INDIA

A discussion of the historical trends in corporate law beginning with the colonial period through India's independence and during the post-colonial era will illuminate our understanding of the trajectory adopted. A longitudinal study will help tease out the extent of colonial law's influence during the post-colonial period. This analysis, while primarily dealing with developments in the legal sphere, also takes into account the economic and social circumstances prevailing at the relevant time.

In this section, greater emphasis is placed on analyzing the legislative developments pertaining to corporate law in India, and to a lesser extent on case law. Particularly during the colonial period, the diffusion of English law to the colonies occurred through legislation.[27] The interpretation of transplanted legislation and its parallels with English legislation gives rise to the relevance of English case law.[28]

A. CORPORATE LAW DURING THE COLONIAL ERA (1850-1947)

Business organizations are not recent phenomena in India. They existed in some form or the other in ancient India. Although they were essentially guilds or groups of businesspersons or artisans engaged in a similar activity, they displayed some of the features of a modern corporation, at least in a rudimentary form.[29] However, these business forms faded out during the series of invasions and other disturbances that preceded the advent of European traders in India at the end of the fifteenth century.[30]

27. B.H. MCPHERSON, THE RECEPTION OF ENGLISH LAW ABROAD 256, 258 (2007).

28. *Id.* at 363.

29. Vikramaditya Khanna, The Economic History of the Corporate Form in Ancient India, 1 (2005) (unpublished working paper), http://www.law.yale.edu/documents/pdf/cbl/Khanna_Ancient_India_informal.pdf (stating that one study of the corporate form referred to as *Sreni* suggests it was prevalent in India "from at least 800 B.C., and perhaps even earlier. . .").

30. *Id.* at 1; RADHE SHYAM RUNGTA, THE RISE OF BUSINESS CORPORATIONS IN

The emergence of the modern business corporation in India can be attributed to the establishment of the English East India Company ("EIC") in 1600, which was granted a royal charter that effectively created a monopoly to trade in India.[31] Since then, other English companies received similar privileges and commenced activities in India.[32] It appears that for nearly two-and-a-half centuries, companies were established and carried on business in India without the existence of a specific body of law regulating companies. The establishment of companies in India, particularly banking companies, was nearly impossible given the "relentless opposition" of the EIC towards granting any charters for companies in India.[33]

1. Developments in the Nineteenth Century

Specific company legislation made a debut only in the year 1850 when India passed the Act for Registration of Joint Stock Companies.[34] India passed this legislation along the lines of England's Companies Act, 1844, which marked the beginning of an era when legislative developments in the corporate field in India merely kept up with developments in England.[35] In other words, Indian corporate law functioned as a continuum of transplants from English law, and this phenomenon continued for a period of over a century. The oddity about the Act of 1850 was that registration was only optional as it conferred certain privileges.[36] Limited liability was not one such privilege, which is unsurprising given that the

INDIA 1851-1900 1 (1970) (showing that Indian business people used the corporate form, from around 800 B.C. until the Islamic invasions around 1000 A.D.).

31. RON HARRIS, THE ENGLISH EAST INDIA COMPANY AND THE HISTORY OF COMPANY LAW 219 (2005) (stating that direct authorization by the Crown was the only method of incorporation).

32. Rosen, *supra* note 17 (referencing the European sterling companies, which had a wide berth of powers due to distance and lack of efficient communication).

33. RUNGTA, *supra* note 30, at 36.

34. C.R. DATTA, DATTA ON THE COMPANY LAW 29 (2008); Government of India, *Report of the Company Law Committee* 16 (1952) [hereinafter Bhabha Committee Report]. *See also* S.M. Shah, SM Shah's Company Law Lectures (1990).

35. P.M. Vasudev, Capital Stock, Its Shares & Their Holdings – A Comparison of India and Delaware at 17 (2007) (unpublished conference paper), http://ssrn.com/abstract=913282 (noting that the Joint Stock Companies Act provided for the application of capital and provided automatic incorporation instead of relying on charters).

36. RUNGTA, *supra* note 30, at 41.

concept had not yet made inroads in England either. Although the Act of 1850 signified an important milestone in Indian corporate law history as the maiden legislation in the field because it enacted key legislative provisions for the management of joint stock companies for the first time,[37] it was rather ineffective given its optionality and the lack of protection for shareholders through limited liability.[38]

Limited liability was first introduced in England by way of the Joint Stock Companies Act, 1856,[39] although this protection was not available to banks and insurance companies.[40] This legislation underwent amendment in 1857.[41] In the same year, India enacted legislation conferring limited liability protection to companies other than banking and insurance companies.[42] Thereafter, following the English legislation of 1858, the Act of 1860 extended the privilege of limited liability to banking companies in India, although the Act did not extend that same privilege to insurance companies.[43]

The pattern of mimicking English legislation continued even shortly thereafter. Following the enactment of the Companies Act of 1862 in England, India passed a new legislation in 1866 for consolidating and amending the "laws relating to incorporation, regulation and winding up of Trading Companies and other Associations"[44] This legislation also made the benefit of limited liability available to insurance companies.[45] This consolidation exercise was meant to keep pace with the English Act.[46] Yet India undertook another consolidation effort through the Companies Act of 1882 by incorporating the amendments in the English legislation from the early 1860s so as to make them applicable in the Indian context.[47]

37. Bhabha Committee Report, *supra* note 34, at 16 (stating that the Act of 1850 was the nucleus around which subsequent Companies Acts developed, although strictly speaking they were all enacted on the lines of the English Companies Acts).
38. *Id.* at 45.
39. DATTA, *supra* note 34, at 28.
40. *Id.* at 68. *See also* Vasudev, *supra* note 35, at 17.
41. DATTA, *supra* note 34, at 28.
42. RUNGTA, *supra* note 30, at 64.
43. *Id.* at 70.
44. *Id.* at 212.
45. *Id.*
46. DATTA, *supra* note 34, at 29.
47. RUNGTA, *supra* note 30, at 212; RITU BIRLA, STAGES OF CAPITAL: LAW,

2. Developments in the Twentieth Century

Following the Companies Act of 1882, India made five different sets of amendments up to the first decade of the twentieth century. Then, following the English Companies (Consolidation) Act, 1908, India enacted a new legislation in the form of the Companies Act, 1913.[48] This was, like previous acts, "a close reproduction of the English Act §§ in its comparable provisions," although "in certain particulars, the Indian Act differed from the English Act."[49] Subsequently, following the enactment of the English Companies Act of 1929, Indian law made significant amendments through the Companies (Amendment) Act, 1936. A unique aspect of this legislative effort is that the Indian legislature decided to embark upon an amendment process rather than a reenactment similar to 1929 English legislation, indicating for the first time a hesitation in a wholesale transplant. The Statement of Objects and reasons of the 1936 amendments suggests that India decided not to adopt the wholesale English legislation due to some unfavorable criticism it attracted and also because of India's recognition of dealing with problems peculiar to India, especially those relating to the managing agency system.[50] This trend began emanating from the judiciary as well. Although it was common during the colonial period for courts to refer to English decisions,[51] they began recognizing the fact that "where there is a positive enactment of the Indian legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any considerations derived from the previous state of the law – or of the English law upon which it may have been founded."[52]

Since 1936 until Indian independence, the Indian Companies Act, 1913 underwent several further amendments principally to address certain defects in the legislation and to account for constitutional

CULTURE, AND MARKET GOVERNANCE IN LATE COLONIAL INDIA 40 (2009) [hereinafter BIRLA, STAGES OF CAPITAL].

48. Bhabha Committee Report, *supra* note 34, at 17.

49. *Id.*

50. *Id.* at 18.

51. GURU PRASANNA SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 225 (1999).

52. *Ramanandi Kuer v. Kalawati Kuer*, (1928) 30 Bom. L.R. 227 § 9 (1927) (India).

developments such as the enactment of the Government of India Act, 1935. This position ensued until India's independence, which necessitated a further round of reforms.[53]

The following table tracks the chronology of legislative developments in England and India, which clearly demonstrates that the Indian legislature was simply following the lead from English law through an ongoing transplantation process.

Table 1: Key Legislative Developments in Corporate Law in England and India[54]

England	India
Companies Act, 1844	Act for Registration of Joint Stock Companies, 1850
Limited Liability Act, 1855 Joint Stock Companies Act, 1856	Companies Act, 1857 Companies Act, 1860
Companies Act, 1862	Companies Act, 1866
Amendments to the Companies Act, 1862	Companies Act, 1882
Companies (Consolidation) Act, 1908	Companies Act, 1913
Companies Act, 1929	Companies (Amendment) Act, 1936

3. The Impact of Corporate Lawmaking in the Colonial Era

A chronological analysis of legislative developments by itself is unsatisfactory because it does not reveal the motives for introducing the legislation (primarily through continual legal transplants) and the

53. *See infra* Section IIB2 (referencing the Bhabha Committee Report, which was drafted by an Indian Government appointed committee).

54. *See also* Mahy & Ramsay, *supra* note 24, at 128-29 (discussing the development of company law, based on English law, in the Straits Settlements and the Federated Malay States and its diffusion through India).

prevailing context in India accounting for the economic and social factors.[55] This sub-section incorporates these factors and analyzes the impact that corporate legislation had on Indian businesses in the colonial period and the motives behind the introduction of such legislation.[56] Two trends are quite evident in the colonial period. First, the purpose of transplanting English corporate law into India was to serve British business interests, rather than to modernize Indian corporate law more generally. Second, transplanted English company law in India operated as an instrument of market regulation, as a sort of "colonial *laissez faire*."[57]

The motive behind transplanting English company law into India was to facilitate better trade between England and India, which could be accomplished if there was symmetry in the corporate legislation between the two countries.[58] In other words, the British thought their businesses' familiarity with Indian corporate law would minimize their risk in trading with that colony.[59] The Statement of Objects and Reasons of the Joint Stock Companies Act, 1856[60] and the Companies Act, 1882 clearly showed motivation for having law in England and India be the same.[61] Rungta was unequivocal in his analysis:

> If there is any underlying theme running through the company legislation of a full half century in India, with the Act of 1850 somewhat excepted, it is a steadfast adherence to the policy that what was good for Britain must also be good for India. It was not that the legislators responsible for these Acts were not able men, some of them were well qualified and experienced in company affairs in India . . . . What they seemed to lack

55. MCQUEEN, *supra* note 24, at 7 (noting that many of the features of modern company law are based on certain objectives and techniques which are created by political forces; therefore, when the political forces are removed, the modern companies trend toward failing in operation).

56. RUNGTA, *supra* note 30; BIRLA, STAGES OF CAPITAL, *supra* note 47. *See also* Ritu Birla, *Capitalist Subjects in Transition*, From the Colonial to the Postcolonial: India and Pakistan in Transition (Dipesh Chakrabarta et al. eds., 2007) [hereinafter Birla, *Capitalist Subjects*]; MCQUEEN, *supra* note 24, at 279; Mahy & Ramsay, *supra* note 24.

57. Birla, *Capitalist Subjects*, *supra* note 56, at 243.

58. RUNGTA, *supra* note 30, at 68; MCQUEEN, *supra* note 24, at 10.

59. RUNGTA, *supra* note 30, at 68.

60. *Id.*

61. BIRLA, STAGES OF CAPITAL, *supra* note 47, at 40.

> the most was the will, rather than the wisdom, to change.[62]

The impact of transplanting English law into India to favor British businesses was consequential because it often ran counter to local business interests.[63] The transplant of English law into India paid scant regard to the needs of local business forms such as the Hindu Undivided Family (HUF) and other kinship based indigenous business structures.[64] For example, it was unclear whether the Companies Act, 1882 operated to ensnare these local business forms when it required all "partnerships" that carried on trading with more than twenty persons to register as a company.[65] In that sense, not only did the transplanted corporate legislation in India fail to account for the needs of vernacular business forms, but it also acted counter to their interests often.

Since the transplanted law was intended to benefit British traders and free business "from the binds of tradition and ancient customary codes,"[66] it adopted a largely free-market ideology. This was consistent with developments within England at the time.[67] During the colonial period, law was used as an instrument to facilitate trade. As Birla notes:

> I would like to reconsider the performance of colonial sovereignty, this time as a staging of market actors and as an implementation of a certain kind of colonial laissez-faire, manifest in legal frameworks standardizing the 'free circulation' of credit and commodities, most especially in the institutionalization of the law of contract as operative mode for market exchange.[68]

In sum, the need to facilitate British businesses to trade with India motivated the continuous transplantation of English law into India, beginning in 1850 and ongoing until decolonization, where it

62. RUNGTA, *supra* note 30, at 214 (whose observations that pertain to the second half of the nineteenth century largely hold good for the remainder of the colonial period spanning the first half of the twentieth century).

63. MCQUEEN, *supra* note 24, at 10 (extrapolating Rungta's conclusions).

64. BIRLA, STAGES OF CAPITAL, *supra* note 47, at 51-52 (referring to the local forms as "vernacular" commercial organizations).

65. *Id.* at 51.

66. *Id.* at 5.

67. *Id.* at 35.

68. Birla, *Capitalist Subjects*, *supra* note 56, at 243.

adopted a free-market approach. The adverse effect impacted local business forms in one way or the other.

Yet, the colonial period in India witnessed the emergence of a rather unique form of management technique involving the use of managing agents to manage companies. Despite the close cross-referencing of Indian developments (both in the business and legislative spheres) with England, the evolution of the managing agency in India bears little connection to England and emerged from specific local requirements.[69] Any historical account of corporate law in India would be incomplete without an analysis of the concept of managing agency, which also garnered significant attention of legislators during the initial years of the postcolonial period.

4. Evolution of the Managing Agency System

In nineteenth century India, the somewhat unique managing agency system emerged due to the necessities of "[h]istory, geography and economics."[70] As previously seen, Indian business history is replete with informal business structures based on family relations and kinship.[71] However, where businesspersons who did not have familial or kinship ties came together to contribute capital to a new idea and where only a few of them had the capabilities and interest in commercializing the idea through managing the operations, it became necessary to place the management of the business in the hands of capable and willing businesspersons.[72] The passive investors had neither the time nor the intention to participate in the day-to-day management of the business. Hence, a system evolved whereby some of the investors would take responsibility for the management of the business. A process that began informally due to the trust capital and reputation available with those managing the business eventually took on a more formal structure.[73] Managing agencies were created in the form of partnerships or small corporations, which then entered into management contracts with

69. Rosen, *supra* note 17, at 262 .
70. RUNGTA, *supra* note 30, at 220.
71. *See supra* note 63-65 and accompanying text.
72. RUNGTA, *supra* note 30, at 227; TIRTHANKAR ROY, COMPANY OF KINSMEN: ENTERPRISE AND COMMUNITY IN SOUTH ASIAN HISTORY 1700-1940 at 121 (2010).
73. *Id.*

businesses to manage them.[74]

Managing agencies soon became a dominant force in the colonial Indian corporate sphere. They began exercising control over several industries such as cotton, jute, and tea, particularly in the Eastern part of the country.[75] British firms, rather than domestic firms, dominated the managing agency system.[76] The British firms' strong presence in Indian business also made them a dominant member of the colonial community.[77]

Although the managing agency system arose out of necessity and was inherently intended to induce efficiency, its functioning soon became mired in a great deal of controversy. It gave rise to the possibility of grave abuse.[78] The managing agents began to enrich themselves at the cost of passive investors,[79] who were unable to monitor the managing agents due to the problem of information asymmetry. The managing agents who already enjoyed enormous autonomy in their functioning were further buttressed through the passivity of investors and their grant of proxies.[80] In all, managing agencies had limited financial investment in businesses, but obtained a disproportionately high amount of control over businesses, which not only made them powerful actors in the economy but they also

74. Rosen, *supra* note 17, at 263 (companies having managing agents tended to coordinate with each other, resulting in lower administrative costs and expanding the reach of their products).

75. RUNGTA, *supra* note 30, at 227; Omkar Goswami, *Sahibs, Babus, and Banias: Changes in Industrial Control In Eastern India, 1918-50*, 48 THE JOURNAL OF ASIAN STUDIES 289, 289 (1989) (stating that European companies had influence, power, and prestige in the Indian industry).

76. MARIA MISRA, BUSINESS, RACE, AND POLITICS IN BRITISH INDIA, C. 1850-1960 4 (1999) (noting "Most British private direct investment in India in the colonial period was represented by the managing agencies, and by 1914 they controlled capital of over £ 200 million in India."); *See also* Goswami, *supra* note 75, at 292 (commenting that the British mercantile presence in eastern India on the eve of World War I was truly staggering. Of 849 tea plantations, 729 (86%) were managed by Britons); RUNGTA, *supra* note 30, at 227 (finding ". . . the number of European firms holding managing agencies was larger than the number of Indian firms.").

77. MISRA, *supra* note 76, at 4.

78. Rosen, *supra* note 17, at 264 (abusing the system was inherent despite its ability to aid in the development of India's economy).

79. ROY, *supra* note 72, at 122.

80. MISRA, *supra* note 76, at 6-7; Goswami, *supra* note 75, at 294.

became susceptible to abusing their powers.[81] That leads to the question as to what role the law played in regulating their conduct during the colonial period.

In the initial years of the managing agency system's operation, no legislative or regulatory fiat directly obstructed its way. This illustrates the inefficiencies of transplanted legislation when it does not consider the prevailing local circumstances. Since the abuse of the managing agency system was predominantly a local Indian problem and did not capture the attention of lawmakers in England, the transplanted law paid short shrift to those problems and did not offer any protection to shareholders of companies that were subjected to mismanagement under the managing agency system. It is also possible that due to the predominance of British firms as managing agents, the necessary political will was absent in India to rein them in.[82] It was only at the very end of the colonial era that the managing agency system received legislative recognition. The Companies (Amendment) Act, 1936, which was the first legislation to make at least some departure from English corporate law,[83] recognized the abuses of the managing agency system and introduced some checks and balances by limiting the duration of the managing agency contract and permitted the removal of the managing agent for cause.[84]

The managing agency system is characteristic of the legislative phenomenon that occurred in colonial India where legal transplants failed to take into account local social and economic circumstances through legislative instruments. The motive of transplants, which indirectly preferred British interests over local interests, exacerbated the failure to account for local and social circumstances. This phenomenon continued for nearly a century until some signs of change began emanating in 1936.

81. *See infra* Section IIIC1 (viewing the emanating problems of the managing agency system from the lens of corporate law and governance).

82. MISRA, *supra* note 76, at 7-8 (demonstrating that aspects of race and politics may have had an influential role to play in the persistence of the managing agency system that was untouched by regulation despite strong criticism by shareholders who were predominantly Indian businesspersons).

83. *See also supra* notes 49-50 and accompanying text.

84. Rosen, *supra* note 17, at 264 (allowing agents to be limited to 20 years and removed for fraud, insolvency, or breach of trust).

After exploring the phenomenon of transplants during the colonial period, it is now necessary to examine the implication of decolonization that occurred through India's independence from the British in 1947.

B. THE EFFECT OF DECOLONIZATION ON INDIAN CORPORATE LAW (1947-1960)

This sub-section considers whether India's independence had any significant effect on the evolution of its corporate law. It is important to examine the developments around the first decade following independence, i.e. until the late 1950s. Any discussion of corporate law during this period must necessarily be set in the context of India's economic policies and political imperatives that held sway at the time. Despite a radical shift in economic policies of the Indian Government immediately following independence, there was no significant change in the legislative process for corporate law as the preexisting phenomenon of legal transplant from England to India continued unabated.

1. Economic Policy Shift Following Independence

Although the Indian Government obtained the freedom to determine its own economic policies after decolonization, it also inherited an economy that was riddled with poverty, low levels of life expectancy, and high rates of illiteracy.[85] Economic policymaking became a challenging exercise given widespread distrust for a wholly capitalistic order following centuries of colonial dispensation using *laissez faire* policies, which were believed to have impoverished Indian businesses and the local economy.[86] Even the preeminent policy makers of free India were divided regarding which appropriate economic policies to adopt. Jawaharlal Nehru, the eventual first Prime Minister of India, advocated the model of "Fabian socialism" which embraced principles of "state ownership, regulation, and control over key sectors of the economy in order to

85. Nirmalya Kumar, *India Unleashed*, 20 BUSINESS STRATEGY REVIEW 4, 7 (2006) (inheriting one of the world's poorest economies, suffering low life expectancies, and a highly illiterate population were all issues facing India when colonial rule ended).

86. DWIJENDRA TRIPATHI & JYOTI JUMANI, THE OXFORD HISTORY OF INDIAN BUSINESS 19 (2007).

improve productivity and at the same time curb economic concentration."[87] Certain members of Nehru's Congress party adopted a different view, such as Vallabhbhai Patel, India's eventual Home Minister, who argued for pursuing "liberal economic policies and incentives to private investment that were justified in terms of the sole criterion of achieving maximum increases in production."[88] The tensions arising from obvious opposing economic policies ran through the initial years of Indian independence.

Given this background, the Indian government effectively pursued the policy for a "mixed economy," a fact that became evident with the first Industrial Policy Resolution of 1948.[89] While people recognized the importance of private capital, and several Indian business groups continued to thrive during this era,[90] the bulk of the focus during this period was the direct participation of the state in the process of industrialization. Certain capital-intensive industries were reserved for the government.[91] It was found that "these measures brought about a sea change in the nation's business environment."[92] Moreover, "[i]ndependent India did not abandon the free enterprise system altogether, but what these policies together sought to introduce was a system very different from the one that had operated under colonialism."[93]

Even though the stated policy did not display any aversion towards private capital and entrepreneurialism, certain legislative measures introduced that effect. Principal among them was the enactment of the Industries (Development and Regulation) Act, 1952, under which

87. FRANCINE R. FRANKEL, INDIA'S POLITICAL ECONOMY 1947-2004: A GRADUAL REVOLUTION __ (2005). *See also* B.R. TOMLINSON , THE ECONOMY OF MODERN INDIA, 1860-1970 168 (1993); TRIPATHI & JUMANI, *supra* note 86, at 20.

88. FRANKEL, *supra* note 87, at 71. *See also* TOMLINSON, *supra* note 87, at 168

89. TOMLINSON, *supra* note 87, at 169; TRIPATHI & JUMANI, *supra* note 86, at 20.

90. TRIPATHI & JUMANI, *supra* note 86.

91. TIRTHANKAR ROY, THE ECONOMIC HISTORY OF INDIA: 1857-1947 294 (2011); Anne O. Krueger & Sajjid Chinoy, *The Indian Economy in Global Context*, in ANNE O. KRUEGER & SAJJID CHINOY, ECONOMIC POLICY REFORMS AND THE INDIAN ECONOMY (2002), at 5 (noting these industries were considered the "commanding heights of the economy"); J. Bradford DeLong, *India Since Independence: An Analytic Growth Narrative*, in DANI RODRIK, ED., IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES OF ECONOMIC GROWTH, at 15.

92. TRIPATHI & JUMANI, *supra* note 86, at 23.

93. *Id.*

industrial units, including private ones, were required to obtain licences from the Government before they were established and operated.[94] Licences were required even for expansion of capacity.[95] Relatedly, a wide network of legislation enacted in the years immediately following India's independence introduced "an extensive system of quantitative controls over capital issues, industrial licensing, foreign exchange rationing, imports and exports and the prices and movement of foodgrains."[96] Under this dispensation, government's authority over private businesses was all-pervasive given that entrepreneurs had to obtain licences for almost every activity they executed. This gave rise to "widespread rent-seeking"[97] resulting in the prevalence of the "licence Raj" that dominated the Indian business sphere for decades to come.[98]

In this economic and political context, it is necessary to analyze the first legislative exercise in corporate law in post-colonial India, the enactment of the Companies Act, 1956, which also turned out to be the most enduring piece of corporate legislation in India.

2. The First Companies' Legislation in Post-Colonial India

In view of the economic and political tensions discussed in the previous sub-section, it would be reasonable to assume that the Companies Act, 1956 would mark a significant departure from corporate law in the colonial era. The economic compulsions of the socialist approach of India's first democratically elected government ought to have driven corporate law in a different direction. Surprisingly, though, that was not the case. Post-colonial corporate

94. Omkar Goswami, *Corporate Governance in India*, *in* TAKING ACTION AGAINST CORRUPTION IN ASIA AND THE PACIFIC 87 (2002) [hereinafter Goswami, *Corporate Governance*] (creating the first barrier against corporate interests, despite the fact that India had a growing corporate sector and a government that was equipped as any former British colony to practice good corporate governance and maximize long-term corporate interest).

95. TRIPATHI & JUMANI, *supra* note 86, at 22.

96. TOMLINSON, *supra* note 87, at 171-72. These legislative packages comprised among others the Essential Commodities Act, 1955, the Essential Supplies (Temporary Powers) Act, 1946, and the Capital Issues Control Act, 1947.

97. Goswami, *Corporate Governance*, *supra* note 94, at 87 (licensing regime led to rent-seeking as entrepreneurial families and groups from old industries like textiles, coal, iron, steel, and jute began to create monopolies in newer industries like aluminum, paper, cement, and engineering).

98. TOMLINSON, *supra* note 87, at 171.

lawmaking followed exactly the same path adopted over and over again during the colonial period, which was to indulge in yet another exercise of legal transplant from England, thereby smacking of colonial continuity. However, the transplant effort this time was not a mechanical exercise, but rather well contemplated.

The inspiration for a new companies' legislation in post-colonial India arose from the appointment of the Company Law Amendment Committee in England (known as the Cohen Committee), which suggested far-reaching changes to the then applicable English company law,[99] whose recommendations resulted in the enactment of the English Companies Act of 1948. After some initial law reform efforts, the Indian Government appointed a committee under the chairmanship of C.H. Bhabha, which undertook an extensive exercise (including interviewing experts across the country) and submitted its 477-page report to the Government in March 1952.[100] The Government accepted most of the recommendations of the Bhabha Committee thereby enacting the Companies Act, 1956.

Both the Bhabha Committee Report as well as the Companies Act, 1956 are striking in many ways. Despite the momentous shift in India's destiny through decolonization, the reliance on English law as the model for Indian corporate law was unaffected. The tenor of the Bhabha Committee Report is such that on every aspect of the law, it largely referred to the developments in English company law and considered whether that would be relevant to the Indian context or not. There was no intention whatsoever to frame an indigenous legislation that is apt to India's changed circumstances given the enormous shift in its economic policies. In order to obtain a better sense of the extent of reliance on English law, a review of the Bhabha Committee Report indicates approximately 148 references to the English Companies Act of 1948, adopting with approval 64 of its provisions, and modifying or rejecting only 21 provisions.[101] The

99. *Report of the Committee on Company Law Amendment (Cohen Committee Report 1945)*, http://www.takeovers.gov.au/content/resources/other_resources/cohen_committee.aspx (making suggestions of both major importance and minor ones, including those dealing with drafting).

100. Bhabha Committee Report, *supra* note 34 (explaining the clauses and making suggestions for growing and developing company law in India).

101. *Id.* (noting the Bhabha Committee Report makes several references to the Cohen Committee Report.).

faithful adherence to English law also meant a continuation of the colonial policy of *laissez-faire*, which stood at stark contrast not only to the broader economic mindset of the time but also to the other statutes that were being enacted contemporaneously.[102] It is somewhat hard to fathom the rationale for such a bewildering approach of the Indian Parliament.

At one level, it may be possible to attribute this development to inertia, and the inability to immediately break away from the colonial mindset.[103] However, that fails to explain the Government's enthusiasm to introduce socialistic legislation in related areas of the law, and to steer clear of a purely market-based approach.[104] Ultimately, it boils down to the compromises that the Government had to make in its economic philosophy to incorporate both a socialist approach that grants a large role to the state in business, but at the same time preserving the importance of the private sector. As one study notes: "That the government had no intention to unduly curtail the freedom of the private sector was also reflected in the new Company Law enacted in 1956."[105] Moreover, "the new policy enunciations did not offer much of an immediate threat to private enterprise, the socialist rhetorics notwithstanding. This was so because the private sector was left undisturbed in the areas in which it had been operating or in which it was likely to expand."[106] Despite the path dependence demonstrated by corporate law and the retention of the free philosophy therein, businesses were nevertheless faced with governmental control, albeit through other legislation rather than corporate law.

The legislative outlook towards company law can be illustrated by the treatment meted towards managing agencies, which had become even more controversial with the advancing tide of economic nationalism in the country.[107] Although the Bhabha Committee recognized the dysfunctional nature of the managing agency system, it was hesitant to jettison it through legislation.[108] It saw "an

102. *See supra* note 96.
103. *See e.g.*, De, *supra* note 11; Kalhan, *supra* note 11.
104. *See supra* note 96.
105. TRIPATHI & JUMANI, *supra* note 86, at 25.
106. *Id.* at 26.
107. MISRA, *supra* note 76, at 190.
108. *See supra* Section IIA4.

advantage to continue to rely on the managing agency system"[109] as it "may yet prove to be a potent instrument for tapping the springs of private enterprise."[110] The Committee however recommended the tightening up of several provisions of the Companies Act relating to managing agencies. This approach seems to have invited furor, as it "was immediately denounced by a broad spectrum of Indian political opinion."[111] The matter was therefore reviewed by a Parliamentary committee that suggested further strengthening.[112] As an outcome of this process, the Companies Act, 1956 "included strict limitations on managing agency remuneration, a limit on the numbers of companies any one agency house could manage, and a ban on intercompany loans between companies within the same managing agency group."[113] At no point during this process was there adequate legislative will to radically address the matter by eliminating the managing agency system altogether due to its mounting ill effects.

In all, although the Indian Parliament was presented with the opportunity following independence to radically alter the nature of company law, especially given the altering economic sentiment, it chose to adopt the path dependence approach and continue to rely on transplanted law from England. In other words, decolonization did not represent any break whatsoever from the past. But, change became evident, albeit gradually and incrementally, in the years to follow.

C. THE APOGEE OF SOCIALISM IN INDIAN CORPORATE LAW (1960-1991)

India's corporate law departed from its colonial past in the early part of the 1960s. The Government's socialist ideology appears not to have taken effect immediately upon decolonization, but only in the years that followed.[114] The Companies Act, 1956 proved to be a dynamic legislation and beginning in the 1960s underwent

109. Bhabha Committee Report, *supra* note 34, at 84 (suggesting continued use of the managing agency system despite admitting its many abuses).

110. *Id.* at 85 (suggesting reducing the abuses of the managing agency system to a minimum).

111. MISRA, *supra* note 76, at 191.

112. *Id.*

113. *Id.*

114. TRIPATHI & JUMANI, *supra* note 86, at 26-27.

amendments nearly thirty times during its life.[115] Most of these amendments were based on recommendations of committees that the Government appointed from time to time.[116] During the first three decades of its operation, Indian corporate law was constantly infused with socialistic ideals.

One such move related to greater influence of the government in the operation of companies, a departure from the previous market-oriented light-touch regulation ranging back from the colonial times. For example, provisions relating to audit and investigation of the affairs of companies by the government were strengthened.[117] The concept of "deemed public companies" was introduced to enhance the regulatory sphere over private companies.[118] Through this, private companies that had share capital or business turnover beyond specified limits were treated as if they were public companies and regulated as such. This signifies a departure from English law, which not only made a clear distinction between private and public companies, but also subjected private companies to limited regulation and conferring considerable freedom given they were treated as organizations akin to partnerships.[119] Moreover, during this period, the concept of "public interest" was widely infused into company law. For example, the Companies Act, 1956 was amended to provide that any scheme of compromise or arrangement (such as an amalgamation) would be permitted only if was not prejudicial to public interest,[120] and that shareholders were entitled to seek the

115. A. RAMAIYA, GUIDE TO THE COMPANIES ACT 1-3 (2010).

116. *See* Vasudev, *supra* note 35, at 21 (the dominant political ideology of the time from the 1960s through the 1980s mostly dictated the implementation of measures suggested for reform by multiple committees).

117. DATTA, *supra* note 34, at 9. *See also* Thanjavur, *Companies Act Amendment Bill: Corporate Regulation in Reverse Gear*, 22 ECONOMIC & POLITICAL WEEKLY 2245, 2246 (1987); Madan Gopal Jajoo, *Companies Legislation in India: Plea for a Rational Review*, 8 ECONOMIC & POLITICAL WEEKLY 1033 (1973)(introducing provisions in the aftermath of certain corporate scandals of the time).

118. Companies (Amendment) Act, 1960, No. 31, Acts of Parliament, 1960 (India) (introducing § 43A into the Companies Act, 1956 that dealt with deemed public companies).

119. *See* Vasudev, *supra* note 35, at 21 (the English statute of 1948 subjected public companies to much more rigorous regulations than private companies).

120. Companies Act, 1956, No. 1, § 394, Acts of Parliament, 1956 (India) (sanctioning of amalgamation of companies must be approved by the Tribunal, but can only be done if it has received a report from the Registrar that the company's

oppression remedy if the affairs of the company were conducted in a manner prejudicial to public interest,[121] thereby riddling the company legislation with the prevailing socialist ideology.

Continuing with the ongoing illustration of the managing agency system,[122] it too was caught by the rising wave of socialism. Despite having survived the turmoil it attracted during the enactment of the Companies Act, 1956, its death knell was sounded at the end of the 1960s. By way of the Companies (Amendment) Act, 1969, the entire managing agency system was sought to be abolished, as it was found to have concentrated power in the hands of a few.[123] This represents an important step in post-colonial India as it clearly separates an institution that was historically dominated by the British business houses, particularly in the colonial period.[124]

During this era, other statutes were enacted to supplement company law in further solidifying the socialist tendencies of the government. Two such statutes deserve a mention. The first is the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), which was intended to prevent the concentration of economic power. The other is the Foreign Exchange Regulation Act, 1973 by which the Government restricted foreign companies from holding more than 40 percent shares of Indian companies. In addition to the altering shape of company law, these statutes had the effect of curbing private enterprise.

These developments had an arguably negative impact on corporate governance. They led to the growth of certain business families and industrial groups (largely to the exclusion of others) that held large chunks of capital in even publicly listed companies. Finance was essentially available only through banking channels (as opposed to the capital markets). During this era, due to concentrated ownership

affairs have not been prejudicial to its members' interests or public interest).

121. *Id.* at § 397(1) as amended by the Companies (Amendment) Act, 1963.

122. *See supra* Section IIA4 and notes 107-113 and accompanying text (explaining how the managing agency system grew into a force in India, but generated great amounts of controversy).

123. DATTA, *supra* note 34, at 10 (extending final deadline for abolition until 1970) MISRA, *supra* note 76, at 192.

124. MISRA, *supra* note 76, at 192 (noting also that this was targeted to end "the old British managing agency houses and the socially exclusive business culture which they embodied").

of shares, the controlling shareholders, which were primarily business families or the state, continued to exert great influence over companies at the cost of minority shareholders.[125]

The legislative activity during this era was ably supported by innovation in judicial decision-making that stretched the contours of corporate law to fit within the "socialist" theme underlying the times.[126] In a significant ruling, the Supreme Court of India observed:

> The traditional view of a company was that it was a convenient mechanical device for carrying on trade and industry, a mere legal frame work providing a convenient institutional container for holding and using the powers of company management . . . . This doctrine glorified the concept of a free economic society in which State intervention in social and economic matters was kept at the lowest possible level. But gradually this doctrine was eroded by the emergence of new social values which recognised the role of the State as an active participant in the social and economic life of the citizen in order to bring about general welfare and common good of the community . . . . The adoption of the socialistic pattern of society as the ultimate goal of the country's economic and social policies hastened the emergence of this new concept of the corporation. . . . But, one thing is certain that the old nineteenth century view which regarded a company merely as a legal device adopted by shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socio-economic institution wielding economic power and influencing the life of the people.[127]

In interpreting the provisions of the Companies Act, the Supreme Court was willing to depart from the provisions of parallel English law, where the circumstances so warranted, thereby requiring it to "shake off the inhibiting legacy of its colonial past and assume a

125. Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NAT. L. SCH. IND. REV. 1, 5 (2009) (focusing mostly on the manufacturing sector combined with the license-raj and industrial capacity quota system ensured that only a few businesses would survive, leading to the growth of certain business families and corporate groups).

126. Constitution (Forty-second Amendment) Act, 1976, § 2 (amending the Constitution to include the word "socialist" in the Preamble, which now provides that India is a "Sovereign Socialist Secular Democratic Republic.").

127. *See* Nat'l Textile Workers v. P.R. Ramakrishnan, (1983) 1 S.C.R. 9 (India) (ruling that an employee of a company cannot claim to "appear and be heard in a petition for winding-up of the company as a matter of right," but a court can hear the employee if it determines the employee should be heard to administer justice).

dynamic role in the process of social transformation."[128]

During this era, the legislative measures in corporate law coupled with activist interpretation by the judiciary brought about a sea change regarding the manner in which companies were viewed. What was essentially a private business organization took on public overtones with much broader societal implications being recognized and popularized in India.[129]

The socialist era came under severe strain towards the late 1980s[130] and a precipice was reached in 1990 when India's foreign exchange reserves depleted to alarmingly low levels.[131] In 1991, the Government then in power was forced to abandon the socialist principles and embark upon a process of economic liberalization, which once again altered India's economic course significantly. This also had a cascading effect on the destiny of Indian corporate law thereafter.

D. CORPORATE LAW FOLLOWING INDIA'S ECONOMIC LIBERALIZATION (1991-2013)

In 1991, the Government introduced a string of policy measures to address the prevailing economic situation. By way of economic liberalization, they were intended to boost business activity and foreign investment in India. These measures included the reduction of industrial licensing only to a small range of industries, permitting companies to freely issue capital without any restrictions, and gradually opening up various sectors for foreign investment.[132] This

128. *Id.* at § 9. *See also Hind Overseas Pvt. Ltd. v. R. P. Jhunjhunwala*, AIR 1976 SC 565, at ¶ 31 (observing: ". . . it is more apposite now that the background, conditions and circumstances of the Indian society, the needs and requirements of our country call for a somewhat different treatment."); VEPA SARATHI, INTERPRETATION OF STATUTES 454-55 (2003); RAMAIYA, *supra* note 115, at 15-16.

129. A.N. Oza, *Committee on Company Law and MRTP Act: Exercise in Futility*, 12 ECON. & POL. WKLY 1268 (1977) (trying to regulate the industrial sector's and other industries' structure with an eye on public interest).

130. India's socialist policies has also been the subject matter of strident criticism by several economists. *See e.g.* JAGDISH N. BHAGWATI, INDIA IN TRANSITION (1993); ARVIND PANAGARIYA, INDIA: THE EMERGING GIANT (2008).

131. *See* Kumar, *supra* note 85, at 8 (decreasing foreign exchange reserves was mostly caused by large and continuing government deficits, which when combined with the oil price shocks from the 1990 Gulf War and the fall of the Soviet Union led to a major economic crisis in India in 1991).

132. *Id.* (reforming the economy involved several new policies including, but

new economic outlook naturally triggered a slew of changes to corporate law in India, which operated on different fronts, including (i) amendments to the Companies Act, 1956, (ii) introduction of securities legislation to promote the stock markets, and (iii) adoption of specific measures to enhance corporate governance.

1. Amendments to the Companies Act, 1956

During the liberalization period, the key changes were the flexibility introduced to companies to raise as well as to restructure capital. This was intended to enable Indian companies to attract investments, particularly from foreign investors. For example, Indian companies were allowed to issue shares with differential rights as to dividend and voting.[133] Similarly, concepts such as employee stock option and sweat equity that were by then common in the U.S. now received statutory recognition in India.[134] A capital maintenance regime that had previously been extremely stringent was relaxed to permit companies to buy back their own securities.[135] These measures had the effect of transitioning this area of Indian corporate law more towards laws from other jurisdictions (e.g. Delaware law),[136] with less emphasis or cross-referencing to the English provisions.[137]

Consistent with the introduction of greater flexibility, legislative reforms of corporate law during this period also sought to reverse the effects of the previous socialist tendencies. For instance, in the year 2000 the concept of "deemed public companies" was deleted,[138] thereby reverting to the previous scenario where only two types of companies exist, i.e. private and public. Similarly, the rigors of the

---

not limited to, licensing only eighteen industries, reducing import tariffs to twenty-five percent, devaluing the rupee and making it convertible on the trade account).

133. Companies (Amendment) Act, 2000, No. 53, § 86(a), Acts of Parliament, 2000 (India) (allowing companies to issue equity share capital in two ways: 1) equity share capital with voting rights or 2) with differential rights "as to dividend, voting, or otherwise.").

134. Companies (Amendment) Act, 1999, §5(d) Acts of Parliament, 1999 (India) (allowing buy-backs, stock options and sweat equity).

135. *Id.* (offering multiple ways for companies to buy back securities).

136. Vasudev, *supra* note 35, at 21 (comparing Indian and Delaware Law will lead one to find similarities, but also many distinctions).

137. This transition is discussed in greater detail later. *See infra* Section III.

138. *See* Companies Act (Amendment), § 23(a) (2000).

MRTP Act were eased through its amendment, which did away with the concept of pre-merger notification. During that regime, mergers and takeovers were effectively permitted without any antitrust law whatsoever.[139]

2. Reforms in Securities Regulation

Prior to 1992, India followed the merit-based regulation of securities offerings.[140] Companies intending to offer securities to the public were required to obtain the approval of the Controller of Capital Issues, a government body, which would specifically approve each public offering and its terms, including the price at which shares were to be offered.[141] Due to the extensive governmental oversight that intensified during socialist era and the resultant excessive stringency in accessing the capital markets, public offering of shares by Indian companies was not that prevalent.

The establishment of India's securities regulator, the Securities and Exchange Board of India ("SEBI") was a watershed event in India's corporate and securities sphere. SEBI's foray not only led to more of a disclosure-based regulation of public offerings of securities by Indian companies,[142] but its role was also focused on promoting India's capital markets in general. This enabled companies since the mid-to-late 1990s to raise billions of dollars in capital through public offering of shares and accompanied listings. These factors triggered a dramatic shift in the Indian capital markets.

---

139. Companies Act (Amendment) (2003) (enacting a new Competition Act in 2002 during the liberalization era to rein in mergers and acquisitions and reintroducing pre-merger notifications, which did not take effect in regulating combinations until 2011).

140. *See* Ronald J. Colombo, *Merit Regulation Via the Suitability Rules*, 12 J. INT'L. BUS. & L. 1, 7 (2013)(involving a review by a securities regulator of the quality and suitability of the offering of securities by a company within the jurisdiction of the regulator).

141. G. Sabarinathan, *Securities and Exchange Board of India and the Indian Capital Markets – A Survey of the Regulatory Provisions*, IIM BANGALORE RESEARCH PAPER NO. 228, http://ssrn.com/abstract=2152909, at 10-11(establishing the Controller of Capital Issues under the Capital Issues Control Act, 1947. *See supra* note 96 and accompanying text).

142. Upon the establishment of SEBI, the office of the Controller of Capital Issues was abolished. PANAGARIYA, *supra* note 130, at 242.

In the two decades that followed its establishment, SEBI has promulgated a number of regulations that affect almost every segment of the capital markets. It also acquired powers under the Companies Act, 1956 to regulate matters pertaining to the issue and transfer of securities by listed companies or those that are proposing to embark upon a listing of their securities.[143] In that sense, the regulatory domain over public listed companies was transitioned from the Central Government under the Companies Act, 1956 to an independent market regulator in the form of SEBI that it exercised through a combination of various corporate and securities laws.

SEBI's entry into the corporate law domain signifies an important step in breaking the linkages that India had with its colonial past. To a large extent, the U.S. Securities Exchange Commission ("SEC") has inspired SEBI's mandate as well as its role and functioning.[144] As far as securities regulation is concerned, there seems to be very little reference to the U.K. model suggesting that the Indian Government had been keen to adopt the U.S. model as a reference point, if at all, while reviewing its own securities regulation. For instance, a substantial part of the jurisprudence relating to insider trading has closely tracked that of the U.S.[145] In all, while SEBI's entry into the Indian regulatory scene marks an important milestone in the evolution of Indian corporate law, it also signifies a further departure not only from the colonial past but the reluctance to rely upon the U.K. model as far as securities regulation is concerned.

143. *See* Companies Act (Amendment), *supra* note 134, § 16 (conferring certain powers on SEBI).

144. *See* Suchismita Bose, *Securities Market Regulations: Lessons from US and Indian Experience*, ICRA Bulletin (Jan.-Jun., 2005), http://ssrn.com/abstract=1140107. (comparing between the role and performance of the SEC and SEBI).

145. *See e.g.*, *Rakesh Agrawal v. Securities and Exchange Board of India*, [2004] 49 SCL 351. *See also* Securities and Exchange Board of India, *Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992 Under the Chairmanship of N.K. Sodhi* (Dec. 7, 2013), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1386758945803.pdf; Somasekhar Sundaresan, *SEBI has greater powers than US SEC*, BUS. STANDARD (last updated Oct. 26, 2009).

3. Corporate Governance Measures

In the 1990s, SEBI rapidly began ushering in corporate governance reforms as well as a measure to attract foreign investment. Curiously, the first corporate governance initiative was sponsored by industry. In 1998, a National Task force constituted by the Confederation of Indian Industry ("CII") recommended a code for "Desirable Corporate Governance," which was voluntarily adopted by a few companies.[146] Here, we witness the re-emergence of the English developments as an influencing factor because the CII Code was largely based on the Cadbury Committee report issued in the U.K.[147]

Thereafter, a committee chaired by Mr. Kumar Mangalam Birla submitted a report to SEBI "to promote and raise the standard of Corporate Governance in respect of listed companies."[148] Based on the recommendations of the Kumar Mangalam Birla committee, the new Clause 49 containing norms for corporate governance was inserted in 2000 into the Listing Agreement that was applicable to all listed companies of a certain size.[149] Although the substance of the corporate governance norms contained in Clause 49 were similar to those recommended in the U.K. by the Cadbury Committee Report and which subsequently found their place in the Combined Code on Corporate Governance,[150] there was one material difference. While

146. *See Desirable Corporate Governance: A Code*, CONFEDERATION OF INDIAN IDUS. (Apr. 1998) http://www.acga-asia.org/public/files/CII_Code_1998.pdf ("CII Code") (directed at large companies, contained some of the measures that continue to date, such as the appointment of a minimum number of non-executive independent directors, an independent audit committee, the unimpeded flow of key information to the board of directors and norms for corporate disclosures to shareholders).

147. U.K., Financial Reporting Council, *Report of the Committee on the Financial Aspects of Corporate Governance* (1992), http://www.ecgi.org/codes/documents/cadbury.pdf [hereinafter *Cadbury Committee Report*].

148. *See* Securities and Exchange Board of India, Report of the Kumar Mangalam Birla Committee on Corporate Governance (Feb. 2000), http://www.sebi.gov.in/commreport/corpgov.html.

149. Securities and Exchange Board of India, SMDRP/POLICY/CIR-10/2000 dated Feb. 21, 2000, http://www.sebi.gov.in/circulars/2000/CIR102000.html. Clause 49 contained a schedule of implementation whereby it was applicable at the outset to large companies and newly listed companies, and thereafter to smaller companies over a defined timeframe.

150. *See* U.K., Financial Reporting Council, *The UK Corporate Governance*

the Combined Code operated as a voluntary code on a "comply-or-explain" basis,[151] Clause 49 was mandated for large listed companies. Hence, there was explicit recognition that what works in the U.K. will not necessarily work in India due to the various institutional circumstances and other local factors.[152]

Thereafter, following Enron and other global corporate governance scandals that occurred at the turn of the century, SEBI decided to strengthen Indian corporate governance norms. In the wake of the enactment of the Sarbanes-Oxley Act ("SOX") in the U.S. in 2002, SEBI appointed the Narayana Murthy Committee to examine Clause 49 and recommend changes to the existing regime.[153] Following the recommendations of the Narayana Murthy Committee, SEBI, on October 29, 2004, issued a revised version of Clause 49, which came into effect from January 1, 2006.[154] Thus, we

---

Code (Sep. 2014) (note that Combined Code has since been renamed the "UK Corporate Governance Code").

151. Other former British colonies such as Australia, Canada and Singapore too have adopted voluntary codes similar to the U.K. *See* Anita Indira Anand, *An Analysis of Enabling vs. Mandatory Corporate Governance: Structures Post-Sarbanes Oxley*, 31 DEL. J. CORP. L. 229, 229 (2006); TAN LAY HONG, TAN CHONG HUAT & LONG HSUEH CHING, CORPORATE GOVERNANCE OF LISTED COMPANIES IN SINGAPORE (2006). Furthermore, for European jurisdictions, see Eddy Wymeersch, *Enforcement of Corporate Governance Codes* (2005), http://ssrn.com/abstract=759364.

152. The Kumar Mangalam Committee report built upon the pattern established by the CII Code and recommended, "under Indian conditions a statutory rather than voluntary code would be far more purposive and meaningful, at least in respect of essential features of corporate governance." *Id.* at ¶ 1.7. For a detailed discussion regarding the transition from the CII Code to the Kumar Mangalam Birla Committee Report, see Bernard S. Black and Vikramaditya S. Khanna, *Can Corporate Governance Reforms Increase Firms' Market Values? Evidence from India*, 4 J. EMP. LEGAL. STUD. 749 (2007).

153. Report of the Secs. and Exch. Bd. of India Committee on Corporate Governance ¶¶ 1.5.5, 1.6.1 (Feb. 8 2003), http://www.sebi.gov.in/ commreport/corpgov.pdf. [hereinafter SEBI and 2003 Committee on Corporate Governance Report].The need for a review of Clause 49 was in part triggered by events that occurred in the U.S. at the turn of the century, such as the collapse of Enron and WorldCom. *See id.* at ¶. 1.6.1. Considerable emphasis was placed in this report on financial disclosures, financial literacy of audit committee members as well as on chief executive officer (CEO) and chief financial officer (CFO) certification, all of which are matters similar to those dealt with by SOX.

154. Madan Lal Bhasin, *Corporate Governance Disclosure Practices: The Portrait of a Developing Country*, 5 INT'L J. BUS. & MGMT. 150, 152 (2010) ("assess the adequacy of current corporate governance practices and to suggest

see that although there was some reference to the English position under the Cadbury Committee report during the initial stages of formulation of corporate governance norms in India, these norms have subsequently been strongly influenced by developments in the U.S. The corporate governance reforms during this era can at best be said to operate as a mixed transplant from both the U.S. and the U.K.

In sum, during the liberalization era, we see a strong shift from the pre-existing socialistic disposition towards a more open market-oriented approach, albeit gradually. While there are some indications of continued guidance from India's former colonizer, this era has been marked by the stronger influence of the U.S. on all fronts, including corporate finance, securities regulation and corporate governance.

During the liberalization phase, considerable efforts were also made to review the provisions of the Companies Act, 1956 given that it had undergone significant change over the years and had possibly outlived its relevance and utility. There were calls for a new companies' legislation. After nearly two decades of debate, the new Companies Act, 2013 was enacted that ushered in an entirely new era in Indian corporate law.

E. CURRENT STATE OF PLAY: THE COMPANIES ACT, 2013

This sub-section discusses some of the policy imperatives and tensions that were prevalent during the elongated process of enacting the Companies Act, 2013. It is essential to analyze the factors that were at play behind the scenes for the new legislation in order to determine whether it breaks further away from India's colonial past as well as the current trajectory of English company law. As elaborated, the new legislation marks a further departure away from English law. While the liberalization phase that began in 1991 attempted to break away from the shackles of the previous socialist approach of company law, the new legislation bucks that trend and reinforces some of the social aspects of corporate law, but in a subtler and more nuanced fashion.

Since the early 1990s, efforts had been underway to revamp the companies' legislation in India due to the difficulties encountered in

improvements").

the implementation of the Companies Act, 1956, which had to be amended. Although several proposals were made and Bills drafted and presented in Parliament over the last two decades (specifically in 1993, 1997 and 2003),[155] it was the appointment of an Expert Committee on Company Law in 2004 under the chairmanship of Mr. J.J. Irani ("Irani Committee") that triggered the shaping of the current legislation. The Irani Committee issued a concept paper based on which it conducted a public consultation, following which it issued its report for drafting a new legislation.[156] The report suggested a simplification of the law, and was indeed business friendly, but at the same time subscribed to stringent norms of corporate governance.[157] Based on the recommendations of the Irani Committee, the Companies Bill, 2008 was presented in Parliament, which lapsed.[158]

In the interim, corporate India was rocked by a massive corporate governance scandal involving Satyam Computers. In January 2009, the chairman of the company confessed to fraud to the magnitude of over US$ 1 billion.[159] This triggered renewed calls for strengthening

155. Aparna Viswanathan, *Reinventing the Company in India: the Expert Committee Report on Corporate Form and Governance: Part 1*, 17 INT'L COMPANY & COM. L. REV. 1, 1 (2006) (noting that, although there were twenty-four amendments to the old Companies Act of 1956 before the 2013 revision, no comprehensive overhaul occurred until it).

156. Jamshed J. Irani, *Report on Company Law*, EXPERT COMM. ON CO. LAW (May 31, 2005), http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf (detailing the committee's findings and decisions).

157. *See id. See also* S. Balakrishnan, *Irani Committee Norms Stringent*, THE HINDU (Aug. 22, 2005), http://www.thehindu.com/biz/2005/08/22/ stories/2005082201521600.htm

158. John Paterson, *Corporate governance in India in the context of the Companies Bill 2009: Part 1: Evolution*, 21 INT'L COMPANY & COM. L. REV. 41-42 (2010) (noting that it was reintroduced into the next session with only the date changed).

159. Letter from B. Ramalinga Raju, Chairman, Satyam Computer Servs. Ltd., to the Board of Directors of Satyam Computer Servs. Ltd. (Jan. 7, 2009), http://www.hindu.com/nic/satyam-chairman-statement.pdf [hereinafter *Letter from Ramalinga Raju*]. *Compare* Heather Timmons & Bettina Wassener, *Satyam Chief Admits Huge Fraud*, N.Y. TIMES, Jan. 8, 2009, http://www.nytimes. com/2009/01/08/business/worldbusiness/08satyam.html(detailing a high-profile investment fraud) *with* Vikramaditya Khanna, *Corporate Governance in India: Past, Present and Future?*, 1 JINDAL GLOB. L.R. 171, 188-89 (2009) (comparing this situation with the American Enron scandal, replete with details and examples of its relevance).

corporate law and governance norms in India. Intriguingly, however, when the Companies Bill, 2009 was presented in Parliament, it contained no changes whatsoever from its previous incarnation in 2008.

The Companies Bill, 2009 was referred to the Parliamentary Standing Committee on Finance under the chairmanship of Mr. Yashwant Sinha. The Standing Committee reviewed the Bill and issued its report in 2010.[160] Although the Companies Bill, 2009 appeared to turn a blind eye to the fateful occurrences of scandals that rocked corporate India, the Standing Committee undid the effects of those deficiencies by recommending detailed provisions in corporate law to prevent such failures in the future. Specific among the Standing Committee's recommendations were heightened standards of corporate governance and measures to rein in company managements and impose higher standards on gatekeepers such as independent directors and auditors. Another set of measures introduced by the Standing Committee is of immense significance as it redefined the role of the corporation in the Indian context. While the Companies Bill, 2009 was shareholder-oriented, in that directors owed duties to carry on the business of the company "for the benefit of its members as a whole,"[161] the Standing Committee insisted on a broader stakeholder approach to corporate law, insisting that directors have a duty "to promote the objects of the company in the best interests of its employees, the community and the environment as well."[162] Most significantly, a concomitant concept was the introduction of a corporate social responsibility ("CSR") provision requiring a mandatory spending by large companies towards social causes.[163] Based on the Standing Committee Report, the Government introduced the Companies Bill, 2011 in Parliament, which naturally contained significant changes from the Companies Bill, 2009. The 2011 Bill was referred back to the Standing Committee for review of

160. Ministry of Corporate Affairs, Twenty-First Report- Companies Bill 2009, Fifteenth Lok Sabha, Standing Committee on Finance (Aug. 2010) [hereinafter Standing Committee on Finance Report] (detailing the findings of the committee).

161. Companies Bill, 2009, No. 59 § 147(2) 2009 (India).

162. Standing Committee on Finance Report, *supra* note 160, at ¶ 11.80 (motivating factor as corporate social responsibility).

163. *Id*. at ¶¶ 49-51 (requiring companies to have a corporate social responsibility policy including spending on it in the form of "at least 2% of its average net profits during the three immediately preceding financial years").

the revised provisions, particularly because it contained significant changes from the previous version. The Standing Committee issued another report,[164] following which the Companies Act, 2013 was passed by both Houses of Parliament and received the assent of the President of India on August 31, 2013. This legislation is being brought into force in stages, with several of its key provisions having already been notified.[165]

At this juncture, it would be useful to consider some of the policy issues underlying the enactment of the Companies Act, 2013. In all, while the Companies Bill, 2009 (and its identical predecessor of 2008) was based on the Irani Committee recommendations, which were business friendly in nature, the result of its review by the Standing Committee transformed it into a document with radically different philosophical overtones that emphasized on stricter controls through regulation and also emphasized the social responsibility of corporations. These philosophical pressures are quite evident. It is clear that the Irani Committee was concerned with attracting greater investment and providing a simple and clear regime for businesses.[166] However, the Standing Committee approached the legislative process from a completely different perspective. Significantly, it was operating in the shadow of a corporate scandal that evoked outrage

164. Ministry of Corporate Affairs, Fifty-Seventh Report- Companies Bill 2011, Fifteenth Lok Sabha, Standing Committee on Finance (Jun. 2012) [hereinafter Standing Committee on Finance Report] (detailing the findings of the committee).

165. *See Table Containing Provisions of Companies Act, 2013 as Notified Up to Date and Corresponding Provisions Thereof under Companies Act, 1956*, Ministry of Corporate Affairs, GOV'T OF INDIA, (2013), http://www.mca.gov.in/Ministry/ pdf/ProvisionsTable_CompAct.pdf. [hereinafter *Table of Companies Act Provisions*] (listing provisions which have already taken effect).

166. *See At 75, J.J. Irani Bids Adieu to Tata Steel*, THE HINDU (Jun. 6, 2011), *accessible at* http://www.thehindubusinessline.com/companies/at-75-jj-irani-bids-adieu-to-tata-steel/article2082317.ece [hereinafter *Irani bids adieu to Tata Steel]*. (detailing Irani's business past); Christabelle Noronha & Cynthia Rodrigues, *A Different Life: Dr. JJ Irani Reminisces About Life and Times in Jamshedpur* (Aug. 2007), *accessible at* http://www.tata.com/careers/articlesinside/Cj0IJRfNjr0=/ TLYVr3YPkMU= (providing an interview and perspectives from Irani himself). *See also supra* note 156 (noting that the membership of the Committee was broadly-based, including "13 members and 6 special invitees drawn from various disciplines and fields including trade and industry, chambers of commerce, professional institutes, representatives of Banks and Financial Institutions, Sr. Advocates etc.").

within the country, particularly against the corporate sector and the business community.[167] That might perhaps explain the Standing Committee's insistence on a stakeholder approach that encompasses constituencies such as the employees, customers and the environment as beneficiaries within the corporate law sphere rather than merely shareholders as has been the approach in several developed jurisdictions. In the wake of these scandals, a lukewarm response by the political class would be met with an element of scorn. It may also be seen as a counteraction by the political class to curb the influence of the business sector and to impose adequate checks and balances through corporate law. It is a confluence of these factors that led to a compromise that is evident in the Companies Act, 2013 and a number of its specific provisions.

This discussion, without doubt, indicates that the present shape of corporate law is the result of local issues and concerns, and is shorn of any influence by the colonial past or its legal regime. During the law reform process that lasted nearly two decades before culminating in the Companies Act, 2013, there was almost no reference whatsoever to English company law. This stands at stark contrast to the process for the enactment of the Companies Act, 1956, which was essentially a transplant of the English Companies Act of 1948.[168] Neither the Irani Committee nor the Parliamentary Standing Committee on Finance (on both occasions in 2010 and 2012) made any significant references whatsoever to the prevailing English position in company law.[169] This despite English corporate law having made giant strides in its evolution since India's decolonization with the Companies Act of 1985 and the more recent Companies Act of 2006. The present English position has been the subject matter of extensive consultation,[170] most of which has been

167. *See NASSCOM Announces Formation of Corporate Governance and Ethics Committee*, BUSINESS STANDARD (Feb. 11, 2009), http://www.business-standard.com/article/printer-friendly-version?article_id=109021100123_1 [hereinafter *NASSCOM Announces*] (noting and exemplifying efforts after the Satyam scandal, which had to some extent sullied the image of the crucial Indian information technology (IT) industry and also posed a threat to the future of its stakeholders such as employees, customers and creditors).

168. For a detailed discussion, *see supra* Section IIB2.

169. *Compare* this process *with supra* note 101 (using extensive cross-referencing during the process for enacting the Companies Act in 1956).

170. *See* Secretary of State for Trade and Indus., COMPANY LAW REFORM (Mar.

closely followed by other former British colonies.[171] But, Indian lawmakers chose to ignore those completely.

Although there is no evidence of explicit resistance from the Indian lawmaking process in embarking on the colonial and the initial post-colonial approach of transplanting English law into India, the focus of the current process was entirely inward looking in attempting to locate solutions for problems that are specific to India. In other words, the solutions proposed were entirely autochthonous, thereby signifying a fundamental change from the previous attitude of Indian legislation.

In concluding this Section, it is evident that the rather lengthy historical narrative regarding the evolution of Indian corporate law was necessitated for a number of reasons. First, the literature regarding the historical analysis of companies' legislation in India is sparse, especially over several time horizons. Such a narrative would fill a gap in the literature and also aid in the understanding of the various factors that were in play at different points in time so as to explain the status of some of the present legislative provisions. Second, and more immediately for the purposes of this article, the historical explanation supports the core thesis that what began as a continual process of transplantation in the colonial era and in the period immediately following India's decolonization subsequently converted itself into an introspective process (with some experiences

2005), http://webarchive.nationalarchives.gov.uk/+/http:/www.dti.gov.uk/cld/ WhitePaper.pdf [hereinafter COMPANY LAW REFORM] (discussing the English Companies Act of 2006, enacted following a series of lengthy consultations that included a review and a white paper; CORPORATE AND CONSUMER AFFAIRS, *Modern Company Law for a Competitive Economy* (Mar. 2005), http://webarchive.nationalarchives.gov.uk/+/http:/www.dti.gov.uk/cld/WhitePaper.pdf [hereinafter MODERN COMPANY LAW] http://webarchive.nationalarchives.gov.uk/20121029131934/http:/www.bis.gov.uk/policies/business-law/company-and-partnership-law/company-law/publications-archive (listing series of documents used as a basis for the legislation); PAUL L. DAVIES, GOWER AND DAVIES PRINCIPLES OF MODERN COMPANY LAW 55-57 (8th ed. 2008) (discussing the legislative process behind the bill).

171. *See, e.g.*, *Report of the Company Legislation and Regulatory Framework Committee*, GOV'T OF SINGAPORE, (Oct. 2002), https://www.acra.gov.sg/uploadedFiles/Content/Legislation/FinalReport1.pdf [hereinafter *Report of Company Legislation*] (providing an example of another Asian, Commonwealth state on these English conventions, one with a powerhouse economy but tiny population and area).

derived from other jurisdictions such as the U.K. and the U.S.), but without wholesale adoption of English law as was hitherto the case. Finally, to be sure, it is not the case that the Companies Act, 2013 or the preceding legislation during India's socialist era were entirely different from parallel English legislation. Of course, several provisions of the Companies Act, 1956 (which were transplanted from the English Companies Act of 1948) continue to find their place in some form or the other under the present law. This might be the result of the attitude represented by the saying "if it ain't broke, don't fix it".[172] But, rather than provisions which have been left untouched, what is of greater importance to this analysis is the areas of law where specific changes have been proposed from time to time and those that have required policy-oriented discourses. It is in these areas where, the reference point that was previously on England has either moved to other jurisdictions such as the U.S. or has simply moved inwards in the search of an indigenous solution to solve problems that are unique to the Indian context. That is what establishes the visible shift from transplant to autochthony.

III. COMPARATIVE ANALYSIS OF CORPORATE LAW: IMPACT OF DECOLONIZATION

This section analyzes the principal concepts under Indian corporate law and compares (or contrasts) them with parallel provisions under English law. This comparison adopts two approaches. One is to consider how Indian law has evolved across various key topics since decolonization and in comparison with laws transplanted from England during the colonial period. The other is to compare Indian corporate law with the developments in parallel English legislation since India's decolonization and to examine how (and why) the two countries have adopted somewhat different trajectories despite their shared common law heritage.

This comparison of substantive legal concepts involves four broad topics, viz. (i) corporate structure and personality, (ii) corporate finance and capital structuring, (iii) corporate governance, and (iv) corporate law enforcement machinery.[173]

172. To that extent, there is support for the "legal families" or "legal origins" theories.

173. While it would be impossible to deal with all these topics with equal

A. CORPORATE PERSONALITY AND STRUCTURE

When it comes to corporate personality and structure, the corporate law in India is strict and somewhat inflexible, and continues to carry some of the rigors of its colonial past, which have been buttressed further by measures introduced in the post-colonial era. On the other hand, England has progressively eased various structural impediments that have made it far more straightforward for companies to be incorporated and structured. To that extent, Indian corporate law has moved in a direction that is very different from the path adopted by its former colonizer.

Corporate law stipulates that a company that has been incorporated in accordance with the law is a legal personality that is separate from its shareholders, directors, creditors and other constituencies.[174] This principle forms the foundation of the limited liability protection offered to shareholders that encourages entrepreneurs to establish business and carry out trade that benefits the economy as a whole.[175] However, the law pertaining to "piercing the corporate veil" steps in to create a balance whereby the limited liability doctrine is not abused to adversely affect the interests of third parties (particularly creditors).[176] A comparison suggests that English law is rather circumspect about the idea of piercing the corporate veil, thereby treating the principles of separately legal personality and limited liability as sacrosanct.[177] More recent evidence from the English courts considerably narrow the situations

weight within the course of this article, greater emphasis will be placed on corporate governance as that is a core (and usually contentious) aspect of corporate law.

174. *See* Companies Act, 2013, No. 18, § 9, Acts of Parliament, 2013 (India) (establishing a similar separation with any future investors as well).

175. *See generally* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) (finding limited liability a "fundamental principle of corporate law" while noting that liability has never been "absolutely limited").

176. *See* Henry Hansmann & Reinier Kraakman, *Towards Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1931-33 (1991) (concluding that veil-piercing is generally synonymous with the idea of unlimited liability anyway).

177. *See* Salomon v. Salomon, [1897] A.C. 22 (H.L.) (establishing the principle of limited liability in a landmark decision); *see also* Adams v. Cape Industries, [1991] 1 All ER 929 Ch. 433.

where the veil can be pierced.[178] Contrast this with the position in India where courts have been more liberal in piercing the veil.[179] The differing treatments are indicative of the variance in the philosophy, whereby England continues to follow a market-oriented approach wherein incorporation is considered a facilitative process for advancing the business needs of entrepreneurs, whereas the courts in India tend to adopt a broader view taking into account the interests of all stakeholders whose interests are affected by the actions of companies.[180]

One of the colonial-era requirements under Indian law obliges companies to include in their memorandum of association[181] the objects for which they are incorporated. This gives rise to the doctrine of *ultra vires* whereby a business activity carried out by the company which is beyond its stated objects is considered void for exceeding the company's capacity.[182] Over the years, this doctrine has caused some level of consternation in countries that have adopted English law.[183] Therefore, both England[184] as well as some of its

178. *See, e.g.*, *Prest v. Petrodel Resources*, [2013] UKSC 34 (appeal taken from Gr. Brit.) ("The recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse.").

179. DATTA, *supra* note 34, at 176 ("The horizon of the doctrine of lifting of the corporate veil is expanding. It can be lifted even at the invitation of the company itself. Contemporary trend shows that the lifting of the corporate veil is permissible whenever public interest so demands. The courts have been pragmatic in their approach in unveiling companies, especially the subsidiary companies to see their real face in the interests of justice. The modern tendency is, where there is identity and community of interest between companies in the group, especially where they are related as holding company and wholly owned subsidiary or subsidiaries, to ignore their separate legal entity and look instead at the economic entity of the whole group tearing of the corporate veil."); *see also* Ritu Birla, *Maine (and Weber) Against the Grain: Towards a Postcolonial Genealogy of the Corporate Person*, 40 J. L. & SOC'Y 92 (2013) (finding that on corporate veil piercing India has adopted a different trajectory from the Western markets).

180. *See supra* notes 126-128 (revealing the broader "socialistic" approach Indian courts generally adopt in corporate law).

181. The constitutional documents of a company (both in England and India) consist of the memorandum of association and the articles of association.

182. *See Ashbury Ry. Carriage & Iron Co. v. Riche*, [1875] LR 7 (HL) 653 (establishing the *ultra vires* doctrine).

183. For instance, one method adopted to overcome this strict prohibition was to follow a "kitchen sink" approach by drafting elaborate objects clauses in the constitutional documents to include any business activity that can possibly be envisaged.

former colonies[185] have done away with the requirement that companies must have objects clauses in their memorandum of association. Consequently, the *ultra vires* doctrine has been effectively abolished in these jurisdictions. Despite the liberalization of this rule in the light of the evolving business environment, India has remained unwavering in its faithfulness to the *ultra vires* rule. Even the Companies Act, 2013 mandates that Indian companies must carry in their memorandum of association objects clauses specifying the type of business activity that they are permitted to carry on.[186] India has therefore opted to display some level of rigidity on this count despite reforms implemented in other "common law" jurisdictions.[187]

Similarly, on several matters regarding the corporate structure, corporate law in India is far stringent not only in comparison with its colonial past, but more so with reference to contemporary English corporate law. While English law clearly bifurcates the extent of regulation between private companies (small, closely-held and hence light regulation) and public companies (large, widely-held and hence more extensive regulation), this distinction is far less clear in India, whose regulatory philosophy tends to be rather overarching. Under current English law, the incorporators possess adequate choice to determine whether to go for a private company or a public one.[188] The philosophy of Indian corporate law is quite the opposite. Under the Companies Act, 2013, a private company that is the subsidiary of a public company is treated for all intents and purposes as if it is a

184. *See* DAVIES, *supra* Note 170, at 153-54. *See also* Companies Act, 2006, c. 46 § 31(1) (Eng.) (providing that a company's objects are unrestricted unless otherwise specified).

185. *See e.g.,* WALTER WOON ON COMPANY LAW 113 (Tan Cheng Han ed. 2009) (Singapore in comparison).

186. Companies Act, 2013, § 4(1)(c) (referencing in the same section the other requirements for companies in their memorandum of association).

187. *See* Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 67 (2006) (showing that U.S. has also granted considerable freedom to companies to carry on their business and has paid scant regard to the *ultra vires* doctrine).

188. *See* DAVIES, *supra* note 170, at 15; COMPANY LAW REFORM, *supra* note 170, at ch. 4 (explaining the philosophy behind this approach as "think small first" and avoid the application of regulation to private companies that were written for public companies).

public company.[189] By this, the state is not only arrogating to itself from the incorporators the choice of corporate form (that is otherwise available to them in other Western jurisdictions), but it also has the effect of enhancing the scope of regulation because several private companies incorporated as such are subjected to extensive regulation if they are subsidiaries of public companies. This demonstrates the philosophy of the Indian state to exercise broader control over the corporate sector, although it arguably has the effect of inducing greater transparency that may benefit various stakeholders.

Other measures in Indian legislation that have crept in over the years represent a rather interventionist approach of the state compared to the market-oriented approach of the colonial period. For example, Indian corporate law places undue restraints on the establishment and operation of corporate groups, although they are quite common in India.[190] The Companies Act, 2013 confers powers on the Government to prescribe the number of layers of subsidiaries that a specific class of company may have.[191] Moreover, a company cannot make investments through more than two layers of investment companies.[192] Although there can be no case against the need for restricting the abuse of group company structures, the present stance arguably goes too far. It is unusual for jurisdictions to impose such absolute curbs on the use of investment vehicles and this provision appears somewhat unusual in the international context. This requirement appears to have emanated from specific episodes witnessed in India in the past, in this case the stock market scam involving the use of investment vehicles for routing funds back and forth from companies and their controlling shareholders, which was the subject matter of a Joint Parliamentary Committee report over a decade ago.[193] Although such a legislative response ensnares specific

189. *See* Companies Act, 2013, § 2(71) (exemplifying the difference with English law by its well-defined rules).

190. *See* Marianne Bertrand et al., Ferreting *Out Tunneling: An Application to Indian Business Groups*, 117(1) Q.J. ECON. 121, 121 (2002). *See also* Rajesh Chakrabarti, Corporate Governance in India – Evolution and Challenges 14-20, 7 (2005) (unpublished manuscript), http://ssrn.com/abstract=649857 (referencing the tendency of these groups to develop worldwide and providing certain specific examples in India).

191. Companies Act, 2013, § 2(87).

192. *Id.* at § 186(1) (proscribing this system of protective layering).

193. *Joint Committee on Stock Market Scam and Matters Relating Thereto*,

abuses of corporate group structures, it also has the unintended effect of capturing genuine business transactions and structures thereby curbing the ability of companies to organize more efficiently. While the general method utilized in other countries to prevent abuse is to invoke the doctrine of piercing the veil, albeit in exceptional circumstances, the law in India proscribes such structures at the outset. In addition, corporate law in India imposes severe restrictions on the movement of funds between group companies (such as holding companies and subsidiaries) whether by way of investment or loan transactions.[194] This makes transactions between group companies extremely onerous.[195]

Hence, on matters relating to corporate personality and structure, Indian corporate law has continued to hold firmly on to some colonial vestiges such as the *ultra vires* doctrine although the origin country and its other former colonies have jettisoned it along the way. On other matters such as group structures, India's approach has been far more restrictive not only compared to the colonial period, but also in the context of developments in the U.K. and other Western jurisdictions which have moved in the opposite (more liberal) direction.

B. CORPORATE FINANCE AND CAPITAL STRUCTURING

This sub-section begins by exploring the evolution of the law relating to the equity finance in India, and how that compares with the colonial era as well as subsequent developments in England. Here, the findings show that India has made giant strides in introducing flexibility to companies as compared to the colonial period, and has also substantially kept with developments in England in this field (although the law in India continues to be somewhat more restrictive than England). This partially explains the explosive

---

LOK SABHA SECRETARIAT, (Dec. 2002), http://www.watchoutinvestors.com/JPC_REPORT.PDF [hereinafter *Joint Committee on Stock Market*] (discussing the irregularities committed by specific firms and banks and detailing the actual and proposed responses to them).

194. Companies Act, 2013, §§ 185-186 (outlining the two-layer system, defining the violations an individual might commit within it, and providing specific fines for its violation).

195. *See infra* Section IIIC2 (discussing the restriction on related party transactions).

growth of India's equity capital markets over the last two decades since liberalization.[196]

A combination of company legislation and securities regulation established a conducive framework for securities offerings in the Indian markets, which permitted offerings of the type recognized internationally. The assumption of regulatory responsibilities by SEBI in 1992 resulted in a complete shift from fixed-price offerings to book-built offerings.[197] Under this regime, companies are free to invite bids from investors within certain indicative limits on the basis of a draft prospectus that contains all the necessary disclosures.[198] Pricing through regulatory intervention gave way to a market-based price discovery process. This enabled companies since the mid-to-late 1990s to raise billions of dollars in capital through public offering of shares and accompanied listings.[199] These factors triggered a dramatic shift in the Indian capital markets, particularly on the primary-markets front.[200]

196. *See* Vikramaditya Khanna & Umakanth Varottil, *Developing the Market for Corporate Bonds in India*, (Nat'l Stock Exch. Of India Ltd., Working Paper No. 6, 2012), http://ssrn.com/abstract=2021602 (noting that while the equity capital markets have witnessed significant growth over the years, the debt markets (e.g. for corporate bonds) have failed to gather steam).

197. *See* Nitish Ranjan & T.P. Madhusoodhanan, IPO Underpricing, Issue Mechanisms, and Size, SOCIAL SCIENCE RESEARCH NETWORK, 3-4 (Mar. 22, 2004) (unpublished article), http://ssrn.com/abstract=520744 (implementing this as a means of ending the broad underpricing which various studies had noted existed across the country).

198. *See* S.S.S. Kumar, Short and Long-run Performance of Bookbuilt IPOs in India, INT'L J. MGMT PRACS. & CONTEMP. THOUGHTS, 19, 20-21, http://dspace.iimk.ac.in/bitstream/2259/523/1/sssk.pdf (providing a brief description of the manner in which the book building process was to be carried out for the purpose of price discovery).

199. *See* Arif Khurshed et al., IPO Certification: The Role of Grading and Transparent Books 1, 3 (Mar. 31, 2011) (unpublished article), http://www.cass.city.ac.uk/__data/assets/pdf_file/0006/86640/Khurshed.pdf ("the Indian book building process is the most transparent in the world in that the book building activity is shown live on stock exchange website with updates every 30 minutes"); *id.* at 3-4 (allowing retail investors to make their bids with full knowledge of the nature of bids made by the better-informed institutional investors).

200. *See* Jayanta Kumar Seal & Jasbir Singh Mataru, *Long Run Performance of Initial Public Offerings and Seasoned Equity Offerings in India* 1, 2 (Indian Inst. of Foreign Trade Working Paper No. FI-13-19, 2012) http://cc.iift.ac.in/research/Docs/WP/19.pdf (providing a table including information of resources raised in the primary market).

SEBI's emphasis on disclosure-based regulation has witnessed a proliferation of disclosure norms for various types of capital raising activities by Indian companies. Over the last two decades, SEBI has gradually expanded the disclosure norms and prospectus requirements, culminating in the presently applicable SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (the "ICDR Regulations"). The ICDR Regulations contain detailed disclosure requirements to be complied with by companies undertaking various types of securities offerings. For public offerings, the ICDR Regulations are prescriptive and encompass disclosures pertaining to the business, risks, legal matters, capital structure and even the controlling shareholders and other entities within the group in which they hold shares. The requirements in the ICDR Regulations are so onerous that the disclosures required to give effect to a public offering in the Indian markets are comparable (or possibly even far exceed) those required in most developed markets. The trajectory followed by SEBI in the last two decades demonstrates the pivotal nature of disclosure as a tool for securities regulation in the primary markets.[201]

Other measures have introduced flexibility in equity financing. Previously, public companies in India were restricted to two types of shares, i.e. preference shares and equity shares. However, another category was added in 2000 whereby Indian companies have been allowed to issue shares with differential rights as to dividend and voting.[202] Other hybrid instruments such as global depository receipts[203] and derivatives[204] have received express statutory

201. *See* Sandeep Parekh, *Integrated Disclosure – Streamlining the Disclosure Norms in the Indian Securities Market*, (Indian Inst. of Mgmt., Ahmedabad Working Paper 2005-01-04,2005, http://ssrn.com/abstract=653703 (showing that, at the same time, the disclosure standards imposed in the secondary markets are considerably inferior in comparison with those in the primary markets).

202. *See* Companies Act, 2013, § 43(a)(ii) (incorporating the shares with differential rights after intense debate about the issues surrounding them); Companies (Amendment) Act, 2000 (outlining these changes which were later reaffirmed in the 2013 Act).

203. *See* Companies Act, 2013, § 2(44) ("any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts").

204. *See id.* at § 2(33) ("as defined in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956").

recognition. All of these provide different financing options to Indian companies. Moreover, concepts such as employee stock options[205] and sweat equity enable the use of equity shares[206] to compensate employees. As far as the menu of options available for equity financing is concerned, the Indian legislation is quite modern.

However, when it comes to capital maintenance, corporate law in India continues to be fairly restrictive in nature. For instance, companies are still required to follow the concept of authorized capital[207] and par value of shares.[208] The concepts that were infused into Indian corporate law during the colonial period were intended to offer some form of creditor-protection.[209] However, these have since outlived their utility, as they had no correlation with the true value of the company that was of greater concern to its creditors.[210] Several Western jurisdictions have either not been following these requirements,[211] or have been following them partly.[212] Even some of the former colonies of the British Empire have since moved away from these somewhat archaic requirements.[213] Even though Britain

205. *See id.* at § 2(37) (option given to the directors, officers or employees . . . which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price").

206. *See id.* at § 2(88) ("such equity shares as are issued by a company to its . . . employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additionsFalse).

207. *See id.* 2013 at §§ 2(8), 60-61 (such capital as is authorized by the memorandum of a company to be the maximum amount of share capital of the company).

208. *See, e.g. id.* at § 65.

209. *See* DAVIES, *supra* note 170, at 260.

210. *See, e.g.*, WOON, *supra* note 185, at 425-29 (providing the example of Singapore); How Yew Kee & Lan Luh Luh, *The Par Value of Shares: An Irrelevant Concept in Modern Company Law*, SING. J. LEG. STUD. 552 (1999) (comparing the par value regimes of Commonwealth states New Zealand and Australia with Singapore and recommending to Singapore a move in their direction).

211. *See, e.g.*, Vasudev, *supra* note 35, at 28 (discussing Delaware law in the U.S. and comparing it with Indian law); William T. Allen et al., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION, 1, 123-24 (2012).

212. *See e.g.*, DAVIES, *supra* note 170, at 260-61, 265-66 (noting that although the U.K. has done away with the concept of authorized capital, it has retained the par value).

213. *See, e.g.*, WOON, *supra* note 185, at 425-29 (providing Singapore as an example of this).

and some of its colonies have migrated away from the concepts of authorized capital and par value of shares that were considered a form of creditor-protection in the colonial era, India has remained wedded to this concept, wherein no reform was suggested even during the most recent process of enacting the Companies Act, 2013.

The rather restrictive approach continues in other areas of capital maintenance and capital restructuring. For example, strict rules permit buyback of shares by a company only out of free reserves, share premium or the proceeds of a fresh issue of shares.[214] Moreover, there are ceilings in terms of total amounts that a company can pay out in a buyback (25% of paid up capital and free reserves) and a maximum percentage (25%) of shares it can buy back.[215] In order to protect the creditors, directors must issue a solvency certificate and the company must maintain a minimum debt-equity ratio following the buyback.[216]

The current regime in India regarding buyback of shares represents a radically different position from the colonial period when a company was not permitted to acquire its own shares under any circumstances whatsoever. The flexibility allowing companies to buy back their own shares was introduced only as late as 1999,[217] after which it has taken a prominent place. It is somewhat comparable to the present English position, which too permits companies to purchase their own shares, although the conditions and requirements are somewhat differently structured with less rigid conditions.[218]

214. *See* Companies Act, 2013, § 68 (outlining the power of a company to purchase its own securities).

215. *Id.* at § 68(2) (including the various technicalities and details as well).

216. *Id.* at § 68(2)(d)(6) ("It shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board, a declaration of solvency signed by at least two directors of the company").

217. Companies Act, 1999 (Amendment).

218. *See* Companies Act, 2006, Part 18 (Eng.) (providing a general discussion of the rules for British companies acquiring their own shares). *See also* Wee Meng Seng, *Reforming Capital Maintenance Law: The Companies (Amendment) Act 2005*, 19 SING. ACAD. L.J. 295 (2007) (providing a discussion on other former British colonies, which have adopted varying approaches to capital maintenance and buyback of shares, ranging from several conditions imposed for buyback of shares as prevalent in Singapore to the emphasis largely on the solvency of the company for permitting a buyback in New Zealand).

As a final matter relating to capital maintenance, the rule against financial assistance operates in an absolute manner whereby companies are prohibited from providing any form of financial assistance for the acquisition of its own shares.[219] While this rule has been controversial owing to its rigidity, a number of jurisdictions have made modifications over the years. Some carry whitewash provisions that enable shareholders to approve the financial assistance so long as the company continues to be solvent thereafter.[220] Others make the rule inapplicable to private companies.[221] In such a case, where a public company has been acquired, it can first be converted into a private company following which it could provide financial assistance.[222] This provides options for acquirers of companies to carry out leveraged acquisitions (whereby the financing of the acquisition is secured by the assets of the company acquired). The Indian position is rather rigid as it does not provide for any exceptions (such as whitewash provisions). Although the rule against financial assistance is not applicable to private companies, this is not altogether attractive as targets in large leveraged buyouts are likely to be public companies. Moreover, even if they are privatized following the acquisition, they could continue to be treated as public companies if they become subsidiaries of acquirers that are themselves public companies.[223] For this reason, the rule against financial assistance is unduly restrictive in the Indian circumstances, with no meaningful exceptions contained in the legislation. Surprisingly, the law reform process that resulted in the Companies Act, 2013 does not seem to have considered this issue at all. To this extent, India's position continues to rely heavily on its colonial origins and has made little progress despite the advancement in equity markets and capital restructuring transactions.

219. Companies Act, 2013, § 67(2).

220. *See* Wee, *supra* note 218 (noting Singapore has adopted this approach).

221. Companies Act, 2006, § 678.

222. *Paros Plc v Worldlink Group Plc* [2012] EWHC 394 (Comm) at ¶ 73, where an undertaking by the company while it was a public company to provide some sort of financial assistance to a purchaser of shares after it was re-registered as a private company (which was a pre-condition) was found to be lawful. For a brief discussion of this case, see GEOFFREY MORSE (ED), PALMER'S COMPANY LAW (1992) at ¶ 6904.1.

223. *See supra* note 189 and accompanying text.

In all, on matters of corporate finance and capital maintenance, on several aspects such as public offerings, options on types of securities and buyback of shares, the Indian legislation has evolved over a period of time. However, on other matters of capital maintenance such as the rule against financial assistance, it has failed to dislodge itself from its rigid stance that continues to affect transactions in the Indian context although the U.K. and some of its former colonies have adopted a more pragmatic approach given the commercial development of the times.[224]

C. CORPORATE GOVERNANCE

While corporate governance[225] has been an inherent part of corporate law since its inception, the concept has gathered considerable momentum in India in the last two decades (and for a longer period of time in Western jurisdictions). During this period, India has adopted corporate governance measures from other jurisdictions, particularly the U.S. and the U.K.[226] This despite considerable variances between conditions prevailing in those Western jurisdictions and locally in India. For example, the U.S. and the U.K. follow the "outsider" model of corporate governance[227]

224. *See* Umakanth Varottil, *Corporate Governance in M&A Transactions*, 24 NAT. L. SCH. IND. REV. 50; Vikramaditya Khanna, *Mergers & Acquisitions and Corporate Governance*, NSE QUARTERLY BRIEFING (Oct. 2013), http://www.nseindia.com/research/content/res_QB3.pdf. (as far as corporate restructuring is concerned, Indian corporate law continues to operate on the basis of concepts derived from the colonial era, which the U.K. too follows to a large extent. These include the concepts of scheme of compromise and arrangement (for effecting amalgamation of companies), contractual mergers (in very limited circumstances), schemes of reduction of capital, compulsory acquisitions and the like.).

225. *See Cadbury Committee Report*, *supra* note 147, at ¶ 2.5 (defining corporate governance as relating to the system where companies are directed and controlled and representing the checks and balances within the corporate structure that helps create long-term value enhancement for stakeholders in a company). *See also* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 2 (1995).

226. *See supra* notes 146-153 and accompanying text (suggesting that India tends to adopt the U.S. model rather than the U.K. model in securities regulation). *See also* Varottil, *supra* note 125 (asserting that implementing the outsider model would not properly address India's governance problem).

227. Stilpon Nestor & John K. Thompson, *Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?* At 5, http://www.oecd.org/dataoecd/7/10/1931460.pdf. (describing the U.S. and U.K. systems as the classic "outsider" systems enabling both countries' institutional

wherein most companies in those jurisdictions display dispersed shareholding and it is not too common to find controlling shareholders.[228] On the other hand, India follows the classic "insider" system[229] where most public companies are controlled (by virtue of dominant shareholding) by either business families or the state.[230]

Although there could be several possible methods to analyze the corporate governance issues in a legal system (and more so in comparison with other systems), this article resorts to the "agency problems" paradigm that provides an elegant underlying framework.[231] As explained in an influential book on the subject,[232]

investors to be among the largest owners of equity and owners of industry).

228. *See* Ronald J. Gilson & Jeffery N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, TBD (2013) (explaining that while this theory has come under some strain in the U.S. context, it remains true in the U.K). For a discussion on the U.S.: Clifford G. Holderness, see *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377 (2009). *See* Bernard S. Black & John C. Coffee Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997, 2001(discussing on the U.K); BRIAN R. CHEFFINS, PUTTING BRITAIN ON THE ROE MAP: THE EMERGENCE OF THE BERLE-MEANS CORPORATION IN THE UNITED KINGDOM, 151, 151 (2002) *in* JOSEPH A. MCCAHERY, PIET MOERLAND, THEO RAAIJMAKERS & LUC RENNEBOOG (EDS.), CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 151, 151 (2002).

229. *See* Nestor & Thompson, *supra* note 227 at 9 (distinguishing insider groups from the outsider system by noting the absence of an agency problem in insider groups due to their small size and ability to act together in management). *See also Law & Finance*, *supra* note 1 (discussing the protection of the shareholders' rights in the insider system specifically in terms of voting).

230. *See* Chakrabarti, *supra* note 190 (describing the inter-locking of corporate control within family businesses and corporate groups that are prevalent in India as blocking minority shareholders' rights). *See also* Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, 3 COLUM. BUS. L. REV. 800, (2007) (dismissing the potential for hostile takeovers by foreign enterprises in India due to the predominance of founding families with shareholding positions and Indian provision and government approvals that favor the founding families); N. Balasubramanian & R.V. Anand, Ownership Trends in Corporate India 2001-2011: Evidence and Implications (Indian Inst. of Mgmt, Bangalore, Working Paper No. 419), http/::ssrn.com:abstract=2303684 (elaborating that India's corporate ownership is mainly controlled by the promoter groups multinational parents, or the state).

231. *See* R. Cheffins, The Trajectory of (Corporate Law) Scholarship (Nov. 2003) (unpublished paper), http://ssrn.com/abstract=429624 (noting that the agency concept is used by academics in corporate governance literature in a wider economic sense and ought to be distinguished from the contractual concept of agency).

the effort of corporate law is "to control conflicts of interest among corporate constituencies".[233] These conflicts are referred to in economic literature as "agency problems".[234]

Corporate law and corporate governance literature define three generic agency problems.[235] The first agency problem relates to the conflict between the company's managers and its owners (being the shareholders).[236] Hereinafter referred to as the "manager-shareholder agency problem", such conflict exists largely in jurisdictions which manifest diffused shareholding in companies. This is due to collective action problems and the resultant inability of shareholders to properly monitor the actions of managers. The second relates to the conflict between the majority or controlling shareholders on the one hand and minority shareholders on the other.[237] Such conflict, which is referred to hereinafter as the "majority-minority agency problem" is largely prevalent in jurisdictions that display concentrated shareholding where the interests of minority

232. REINIER R. KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, (2009) (defining agency problem as arising when a principal's welfare depends on an agent's actions and those actions are not done in the interest of the principal).

233. *Id.* at 35.

234. For a detailed analysis of agency theory in economic literature, see J. Michael Jensen & William Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, (1976) (explaining that in an agency relationship the principal and the agent generally incur "positive monitoring and bonding costs" and so the agent cannot always make decisions beneficial to the principal's welfare). *See also* KRAAKMAN, ET. AL., *supra* note 232, at 35 (noting that an 'agency problem'—in the most general sense of the term—arises whenever the welfare of one party, termed the 'principal,' depends upon actions taken by another party, termed the 'agent.' The problem lies in motivating the agent to act in the principal's interest rather than simply the agent's own interest. Viewed in these broad terms, agency problems arise in a broad range of contexts that go well beyond those that would formally be classified as agency relationships by lawyers).

235. *See generally* KRAAKMAN ET. AL., *supra* note 232, at 36; Paul L. Davies, The Board of Directors: Composition, Structure, Duties and Powers 1, 2 (unpublished article) (2000), http://www.oecd.org/dataoecd/21/30/1857291.pdf (outlining three types of agency problems).

236. KRAAKMAN ET. AL., *supra* note 232, at 36; Davies, *supra* note 235, at 2 (noting that the conflict between shareholders and the management arises where shareholdings are dispersed).

237. *See* Davies, *supra* note 235, at 3 (explaining that an issue arises in protection of minority shareholders when a small number of shareholders have large amounts of shares in the company).

shareholders are significantly diluted. The third agency problem relates to the conflict between the owners and controllers of the firm (such as the shareholders and managers) and other stakeholders (such as creditors, employees, consumers and public), with many of whom the company may enter into a contractual arrangement governing their affairs *inter se*.[238] This conflict, referred to hereinafter as the "controller-stakeholder agency problem" exists both in jurisdictions that have diffused shareholding as well as those that have concentrated shareholding, but its role is accentuated in those that have concentrated shareholding.[239]

Through this "agency problems" paradigm, it is appropriate to discuss the evolution of corporate law in post-colonial India and how it has sought to address these different agency problems.

1. Controlling the Managers

The manager-shareholder agency problem is of limited relevance in India due to the general concentration of shareholding. However, looking at historical evolution in India, legal instruments were indeed utilized to address this agency problem that existed during independence. As we have seen,[240] the managing agents that proliferated during the colonial era gave rise to the manager-shareholder agency problem. The managing agents of the time held only a small percentage of shareholding in the companies they managed. Since the outside investors were not only large in number and unrelated to the managers, they were also disinterested in participating in the management of the companies. Arguably, the governance issues afflicting Indian companies that were managed during the colonial period by the managing agents were somewhat

238. *Id.* (noting that all company laws address relations between the company and its creditors because of the company's shareholders' limited liability).

239. Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 539 (2000). *See also* Alan Dignam & Michael Galanis, *Corporate Governance and the Importance of Macroeconomic Context*, 28 OXFORD J. LEGAL STUD. 201, 202 (2008) (explaining that there is some correlation between ownership structure and the shareholder-stakeholder focus. Interesting political explanations have been proffered for this phenomenon. Professor Roe notes that "when we line up the world's richest nations on a left-right political continuum and then line them up on a close-to-diffuse ownership continuum, the two correlate powerfully.").

240. *See supra* Section II.A.4.

akin to those faced by the classic Berle & Means corporation in the U.S.[241] Although there was initial hesitation to confront this agency problem directly both towards the end of the colonial period and immediately upon India's independence,[242] sufficient political will was mustered in the late 1960s to eliminate the institution of managing agencies altogether.[243]

To that extent, India's experience in dealing with the manager-shareholder agency problem is somewhat distinctive. The transplant of English law into India until the 1960s did not specifically address the problems relating to managing agencies. Although English law was focused on addressing the manager-shareholder agency problem generally, the indigenous innovation of managing agencies in India required a more targeted solution. This required the Indian Parliament to make a clean break from the colonial era in eliminating the concept of managing agencies altogether. Thereafter, the agency problems that were more prevalent in India relate to those between controlling shareholders and minority shareholders, wherein neither the colonial laws nor the corporate governance regime as it has evolved in England provide any solution.

2. Protecting the Minority

Due to the concentration of shareholding in Indian companies, the majority-minority agency problem is rampant. Hence, the role of corporate law and governance norms ought to be to address that specific problem. Until recently, corporate law in India failed to directly address this problem. In the two decades following liberalization, several corporate governance norms were gradually introduced in the Indian context.[244] The efficacy of importing several corporate governance concepts into an emerging economy like India from the developed economies like the U.S. and U.K. is open for debate.[245] Any problems with regard to transplantation of these

241. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 66 (1940).

242. *See supra* notes 107-113 and accompanying text.

243. *See supra* notes 122-124 and accompanying text.

244. *See supra* Section II.D (discussing the norms and how they were introduced).

245. Jairus Banaji & Gautam Mody, *Corporate Governance and the Indian Private Sector* 8 (Univ. of Oxford, Queen Elizabeth House Working Paper No. 73,

corporate governance concepts are exacerbated by the differing political, social and economic considerations that operate in these two sets of jurisdictions, namely the U.S. and U.K. (the outsider system) on the one hand, and India (an insider system) on the other.[246] As argued elsewhere, several corporate governance concepts remained unimplemented effectively in India, and this implementation failure raises questions regarding the viability of the transplant itself.[247]

Just to illustrate this point further, during this phase, one key transplant related to the concept of board independence, which was transplanted to India from the U.S. and the U.K.[248] As mentioned earlier, controlling shareholders in Indian companies possess significant voting power, both *de jure* and *de facto*, and can determine the composition of the boards of most Indian public listed companies by exercising their voting power to appoint or remove directors.[249] This holds good for the appointment of independent directors as well. Hence, although independent directors (a seemingly critical component of the corporate governance norms) are required to act in the general interests of the company and the shareholder body as a whole and as monitors of managers and controlling shareholders, in practice they are generally likely to owe their *de facto* allegiance to the controlling shareholders, as such

2001), http://www3.qeh.ox.ac.uk/pdf/qehwp/qehwps73.pdf.

246. *See* Troy Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1058 (2004).

247. Varottil, *supra* note 125 (describing that it is arguably ineffective in using the U.S. and U.K. models because their corporate government norms are not effective in India).

248. *See* Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6 HASTINGS BUS. L.J. 291 (2010) (analyzing the incorporation of the independent director concept in India and the process by which it has evolved).

249. Companies Act, 1956, No. 1, §§ 263, 284, Acts of Parliament, 1956 (India) (in India, the appointment of each director is to be voted on individually at a shareholders' meeting by way of a separate resolution. Each director's appointment is to be approved by a majority of shareholders present and voting on such resolution. Hence, controlling shareholders, by virtue of being able to muster a majority of shareholders present and voting on such resolution, can control the appointment of every single director on the board. Companies Act, 1956, § 263. Similarly, any director may be removed before the end of her term without cause by a majority of shareholders present and voting on such resolution.).

directors depend on the controlling shareholders for their board seats (as well as remuneration and other terms and conditions). In view of this, independent directors may have a tendency to passively approve actions taken by controlling shareholders and the managers (whose appointments again are subject to be influenced substantially by the controlling shareholders). Proceeding on the assumption that one of the fundamental purposes of corporate governance in India is to address the controller-minority agency problem by protecting the interests of the minority shareholders from actions of the controlling shareholders, this purpose is defeated at its very source because the instrumentality of independent directors that has been created to solve this agency problem is itself subject to potential dominance by the controlling shareholders.[250] This illustration of the independent director concept is replete with problems that are likely to be encountered when concepts from outsider systems are transplanted to insider systems without adequate consideration of inherent differences in corporate structures or other relevant factors.

The latest round of corporate law reforms have, however, shifted away from a wholly transplant-oriented approach to a more indigenous approach that takes into account the local circumstances, particularly the concentration of shareholding in Indian companies and hence the presence of the majority-minority agency problem. The Companies Act, 2013 brings about substantial changes to the concept of board independence and also introduces other measures such as rules pertaining to related-party transactions, all of which seek to directly address the majority-minority agency problem. Under the new legislation, independent directors are to be chosen by a nomination committee of the board, which has been made mandatory.[251] Moreover, a widening monitoring role of independent directors also extends specifically to protecting the interest of the minority shareholders, thereby providing a pointed solution to the agency problem prevalent in India.[252] The altered role of independent

250. As controlling shareholders have vast powers to determine the selection of the independent directors, it is likely that controlling shareholders would most likely appoint persons who would be passive to their decision-making. Further, even independent directors who may wish to act in the larger interests of the company may be precluded from doing so because of the wide-ranging powers that controlling shareholders exercise.

251. Companies Act, 2013, No. 18, § 178 Acts of Parliament, 2013 (India).

252. *Id.* at Schedule IV, ¶ II(5),(6),(8).

directors under the contemporary legislation is an effort to devise indigenous solutions as opposed to simply relying on transplants.

The enormous stress placed on regulating related-party transactions under the new legislation is yet another evidence of autochthony. Previously transplanted legal regimes pertaining to corporate governance in India paid short shrift to related-party transactions as they are less relevant in jurisdictions such as the U.K. (and the U.S.) where shareholding is diffused. They are, however, rampant where shareholding is concentrated and corporate groups structures are common, such as in India.[253] The Companies Act, 2013 introduces strict measures to regulate related-party transactions. For instance, such transactions are now required to be approved by the board of directors of the company, and in the case of material transactions they also require the approval of the shareholders (wherein a shareholder who is a related party is disallowed from voting).[254] Disinterestedness and independence in decision-making would ensure that the transactions are carried out at arm's length and are not abusive in nature so as to unduly transfer value from a company to a related party (such as a controlling shareholder) so as to adversely affect the interests of the minority shareholders.

These illustrations are indicative of India's shift away not only from colonial era laws (that did not encompass matters of corporate governance in as much detail), but also from developments in the U.K. (as well as perhaps other former colonies such as Australia and Canada) in recognition of the specific majority-minority agency problem that is prevalent in India.

253. *See* ORG. FOR ECON. CO-OPERATION & DEV., GUIDE ON FIGHTING ABUSIVE RELATED PARTY TRANSACTIONS IN ASIA 11 (2009) (related-party transactions are defined as those transactions between a company, its subsidiaries, employees, its controlling shareholders, management or members of their immediate family, and affiliates. While related-party transactions are often beneficial to companies, they also have the potential to be abusive in nature thereby unduly benefiting the controlling shareholders while adversely affecting the interests of minority shareholders.).

254. Companies Act 2013, § 188 (outlining when a company may not enter into arrangements with a related party).

3. Enabling Other Stakeholders

The question whether companies should be run for the benefit of their shareholders or whether the interests of other stakeholders must be taken into account is a vexing one,[255] and directly attracts the controller-stakeholder agency problem. The colonial law in India was unequivocal in its zeal to protect shareholders so as to enable companies to attract capital.[256] Corporate law did not play any role at all in taking cognizance of the interests of non-shareholder constituencies. This position continued immediately following decolonization, but the change in philosophy began taking shape in the 1960s with amendments to the Companies Act, 1956, which was also consistent with the escalation of the socialistic sentiment of the period.[257] This sub-section seeks to demonstrate that the legal position has evolved substantially in the post-colonial era such that corporate law's approach towards viewing the company as a private matter has given way to an approach that considers the company as carrying wider societal ramifications and affecting public interest. This vision of the corporate entity not only contrasts with the colonial origins of Indian corporate law, but stands at considerable variance with the English position, which continues to be staunchly shareholder-oriented.

Following decolonization, consistent with its journey through years of socialism, the role of company law in India has extended beyond merely the protection of shareholders.[258] It encompasses the protection of employees, creditors, consumers and society. For instance, employees obtain certain special rights under company law, such as preferential payment for dues in case of winding up of a

255. Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 642 (2011) (analyzing the history behind the argument of whether a corporation should be run in favor of a shareholder's interest or stakeholders' interests by examining the systems in US, Germany, and France).

256. *See supra* Section II.A.3. (noting that this was consistent with the *laissez faire* policy prevalent during the period).

257. *See supra* Section II.C.

258. *See* Tarun Khanna & Krishna Palepu, *Globalization and Convergence in Corporate Governance: Evidence from Infosys and the Indian Software Industry*, 35 J. INT'L BUS. STUDIES 484, 500 (2004) (laying out the debate in the context of protection of employees using the stakeholder theory).

company,[259] and also the right to be heard in case of significant proceedings involving a company such as in a scheme of arrangement (merger, demerger or other corporate restructuring)[260] or in a winding up[261] of the company. As far as creditors are concerned, while company law does provide them with the standard rights and remedies,[262] other special laws confer further corporate law rights such as the ability of the creditors to convert their loans into equity of the debtor company and, more specifically from a corporate governance standpoint, to appoint nominee directors on boards of debtor companies.[263] These rights are seemingly provided to protect the interests of the creditors. Building upon the element of "public interest", affected parties may exercise remedies in case the affairs of a company are carried out in a manner prejudicial to public interest,[264] or if a scheme of arrangement[265] is not in consonance with public interest.[266] For example, while according its sanction to a merger, demerger or corporate restructuring that is carried out through a scheme of arrangement, the court must take into consideration the effect of such a transaction on public interest, a

259. Companies Act, 2013, No. 18, § 325 Acts of Parliament, 2013 (India).

260. Companies Act 2013, §§ 230-232. *See In Re, River Steam Navigation Co. Ltd.*, (1967) 2 Comp. L.L. 106 (Cal.) (holding that in considering any scheme proposed, the Court will also consider its effects on workers or employees); *In Re, Hathisingh Manufacturing Co. Ltd.*, (1976) 46 Comp. Cas. 59 (Guj.) and *Bhartiya Kamgar Sena v. Geoffrey Manners & Co. Ltd.*, (1992) 73 Comp. Cas. 122 (Bom.) (approving the proposition that while sanctioning a scheme of arrangement the court should consider not merely the interests of the shareholders and creditors but also the wider interests of the workmen and of the community).

261. Companies Act, 2013, No. 18, § 282 Acts of Parliament, 2013 (India). *See* National Textile Workers' Union v. Ramakrishnan (P.R.), (1983) 75 A.I.R. SC (India) (holding that a court can hear the employee if it determines the employee should be heard to administer justice).

262. Companies Act, 2013, § 272(1)(b) (stating that these include the right to initiate a winding up of the company, which is a customary company law right conferred on creditors in most jurisdictions).

263. *See e.g.*, State Bank of India Act, 1955, No. 23, § 35A, Acts of Parliament (2010) .

264. Companies Act, 2013, § 241(1)(a). *See also supra* note 121.

265. *See* Jennifer Payne, *Schemes of Arrangement, Takeovers and Minority Shareholder Protection*, 11 J. CORP. L. STUD. 67 (2011) (mergers, demergers and other forms of corporate restructuring are usually effected through a scheme of arrangement that not only requires the approval of different classes of shareholders and creditors, but also the sanction of the relevant court of law).

266. Companies Act, 2013, No. 18, § 232 Acts of Parliament, 2013 (India).

matter that is alien to English law.[267]

If Indian corporate law was already stakeholder-oriented during the socialist era, the recent reforms culminating in the Companies Act, 2013 stress that further in several ways. Here, two such reforms are indicative of this move, viz. (i) expansion of directors' duties, and (ii) corporate social responsibility.

Hitherto, directors of Indian companies had negligible guidance under company law as regards their duties and liabilities. The preexisting Companies Act, 1956 did not explicitly stipulate directors' duties, which made it necessary to fall back on common law principles (to be articulated by courts while delivering specific decisions). The statutory uncertainty was compounded by the absence of significant cases of director duties and liabilities before Indian courts. This somewhat unsatisfactory situation has been mended in the Companies Act, 2013, which is rather explicit about directors' duties. The new provisions not only provide greater certainty to directors regarding their conduct, but also enable the beneficiaries as well as courts and regulators to judge the discharge of directors' duties more objectively.

More important for our present purpose, the Companies Act, 2013 extends the stakeholder principle further while codifying directors' duties. It provides:

> A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.[268]

Even if there was a doubt under previous legislation as to the extent to which stakeholder interests are to be considered by directors of a company, it has been put to rest in the new legislation. In other words, shareholders are not the only constituency that deserves the attention of directors; other constituencies such as employees and even the community and the environment are to be considered by the directors.

267. Hindustan Lever Employees' Union v. Hindustan Lever Ltd., A.I.R. 1995 S.C. 470, ¶ 5 (India).

268. Companies Act, 2013, No. 18, § 166(2) Acts of Parliament, 2013 (India).

While the stakeholder approach was considered during the latest English company law reform process, matters were resolved rather differently. There, the Company Law Review came up with proposals to cater to stakeholder interests.[269] Essentially, two approaches that were considered: (i) the pluralist approach, which states that "company law should be modified to include other objectives so that a company is required to serve a wider range of interests, not subordinate to, or as a means of achieving, shareholder value . . . but as valid in their own right,"[270] which represents an expansive conception of stakeholder interest; and (ii) the enlightened shareholder value ("ESV") approach, which takes the position that the ultimate objective of company law to generate maximum shareholder value is also the best means of securing protection of all interests and thereby overall prosperity and welfare.[271] In other words, the latter approach conceives of a merger of interests of stakeholders and shareholders by adopting the position that if the company acts to preserve stakeholder interests, then that would necessarily bring about enhancement of shareholder value. However, after some extensive debate, it is the ESV model that has received statutory recognition in the UK. This appears to be a hybrid approach that is primarily for the benefit of shareholders, but also obliquely takes into account the interests of other stakeholders.[272] Notwithstanding this compromise, it is clear that in case of conflict between various interests, the directors must prioritize shareholders' interests, which is the paramount goal.[273]

On the other hand, in the context of the aforesaid dichotomy, the Companies Act, 2013 in India has preferred to adopt the pluralist approach by providing recognition to both stakeholders and shareholders, without necessarily indicating a preference to either.

269. *Supra* note 170.
270. *Id.* at ¶ 5.1.3 (explaining that the approach is "pluralist because it argues that the interests of a number of groups should be advanced without the interests of a single group (shareholders) being overriding").
271. *Id.* at ¶ 5.1.2.
272. Companies Act, 2006, c. 46, § 172(1) (Eng.)
273. *See* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 34, 44 (2013) (showing that U.K. legislation and jurisprudence hold a shareholder's interest as higher priority as shown through §172 of the U.K. Companies Act).

Despite the superficial similarity between the English and Indian legal provisions on directors' duties, there is a vital distinction in that shareholders continue to occupy a pivotal position in England, whereas in India they are only one among a number of constituencies that command the attention of directors.

Related to this is the newly introduced requirement of CSR,[274] which has gained considerable traction. The concept of social responsibility of corporations is not novel, and has been part of the indigenous thinking during the colonial era.[275] After much debate, CSR found its place in the Companies Act, 2013 whereby every company of a certain size is to announce a CSR policy. More importantly, India is one of the earliest countries to require large companies to spend at least two percent of its average net profits made during the three immediately preceding financial years in pursuance of its CSR policy towards specified activities.[276] During the legislative process, there was an intense debate as to whether the spending requirements must be made mandatory, but in the end due to a compromise the position resulted in a "comply-or-explain" approach although the wording of the statutory provision largely operates as a mandate.[277] While there is strident criticism against such a broad and overarching CSR policy on various counts, the requirements are here to stay.[278] These developments are a far cry

274. *See* Bhasin, *supra* note 154.

275. For example, Mohandas K. Gandhi is credited with the idea of the trusteeship obligations of businesses. *See* BIRLA, STAGES OF CAPITAL, *supra* note 47, at 103. *See also* Colin Mayer, THE FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013) (arguing that a corporation is able to afford commitments to others).

276. Companies Act, 2013, No. 18, §135 Acts of Parliament, 2013 (India).

277. *See* Umakanth Varottil, *Companies Bill, 2011: CSR*, INDIACORPLAW BLOG (Dec. 16, 2011), http://indiacorplaw.blogspot.in/2011/12/companies-bill-2011-csr.html (showing that the law provides a way for companies to explain why they did not spend the required amounts under CSR).

278. For a growing literature on CSR in India, see Afra Afsharipour, Symposium, *Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34 SEATTLE U. L. REV. 995, TBD (2011) (describing the history behind CSR and its purpose as an attempt to expand the interaction amongst the stakeholders and the corporations); *See also* Caroline Van Zile, Comment, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 ASIAN-PAC. L. & POL'Y J. 269 (2012) (explaining that the legislation does not define CSR and therefore allows companies to create CSR spending plans specific

from the position that prevailed during the colonial period, which was a single-minded focus on shareholder interests. They also take India in a different direction compared to the largely shareholder-oriented focus that continues to operate in contemporary U.K. While the corporation has acquired public overtones in India, which have only increased over time, the broader stakeholder interest is subservient to shareholder value enhancement in the U.K. context.

In all, we find diverging philosophies in corporate governance that operate in India and its colonizer. Viewed from the agency problems paradigm, the manager-shareholder agency problem that is the focus of corporate law in the U.K. hardly exists in India. Similarly, the recent focus of the Indian legislators in dealing with the majority-minority agency problem is of limited interest in the U.K. Finally, while shareholders continue to hold the attention of corporate managements in the U.K., other stakeholders are entitled to the wider protection of corporate law in India. Here too, transplant has given way to autochthony.

D. CORPORATE LAW ENFORCEMENT MACHINERY

Corporate law may be enforced either through the public enforcement apparatus or through private action. In public enforcement, the state (or an independent regulatory body) initiates proceedings against alleged violators of corporate law with a view to imposing civil or criminal penalties.[279] Private enforcement consists of legal action by the victims of wrongdoing (who are private parties) to recover damages or obtain injunction by way of a civil suit.[280] The "legal origins" strain of literature posits that in common law countries the judiciary plays an important role in enforcing investor rights, thereby enhancing the value of capital markets.[281] On the other hand, civil law countries tend to rely heavily on

to them); Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 174 (2014) (discussing India's emergence as the first to require CSR considerations and compulsory spending whereas places like China still strongly support a voluntary structure).

279. Bernard Black, *The Core Institutions that Support Strong Securities Markets*, 55 BUS. LAW. 1565, 1576-77 (2000).

280. *Id*. at 1577-78.

281. *Supra* note 1.

governmental intervention in regulating the capital markets.

In India, during the colonial period, there was greater emphasis on private enforcement and very little on public enforcement. This is consistent with the approach in England (which largely continues to date) wherein private enforcement plays a significant role in enforcing corporate law. However, beginning the socialist phase in Indian corporate law history, the focus shifted rather significantly towards public enforcement, whereby the government obtained extensive powers of investigation and other forms of enforcing corporate law.[282] This approach was fortified after SEBI's establishment when it obtained significant powers of enforcement.

It is simple at first blush to attribute the growth to India's legal system through civil liability and its enforcement through the judiciary. This would be consistent with the "legal origins" notion of investor protection due to India's colonial legal heritage.[283] India not only has a sufficiently robust substantive law on investor protection, but the independent judicial system drawn from the common law tradition allows for judges to mold the law to suit specific circumstances and thereby adapt to the dynamicity in the capital markets.

However, as argued elsewhere,[284] the efficacy of India's legal system as a tool for enforcing corporate and securities laws necessitates a more nuanced treatment. Counter-intuitively, India's common law legal system operating through the judiciary has not played a vital role in the development of the capital markets through the imposition of civil liability upon issuer companies or the compensation of investors for losses due to misstatements. Despite the existence of substantial rules for civil liability and compensation

282. *See supra* Section II.C (discussing India's corporate governance and adoption of the U.S. and the U.K. models).

283. *See* Armour & Lele, *supra* note 3, at 499. *See also* Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 UC DAVIS L. REV. 1029, 1047-49 (2011) (correlating India's common law structure and complex structure of laws to the adoption of the English language and colonization by the British for two centuries).

284. Umakanth Varottil, *The Protection of Minority Investors and the Compensation of Their Losses: A Case Study of India*, *in* PIERRE-HENRI CONAC & MARTIN GELTER, GLOBAL SECURITIES LITIGATION AND ENFORCEMENT (forthcoming), http://ssrn.com/abstract=2421098 (arguing that India's common law system fails to impact investor protection through the court system).

and the presence of an elaborate court system, the associated conditions for the judiciary to make an impact on corporate law and investor protection are conspicuous by their absence.[285] The Indian court system is plagued by delays, costs, and other inefficiencies. Nearly 32 million cases are pending before different levels within the Indian judiciary thereby causing a significant strain on the system.[286] Cases can on average take 15 years to achieve final outcomes.[287] For this reason, civil liability and compensation of investors' losses have almost never been utilized to any meaningful extent in India as a tool for enforcing corporate law.

By way of comparison, under English law while case law forms the bulwark of the evolution in areas of corporate such as directors' duties, there is sparse case law in post-colonial India in this crucial area of the law despite over half a century of judicial experience in implementing the Companies Act, 1956.[288] Similarly, the shareholder remedy of derivative law suits, an important form of private enforcement of directors' duties, has been hardly utilized in India.[289]

Recognizing the need for private enforcement of corporate law, the Companies Act, 2013 has introduced a statutory shareholder class

285. Armour & Lele, *supra* note 3, at 508-11.

286. M.J. Antony, *Only Bad News*, THE BUS. STANDARD (Jan. 14, 2014), http://www.business-standard.com/article/opinion/m-j-antony-only-the-bad-news-114011401025_1.html (noting that around five thousand cases are added every month and only about four thousand are disposed). See also, Jayanth Krishnan, *Globetrotting Law Firms*, 23 GEO. J. OF LEGAL ETHICS 57 (2010).

287. *See* Press Release, Press Information Bureau, Gov't of India, *National Legal Mission to Reduce Average Pendency Time from 15 Years to 3 Years*, (June 23, 2010), http://pib.nic.in/newsite/erelease.aspx?relid=62745(stating that the National Litigation Policy's purpose is to diminish the average pendency time in Indian courts from fifteen years to three years).

288. *See* Paterson, *supra* note 158 at 50 (stating the lack of case law on directors' duties has made the law somewhat less certain in India compared to other jurisdictions where the judiciary sets the standards for director conduct.); Chen, *supra* note 24 (arguing generally that the minimal amounts of insurance litigation is causing Singapore's inability to develop insurance-contract law).

289. *See* Vikramaditya Khanna & Umakanth Varottil, *The Rarity of Derivative Actions in India: Reasons and Consequences*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH, 380 (Dan W. Puchniak et al. eds., 2012) (finding that "over the last sixty years only about ten derivative actions have reached the high courts or the Supreme Court. Of these, only three were allowed to be pursued by shareholders, and others were dismissed on various grounds").

action mechanism.[290] In order to obviate the delays faced before the regular court system, the legislation proposes the establishment of a specialized body in the form of the National Company Law Tribunal ("NCLT") that will hear shareholder class actions and other corporate law disputes. Nevertheless, it is difficult to be sanguine about their effectiveness due to the lack of institutional factors necessary for their utilization. For example, India follows the English rule on costs, whereby the loser pays the reasonable costs of the opponent as ordered by the courts.[291] This may act as a disincentive to shareholders to bring suits even if they have a strong case on the merits. Moreover, in India the costs are not limited to attorneys' fees. Because investor actions are brought before the regular civil courts, plaintiffs usually have to pay stamp duty and court fees, which may be significant in some states. Contingency fees are one way to motivate entrepreneurially minded attorneys to take on riskier suits with the likelihood that they would partake a portion of the proceeds if the suit were successful. Although this system has worked in the U.S. and a number of other jurisdictions, contingency fees are prohibited in India[292] thereby disincentivizing plaintiff attorneys from taking on riskier suits. Although the establishment of the NCLT will eliminate some of the costs such as stamp duty and court fees, the lack of institutional factors that promote a class action culture make it unlikely that private enforcement will obtain the necessary fillip.

India's enforcement is vastly different from that of the U.K. on yet another count, particularly in the area of corporate governance. In order to implement corporate governance norms, legal systems have utilized two broad approaches. One relates to the use of a voluntary code of corporate governance. Under this approach, either the government or an industry body (self-regulator) may establish a code of conduct for companies. This is often referred to as "soft law".[293]

290. Companies Act, 2013, No. 18, §135 Acts of Parliament, 2013 (India) (although this provision is yet to take effect as of the date of this writing).

291. Code Civ. Proc. (1980), § 35(2), (India), http://www.vakilno1.com/bareacts/laws/civil-procedure-code-1908.html#35_Costs.

292. Bar Council of India Rules, Part VI, Chapter II, § II(20), http://lawmin.nic.in/la/subord/bcipart6.htm#chapter2. ("An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.").

293. Melvin Aron Eisenberg, *The Architecture of American Corporate Law: Facilitation and Regulation*, 2 BERKELEY BUS. L.J. 167, 182 (2005) (defining "soft

Although there is no compulsion to comply with such a code, companies are required to make appropriate disclosures on whether they comply with the code, or alternatively to explain the reasons for non-compliance. The Combined Code in the UK is a classic example of such a voluntary "comply-or-explain" approach.[294]

While India began briefly with the "comply-or-explain" approach,[295] it quickly migrated to a mandatory approach towards corporate governance,[296] which has since continued. This resonates with the legal tradition and enforcement culture in India, wherein in the postcolonial period there has been reliance on government regulation of the corporate sector. Since independence, the Indian industry has been subject to close regulation and supervision by the government through mandatory regulation.[297] This approach has become further solidified with the enactment of the Companies Act, 2013, which encapsulates detailed corporate governance provisions. The push towards mandatory rules in India has therefore become complete.[298]

Hence, the enforcement machinery in corporate law in India has undergone a sea change not just compared to colonial time (which is understandable given the pace of developments in India's corporate sector since decolonization), but it has developed in a direction that is very different from that of its colonizer.

As this Section indicates through the extensive use of various legal concepts that apply under contemporary Indian corporate law, not only has there been a break from India's colonial past, but India has

law" as one that is not similarly binding like traditional laws because it is voluntary to certain degrees and is not directly backed by a state sanction).

294. *See supra* note 151. The voluntary approach is the brainchild of the institutional investor community that plays a significant role in the U.K. corporate sector. Simon C.W. Wong, *Developing and Implementing Corporate Governance Codes* 5, 9 (2008), http://ssrn.com/abstract=1321127.

295. *See supra* note 146 and accompanying text.

296. *See supra* note 149 and accompanying text.

297. *See* Khanna, *supra* note 159, at 174-79; Rajesh Chakrabarti, William L. Megginson & Pradeep K. Yadav, *Corporate Governance in India*, 20 J. APP. CORP. FIN. 59, 62-63 (2008).

298. At the same time, mandatory rules of corporate governance imposed through legislation might be subject to criticism. Given that corporate governance is dynamic and requires a flexible approach with constant updating in accordance with developments in the markets, addressing ongoing concerns in an efficient manner would be impossible through legislative amendments.

also charted its own course which is considerably different from those of Britain as well as several of its leading former colonies.

IV. LESSONS AND CONCLUDING REMARKS

This article analyzes the evolution of corporate law in India since the colonial period and the considerable shifts it has witnessed in the post-colonial era. While Indian corporate law began as a legal transplant from England, subsequent amendments and reforms have moved it further away from its origin as they have been focused either on finding solutions to local problems or borrowing from other jurisdictions such as the U.S. To that extent, decolonization has had a significant effect of radically altering the course of Indian corporate law. Although the shift was not evident in the period immediately following decolonization, it began to take shape about a decade thereafter. Current Indian corporate law not only represents a significant departure from its colonial origins, but the divergence between Indian law and English law as they have developed since independence has been increasing. This study offers some valuable lessons that add to the theoretical debates across various planes, including on comparative corporate law and post-colonial legal systems. This section summarizes some of the key messages emanating from the analysis.

First, as demonstrated in this article, the corporate law in India has evolved in a rather fundamentally different fashion from that in England despite both countries being part of the "common law" family and one being a former colony of the other. This raises doubt about the bolder and more free ranging claims made by the proponents of the "legal origins" thesis as to the differences between the "common law" systems and the "civil law" systems.[299] A more nuanced approach ought to be taken while considering the effect of dispersion in the law among systems that share the same legal family.[300]

299. *See* La Porta, *supra* note 1 (concluding that countries with the common law tend to afford stronger protections to outsider investors but civil law countries tend to provide them with less protection).

300. This approach resonates with the literature set out in *supra* note 4. *See also* Mahy & Ramsay, *supra* note 24.

This assertion can be supported by several findings in this article. For example, although "common law" systems are generally understood to be shareholder-oriented, there is ample evidence of India adopting a broader stakeholder approach. While "common law" systems tend to rely on judge-made law in the development of their jurisprudence, in the corporate sphere India has largely relied on a codification process rather than through judge-made law (which is almost non-existent in this subject area). Consequently, greater reliance in placed on public enforcement of corporate law rather than private enforcement. At one level, if a combination of these factors is taken into account, India begins to resemble the typical civil law jurisdiction where these factors are present. But that is too simplistic an analysis. For example, nothing explains why India has not gone as far as civil law jurisdictions in insisting on codetermination whereby workers obtain a set on the board of directors and hence participation in the management of the company.[301]

India's position as a member of the "common law" family is different from others, particularly the U.K. This is on account of historical, economic and political reasons that have determined its destiny in a manner that is different from that of its colonizer. The economic policies of the Indian government following decolonization appear to have had some role to play by which some of the socialist mindset and government oversight of corporate affairs continues to the day.

Second, India's initial corporate law during the colonial period was a direct transplantation of English law on an ongoing basis. Such a legal transplant did not take into account local conditions. For instance, the law was focused on enabling British businesses to trade with India, and failed to heed to the indigenous business organizations, which did not find any place in corporate law.[302] Similarly, the transplanted legislation paid little regard to the problem of managing agencies, which did not pose any significant problem in England.

301. *See* Spamann, *supra* note 4, at 1866-67.
302. *See supra* Section II.A3 (describing the impact and goals of corporate legislation on Indian businesses during the colonial era).

Resistance to the transplanted legal system began occurring only in the post-colonial scenario. Some signs of decoupling are evidenced by legislative reforms such as the abolishment of the managing agency systems. More importantly, the transplanted legislation was incapable of addressing local issues in the post-colonial era due to which ongoing reliance on English law for legislative reform in India came to an end. All future corporate law reform processes looked inward for solutions to problems and did not look at all to the origin country for guidance. This suggests that transplants that do not take cognizance of local circumstances may be present formally but may not possess much functional effect. Moreover, following the lapse of time, one may witness change at the formal level itself.

Finally, a comparison of the historical colonial experience in the functioning of the transplanted legal system and the more contemporary experience in the post-colonial period suggests fragility in the foundations of the transplant. It is also an indication that formal transplants may be inevitable during the colonial era, but following decolonization such transplants could be called into question. India's post-colonial economic history also appears to have a significant role to play in the evolution of corporate law. A *laissez faire* policy at independence gave way to socialist propensities for nearly three decades followed by a process of gradual liberalization of the economy.

This article presents a macro-comparative analysis of the evolution of corporate law in India across two planes. First, it compares the law as it evolved in the colonial period, and how decolonization operated as a break from the past due to which the post-colonial developments took on a rather different tone. Second, it compares the post-colonial evolution of corporate law in India and England to determine the different direction that India took from its fellow-member of the "common law" family. The findings presented herein take into account not only the legal evolution, but also places it in the context of historical, economic and political factors that were at play in determining the legal regime from time to time.

Several avenues for further research arise from this article. For instance, research in specific areas of corporate law may be analyzed in depth to test the conclusions made in this article at a macro-level.

Such a body of literature may not only aid in our understanding of post-colonial legal developments, but also operate as a reflective and introspective exercise that will help better understand contemporary corporate law in India.