International Company and Commercial Law Review

2010

Corporate governance in India in the context of the Companies Bill 2009: Part 1: Evolution

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Subject: Company law

Keywords: Corporate governance; Directors' powers and duties; India

Legislation: Companies Bill 2009 (India)

**I.C.C.L.R. 41* Introduction

This is a vitally important period for corporate governance in India. After many false starts and delays, significant progress was made in the reform of company law with the completion of a comprehensive review in 2005 and the laying before the Lok Sabha (the lower house of the Indian Parliament) of a new Companies Bill on October 23, 2008. Any satisfaction that might have been felt as a result of these positive steps was cut short soon after, however, with the emergence of a significant corporate governance scandal at the beginning of 2009. On January 7, the chairman of Satyam Computer Services, B. Ramalinga Raju, admitted that there had been a systematic inflation of cash on the company's balance sheet over a period of some seven years amounting to almost $1.5 billion.1 The immediate fallout from this admission was familiar to those who witnessed the corporate scandals on the London Stock Exchange in the late 1980s and early 1990s (for example, Polly Peck, BCCI and Maxwell)2 or on the New York Stock Exchange at the beginning of the current century (for example, Enron, WorldCom and Xerox).3 The company's share price plummeted, its auditors and institutional shareholders (not to mention the stock exchange regulator) faced awkward questions as to how they had apparently missed the problems and the spectre of bankruptcy loomed. Beyond that, of course, broader questions also emerged. If the financial statements and auditors' reports for a company that had been regarded as a model of good corporate governance practice4 could not be taken at face value, then what other apparently solid stocks were investors holding that might actually be problematical? Was this an aberration or was this a symptom of more fundamental problems with the Indian system of corporate governance? If the experience of London and New York was anything to go by, then this might just be the first in a series of corporate collapses. The question, accordingly, was: what should be done? Again, looking to London and New York for inspiration appeared to indicate that someone was going to have to do something, whether the private sector seeking to reassure government by putting its own house in order (on the analogy of the Cadbury Committee in the United Kingdom5) or the Government seeking to reassure the wider market by passing new legislation (on the analogy of the Sarbanes-Oxley Act in the United States6).

It might be argued, however, that those with responsibility for these matters were granted some breathing space by other events. First, the broader global financial crisis and the collapse of banks in developed economies served to make Satyam's huge losses look relatively small in comparison. Secondly, the general election in India in April and May 2009 meant that political attention was focused on more immediate concerns. While the private sector appeared content to dismiss Satyam as a one-off7 --and certainly the fall of that company did not precipitate a series of failures in the way that had happened in London and New York--the Government would eventually have to consider whether any action was necessary ****I.C.C.L.R. 42*** beyond the immediate interventions required to deal with Satyam at the firm level.8

In this last regard, the advent of the new Parliament (the 15th Lok Sabha) has provided an answer. While the Companies Bill 2008 lapsed with the end of the 14th Lok Sabha, the new government has decided to reintroduce the same Bill with only the date changed.9 There had been speculation that the Satyam scandal would lead to the Bill being sent to another expert committee for further review before reintroduction to Parliament, but the fact that this has not happened must surely be read as a confident statement that the Bill as it stands is sufficient to deal with any problem that the scandal has exposed. That said, however, the Bill is being sent to a Parliamentary Standing Committee meaning that further detailed consideration of its content will be carried out in the months ahead.

The question that remains for those with an interest in Indian corporate governance is what changes might that Standing Committee usefully consider? Has the extensive discussion of corporate governance in India over the past decade coupled with stock market regulatory reforms produced an effective system? Are any remaining problems already addressed by the Bill? This three-part article sets out to address these questions and to offer answers that will hopefully be of use to those now considering the Bill.

Part 1 traces the evolution of the debate on corporate governance in India over the past decade from its initiation by a committee established by the Confederation of Indian Industry, through the Birla, Chandra, Murthy and Irani Reports to the Companies Bill 2008 and its latest incarnation as the Companies Bill 2009. Noting that these initiatives have drawn on developments in other jurisdictions (notably the United Kingdom and the United States) while endeavouring to accommodate the specific characteristics of the Indian context, Part 2 carries out an evaluation of the position that has been reached to date by considering two interrelated questions that are raised by recent events. First, is it the case that the jurisdictions from which India has borrowed corporate governance ideas can still be regarded as adequate sources of inspiration given the problems that they themselves have encountered in corporate governance in recent years? Secondly, to what extent has the Indian context indeed been adequately taken into account when corporate governance concepts have been borrowed from other jurisdictions? Noting the problems with existing corporate governance arrangements that are now under discussion in both the United Kingdom and the United States, and with a clearer understanding of the particularities of the Indian context that corporate governance reformers have sought to accommodate in their borrowing of UK and US concepts, Part 3 of the article goes on to offer proposals that may be of use to the Parliamentary Standing Committee as regards the issues that should be prioritised during its consideration of the Companies Bill 2009 in the months ahead. The overall conclusion drawn is that with a well-developed Bill already before Parliament, and with the benefit of being able to see the problems now facing the United Kingdom and the United States, India is well placed to implement reforms that would place it at the forefront of corporate governance globally. The Bill would require amendment; political will that has not always been evident when it comes to company law reform would have to be found; and long-proposed reform of the court system would finally have to become reality. The obstacles are not insignificant, but the prize for India as it prepares to compete for investment in the rebalanced global economy that emerges from the financial crisis is considerable. The sort of legal reform proposed in Part 3 of this article would send an unequivocal signal to domestic and international investors that India is as serious about protecting their interests as it is in making use of their resources for growth and development.

Evolution of corporate governance in India

The CII Code

The development of corporate governance in India can be traced in particular from the establishment by the Confederation of Indian Industry in 1996 of a National Task Force under the chairmanship of a leading business figure, Rahul Bajaj. The motivations behind this initiative included, at one level, public concern with fraudulent stock offers during the early 1990s and, at another, the expectations of international investors with regard to transparency and disclosure.10 The Task Force was in due course responsible for the production ***I.C.C.L.R. 43** in 1998 of a code of best practice entitled *Desirable Corporate Governance.* In setting out its understanding of corporate governance, the CII Code expressed faith in what would shortly after be defined as the enlightened shareholder value (ESV) model by the Modern Company Law Review in the United Kingdom.11 Thus the CII Code is clear that corporate governance is concerned with managerial decision-making in the context of the company's relationships with a range of stakeholders, that shareholders are the residual claimants, that focusing on long-term shareholder value is the best way to satisfy the claims of other stakeholders and that claims should be restricted to those that may be raised by shareholders and creditors.12 The recommendations of this voluntary code indicated a clear awareness of developments in corporate governance in countries such as the United Kingdom insofar as they touched on the role of independent non-executive directors (NEDs),13 focused on the appropriate scale and form of directors' remuneration,14 specified in detail the sort of information that should be reported to the board,15 required audit committees for companies over a certain size,16 and called for compliance certification by CEOs and CFOs.17 The CII Code also dealt with issues peculiar to the Indian context, in particular the fact that the financial institutions that were the largest shareholders were in the public sector (designated as public financial institutions or PFIs in a 1974 amendment to the Companies Act 195618) with the consequence that their monitoring of corporate governance and placement of nominee directors did not appear to operate in the same way as with private sector institutions in developed markets. A number of factors were identified including: government involvement in decision making; lack of appropriate reward structures; and a tendency to favour stability over challenging the board.19 As one commentator has put it, “In most instances these board members are believed to have supported existing management decisions.”20

The Birla Report and clause 49

The next development was at the initiative of the Securities and Exchange Board of India (SEBI), the market regulator,21 which established a committee on corporate governance under the chairmanship of Shri Kumar Mangalam Birla, which committee duly reported in 1999. This is a particularly important document, as it represents the “first formal and comprehensive attempt to evolve a Code of Corporate Governance, in the context of prevailing conditions of governance in Indian companies, as well as the state of capital markets”.22 Influenced by the CII report, as well as by developments in the United Kingdom and the United States, the Birla Committee too adopted an essentially ESV approach, agreeing that the “fundamental objective of corporate governance is the ‘enhancement of shareholder value, keeping in view the interests of other stakeholders”'.23 While the impact of the CII was acknowledged, it was also noted that this impact was restricted to some “progressive”24 or “forward looking companies”.25 The Committee was accordingly clear that “under Indian conditions a statutory rather than a voluntary code would be far more purposeful and meaningful”.26 While the Committee did then go on to note that some of its recommendations would require legislative change,27 by far the most important developments were to be achieved by modifications to the listing agreement.28 The language of the report in this regard is, however, apt to mislead, for although the subsequent recommendations are identified as either mandatory or non-mandatory, this terminology is employed simply to differentiate those which the Committee felt could only be implemented via legislation (and over which it and the SEBI accordingly had no control) from those which could be implemented by amendments to the listing agreement. Thus, while ***I.C.C.L.R. 44** a cursory reading of the report could lead the reader to assume that the approach here stands in stark contrast to the lighter touch “comply or explain” approach to be found in the United Kingdom's Combined Code,29 in fact it transpires that practically the same approach is envisaged. This becomes clear towards the end of the report where the Committee notes in relation to the separate section on corporate governance which it envisages as being part of the company's annual report that:

“Non-compliance [with] any mandatory recommendation with reasons [therefor] and the extent to which any non-mandatory recommendations have been adopted should be specifically highlighted. This will enable shareholders and securities markets to assess for themselves the standards of corporate governance followed by a company."[30]

Accordingly, in common with the Combined Code, engagement in corporate governance is expected from institutional investors in addition to any role for the regulator.[31] This is perhaps surprising given the particular problems caused in the Indian context by the public sector nature of the main institutional investors as noted in the CII Code.[32] The Committee does address institutional investors, but it really does no more than exhort them to take an interest in corporate governance and the language of the report at this stage recognises that it really has no power over them.[33] The position is bolstered to some extent by the fact that the company must obtain a certificate from its auditors detailing compliance with the mandatory recommendations. It is clear, however, that the Committee is looking forward to a point when global portfolio investors will be a more significant presence on Indian markets.[34] It is moreover unequivocal in its assessment of the consequences of a failure to develop in the direction that it had set out: "Without financial reporting premised on sound, honest numbers, capital markets will collapse upon themselves."[35]

The Birla Committee followed the CII Code in focusing attention on the role of independent NEDs and went further in offering a definition (albeit brief) of independence.[36] While the Committee followed the Cadbury Committee in recognising the different roles of the chairman and the CEO, it was much less concerned about these functions being in the hands of the same individual.[37] It did, however, see "a qualified and independent audit committee" of the board as indispensable[38] and devoted considerable attention to the specification of its powers and functions.[39] Its recommendation in relation to a remuneration committee was nonmandatory,[40] although those on disclosures of remuneration packages were.[41] Recommendations regarding accounting standards might appear to have been rather less tough than could have been expected, but reflected the fact that the Institute of Chartered Accountants of India (ICAI) was already moving towards the adoption of international standards and the Committee restricted itself to requesting finalisation as soon as possible.[42] The consideration of the overall role and responsibility of the board echoes the terms of the Combined Code[43] and is bolstered by requirements relating to the disclosure of details of ongoing discussion with the management responsible for the day-today running of the company.[44]

The SEBI board meeting to discuss the report of the Birla Committee decided to make the relevant amendments to the listing agreement in the form of a new clause: cl.49 on Corporate Governance.[45] This represented a wholesale acceptance of the Birla Committee's recommendations. A Schedule of Implementation envisaged that the largest listed companies would be in compliance with the clause by March 31, 2001 and that smaller listed companies would be in compliance within one or two further years, depending on their precise size.

Even before the initial compliance period had expired, amendments were made to cl.49, most notably the clarification that an institutional director should be considered as an independent director.[46] On one view, this is a very singular interpretation of "independence" given the CII Committee's concerns about the lack of interest in corporate governance on the part of the public sector institutional investors who were such a feature of the Indian context.[47]

As the deadline for initial compliance approached, a further communication from the ***I.C.C.L.R. 45** SEBI, first, required that stock exchanges should establish a "monitoring cell" to monitor compliance with cl.49 and, secondly, proposed a form to be used for a company's quarterly compliance report.[48] It is surely noteworthy that such important changes were being made with only just over two months to go before the deadline for initial compliance.

The Chandra Report

At this point in the evolution of Indian corporate governance, the focus shifts away from the initiatives of the private sector or of the market regulator and on to those of the Government. The Department of Company Affairs[49] appointed a committee to consider various aspects of corporate governance on August 21, 2002 under the chairmanship of Naresh Chandra, a former cabinet secretary. The background to this event was, of course, the series of corporate failures in the United States commencing with Enron, the subsequent collapse of Andersen, one of the then Big Five auditing firms, and the passing into law of the Sarbanes-Oxley Act. The Committee reported on December 23, 2002 and opened by noting the advances that had been made as a consequence of the Birla Report and cl.49 of the listing agreement. Indeed, it went so far as to say that the guidelines to which Indian companies were now subject "rank among some of the best in the world".50 It continued in a much more pessimistic tone, however, by suggesting that there was nevertheless "a wide gap between prescription and practice" and that the enforcement of corporate governance was hampered by "inefficiency, corruption and the intricate, dilatory legal system".51 The list of areas that the Committee was asked to examine--and if necessary recommend changes to--focuses extensively on auditors, with mention also of CEO/CFO certification and of the role of independent directors.52

The Committee's recommendations appear significantly influenced by the Sarbanes-Oxley Act53 and include the following: disqualification of auditors where there is a question over independence54 ; prohibition of certain non-audit services and prior approval required for others55 ; rotation of audit partners56 ; disclosure by an auditor of contingent liabilities and of qualifications to the audit report57 ; certification of annual audited accounts by CEO and CFO with repayment of such part of any bonus or similar payment as the audit committee determines in the event of a serious misstatement58 ; the establishment of Independent Quality Review Boards (QRBs) in relation to audit, secretarial and cost accounting firms (although the Committee stopped short of recommending an equivalent to the US Public Companies Accounting Oversight Board and the new QRBs were to be funded by the respective professional institute)59 ; the establishment of a Prosecution Directorate within the Institute of Chartered Accountants of India as a means of trying to overcome the legal system's delays in dealing with disciplinary matters60 ; a definition of independence in the context of directors that is explicitly said to be more precise than that contained in cl.4961 (this apparently salutary step must, however, be read in the context of the committee's observations at this point that the "directors are the fiduciaries of shareholders",62 evidencing perhaps a degree of confusion about the position of the director in Indian company law, which is the same in this regard as in English company law63); a requirement that at least half of the board be independent directors (with nominee directors excluded from the calculation,64 representing an interesting and reassuring contrast with the amendment to cl.49 in this regard discussed above65); ensuring that ***I.C.C.L.R. 46*** audit committees were entirely staffed by independent directors66 and that the work of such committees be carried out in accordance with a published charter.67 A variety of recommendations also sought to improve the position of independent directors in terms of ensuring that they received all relevant information, and were appropriately trained.68 More controversially, the recommendation was also made that a legal distinction should be recognised between executive and non-executive directors such that the latter were exempt from a range of criminal and civil liabilities.69 While this last recommendation was explicitly designed to encourage the appropriate quality of individual to take on the role of NED, there must be a question as to whether this approach does not raise significant risks that NEDs will lack the incentive to carry out the tasks envisaged for them insofar as there would appear to be no adverse consequences for inadequate performance. It is not clear that the Committee considered whether the existing test for the duty of care would not adequately protect NEDs from draconian action.70 A draft Companies (Amendment) Bill 2003 was prepared following this report, but, as will be seen below, it was held back pending a more extensive review of company law and has since been overtaken by a more comprehensive Bill.

The Murthy Report and the revised clause 49

Just as the Chandra Committee was on the point of publishing its report at the end of 2002, the SEBI established yet another committee on corporate governance under the chairmanship of NR Narayana Murthy.71 The terms of reference for this committee called upon it "to review the performance of corporate governance" in India and "to determine the role of companies in responding to rumour and other price sensitive information circulating in the market, in order to enhance the transparency and integrity of the market".72 The Committee's recommendations in some cases supported the Chandra Committee's ideas and in others went further. Thus, whereas the Murthy Report specifically adopts the Chandra Committee's proposals on disclosure of contingent liabilities,73 CEO/CFO certification,74 the definition of independence,75 the requirement that the audit committee be composed entirely of independent directors76 and the call for legal exemption of independent directors from certain criminal and civil liabilities,77 it goes further in a number of respects, including: setting out the issues to be reviewed by audit committees,78 requiring all audit committee members to be financially literate,79 requiring justification for and explanation of non-standard accounting treatments,80 requiring management reporting to boards on risk management,81 the establishment of a published code of conduct for all board members together with a requirement for affirmation of compliance signed off by the CEO and COO,82 establishment of whistleblower access to the audit committee83 and whistleblower protection.84 In view of the second term of reference noted above, it is also not surprising to see the Committee recommend that the SEBI should make rules to avoid conflicts of interest in reports by analysts.85 On the other hand, the committee was not minded to make recommendations regarding real time (or at least very rapid) reporting of critical business events without further in-depth study of the matter.86 It also went even further than Chandra in relation to nominee and institutional directors. It recommended that the former be prohibited and that in future if institutions wished to appoint a director, then they would have to be elected by the shareholders as a whole.87 As regards implementation of its ideas, the committee proposed that this be done via amendment of cl.49 of the listing agreement.88 In concluding, it noted that it did not in any sense think that it was issuing the last word on the matter, but that the corporate governance system it had further developed would continue to evolve. The proposed changes were eventually introduced in a revised cl.49 issued on October 29, 2004, ***I.C.C.L.R. 47** with a deadline for implementation of April 1, 2005.89 Intriguingly, the communication from the SEBI repeated the requirement that exchanges set up "monitoring cells" to monitor compliance,90 which would appear to be redundant had the same requirement in the initial version of cl.49 already been effectively and uniformly complied with.

The Irani Report and the Companies Bill 2008

As was mentioned above, previous efforts towards the reform of company law as it affected corporate governance had resulted in draft legislation but had not produced actual legal change.91 This was due to the fact that a more extensive review of company law was in due course envisaged. Finally, just over a month after the SEBI issued the amended cl.49, an Expert Committee on Company Law was established by the Ministry of Company Affairs92 under the chairmanship of Dr Jamshed J. Irani, a director on the board of Tata, on December 2, 2004. The scope of this review was obviously much broader than any of the other reports considered above, and what follows focuses only on the issues directly relevant to the consideration of corporate governance, in particular as they have been dealt with in the Companies Bill initially laid before the Indian Parliament in 2008 and reintroduced in August 2009.93

Background

The background section to the Irani Report, which was published on May 31, 2005, recognises the balancing act that the Committee has to pull off--namely providing good corporate governance and robust investor protection while ensuring autonomy, self-regulation, and economic growth; and improving disclosure and transparency in the context of optimum compliance costs.94

The Committee also uses language very reminiscent of the Modern Company Law Review in the United Kingdom when it states that it seeks to "provide India with a modern company law to meet the requirements of a competitive economy".95 It sees this as involving the development of a simplified company law, characterised by "internationally accepted best practices", which exhibits the flexibility to allow evolution in the context of changing circumstances. On the other hand, the Committee is also aware of the risk involved in legal transplants. It is one thing to adopt international best practice, but it needs to be done in the context of an appreciation of the particularities of the Indian situation.96

Courts

One very significant feature of the report is the support offered for the proposed National Company Law Tribunal (NCLT) which had been envisaged in the Companies (Second Amendment) Act 2002, but which had not so far been introduced owing to a legal challenge as to its constitutionality.97 Despite the challenge (which is not actually mentioned in the Irani Report), the Committee sees advantages in terms of speed and specialisation and calls for speedy conclusion of the process to establish the new court. Recall in this regard the Chandra Committee's criticism of the "dilatory legal system" and its concern that this, among other factors, led to the "wide gap between prescription and practice" in matters of corporate governance.98 Thus, if a dedicated company law tribunal could be established with the requisite powers, then a very significant step would be taken in closing that gap. It should also be noted that a specialist Company Law Board already exists,99 but both it and the High Court are regarded as being responsible for delay because of the weight of business they have to deal with.100

Notwithstanding the still outstanding legal challenge, the Companies Bill 2009 includes provisions in relation to the tribunals envisaged by the Irani Committee, very much in the terms of the 2002 Act. The central government is required to constitute the NCLT composed of a president (who must be or have been a High Court judge for at least five years) and a number (to be determined) of judicial and technical members.101 It is also required to establish an appellate tribunal composed of a chairperson and a number to be ***I.C.C.L.R. 48** determined (not exceeding eleven) of judicial and technical members.102 In each case the definition of technical member includes the possibility that such members may come from the private sector. Given the problems identified with PFIs by the CII Committee103 and with government companies generally by the Irani Committee,104 it will be interesting to see whether technical members are indeed in due course appointed from the private sector. It is envisaged that there may be a number of benches of the NCLT with the principal one located in Delhi and that a bench will be composed of two members, one judicial and one technical, although a single member bench may operate in relation to such class of cases as the president may determine.105 The obvious question arising in the context of two-member benches is what happens when the members disagree. Somewhat bizarrely, given that cl.380 clearly envisages that the vast majority of cases will indeed be heard by two-member benches, subs.(5) states that where there is a difference of opinion on a point or points "it shall be decided according to the majority". Where no majority exists, which would presumably be in the overwhelming number of cases involving a disagreement, the case shall be referred by the President for consideration by one or more other members and the matter will be decided on a majority, including in the calculation the members who originally heard the case. The powers of the tribunal are widely drawn insofar as it is enabled "to pass such orders … as it thinks fit".106 In response to the concerns that have existed in relation to the court system generally, proceedings before either the Tribunal or the Appellate Tribunal must be dealt with "as expeditiously as possible", with "every endeavour" being made to dispose of a case within three months of the proceedings commencing before the body in question.107 Given a time limit for appeal from the Tribunal to the Appellate Tribunal of 45 days, a case could be dealt with by both tribunals in well under a year, representing a very significant improvement over the status quo. A further appeal also lies to the Supreme Court.108 It is also very significant, given concerns with the current arrangements, that the Tribunal and Appellate Tribunal are specifically not bound by the Code of Civil Procedure 1908, but, provided that they adhere to the principles of natural justice, "shall have the power to regulate their own procedure".109 The Tribunal and Appellate Tribunal nevertheless enjoy the same powers as other courts with regard to the summoning of witnesses, treatment of evidence, contempt of court, etc.110 Very importantly, the Tribunal and Appellate Tribunal will have exclusive jurisdiction over the classes of cases they are empowered to hear.111 This would allow expertise to be built up on the part of the judges involved as well as promoting the development of a consistent approach. It would also prevent "forum shopping" by claimants looking for courts most favourable to their cause, resulting in a potentially inequitable situation overall. Indeed, not only may cases currently be brought either before the Company Law Board or the civil courts, but may actually be brought simultaneously before both.112 As regards representation, a party to proceedings before the Tribunal or Appellate Tribunal may appoint not only a lawyer but also a chartered accountant, company secretary or cost accountant.113

The Bill also envisages the establishment of special courts "for the purpose of providing speedy trial of offences under this Act"114 which once again would enjoy exclusive jurisdiction115 with an appeal lying to the High Court.116

PFIs and government companies generally

The CII Code, published some eight years before the Irani Report, had already raised concerns about the ability of PFIs to monitor the corporate governance of the companies in which they had a significant financial stake.117 The Irani Committee seeks to address this issue by calling for an end to the more relaxed arrangements which these bodies enjoy under Indian company law, thus exposing them to similar standards of regulation and governance as the companies they are supposed to be monitoring.118 The Companies Bill 2009 is, however, silent on this issue.

In this regard, it is instructive to look at the Irani Committee's observations and recommendations in relation to government companies generally and the government's response in the context of the Bill. A particular problem identified by the committee is the poor example set by government companies when it comes to finalisation of ***I.C.C.L.R. 49*** accounts and audit. Despite the fact that directors in general are liable to penalties in such cases, the practice has grown up of exempting the directors of government companies from such penalties. "This is leading to an unhealthy situation which must be addressed."119 Specifically, the Irani Committee recommends that such exemptions and protections must be done away with so that government companies "operate in the market place on the same terms and conditions as other entities".120 Notwithstanding the Irani Committee's recommendations in this regard, however, cl.357 allows the Government to disapply or otherwise modify the Act in relation to government companies, subject only to a negative resolution procedure of both houses of the Indian Parliament. It is hard to escape the conclusion that the government is not interested in holding either the companies in which it is a majority shareholder or the directors of such companies to the same standards as apply to all other companies and their directors.

Directors

The Irani Committee is strongly persuaded of the importance of independent directors and wants the law to recognise the principle and to enshrine the definition of independence.121 As regards the proportion of the board which should be independent, the committee calls for a minimum of one-third122 but suggests that regulators may specify a different (and presumably higher) number where they are responsible for particular classes of company.123 Very significantly, the Irani Committee follows the Chandra and Murthy Committees with respect to the status of institutional or nominee directors. They note that representations were made that such directors may be categorised as independent, but conclude, reassuringly, that these individuals "represented specific interests and could not, therefore, be correctly termed as independent".124

Clause 132(3) of the 2009 Bill reflects the Irani Committee's recommendation as regards at least one-third of the board of a listed company being independent directors and requires companies to comply with this requirement within one year of the coming into force of the Act,125 which could pose problems given the apparent problems to date in recruiting NEDs in India.126 Clause 132(5) provides the definition of independence and explicitly excludes nominee directors from this definition. The definition is less extensive than is to be found in the Higgs Report127 and the latest version of the Combined Code in the United Kingdom,128 but it is noteworthy that the intention in India is to make this a legal requirement rather than simply a code provision.

Board committees

As regards board committees, the Irani Committee is mindful of the need to avoid undue interference with the discretion of companies to run their own affairs, but nevertheless feels that there are "certain core areas relevant to investor/stakeholder interests" where the law may appropriately mandate particular arrangements.129 In this regard, it recommends that there be a legal requirement for companies above a certain size to have an audit committee,130 a stakeholders' relationship committee and a remuneration committee.131 The first and third of these are familiar from other jurisdictions such as the United Kingdom,132 but the second is an innovation. "Stakeholder" is after all a term that is extensively used in the field of corporate governance to indicate the wider group of individuals who are affected either positively or negatively by the actions of the company and can be defined broadly or narrowly to include more or fewer of the following categories (among potentially others): employees, customers, suppliers, local communities, environmental considerations, etc.133 At first sight, then, this appears ***I.C.C.L.R. 50** to be an extremely progressive step insofar as the Committee wants this body to monitor the redressing of stakeholder grievances.134 On closer inspection, however, it may be that this body is not precisely what the title would lead one to expect it to be. No further detail is given in this section of the report, and the Stakeholders' Relationship Committee is otherwise only mentioned later in Ch.VII in the context of the redress of *investor* grievances.135 Either the Committee is keen to open up the possibility of a much more inclusive grievance mechanism without signalling this in advance and without considering the significant complications this would produce in practice or it has simply been guilty of a loose use of language.

As regards the implementation of these recommendations by the 2009 Bill, all listed companies are required to establish audit and remuneration committees.136 Regarding the requirements for an audit committee, these are less stringent than envisaged by the Irani Committee: while the chair must be independent,137 thereafter only a majority is required to be independent, and only one director138 is required to have knowledge of financial management, audit or accounts.139 This looks like a significant watering down, but may perhaps be explained by the tight time-limit for compliance of one year from the date of commencement.140 Nevertheless, a longer limit with more stringent requirements would appear to be preferable.

Similarly, the requirements in relation to the remuneration committee represent a watering down of the Irani Committee's recommendations: while cl.158(10) requires that it be composed entirely of NEDs, only one of these need be independent.

As regards the stakeholders relationship committee, this is required by the Bill for larger companies, and must have a NED as chairman, but no other restrictions are imposed on membership.141 Interestingly, given the ambiguity of the language employed by the Irani committee, the Bill explicitly states that the role of the committee is to "consider and resolve the grievances of stakeholders".142 There is no further discussion of who the stakeholders are either in cl.158 or in the definitions clause,143 nor of precisely what the consideration and resolution of grievances might involve nor of the procedure to be followed in the event that a resolution is not reached. Nor is any further information provided in the Notes on Clauses appended to the Bill. This is an issue in apparent need of clarification in Parliament--not least because as matters stand a literal reading of cll.158(13) and 158(15) would render a company liable to a fine and the members of the committee liable to a fine or imprisonment in the event that they failed to resolve a grievance!144

Directors' duties

To an even greater extent than was the case in the United Kingdom before the Companies Act 2006, directors' duties in India have historically been a matter for the common law rather than statute, the 1956 Act being silent in this regard. Very strikingly, however, the case law in this regard has been described as "sparse".145 In discussing this issue, the Irani Committee refers specifically to the United Kingdom as an example of the wide range of duties that may be set out in law. It asks, however, "whether all such duties … can be recognized in law".146 Given the centrality of this issue to company law and the extent to which it may be seen to have been one of the principal concerns of the Company Law Review in the United Kingdom,147 the speed with which it is dealt with in the Irani Report and the vagueness of the language is remarkable. Thus the Committee calls for further debate but suggests that the law "may" include certain duties of directors. In this regard, it wants an "inclusive" but "not exhaustive" list to be set out in the Act148 and suggests as examples a duty of care and diligence, the exercise of powers in good faith and the "duty to have regard to the interests of the employees, etc.".149 Nothing further is offered.

I.C.C.L.R. 51 Given this vagueness, it is perhaps not surprising that cl.147 of the 2009 Bill stays on familiar territory and offers no innovations of the sort seen in s.172 of the UK Companies Act 2006.150 Thus we find statutory expressions of the duty to act in good faith in the best interests of the company, the duty of skill and care, the duty to avoid conflicts of interest and undue personal gain, but no attempt to give expression to the Committee's vague desire "to have regard to the interests of employees, etc.". The Bill's drafters may have been influenced by the Irani Committee's apparent scepticism of the United Kingdom's more extensive list, though commentators appear clear that it represents more of a clarification of the law than a modification and that its principal effect will be in reminding directors of the obligation to take account of others to the extent that this is in the interests of the company.151 It could, therefore, be suggested that a similar approach would be a useful addition to Indian company law given that self-serving decisions may be more of an issue in the context of closely held companies.152 It is certainly the case that the Word Bank report on corporate governance in India perceived a need for a clear statutory statement of directors' duties.153

Liabilities of independent and non-executive directors

In contrast to earlier calls for legal exemptions and protections from certain criminal and civil penalties for independent and NEDs,154 the Irani Committee suggests instead that the liability of such directors should be established on the basis of a knowledge test.155 In this last regard, it is significant that the Committee also recommends a set of rights of access to information on the part of independent and NEDs.156 The Bill indeed draws no distinction between the categories of directors with regard to liabilities but does provide a variety of powers, such as those of the audit committee under cl.158. As regards a knowledge test, the Bill is silent. The conclusion would have to be drawn that the clarity called for by the Irani Committee has not yet been achieved.

Corporate structure

Perhaps influenced by the Sarbanes-Oxley Act, and echoing the sentiments of the Chandra and Murthy Committees, the Irani Committee wants to see certain key managerial personnel recognised by law "along with their liability in appropriate aspects of company operations".157 In this regard it identifies the CEO, company secretary and CFO.158 This recommendation is reflected in cll.174-178 of the Bill.159 By contrast, the existing legislation is silent with regard to the CEO and CFO.

Minority interests

Significant in this regard, and perhaps influenced by developments in the United Kingdom and the United States, is the suggestion that while the existence of derivative and class actions have been recognised by the courts in India, these should be placed on a statutory footing.160 The Committee takes a similar view in relation to investor protection generally.161 Ultimately, however, while the Companies Bill 2009 does make mention of a class action,162 it does not include a statutory derivative action.163 Again, given the problems identified earlier, for example in relation to government companies, the lack of a clearly defined derivative action would appear to represent a missed opportunity to enhance the protection of minority shareholders and encourage higher standards of governance. The approach of the Irani Committee might also be read as an indication of the success of earlier efforts aimed at minority protection, such as the possibility for companies of a certain size to have a director elected by small shareholders on the board.164

Investor education and protection

The Irani Committee takes seriously the idea that markets operate properly on the basis of appropriate information, while recognising ***I.C.C.L.R. 52** that matters are different for different types of investor.165 The Committee recalls that the development of the Indian capital market is a relatively recent phenomenon with its roots in the liberalisation of the early 1990s. It commends the SEBI for its work so far, but suggests that there is nevertheless "a need for the framework to develop further in a balanced manner keeping in view the Indian context while enabling best international practices".166 Interestingly, a fund for investor education and protection (the Investor Education and Protection Fund) was established under s.205C of the 1956 Act and the committee considered how that fund could be used more effectively.167 Clause 112 of the 2009 Bill mirrors s.205C. Note, however, that the SEBI has more recently been active in this regard.168

Accounts and audit

The Irani Committee notes, as did the earlier Birla Committee, that work is under way on the part of the ICAI to bring Indian accounting standards into line with international standards and that progress is expected shortly.

In relation to accounting standards, the 2009 Bill echoes the pre-existing s.210A of the 1956 Act in that it empowers the central government to establish an advisory committee, the National Advisory Committee on Auditing and Accounting Standards, which would in due course and in consultation with the ICAI make recommendations to the Government on these matters.169 Clause 119 empowers the Government to lay down accounting standards. Much accordingly depends upon what the ICAI ultimately achieves.170

In contrast to the earlier Chandra Committee report, there is no call for mandatory rotation of auditors.171 Rather, this is a matter that is to be left to shareholders to decide172 and the Bill is indeed silent on this issue.

In common with the US approach, and following the Chandra and Murthy Committees, certain non-audit services are to be prohibited while others could be allowed provided there is pre-approval by the board or the audit committee.173 Clause 127 of the 2009 Bill reflects this recommendation.

Internal control

Again reflecting the recognition of the importance of internal control in other jurisdictions,174 the Irani Committee "feels that the internal controls in any organization constitute the pillar on which the entire edifice of Audit stands".175 Accordingly, these controls "should be certified by the CEO and CFO of the Company and in the Directors' report through a separate statement on the assessment".176 This recommendation is implemented in the 2009 Bill in cl.120(4)(e) where it is provided that the Directors' Responsibility Statement shall state inter alia that "the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls have been complied with". This is bolstered by cl.126(3)(i), which requires that the auditor's report shall state "in the case of listed companies, whether the company has complied with the internal financial controls and directions issued by the Board". Note also that cl.158(5) includes among the terms of reference of the audit committee "evaluation of internal financial controls and related matters" while cl.158(6) gives the audit committee authority to call for comments from auditors about internal control systems.

Concluding remarks on the evolution of corporate governance in India

At the end of this review of the evolution of corporate governance in India over the last decade, what stands out is that, on paper at least (and barring the issues identified where clarification appears to be required), the country has, at the level both of the rules applicable to listed companies and of the proposed legislation, arrangements that are surely as good as any in the world. Given the extent to which those involved in the various committees have been inspired by developments especially in the United Kingdom and the United States this is hardly surprising. Those committees have, however, also been at pains to stress the extent to which it has been necessary to take account of the particularities of the Indian context. In considering whether all of these developments have put India in a position where it has already taken steps sufficient to respond to the ***I.C.C.L.R. 53** Satyam scandal, two questions next need to be addressed: first, it is necessary to consider whether the jurisdictions from which India has borrowed corporate governance concepts--the United Kingdom and the United States--may still be regarded as adequate sources of inspiration given the problems that they themselves have encountered in corporate governance in recent years; and, secondly, it is necessary to examine the extent to which the Indian context has indeed been adequately taken into account when corporate governance concepts have been transplanted from other jurisdictions. These interrelated questions are the subject of Part 2 of this article.

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1. For details, see Nandini Rajagopalan and Yan Zhang, "Recurring failures in corporate governance: a global disease?", *Business Horizons,* 2009, vol. 52, 545-552, 545. See also "India's Enron", *The Economist,* January 8, 2009.

2. For a convenient review, see Jill Solomon, *Corporate Governance and Accountability,* 2nd edn (Chichester: John Wiley & Sons, 2007), pp.49 et seq.

3. For a convenient review, see Solomon, *Corporate Governance and Accountability,* 2007, pp.31-34.

4. See Randeep Ramesh and Kakoli Bhattacharya, "India has its 'Enron moment' after revelations of Satyam's founder's £1bn fraud", *Guardian,* January 8, 2009.

5. Sir Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (London: Gee, 1992) (Cadbury Committee). The committee was set up by the Financial Reporting Council, the London Stock Exchange and the accounting profession.

6. The full title of the Sarbanes-Oxley Act of 2002 is "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws, and for other purposes".

7. See, for example, press releases from the Confederation of Indian Industry on January 7 and January 10, 2009. It is noteworthy, however, that the CII also launched a Task Force on Corporate Governance in the immediate aftermath of the Satyam scandal and is, at the time of writing, poised to issue a new Code of Best Practice. See CII press releases on January 12 and March 27, 2009. All available online at *http://cii.in/more_press_release.php?menu_id=78* [Accessed November 20, 2009].

8. For a discussion in this regard see the interview with Anurag Goel, Secretary, Ministry of Corporate Affairs,

Namaskaar, March 2009, pp.94-98.

9. "Companies Bill, 2009 introduced in Lok Sabha", Government of India Press Information Bureau, Press Release, August 3, 2009. See also "Companies Bill Housed in Lok Sabha", *Economic Times,* August 4, 2009.

10. Confederation of Indian Industry, *Desirable Corporate Governance: A Code* (1998) (CII Code). See the foreword by N. Kumar, president of the CII. See also Solomon, *Corporate Governance and Accountability,* 2007, pp.208-209; Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (Oxford: Oxford University Press, 2009), p.206.

11. Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: the Strategic Framework* (London: DTI, 1999), paras 5.1.12, 5.1.17 to 5.1.23.

12. CII Code, 1998, p.1.

13. CII Code, 1998, recommendation 2. See also Cadbury Committee, 1999, paras 4.10 to 4.17.

14. CII Code, 1998, recommendation 5. See also Cadbury Committee, 1999, para.4.40. See especially, Sir Richard Greenbury, *Directors' Remuneration: Report of a Study Group* (London: Gee, 1995).

15. CII Code, 1998, recommendation 7. See also Cadbury Committee, 1999, paras 4.23 to 4.24.

16. CII Code, 1998, recommendation 8. See also Cadbury Committee, 1999, paras 4.33 et seq.

17. CII Code, recommendation 11.

18. Companies Act 1956 s.4A.

19. CII Code, 1998, recommendation 17.

20. Kathryn C. Lavelle, *Politics of Equity Finance in Emerging Markets* (Cary, NC: Oxford University Press, 2004), p.118.

21. Note that the stock market regulator is a relatively recent phenomenon in India. SEBI was established by the Securities and Exchange Board of India Act 1992. See also the Securities and Exchange Board of India (Amendment) Act 2002.

22. SEBI, Report of the Committee Appointed by SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla, 2000 (Birla Report), para.3.1.

23. Birla Report, 2000, para.4.2.

24. Birla Report, 2000, para.1.1.

25. Birla Report, 2000, para.1.7.

26. Birla Report, 2000, para.1.7.

27. Birla Report, 2000, para.2.2.

28. Birla Report, 2000, para.2.5.

29. See Cadbury Committee, 1999, paras 3.7, 3.14 and 6.6. See now, Financial Reporting Council, The Combined Code on Corporate Governance, June 2008 (Combined Code).

30. Birla Report, 2000, para.15.6.

31. See Cadbury Committee, 1999, paras 6.9 et seq. See now Combined Code, 2008, s.2.

32. See above fnn.18-20 above and associated text.

33. Birla Report, 2000, paras 14.14 to 14.16.

34. Birla Report, 2000, End Note.

35. Birla Report, 2000, para.1.3.

36. Birla Report, 2000, para..6.5.

37. Birla Report, 2000, para.8.1. See also Cadbury Committee, 1999, para.4.9.

38. Birla Report, 2000, para.9.4

39. Birla Report, 2000, paras 9.9 and 9.10.

40. Birla Report, 2000, para.10.2.

41. Birla Report, 2000, para.10.8.

42. Birla Report, 2000, para.12.

43. Birla Report, 2000, para.6.2. See also Combined Code, 2008, paras 4.1 to 4.6.

44. Birla Report, 2000, para.13.4.

45. SMDRP/POLICY/CIR-10/2000.

46. SMDRP/POLICY/CIR-42/2000.

47. See above fnn.18-20 and associated text. In fact the picture is even muddier insofar as the initial circular excluded government companies from this new provision, while a later circular (SMDRP/POLICY/CIR-53/01) without further explanation indicated that they were now included with immediate effect.

48. SMDRP/POLICY/CIR-03/01.

49. As it then was. The Department became the independent Ministry of Company Affairs in 2004 and changed its name to the present Ministry of Corporate Affairs in 2007.

50. Department of Company Affairs, Report of the Committee on Corporate Audit and Governance under the chairmanship of Naresh Chandra (2002) (Chandra Report), para.2.

51. Chandra Report, 2002, para.2.

52. Chandra Report, 2002, para.4. This more pessimistic view was backed by the Central Vigilance Commissioner, N. Vittal, delivering the Tata Memorial Lecture in the same year when he said: "I find the legal and administrative environment in India provides excellent scope for corrupt practices in business. As a result unless a management is committed to be honest and observe the principles of propriety, the atmosphere is too tempting to observe good corporate governance in practice." Quoted in Tricker, *Corporate Governance: Principles, Policies and Practices,* 2009, p.206.

53. Note, however, that some were immediately keen to qualify the nature of the comparison with the US legislation. See Amit C. Kamath, "Naresh Chandra Reports: A Pale Shadow of SOX", *Hindu Business Line,* August 18, 2003.

54. Chandra Report, 2002, recommendation 2.1. See also Sarbanes-Oxley Act 2002 s.206.

55. Chandra Report, 2002, recommendation 2.2. See also Sarbanes-Oxley Act 2002, ss.201 and 202.

56. Chandra Report, 2002, recommendation 2.4. Though the Sarbanes-Oxley Act only calls for a study into the question of auditor rotation; see s.207.

57. Chandra Report, 2002, recommendations 2.5 and 2.6.

58. Chandra Report, 2002, recommendation 2.10. See also Sarbanes-Oxley Act 2002 s.304.

59. Chandra Report, 2002, recommendation 3.1. Sarbanes-Oxley Act 2002 s.101.

60. Chandra Report, 2002, recommendation 3.2.

61. Chandra Report, 2002, recommendation 4.1.

62. Chandra Report, 2002, Executive Summary, para.23 (emphasis in original).

63. See Bikramaditya Ghosh and Karmedra Singh, "Directors' Duties in India: Strengthening the Laws on Trusteeship" [2009] I.C.C.L.R. 199.

64. Chandra Report, 2002, recommendation 4.1.

65. See above fnn.46 and 47 and associated text.

66. Chandra Report, 2002, recommendation 4.7. See Sarbanes-Oxley Act 2002 s.301.

67. Chandra Report, 2002, recommendation 4.8.

68. Chandra Report, 2002, recommendations 4.6 and 4.11.

69. Chandra Report, 2002, recommendation 4.10.

70. cf. Sharmila Mahamuni, “The potential role of non-executive directors in Indian Companies” [2007] I.C.C.L.R. 207.

71. SEBI, Report of the Committee on Corporate Governance under the chairmanship of N.R. Narayana Murthy, February 8, 2003 (Murthy Report).

72. Murthy Report, 2003, para.2.2.1.

73. Murthy Report, 2003, para.4.2.1.

74. Murthy Report, 2003, para.4.3.1.

75. Murthy Report, 2003, paras 4.4.1 and 3.10.1.4.

76. Murthy Report, 2003, para.4.5.1.

77. Murthy Report, 2003, para.4.6.1.

78. Murthy Report, 2003, para.3.2.1.4

79. Murthy Report, 2003, para.3.2.2.3. This is a significantly tougher requirement than that imposed by the Sarbanes-Oxley Act 2002 s.407.

80. Murthy Report, 2003, para.3.3.1.3.

81. Murthy Report, 2003, para.3.5.1.7.

82. Murthy Report, 2003, para.3.7.1.3.

83. Murthy Report, 2003, para.3.11.1.3.

84. Murthy Report, 2003, para.3.11.2.4. See also Sarbanes-Oxley Act 2002 s.1107.

85. Murthy Report, 2003, para.3.15.1.3. See also Sarbanes-Oxley Act 2002 s.501.

86. Murthy Report, 2003, para.3.13.1; cf. Sarbanes-Oxley Act 2002, sec. 409.

87. Murthy Report, 2003, para.3.8.1.5.

88. Murthy Report, 2003, para.6.1.

89. SEBI/CFD/DIL/CG/1/2004/12/10.

90. SEBI/CFD/DIL/CG/1/2004/12/10, para.7.

91. See section above on the Chandra Committee.

92. See above fn.49 above for the history of the denomination of the Ministry.

93. For an overview of the report as a whole, see Aparna Viswanathan, “Reinventing the company in India: the Expert Committee Report on Corporate Form and Governance” (Part 1) [2006] I.C.C.L.R. 1; (Part 2) [2006] I.C.C.L.R. 102.

94. Ministry of Company Affairs, Report of the Expert Committee on Company Law chaired by Dr Jamshed J. Irani, 2005 (Irani Report), Ch.I, para.5.

95. Irani Report, 2005, Ch.I, para.7. The full title of the equivalent review in the UK was Modern Company Law for a Competitive Economy. See above fn.11.

96. Irani Report, 2005, Ch.II, para.3.

97. *Madras Bar Association v Union of India* (2007) 6 *Madras Law Journal* 1805 SC. This will be discussed further in Part 3.

98. Chandra Report, 2002, para.40.

99. See Companies Act 1956 s.10E.

100. For a discussion of the relative merits of the two systems from the practitioner point of view, see Gopal Pd. Dokania, "National Company Law Tribunal and Appellate Tribunal", *Chartered Accountant,* August 2003, pp.147-151.

101. Companies Bill 2009 cl.369.

102. Companies Bill 2009 cl.371.

103. See above fnn.18-20 above and associated text.

104. See below.

105. Companies Bill 2009 cl.380.

106. Companies Bill 2009 cl.381.

107. Companies Bill 2009 cl.383.

108. Companies Bill 2009 cl.391.

109. Companies Bill 2009 cl.385(1). The wording of this clause is similar to the provisions relating to the existing Securities Appellate Tribunal which hears appeals from decisions of the SEBI. See Securities Laws (Second Amendment) Act 1999 s.15U(1).

110. Companies Bill 2009 cll.385(2) and 386.

111. Companies Bill 2009 cl.391.

112. See Durga Rao, "National Company Law Tribunal --a comment", April 1, 2009. Available online at *http://www.caclubindia.com/articles* [Accessed November 21, 2009].

113. Companies Bill 2009 cl.393.

114. Companies Bill 2009 cl.396.

115. Companies Bill 2009 cl.397.

116. Companies Bill 2009 cl.398.

117. See above fnn.19-20 and associated text.

118. Irani Report, 2005, Ch.III, paras 11.1 to 11.3.

119. Irani Report, 2005, Ch.IX, para.38.

120. Irani Report, 2005, Ch.IX, para.39.

121. Irani Report, 2005, Ch.IV, para.8.1. For the Committee's proposed definition of independence, see para.9.

122. Irani Report, 2005, Ch.IV, para.8.2.

123. Irani Report, 2005, Ch.IV, para.8.3. Clause 49 of the listing agreement initially required that one-half of the board of a listed company be composed of NEDs. The number of those who should be independent would depend on whether the chairman was also a NED or an executive. In the former case, one-third should be independent, whereas in the latter one-half should be. This position was modified in April 2008 such that where a NED chairman is a promoter or related to a promoter or a senior manager of the company, then at least one-half of the board must be independent. See SEBI/CFD/DIL/CG/1/2008/08/04. On the significance of closely-held companies in India see the discussion in Part 2 of this article.

124. Irani Report, 2005, Ch.IV, para.8.4.

125. Companies Bill 2009 cl.132(4).

126. See Mahamuni, Mahamuni, "The potential role of non-executive directors in Indian Companies" [2007] I.C.C.L.R. 207, 215.

127. See Derek Higgs, *Review of the Role and Effectiveness of Non-Executive Directors* (London: DTI, January 2003), Ch.9.

128. See the Combined Code A.3.1.

129. Irani Report, 2005, Ch.IV, para.17.

130. Note that an audit committee was already a requirement for companies of a certain size. See Companies Act 1956 s.292A, inserted by the Companies (Amendment) Act 2000.

131. Irani Report, 2005, Ch.IV, paras 17.1 to 17.5.

132. See the Combined Code C.3 (audit committee) and B.1 (remuneration committee).

133. For a classic statement see R. Edward Freeman, "A Stakeholder Theory of the Modern Corporation" in Tom L. Beauchamp and Norman E. Bowie (eds), *Ethical Theory and Business,* 5th edn (Upper Saddle River, NJ: Prentice Hall, 1997), pp.66-76. For a critique of stakeholder theory and a possible solution to the problems, see Thomas Donaldson and Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications" (1995) 20(1) *Academy of Management Review* 65.

134. Irani Report, 2005, Ch.IV, para.17.2.

135. Irani Report, 2005, Ch.VII, para.10.

136. Companies Bill 2009 cl.158(1).

137. Companies Bill 2009 cl.158(3).

138. Note that this is not required to be an independent director, which does raise the possibility of an effective conflict of interests.

139. Companies Bill 2009 cl.158(2).

140. Companies Bill 2009 cl.158(4).

141. Companies Bill 2009 cl.158(12).

142. Companies Bill 2009 cl.158(13).

143. Companies Bill 2009 cl.1.

144. Note that cl.49, of the listing agreement includes a reference to a "*Shareholders* /Investors Grievance Committee" (emphasis added), but given that both the Irani Committee and the Bill's drafters have specified "Stakeholders", it would appear that they have something else in mind or have both committed the same error. See para. IV(G)(iii) of cl.49.

145. World Bank, *Report on the Observance of Standards and Codes: Corporate Governance Country Assessment --India* (Document of the World Bank 35084, April 2004), p.11.

146. Irani Report, 2005, Ch.IV, para.18.1.

147. See for example, Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: the Strategic Framework* (London: DTI, 1999), Ch.5.1; *Modern Company Law for a Competitive Economy: Developing the Framework* (London: DTI, 2000), Ch.3.9; *Modern Company Law for a Competitive Economy: Completing the Structure* (London: DTI, 2000), Ch.3; *Modern Company Law for a Competitive Economy: Final Report* (London: DTI, 2001), Ch.3.

148. Irani Report, 2005, Ch.IV, para.18.2.

149. Irani Report, 2005, Ch.IV, para.18.3.

150. For a discussion, see Andrew Keay, "Section 172(1) of the Companies Act 2006: an interpretation and assessment" (2007) 28 *Company Lawyer* 106.

151. See, for example, Paul Davies, *Principles of Company Law,* 8th edn (London: Sweet &Maxwell, 2008), para.16.26. See also Deryn Fisher, "The Enlightened Shareholder: Leaving Stakeholders in the Dark--Will section 172(1) of the Companies Act 2006 make directors consider the impact of their decisions on third

parties?” [2009] I.C.C.L.R. 10.

152. For a positive reading of the developments contained in cl.147 of the Companies Bill 2009, see Bikramaditya Ghosh and Karmendra Singh, “Directors' Duties in India: Strengthening the Laws on Trusteeship” [2009] I.C.C.L.R. 199, 204-205.

153. “The [Companies Act] should clearly spell out the fiduciary obligations of directors, including care, skill and diligence in the performance of their duties, as well as loyalty and avoidance of conflicts of interest”. See World Bank, *Report on the Observance of Standards and Codes: Corporate Governance Country Assessment--India,* 2004, p.11.

154. See above fnn.69 and 77 and associated text.

155. Irani Report, 2005, Ch.IV, para.22.

156. Irani Report, 2005, Ch.IV, para.24.

157. Irani Report, 2005, Ch.IV, para.34.1. See also Chandra Report, 2002, recommendation 2.10. See also Sarbanes-Oxley Act 2002 s.304.

158. Irani Report, 2005, Ch. IV, para.34.2.

159. See also Companies Bill 2009 cl.2(1)(zza).

160. Irani Report, 2005, Ch.VI, para.10.2.

161. Irani Report, 2005, Ch.VII, para.15.

162. Companies Bill 2009 cl.216.

163. See, for example, the statutory derivative action now provided in the UK Companies Act 2006 ss.263 and 268,

164. See Companies Act 1956 s.252, inserted by the Companies (Amendment) Act 2000.

165. Irani Report, 2005, Ch.VII, para.1.

166. Irani Report, 2005, Ch.VII, para.5.

167. Irani Report, 2005, Ch.VII, para.12.

168. See Stock Exchange Board of India (Investor Protection and Education Fund) Regulations 2009. Regulation 3(2) states that “the Fund shall be deemed to have been established on the 23rd day of July 2007”.

169. Companies Bill 2009 cl.118.

170. This will be discussed further in Part 3 of the article.

171. Chandra Report, 2002, recommendation 2.4.

172. Irani Report, 2005, Ch.IX, para.25.

173. Irani Report, 2005, Ch.IX, para.26.

174. See especially the Sarbanes-Oxley Act 2002 ss.302 and 404. See also the Turnbull Report in the UK: *Internal Control: Guidance for Directors on the Combined Code* (London: Institute of Chartered Accountants in England and Wales, 1999).

175. Irani Report, 2005, Ch.IX, para.31.

176. Irani Report, Ch.IX, para.31.