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FROM GENDER DISPARITY TO GROWING BOARD REPRESENTATION: INDIA’S MANDATE FOR WOMEN DIRECTORS

- Soumya Srinivasan¹

ABSTRACT

The aim of this paper is to scrutinize the provisions pertaining to gender presence and board representation of women vis-à-vis the established corporate regulations in India i.e., “The Companies Act, 2013” and “SEBI Listing Obligations and Disclosure Requirements, Amendment Act” (LODR), 2018 and across the world. The objective is to also provide policy implementations and suggestions from across the world to have a better board experience by evolving the ‘ESG’ practices with the help of a diverse board.

Keywords: SEBI, Corporate Governance, Companies Act, Shareholder, ESG

INTRODUCTION

“If you want something said, ask a man: If you want something done, ask a woman.”

- Margaret Thatcher

The above quote is a strong realization of the power of women; however, this doesn’t hold true in the corporate world for women. Corporates are a man’s world and the highest positions and the largest number of seats are held by men. This in turn proves that even in corporates, the decisions pertaining to it are made by men. Women are so underrepresented in Corporates that their vote won’t even matter in the long run. This under-representation has led many countries to develop legislations to mandate presence of women on Corporate Boards through quota system. This paper argues the necessity of women on boards and the current situation in India and all around the world for women argues, If the corporate world is really becoming a better place for women?

Board gender diversity has been gaining a lot of traction in the past decade which is essentially due to the increasing influence of environment, social and governance practices, the social and

¹ Post Graduate, Jindal Global Law School, Sonipat

governance practices segment of ESG have to move hand in hand, especially when we talk about the current state of affairs and representation of women on boards as compared to men. Fundamentally, companies focus on maximizing shareholder value and wealth maximization. Although a question arises as to the relevance of presence women affecting the profitability of a company, it has been found through recent studies that having a higher number of women in executive positions results in a stronger rate of corporate's return on corporate equity.² Apart from the argument above, significance should also be given to the question, what is a board? Who are board of directors? The board consists of a number of individuals designated as directors who are responsible for the profitable management of the business while ensuring adherence to the best corporate governance practices. A board should serve the company and surely having a diverse board with men and women together shall have its benefits. Scholars are of the opinion that diverse boards have a tendency to perform better than homogenous boards, theories such as groupthink which explain how a "critical mass" of minority women directors would ensure optimum benefits of diversity³. Many commentators also opine that diverse boards will make better decisions as diverse board members have diverse views⁴ The world is moving fast and the western corporates currently are pressing for racial diversity, whilst in the rest of the world and the Indian corporates are still struggling to maintain a healthy board gender diversity. Women today are not only consumers but also investors, suppliers, business owners and in such a scenario the need for women representation on boards is more as they form a substantial part of corporates. Such a representation would not just increase profitability but also reduce evils such as sexual harassment. Moreover, if women see other women on boards, they might get the confidence to speak up and ask for a position they deserve. Hence, having more women on boards is only going to serve as a boon and this will only increase the "return on diversity" as opposed to just a "return on equity".⁵ Studies have also shown that more women and female representation will only support communication in boardrooms, as women are not afraid and

² Vinnicombe et al., 'The Female FTSE Report 2004', Center for Developing Women Business Leaders, Cranfield School of Management 1 (2004), available at

<http://www.som.cranfield.ac.uk/som/research/centres/cdwbl/downloads/FT2004FinalReport.pdf>

³ Lisa M. Fairfax, 'The Bottom-Line On-Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards', (2005) Wis. L. Rev. 831-32, 837.

⁴ Elena Bajic, 'Why Companies Need to Build More Diverse Boards, Forbes' (Aug. 11

<https://www.forbes.com/sites/elenabajic/2015/08/11/why-companies-need-to-build-more-diverse-boards/?sh=19c7de3c662c>, 2015) Last assessed on 4th October, 2021

⁵ 'Board Diversity without Quotas: An International Perspective', available at

http://www.harrisandassociates.com/web/z/1/1764/Board_Diversity_Without_Quotas

they amplify the discussion of “tough issues”⁶. The essence of a corporation lies in its best corporate governance practices in today’s world; A few characteristics known for promoting corporate governance practices are active board of directors and independent directors which are closely related to strong organizational performance⁷. Women have a lot many things to bring to the table as they already are not a part of any corporate group i.e., they are outsiders and have a more realistic approach in this regard. Women directors have had to overcome many barriers to reach the position they are in and hence they are in a better position than their male counterparts to deal with complex issues and, ask difficult and tough questions as opposed to men who are bound by loyalty norms.⁸

WOMEN ON BOARDS INTERNATIONALLY

A few countries that promoted quota regime for women in promotion of female representation are discussed in this section. Norway in the year 2003 was the first country to enact a law for adequate representation of women on Boards with a mandate of having a whopping 40% of women on their corporate boards by 2008, soon after this Malaysia adopted a 30% mandate for women representation and Spain had a mandate for 40% representation of women on Boards by 2016.

In the year March 2010, Australia developed a unique programme through Australian Institute of Company Directors (AICD), wherein they offered mentoring for women, it was with an aim to accelerate ‘connections the chairmen and experienced (having up to 5-10 years of experience) directors of the ‘ASX 200 listed companies with experienced and skilled women who may be suitable for director roles’⁹. The most recent studies show that there are 34% of Women directors in the ASX 200 listed companies currently¹⁰.

⁶ Nancy McInerney-Lacombe et al., ‘Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations’, Susan Vinnicombe in *Women on Corporate Boards of Directors: International Research and Practice* (2008) 123, 123 (Susan Vinnicombe et al. eds.,)

⁷ See David A.H. Brown, Debra L. Brown and Vanessa Anastasopoulos, ‘Women on Boards: Not Just the Right Thing . . . But the “Bright” Thing’ by <https://dokument.pub/women-on-boards-flipbook-pdf.html>, Last assessed on 4th October, 2021

⁸ See n5, at 135-137

⁹ Australian Stock Exchange: Chairmen’s Mentoring Program 2022, <https://aicd.companydirectors.com.au/advocacy/chairs-mentoring-program>

¹⁰ <https://aicd.companydirectors.com.au/advocacy/board-diversity/statistics>, Last assessed 4th October, 2021

REGULATIONS PERTAINING TO WOMEN IN INDIAN CORPORATE BOARDS

In the Global gender gap index/report India has ranked 151 out of 156 countries in the ‘Economic Participation and Opportunity’¹¹ segment which truly is questionable and calls for effective and immediate change. There is only 22.3% women participation in Indian labour markets which suggests a gender gap of about 72%¹². This only shows us the under-representation of women on labour and employee forces let alone corporate boards.

The quest for female representation in corporates has been in existence for a long time, Company’s in India follow an ‘insider model’ of corporate system wherein the promoter and promoter group hold substantial portion of the shareholding which could be the reason for having less women on boards. Additionally, the only representation of women in such companies are of family members such as wives, daughters, sisters etc (such as Reliance Industries, Aditya Birla Group, TVS, Apollo Hospitals, and Asian Paints). This in turn questions the credibility of such women directors and symbolizes nothing apart from tokenism. Many countries that have a concentrated ownership structure have introduced gender quotas for boardroom purposes¹³, these are firms owned largely by families such as in Spain, Denmark, Belgium, India, Kenya, Isarel, Honkong, Germany and Brazil¹⁴. These quotas are essential not only because there is less representation of women on the board rooms but the fact that such corporates also have women employees and they not only caters to male but also female investors and consumers. If there are no women on boards then the essential viewpoint by a woman is missed out and this may not be acceptable in today’s day and age.

The Securities exchange board of India has made a few landmark implementations in the past few years, some of which have been questionable but mostly appreciated. The idea of having women on corporate boards came in the year 2002 by the Naresh Chandra committee, through the Companies amendment bill (2003), However this was highly criticized during the time¹⁵. The Companies Bill of 2012 proposed a mandate for one woman director to be appointed on the

¹¹ The Global Gender Gap Index/Report, The World Economic Forum Pg 19 (2021), https://www3.weforum.org/docs/WEF_GGGR_2021.pdf, Last assessed on 4th October, 2021

¹²See n 5, Pg 14.

¹³ Jayanti Sarkar and Ekta Selarks, ‘Women on boards and Performance of Family firms: Evidence from India’, Indira Gandhi development research, India, <https://www1.nseindia.com/research/content/NSE-IGIDR-WP6-14-15.pdf>

¹⁴ Increasing Gender Diversity on Boards: Current Index of Formal Approaches <http://www.catalyst.org/knowledge/increasing-gender-diversity-boards-current-index-formal-approaches>

¹⁵ Afra Afsharipour, ‘The One Woman Mandate: History and Trajectory’,(2015) Research paper no. 472 (Indian Institute of Corporate Affairs) (Oxford University Press)

Board of directors in the companies, by the rules prescribed by central government. SEBI in its 'Consultative paper on review of corporate governance norms in India' proposed a few changes and implementations necessary in the corporate governance scenario, it stated that diversity is essential for board effectiveness and the Indian boards having only a handful of women on corporate boards need more representation and thereby encouraged board gender diversity¹⁶. SEBI also reiterated that having a diverse board will help the companies understand their stakeholders better. This has been largely supported by scholars, a study found that women directors broadened the content of board discussions and were more invested in raising questions regarding the stakeholders than their male counterparts¹⁷. This proves that women are not just meant for petty tokenism tactics but for bigger things in corporate governance reforms. SEBI, along with board gender diversity also recommended that while choosing an independent director the nomination and remuneration committee should also encourage persons from diverse backgrounds and genders under clause 49 by promoting diversity of thought, knowledge, experience, perspective, understanding, age and gender.

The question that arises is whether the current legal framework adequate for representation of women on Indian corporate Boards? For which we have to understand what are the current laws pertaining to board gender diversity and women directors. By the amendment of Companies Act, 2013 many things changed for India and its pursuit towards better Corporate Governance began. With clause 49 of the SEBI guidelines mandating one woman directors' presence for listed companies. SEBI, (LODR) Regulation of 2018 have mandated top 500-1000 listed companies to have at least one independent woman director on their corporate boards¹⁸. By virtue of section 149 sub section (1) of the companies act of 2013¹⁹ and Rule (3) of Companies (Appointment and Qualifications of Directors) Rules, 2014²⁰, the public listed companies and public companies having a turnover of Rupees 300 crores and public listed/public companies having paid-up share capital of 100 crores or more shall appoint at least one-woman director to their boards. The tenure of such a woman director would subsist till the next annual general meeting of the company, in case of vacancy, the company shall have to appoint one woman director by the next

¹⁶ SEBI, Consultative Research paper on review of Corporate Governance norms in India https://www.sebi.gov.in/sebi_data/attachdocs/1357290354602.pdf , Last assessed on 4th October, 2021.

¹⁷ Kramer, V., Konrad, A., Erkut, S., Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance, Wellesley Centers for Women, Report No. WCW 11, at 9 (2006) cited in Rhode & Packel

¹⁸ SEBI, (Listing Obligations and Disclosure Requirements) Amendment 2018

¹⁹ Companies Act, 2013

²⁰ SEBI, Companies Appointment and Qualification of Directors rules, 2014

AGM or 3 months from the date of vacancy whichever is later. This “whichever is later” rule is a little stretch in my opinion and SEBI should have mandated the earlier date for vacancy appointment of women directors as it would have given a clearer and stricter obligation for the companies to have their directorship sorted. Another disappointing rule by SEBI is with regards to the punishment for non-appointment of women directors. SEBI has only prescribed a penalty under section 172 of rupees 50,000 which can go up to 5 lakh rupees and an additional penalty of 1000 each day of non-compliance, without having a separate punishment altogether for non-appointment. The other question that arises in this situation is the stark contrast between the regulations for appointment of independent directors from that of the women directors. Rule 4 of Companies (Appointment and Qualifications of Directors) Rules, 2014 mandate appointment of at least two independent directors in a public listed company having a paid-up share capital of rupees ten crore and a turnover of hundred crore or more and appoint such higher number as would be necessary due to the composition of its audit-committee. It only makes one question whether this is an inherent bias towards women? SEBI could have easily made the same rules and managed to keep lower threshold in the case of appointment of women directors as well. This different rule for women directors increases the doubts whether appointment of women directors is actually just a matter of tokenism or a mandate just for copying the western culture and corporate governance strategies. A percentage limit is set for independent directors i.e., 1/3rd of the board shall consist of independent directors in every public listed company, why has the same not been mandated for women directors? Maybe such a thing might be ‘too much to ask for’ by corporates and public listed companies consisting only of men as controlling shareholders. It is truly difficult to obtain an equal forum when policies and frameworks themselves are being made by men. If only such enthusiasm is shown for equal representation for women will the corporate world become a better place.

One of the greatest Russian author Leo Tolstoy said *“Everybody wants to change the world, but nobody thinks about changing themselves”*.

This quote reasonably explains the state of affairs for women in corporate world today, everyone does want the corporations to implement a change but when it comes to execution on personal level, no one does anything.

The penalties are also an adding factor towards why usually companies don’t comply with these regulations, a public listed company having a turn-over of 300 crores and paid-up capital of 100 crores can easily pay 50,000 and 1000 each 20 defaulting directors, that would be easier than

spending money on R&D in the search for women directors. These rules and regulations will not suffice in the long run as they only have a soft-law impact on corporates. They don't otherwise deter the corporates from participating in business, Australian companies follow unregulated mandates for having lesser women directors they have to pay higher interest on loans taken/borrowed by them. Such a policy which indirectly forces corporates to take accountability for appointment and adequate representation of women on boards would be appreciated in India as well.

POSITION OF WOMEN DIRECTORS IN INDIAN BOARDS

The battles faced by women in India are still many, Indian women are subjected to trials and tribulations since time immemorial. This although a generalized opinion, holds true, no Indian woman/mother who works would deny this. The society in India and around the globe is such that would make a woman feel guilt for looking beyond family and focusing on her career. This is the most indispensable aspect for every wife/mother/woman in India, that they have to juggle their career with domestic responsibilities this means that 'unless family is taken care of there is little capacity for women to be involved in any leadership roles'²¹ each and every Indian woman at least knows one such woman who masters it regardless.

The number of women on Corporate Boards in India were negligible 5 years ago women occupied only 5.3% of directorships in the top 100 listed Companies of Bombay stock exchange 54% of BSE listed companies had no women directors at all²², but now the Indian corporates have submerged into the realm of having more diverse boards. The predominance of old boys club' has reduced significantly. By virtue of section 149 (1), Regulation 17 (1) of SEBI, (Listing Obligations and Disclosure Requirements) there have been many changes in the presence of women directors of Indian corporate boards. It has been established that up to 44% of NIFTY 500 companies are now having above two women directors on their boards, 28% of these companies have more than 20% women representation on their boards as on March 2020 as opposed to only 11% in March 2017. In totality women now have 17% Corporate positions on

²¹ Rosenblum, D., *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1398&context=lawfaculty>, Last Assessed on 4th October, 2021 see also, Akshaya Kamalnaath and Yamini Peddada 'Women in Boardrooms: Formulating a legal regime for Corporate India' (2012), *Journal on Governance*, Vol. 1 No. 6.

²² Banerji, A., Mahtani, S., Sealy, R., Vinnicombe, S., *Standard Chartered Bank: Women on Corporate Boards in India 2010*, p.16, available at http://www.communitybusiness.org/images/cb/publications/2010/WOB_India.pdf

the Board as on March 2020²³ and 20% of women directors hold more than one seat on the board as compared to men at 8%²⁴ However, now the pressing issue is that 21% of these women on boards have an independent position which is a non-executive position, women in executive position are only 11%, out of the total number of executive directors women are merely 31% and the rest of the 69% were members forming part of the Promoter and Promoter Group²⁵.

CONCLUSION AND POLICY SUGGESTIONS FOR INDIAN REGULATORS

India has bagged the 12th rank in the presence of women in boardrooms²⁶. Another recent study showed that 70% of Indian corporates have surprisingly fulfilled their quotas by appointing women directors who weren't insiders of the company²⁷. These studies show that Indian corporate system has taken a foot in the right direction and will only be ever evolving. However, some women directors still face many challenges in corporate boardrooms, the government and SEBI should take a stand and call for more representation on Boards as opposed to one woman director. Sonu Bhasin a leading Indian woman director in a recent webinar mentioned that men in the boardroom still look at women on boards to be a glamor quotient²⁸ and this in the 21st century where a huge number of Indian woman population is educated sounds absurd. She also mentioned that the mindsets of the board members in Corporates haven't changed at all, even after the 'One woman director mandate' came into being.

SEBI should also make women directors mandate a percentage-based system as opposed to a single digit numeric. There should also be stricter and heavier charges levied on the defaulters. Apart from these women should be encouraged to take part in directorships and experienced women employees should be motivated to try and take part in directorship roles. SEBI should try to also include mentorship activities by recognizing and promoting companies that will support

²³ IiAS Research, PRIME Database group, See also 'Corporate India : Women on Boards' https://80cb29c1-d47b-4d4e-a4b4-a262ad35f48b.filesusr.com/ugd/09d5d3_8ca2d0240f83425ab6505327a62a7b2d.pdf Last assessed on 4th October, 2021

²⁴ The Indian Express, December 14 2020, <https://www.financialexpress.com/economy/india-sees-8-6-rise-in-percentage-of-women-on-boards-between-2012-and-2020/2149325/>

²⁵ <https://indianexpress.com/article/business/economy/women-directors-executive-roles-nifty-500-companies-7317887/>

²⁶ 'Women on Board' 2020, (628 Indian listed companies participated in this), MyHiringClub.Com and Sarkari-Naukri.Info, <https://www.shethepeople.tv/news/india-women-board-members-study/>

²⁷ Harvard Business Review, <https://hbr.org/2021/02/what-happened-when-india-mandated-gender-diversity-on-boards>, Last assessed on 4th October, 2021.

²⁸ "Perspectives of Women on Boards in India and Australia", <https://youtu.be/G4P2GAMnCI>, Last assessed on 5th October, 2021

women to grow further in the field, a framework like the AICD ‘AUS ASX 200’ company’s follow and promote.

If only did the ‘One woman director’ not seem more of a token given just for the sake of having a woman on board, will it help the Indian Corporates. Nevertheless, the concept and mandate has changed the corporate representation of women manifold and shall surely be fruitful in the future as well and hence the quota system for appropriate representation should be supported. Indian regulators should feel inspired by their own success in this forefront and encourage more women on boards and continue striving for gender diversity.