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BETTER POWER OF THE BOARD: THE BETTER CORPORATE GOVERNANCE

Name Of 1st Author-Charu Priyadarshi

Name Of 2nd Author-Simant Priyadarshi

Designation Of 1st Author-LLM, PG Department Of Law, Patna University

Designation Of 2nd Author-LLM, The ICFAI Law School, The ICFAI University, Dehradun

1. "THE BOARD": BALANCE OF POWER

A company is an artificial person. It has no physical existence and has neither the body nor the soul. As per Cairns, the company itself cannot act in its own person. It can act only through directors. The separation of ownership from active directorship and management is an essential feature of the company form of organization. The shareholders elect their representative, to manage the affairs of the company. The representatives are known as directors of the company.[1]Director means director appointed to the board of the company.[2]The board of directors refers to a collective body of directors.[3] The board further delegates powers to departmental heads in charge of operations.[4] Every company shall have board of directors which shall consists of individuals. The minimum number of directors in a public company is three and in a private company its two. The one person company shall have minimum of one director. The maximum number of directors is fifteen. But the number can be increased by a special resolution.[5] The role of the board is to work out business strategy and address big issues.[6] It is the broader responsibility of the board to ensure that the management works in the best interest of the corporation and the shareholder to enhance corporate economic value. The quality of the directors, their competence, willingness and ability to assume a high degree of obligation to the company and its shareholders as members of the board alone derives the value of any board.[7]

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[1] A. C. Fernando, *Corporate Governance Principles, Policies And Practices,* 188 (Dorling Kindersley (India) Pvt. Ltd. 6th ed., 2014).
[2] S. 2(34), The Companies Act 2013,(India).
[3] S. 2(10),The Companies Act 2013,(India).
[4] Supra 1.
[5] S. 149(1), The Companies ACT 2013, (India).
[6] Supra 1, at 199.
[7] Supra 1, at 200.

1.1. POWERS OF THE BOARD OF DIRECTORS:

The board of directors are entitled to exercise all such powers which the company is authorized to do. But while exercising such powers the board shall be subject to provisions of the companies act, the memorandum, articles and regulations. The board shall not exercise any power which is to be exercised by the company in the general meeting.[8] No regulation made by the company in a general meeting shall invalidate any prior act of the board which would have been valid if that regulation had not been made.[9] By passing a resolution in a general meeting, the board of directors can make calls on shareholders in respect of money unpaid on their shares. The board of directors can authorize buy-back of securities. They have the power to issue securities including debentures. They can borrow monies and have power to invest the funds of the company. They have power to grant loans or give guarantee or provide security in respect of loans. They have power to approve financial statement and approve board's report. They have power to diversify the business of the company. They have power to approve amalgamation, merger or reconstruction. They can take over the company and acquire a controlling or substantial stake in another company. They have power over any other matter which may be prescribed under rule 18 of the Companies (Meetings Of Board and its Powers) Rules, 2014.[10]

1.2. RESTRICTIONS ON POWERS OF THE BOARD

There are certain powers that the board of directors can exercise by a special resolution. The power to sell, lease or dispose of the whole or substantially the whole of the undertaking of the company. The amount of compensation that has been received as a result of merger and amalgamation, to invest the same in trust securities, a special resolution is required. When the board of directors have to borrow the money, where the money to be borrowed together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves.[11] Every special resolution passed by the company in a general meeting shall specify the total amount up to which monies may be borrowed by the board of directors.[12] Prior permission of the company is required to contribute to bona fide charitable fund, if the amount of contribution exceed five percent of its average net profits.[13] A company can contribute not more than seven and a half of its average net profits, to a political party provided a resolution has to be passed at the meeting of the board of directors.[14]

Therefore, in order to achieve good corporate governance, a balancing of the power of the board is required. The board must exercise its power effectively and in a transparent manner.

[8] S. 179(1), The Companies ACT 2013, (India).
[9] S. 179(2), The Companies ACT 2013, (India).
[10] S. 179(3), The Companies ACT 2013, (India).
[11] S. 180(1), The Companies ACT 2013, (India).
[12] S. 180(2), The Companies ACT 2013, (India).
[13] S. 181, The Companies ACT 2013, (India).
[14] S. 182, The Companies ACT 2013, (India).

2. THE BOARD AND CORPORATE GOVERNANCE: THE PROPORTIONALITY.

Corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment.[15] Corporate governance refers to the internal structure and rules of the board of directors, the creation of independent audit committee, rules for disclosure of information to shareholders and creditors, and control of the management. An underlying uniformity in the thinking of analyst is that there is a need to eradicate corporate misgovernance and promote corporate governance.[16]

2.1. OECD PRINCIPLES FOR BETTER CORPORATE GOVERNANCE: OECD was one of the earliest non-governmental organizations which laid down the principles of better corporate governance.[17] The principles were originally developed in 1999. According to the OECD principles, the corporate governance framework should promote transparency and fair dealing. There must be efficient allocation of resources, supervision and enforcement. There must be strategic guidance of the company and effective monitoring of management by the board. The board must be accountable to the company, the shareholders and public good. The board is chiefly responsible for monitoring managerial performance. The board must prevent conflict of interest and must balance competing demands of the corporation. The board must exercise objective and independent judgement. The board must oversee risk management system and must oversee that the corporation obeys applicable laws. There are two fiduciary duty on the board. The board has a duty of care and loyalty. The duty of care requires the board members to act on a fully informed basis, in good faith, with due diligence and care. The duty of loyalty for board members relates to the company and all its shareholders and not to the controlling company of the group. Where the board decisions affect different shareholder groups differently, the board should treat all shareholders fairly. The board must apply high ethical standards in the long term interest of the company in order to meet the longer term commitments. The board must adopt code of conduct based on professional standards. The board must review and guide corporate strategy, major plans of action, risk management policies and procedures, annual budgets and business plans. It must set out performance objective and oversee capital expenditure, acquisition and divestitures. The board must continuously review the internal structure of the company and must ensure that there are clear lines of accountability throughout the management. The board must select, compensate and monitor the key executives and must oversee succession planning. The board must develop and disclose remuneration policy statement for long term interest of the company and its shareholders. The principles promote that there must be transparent board nomination and election process. The board must monitor and manage potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

The board must set out and enforce clear lines of responsibility and accountability in order to ensure the integrity of the corporation.

[15] Ramesh. K. Arora and Tanjul Saxena, *Corporate Governance: Issues And Perspectives*, (Mangaldeep Publications, 2004).
[16] Supra 1, at 9.
[17] S.P.Bajaj and Agarwal Raj, *Business Ethics: An Indian Perspective*, (Biztantra, New Delhi, 2004).

The board must oversee the senior management by the establishment of internal audit system. The appointment of investment relations officer is considered a good corporate practice for disclosure and communication. The board must be able to exercise objective independent judgement on corporate affairs. Independent board members can bring an objective view to evaluation of the performance of the board and management. they can contribute significantly to the decision-making of the board. The board should constitute committees with minimum number of non-executive members, to consider question where there is potential for conflict of interest. The board should set up specialized committees to support the board in performing its function, particularly in respect of audit. In order to achieve legitimacy and confidence in the eyes of the shareholders, there must be disclosure about board membership to shareholders and it must be facilitated by publication of attendance records. Board should regularly carry out evaluations to appraise their performance and assess whether they possess the right mix of background and competences. In order to fulfill their responsibilities, board members should ensure that they obtain accurate, relevant and timely information. When employee representation on the board is mandated, mechanism should be developed to facilitate access to information and training for employee representatives, so that this representation is exercised effectively. Employee representative should have same duties and representative as all other board members and must work in best interest of the company.[18]

2.2. INITIATIVES BY THE NATIONAL FOUNDATION FOR CORPORATE GOVERNANCE: With a view to promote better corporate governance, ministry of corporate affairs has set up the National Foundation For Corporate Governance in partnership with CII, ICSI and ICAI. NFCG provides a platform for deliberations on corporate governance issues. It conducts several research work on corporate governance. It has established linkage with OECD, ACGA, Lexis Nexis, Hong Kong.[19] At one of the NFCG events several important discussions relating to corporate governance were laid down. The best way to improve corporate governance in family managed business is to involve the owner director himself rather than independent directors. Corporate governance should involve academic normative science. In order to pursue better corporate governance there is a need to strengthen the contribution of independent director. There are areas that require further strengthening like risk management, internal controls and disclosures.[20]

One of the strong principles of corporate governance is strong performance of the company. Highly professional persons must be invited on the board as independent directors and the company should take advantage of their expertise in the specialized areas like accounting, strategy formulation etc. One of the most important principles of corporate governance is financial, operational and strategic performance. There must be strong link between the interest of the company and the interest of employees. This can be carried out by a system of performance linked variable remuneration and a well structure system of incentives through ESOPs.

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[18] *G20/OECD Principles Of Corporate Governance*, G20 Finance Ministers and Central Bank Governors Meeting, OECD Report To G20 Finance Ministers and Central Bank Governors,(September. 2015) available at https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf, last seen on 2/03/19.

[19] Ministry Of Corporate Affairs, Government Of India, *E Newsletter Corporate Governance, Issue 1 April-June 2008,* available at http://www.nfcg.in/corporate-governance-newsletter-1, last seen on 4/3/19.

[20] *Report Of Round Table On Excellence In Corporate Governance "Showcasing Corporate Governance Best Practices By Medium, Sized Family Managed Listed Companies-Three Case Studies"* Mumbai, April 27, 2009,National Foundation For Corporate Governance, Sess.1 available at http://www.nfcgindia.org/spjimr_brief.htm#Top last seen on 4/3/19.

There must be relationship of trust and respect between providers and users of goods and services. There must be transparency, accountability and equitable treatment. The formation of company consumer grievance cell can generate a great deal of trust and goodwill among the consumers. There is a need for greater shareholder activism, lack of formal evaluation of the board, need for the board to have greater access to senior management, need for better internal vigilance and strong role to be played by institutional directors on the board to improve corporate governance. The board and senior management are together involved in the process of strategic planning and risk management.[21]

2.3. FICCI: The committee is actively involved in several issues relating to corporate governance. FICCI has implemented several recommendations such as an enhanced role of nomination and remuneration committee, separation of the roles of chairman and CEO, enhanced focus on independent directors. It is believed that these measures would further strengthen governance, leading to investor's confidence. Market integrity and fair conduct are cornerstone of an efficient capital market. It is extremely important to prevent fraudulent and unfair trade.[22] A survey was conducted by FICCI in which it was found that there is there is limited availability of quality independent directors which is a barrier to robust decision making by the board. The enhanced personal and professional liability for independent directors coupled with insufficient risk reward matrix acts negatively on effective performance of independent directors. Increased liabilities have necessitated that directors undertake considerable due diligence before accepting independent directorship in companies. It is board's function to ensure a transparent nomination process with diversity of thought, experience, knowledge, perspective and gender. Directors from different background would make the board more diverse and decision making more robust and inclusive. Excessive board diversity does not negatively impact the ability to reach unanimity. Board diversity results in better board discussions and strategic decisions. There are several challenges such as concentration of ownership structures, absence of experience among board members, unrealistic expectations from certain class of directors and cultural bias against honest appraisal. Therefore, because of these challenges board's evaluation process is not practicable. A greater flexibility in provision of law would make the provision practical to implement.[23]Therefore, a proportionality exists between an effective board and good corporate governance.

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[21] *Report Of Round Table On Excellence In Corporate Governance "Showcasing Corporate Governance Best Practices By Medium, Sized Family Managed Listed Companies-Three Case Studies"* Mumbai, April 27, 2009,National Foundation For Corporate Governance, Sess.2 available at http://www.nfcgindia.org/spjimr_brief.htm#Top last seen on 4/3/19.

[22]FICCI, Press Release, *As the market grows, we need greater governance norms to keep the faith and trust of investors: SEBI Chairman Ajay Tyagi*, (11/09/18) available at http://www.ficci.in/pressrelease-page.asp?nid=3215, last seen on 5/3/19.

[23] *Survey Report on Corporate Governance in India@2016: Where Do We Stand?*, FICCI, available at FICCI-Corporate-Governance-Report.pdf, last seen on 5/3/19.

3. WOMEN ON THE BOARD: THE NEED OF INDIAN CORPORATE HOUSES

The conventional Indian society constantly prevented women from entering into the public domain and they were given a inferior position in the society. The progress of women has been shackled by the fetters of societal gender bias.[24]The legislature has taken a bold initative in recognizing women on the board of directors. Every listed company and every other public company having paid up share capital of one hundred crore rupees or more and turnover of three hundred crore rupee or more shall have one woman director on the board. In case there is a vacancy, it has to be fulfilled as early ad possible. It should not be later than the next immediate board meeting or after three months from the date of post being vacant i.e. whichever is later.[25] Every company shall within one year from the commencement of the companies act 2013, shall have one women director o the board. [26] In four and a half months since the SEBI board meetings in February, 2014, 91 women have been appointed to 97 directorship positions in 94 companies.[27] It is believed that presence of women on the board will lead to less corruption and would improve corporate transperancy. Gender diversity is a requirement that aims at breaching gender bias and improving corporate governance as well as championing women rights. Gender diversity of boards would ensure a diversity of thought, experience, knowledge, perspective and gender. There is positive impact of inclusion of women directors on the board.[28]

We do not need singularity representation of women on the board. What we need is a plurality representation on the board. A majority representation of the women on the board will promote different skills, optimize resource utilization and maximize the potential of women on the board. In India, the shortage of qualified and experienced women at executive levels is often given as one of the main reasons for male domination in the board.[29]FWD is an initiative to encourage women directors on the board. They provide training programs to women.[30] More representation of women on the board will add diversity to the board. Moreover, it will be a remarkable evolution for women empowerment. Board run by mix of both men and women has helped in return of equity, in comparison to companies with men only on the board. For instance, Chanda Kochhar, who leads ICICI bank and Kiran Mazumdar Shaw, director of Bicon Limited has shown a positive difference on return on equity. Norway, in 2003 became the first country in the world to enforce a gender quota requiring nearly 500 firms , to raise the proportion of women on the board by 40%.[31]India needs to increase women's participation in the economy. As they comprise half of country's population. Failure to address gender

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[24] Kalpana Bardhan, *Women: Work, Welfare and Status, Forces Of Tradition And Changing In India*, 20(50) ECONOMIC AND POLITICAL WEEKLY, 2007, 2220(Dec.14, 1985).
[25] Rule 3 of the Companies (Appointment And Qualifications of Directors) Rules, 2014.
[26] S. 149(2), The Companies ACT 2013, (India).
[27] Press Release, Khaitan & Co & Biz Divas, *Women On Boards: A Policy Process AND Implementation Roadmap* (Aug. 07, 2014) available at http://www.bizdivas.in/wp-content/uploads/2014/09/women_on_boardV3-PRINT.pdf. last seen on 6/3/19.
[28] Supra 23.
[29] Meena Goyal & Jai Prakash, *Women Entrepreneurship In India-Problems And Perspectives* 1(5) INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY RESEARCH (Sept. 2011) available at http://zenithresearch.org.in/images/stories/pdf/2011/Sept/14.Vol_01_Issue_05%20MEENU%20GOYAL%20women%20paper.pdf, last seen on 6/3/19.
[30] *FLO Women Directors(FWD)*, available at http://www.ficciflo.com/initiatives/flo-women-director/, last seen on 5/3/19.
[31] Aagoth Storvik & Mari Teigen, *Women On Board: The Norweigen Experience*, FRIEDRICH EBERT STIFTUNG, Jun 2010, at 4, *available at* http://library.fes.de/pdf-files/id/ipa/07309.pdf.

diversity would lead to serious economic consequences in future.[32] FICCI has established the centre for corporate governance to enhance corporate governance. The major initiative would be to coach professional women to make them ready to join corporate boards. This will improve gender balance and increase the number of women as independent directors on corporate boards. More representation of women on the board is a good sign of corporate growth. The need of women directors on the board has become inevitable. Studies show that companies with women on the board show better profitability and are more likely to have healthy and productive board meetings and are less likely to have cases of fraud. In order to ensure good corporate governance, greater participation of women is imperative. Therefore, it can be concluded that majority representation of women on the board is the need of Indian corporate housed.

4. CONCLUSION AND SUGGESTION

The researcher had initially raised the research question as to how a better board can lead to better corporate governance. After a detailed study the researcher concluded that a strategic board with board governing responsibilities is the need of the hour. A smaller size of the board leads to cohesive functioning and decision-making. It is advisable to have lesser number of insiders and more number of outsiders on the board. The board, when it consists of outside directors, will work out long term strategies, take investment decision. They would ensure secular interest of the firm as well as the stakeholders. This will lead to independence of the board. It is necessary that the board must comprise of persons with varies experience and expertise. People with different ethnic and cultural backgrounds should be present on the board. The effectiveness and efficiency of the board of directors depends on intelligent, timely and accurate information it gets from the management. The board should be allowed to have professional advice. The board should have longer vision and broader responsibility. The board must not act in response to the demands of the CEO. To strengthen the position of the board and to protect the long-term shareholder's value, many big corporate houses are turning to advisory boards to draw on the collective wisdom of several professionals.[33] The OECD principles lays down that shareholders, board members, executives and financial intermediaries must perform their roles within a framework of checks and balances.[34]

The researcher has concluded that there is a direct proportionality between improper exercise of board's power and corporate failures. The improper exercise of board's power has been attributed to the corporate failures. Therefore, the hypothesis of the researcher has been fully proved and established. The researcher had initially raised the research question as to how more representation of women on the board can lead to better corporate governance. The onus of ensuring greater representation of women on the boar primarily rests on the board

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[32] PTI, *Women Directors: FICCI to set up pool to fix issue*, The Economics Times, (29/05/16) available at http://m.economictimes.com/news/company/corporate-trends/women-directors-ficci-to-set-up-pool-to-fix-issues/articleshow/52487305.cms, last seen on 5/3/19.

[33] Supra 1, at 200.

[34] *G20/OECD Principles Of Corporate Governance*, G20 Finance Ministers and Central Bank Governors Meeting, OECD Report To G20 Finance Ministers and Central Bank Governors,(September. 2015) available at https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf, last seen on 1/03/19.

members. The organizations must have clear understanding of the obligations and responsibilities in ensuring compliance with the act. Developing countries, so far, had no quota for women representation on the board. India was the first country with such statutory mandate. India may be an inspiration for other developing countries if we are able to demonstrate an actual change in the women representation on the board as well ws influence their presence through actual leadership. Our constitution enshrines with the basic rule that there should not be inequality in the society.

There is a need to carry out empirical study to establish a link between corporate governance and company's performance. There is a need for training and evaluation of board members and better contribution from independent directors in important decision making.[35]

[35]Supra 21.