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GENDER DIVERSITY IN THE BOARD OF DIRECTORS – AN ANALYSIS OF LAWS THAT AIM TO INCREASE THE PRESENCE OF WOMEN IN BOARDROOMS

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Essay & Comments

GENDER DIVERSITY IN THE BOARD OF DIRECTORS – AN ANALYSIS OF LAWS THAT AIM TO INCREASE THE PRESENCE OF WOMEN IN BOARDROOMS

Shantanu Braj Choubey*

Abstract

The lack of women directors on boards of directors has often been pointed out as a primary reason behind group thinking, leading to inefficient monitoring of management. Both Markets and governments have been striving to incentivise and/or force corporations to appoint a greater number of women directors. Markets adopt tools like ESG-based investing, etc., while governments use the law to achieve gender diverse boards. However, the Corporations have continued to show their reluctance and are holding out as a prominent Example of the last male bastions. The present paper analyses the laws on women directors And, at the same time, also studies the impact law and markets have had on increasing gender Diversity in boards of directors in India and the State of California, USA, being two very Prominent examples of common-law jurisdictions that have adopted mandatory quotas for Women directors.

The paper also presents an analysis of the various factors, in addition to the Legal requirements, that play a role in appointing women directors on the Board. The conclusion that one can arrive at after reviewing the data assessed in this paper is that, Contrary to the widely claimed argument, the lack of women directors on the Boards of Indian Companies is not due to the unavailability of meritorious female candidates. Instead, it can be solely attributed to the hesitation of the board members in appointing a woman director.

I

Introduction

The board must monitor and oversee the performance of the firm. In this sense, board composition plays a significant role in ensuring that the board can perform its duty effectively. The structuring of board composition has, thus, been a prominent topic of debate in corporate governance. Though initially the literature was limited to inside versus outside directors, independent directors and the presence of dissenters on the board, it has now gradually evolved to include the topic of board diversity regarding representation of women and minorities. Women directors are increasingly being considered key to bringing more dissenting voices on the board while improving the overall work environment. The formidable push for gender diversity in boardrooms has partly come from Environmental, Social and Governance (E.S.G.) based investing, a comparatively new phenomenon, and partly through legal sanctions. The present paper focuses on the reasons behind the rise of advocacy for women directors and how laws and markets address the issue. Part I of the paper will present an analysis of the purpose of corporate boards and how that leads to the determination of board composition. Part II will deal with the 'organisational justice' and 'organisational performance' based arguments for having greater gender diversity in the board of directors. Part III will present a detailed discussion about how laws influence the appointment of women on boards and how corporations have been reacting to such changes. Under this part, a comparative analysis has been made on the impact of such laws in the states of California, USA, and India. The data taken from both the jurisdictions under study are from 2022, as California has since stopped publishing data on gender diversity in Boards. Part IV will present findings and conclusions.

II

Purpose of Corporate Boards

The composition of the board needs to be ascertained in line with the purpose the company is supposed to achieve. However, the true purpose of a company has always been a debatable topic. Traditional economists have believed that "*there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits*"[1]. This belief, otherwise known as the shareholder approach, has generally dominated the mainstream literature and defined corporate ethics over the years. However, over time, it has also found itself battling against opposing ideas coming from different quarters.

The literature that adopts the shareholder approach has provided us with some very valuable insights into efficient board composition. In 1932, Berle and Means famously advocated for the separation of ownership and control in corporations[2]. This led to fragmented share ownership[3] and, thus, appointment of "*inside directors,*

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1 MILTON FRIEDMAN, CAPITALISM AND FREEDOM (7. print ed. 1991).

2 ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1991).

3 Brian Cheffins, *The Rise and Fall of the Berle-Means Corporation*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2018), https://corpgov.law.harvard.edu/2018/08/06/the-rise-and-fall-of-the-berle-means-corporation/ (last visited May 10, 2024).

chosen and controlled by the C.E.O. (Chief Executive Officer)".[4] The significance of the board as a monitoring body came to be realised only in the 1970s. It was argued that the board must monitor the performance of the company, and to do that effectively, it must exercise some degree of independence.[5] This was the first time that the concept of an independent director was introduced. Subsequently, due to several corporate governance reforms effected due to the Cadbury Report in England[6] and the Birla Committee Report in India[7], it gained currency in the 1990s.

A point to note here is that the underlying idea behind the evolution of the board of directors as a majorly independent monitoring body is the emphasis on the importance of neutral and diverse views in the decision-making process. Thereby, it is expected to avoid group thinking and promote a dissent culture. The concept of women directors, the advocacy of which is also based upon similar grounds, did not have a place in the mainstream literature of this era.

The counter-narrative to the shareholder approach is generally dubbed the stakeholder approach. It advocates for considering not only the interests of the shareholders (i.e. profits) but also those of others who are associated with the business and are affected by it. Through that, the latter theory says, the company will be able to generate more value in the long run. Thus, while the shareholder theorists believe that all that is required for a corporation is to align its interests with those of its shareholders, the stakeholder theorists emphasise aligning the interests of the corporation with those of a much larger group of stakeholders. The common thread between the two is that both focus on generating more value for the shareholders, though the routes they suggest differ.

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[4] Harald Baum, *The Rise of the Independent Director: A Historical and Comparative Perspective*, MAX PLANK PRIV. LAW RES. PAP. NO 1620 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814978 (last visited Jul 9, 2024).

[5] MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (2006).

[6] ADRIAN CADBURY, *Report of the Committee on the Financial Aspects of Corporate Governance*, (1992), https://www.ecgi.global/sites/default/files/codes/documents/cadbury.pdf (last visited May 10, 2024).

[7] KUMAR MANGALAM BIRLA, *Report of the Committee Appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla*, (1999), https://www.nfcg.in/UserFiles/kumarmbirla1999.pdf (last visited Sep 27, 2024).

In the recent past, with the Business Roundtable declaring the overall adoption of the stakeholder approach[8] and the rise of E.S.G. criteria-based investments[9], the stakeholder theorists have claimed triumph.

Though the idea dates to 2004[10] E.S.G. norms have made quite a buzz in the markets lately. E.S.G. norms consider factors ranging from carbon emissions, climate change, natural resource use, energy efficiency [environmental factors]; labour relations, diversity, human rights [social factors]; and board independence, board diversity, corporate ethics [governance-related factors][11]. To put it simply, E.S.G. based investments have an underlying belief that if corporate democracy considers the wider duties of the company (including the duty to have gender diverse boards), then that will ultimately help it yield greater returns for the decision makers, i.e., shareholders. However, the difficulty in measuring the varied and oftentimes vague norms has been one central area of criticism for E.S.G.-based investments.[12] Nevertheless, the rise of E.S.G.-based investment funds, especially since the Covid-19 mayhem, has shown that the concept is here to stay.

Forces that Regulate Board Composition

The popularity of ESG amongst market players has shown some definite impact on corporate governance practices. Retail and institutional investors have been adopting E.S.G. metrics in investment decisions. This can directly affect the flow of investment to the company and its share prices. The advertiser boycott campaign against Facebook that saw the participation of more than 1,100 advertisers is a stark

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[8] Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans," BUSINESS ROUNDTABLE (2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans (last visited Jul 10, 2024).
[9] INSTITUTIONAL INVESTOR SURVEY 2020, (2020), https://morrowsodali.com/uploads/insights/attachments/83713c2789adc52b596dda1ae1a79fc2.pdf (last visited Sep 25, 2024).
[10] Georg Kell, *The Remarkable Rise of ESG*, FORBES, Nov. 2018, https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=64f03cde1695 (last visited Apr 10, 2024).
[11] OECD, ESG INVESTING: PRACTICES, PROGRESS AND CHALLENGES (2020), https://www.oecd-ilibrary.org/finance-and-investment/esg-investing_5504598c-en (last visited Oct 7, 2024).
[12] ESG Should be Boiled Down to One Simple Measure: Emissions, THE ECONOMIST, Jul. 21, 2022, https://www.economist.com/leaders/2022/07/21/esg-should-be-boiled-down-to-one-simple-measure-emissions (last visited Jan 10, 2024).

example of the kinds of financial repercussions that a company may attract today if it ignores its ESG responsibilities.[13]

Another way the markets can influence businesses through E.S.G. could be when investors consider E.S.G. metrics to influence the company's decisions through the exercise of their voting powers. According to the Institutional Investor Survey 2020 conducted by Morrow Sodali.[14] A great majority of the respondents agreed that "E.S.G. risks and opportunities played a greater role in their investment decisions" in the past year, and more than half said that they "*would consider voting against a director to influence outcomes*". The survey also noted that human capital management, including gender equality, is one of the "*top sustainability topics investors will focus on while engaging with the boards*". E.S.G. funds are increasingly being set up by some of the most prominent institutional investors in the world.[15] With the coming of Avendus India ESG Fund in 2019, Indian markets have also joined the bandwagon.[16]

Another force that has been ceaselessly working to make businesses comply with E.S.G.-like norms is the law. Though instances of market regulating corporate behaviour to make the companies ESG compliant have increased in the recent past, the legal systems around the world have been trying to do that for decades now. Environmental protection legislation is a prominent example of the state trying to ensure that businesses do not sacrifice environmental concerns in pursuit of financial rewards. Similarly, legislation on the prohibition of discrimination and norms on corporate governance under national laws are examples of the state's endeavour to ensure social and governance-related concerns are also factored into corporate behaviour. When it comes to making corporate boards gender diverse, regulatory bodies in different jurisdictions have resorted to prescribing either mandatory quotas or voluntary goals. The objective has been to ensure that women's representation on corporate boards in the long run should increase.

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[13] Katie Paul & Kanishka Singh, *Facebook Ad Boycott Organizers Ask European Firms to Join Campaign*, REUTERS, Jul. 30, 2020, https://www.reuters.com/article/us-facebook-ads-boycott/facebook-ad-boycott-organizers-ask-european-firms-to-join-campaign-idUSKCN24V1R4 (last visited Sep 29, 2024).

[14] INSTITUTIONAL INVESTOR SURVEY 2020, *supra* note 10.

[15] Patrick Temple-West, *Private Equity Giants Vow to Show Their ESG Credentials in 2020*, THE FINANCIAL TIMES, Mar. 1, 2020, https://www.ft.com/content/cd530ee8-2194-11ea-92da-f0c92e957a96 (last visited Oct 9, 2024).

[16] Kiran Kabtta Somvanshi, *Why India Is Turning into ESG Funding Hotspot*, THE ECONOMIC TIMES, Nov. 2, 2019, https://economictimes.indiatimes.com/markets/stocks/news/why-india-is-turning-into-esg-funding-hotspot/articleshow/67938722.cms?from=mdr (last visited Dec 9, 2024).

III

Why Have More Women on Corporate Boards?

Corporate boardrooms have traditionally been bastions of male dominance. Up until the Great Recession of 2008, the practice continued without much opposition. However, since the onset of the global housing crisis, scholars around the world have increasingly pointed out the importance of having women directors. In addition to the kinds of reasons generally cited for independent directors, like avoidance of group-thinking, bringing diverse views, and dissenting voices, women directors are also justified on the basis of their being risk-averse and as a significant pool of untapped labour. Besides such efficiency-based arguments, scholars and lawmakers have also argued that more women directors are necessary simply because females are poorly represented on corporate boards. These arguments have been analysed in detail below.

Gender Diversity for Organisational Performance

As discussed above, traditionally, corporate boardrooms have consisted of members chosen and controlled by the C.E.O.s. Thus, group-thinking has been an inevitable issue to grapple with. A homogeneous board of directors, with members possessing similar skills and coming from similar backgrounds and lifestyles, sometimes tends to overlook highly consequential factors because of their groupthink.[17] As the directors often share a bond of trust and friendship with the C.E.O.s, instances of C.E.O.s being challenged and questioned about their decision-making have been rare. To reduce this backscratching, concepts like outside directors, non-executive directors, and independent directors were introduced. However, even with all these measures in place, boards have often overlooked illicit accounting practices, corporate mismanagement, and fraud.

The need to have greater women's representation on the boards became evident with the unfolding of the 2008 crisis. The Treasury Select Committee, appointed by the UK Parliament, in its report in 2010, opined that the crisis could have been avoided had there been more women directors on company boards.[18] Such kinds of

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[17] Martha L. Maznevski, *Understanding Our Differences: Performance in Decision-Making Groups with Diverse Members*, 47 HUM. RELAT. 531 (1994).

[18] HOUSE OF COMMONS TREASURY COMMITTEE WOMEN IN THE CITY TENTH REPORT OF SESSION 2009-10 REPORT, TOGETHER WITH FORMAL MINUTES, ORAL AND WRITTEN EVIDENCE ORDERED BY THE HOUSE OF COMMONS, (2010), https://publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/482/482.pdf (last visited Sep 16, 2024).

opinions became commonplace since then.[19] One of the prominent reasons behind such understanding was that women are trusted differently from men.[20] There are more than just biological differences between the two.[21] Women are known to be more sensitive and risk-averse.[22] Because of these reasons, they are less likely to fall prey to groupthink. Also, as they are more risk-averse, they are more likely to challenge the executive in decision-making. This makes up for better prospects for the company and greater returns for the investors.

Several empirical studies have confirmed a positive relationship between the presence of women on the board and the firm's financial performance. Still, a great majority of market participants have come to believe in it.[23] The reasons behind this positive relationship are manifold. With more women directors on board, the female perspective is factored into the decision-making process. As women account for most of the consumer base[24], such 'market reciprocity' is bound to bring positive results for the company[25]. In addition, the presence of women directors has also been found to improve the board's overall ability to identify "*criteria for measuring strategy, monitoring its implementation, following conflict of interest guidelines, and*

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[19] Dealbook, *Lagarde: What If It Had Been Lehman Sisters?*, THE NEW YORK TIMES, Nov. 5, 2010, https://archive.nytimes.com/dealbook.nytimes.com/2010/05/11/lagarde-what-if-it-had-been-lehman-sisters/ (last visited Jun 10, 2024); Angela Priestley, *Women and the Next Financial Crisis*, WOMEN'S AGENDA, Sep. 13, 2012, https://womensagenda.com.au/latest/eds-blog/women-and-the-next-financial-crisis/ (last visited Apr 10, 2024); Leonie Lamont, *Time Male Bosses Walked the Talk on Equality*, THE SYDNEY MORNING HERALD, Oct. 15, 2011, Retrieved from https://www.smh.com.au/business/time-male-bosses-walked-the-talk-on-equality-20111014-1lp2x.html (last visited Apr 10, 2024).

[20] Joan MacLeod Heminway, *The Last Male Bastion: In Search of a Trojan Horse*, 37 DAYT. LAW REV. 77 (2011).

[21] Renée B. Adams & Patricia Funk, *Beyond the Glass Ceiling: Does Gender Matter?*, 58 MANAG. SCI. 219 (2012); MICHAEL GURIAN & BARBARA ANNIS, LEADERSHIP AND THE SEXES: USING GENDER SCIENCE TO CREATE SUCCESS IN BUSINESS (1. ed ed. 2008); Linda C. McLain, *Chapter 5: What's so Hard about Sex Equality?: Nature, Culture, and Social Engineering Engineering*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 67 (2010).

[22] Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors – A Global Snapshot*, 37 J. CORP. LAW 793 (2011).

[23] Nada K. Kakabadse et al., *Gender Diversity and Board Performance: Women's Experiences and Perspectives*, 54 HUM. RESOUR. MANAGE. 265 (2015); MOVING WOMEN TO THE TOP: MCKINSEY GLOBAL SURVEY RESULTS, (2010), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/moving-women-to-the-top-mckinsey-global-survey-results (last visited Mar 10, 2024).

[24] Black Barbara, *Stalled: Gender Diversity on Corporate Boards* (2011), https://scholarship.law.uc.edu/fac_pubs/185/.

[25] Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. LAW REV. 795 (2005).

adhering to a code of conduct"[26]. Also, the presence of women in boardrooms is closely associated with improved work environment and stronger oversight.[27]

Gender Diversity for Organisational Justice

For most of human history, women have remained an oppressed and marginalised class. However, we see that we are being challenged in almost all spheres. Nevertheless, corporate boardrooms have proved to be one of the last bastions of male dominance that have often kept their doors closed for women, generally, on the pretext of promoting meritocracy. The argument is that there are not enough capable women to be appointed as directors, so there is low representation. The argument is based upon the belief that "*board appointments must always be made on merit, with the best-qualified person getting the job*"[28]. Quotas, in this sense, bypass competitive processes.[29] This idea was also echoed in the opinion of the Finance Minister of India when she said, "*[g]et me those kinds of women who can be put on the boards. Where are they?*"[30]. This understanding is so deeply rooted that a study on female directors revealed that they want to be perceived as being appointed only due to merit.[31]

However, the argument that meritocracy is the reason behind the low representation of women on corporate boards is not one without challenge. Though we find a greater number of women being involved in mid-managerial positions recently, the same does not apply to corporate boardrooms.[32] This points to the issue of a possible large untapped resource pool of capable women not getting

[26] LORD MERVYN DAVIES, *Women on Boards*, (2015), https://assets.publishing.service.gov.uk/media/5a806e4de5274a2e8ab501aa/bis-15-134-women-on-boards-2015-report.pdf (last visited Jul 9, 2024).
[27] *Id.*
[28] *Id.*
[29] DRUDE DAHLERUP & LENITA FRIEDENVALL, *Electoral Gender Quota Systems and Their Implementation in Europe*, (2008), https://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf (last visited Jun 10, 2024).
[30] PTI, *Women Reluctant to Join Company Boards, Difficult to Find Those Who Are Interested: Nirmala Sitharaman*, THE ECONOMIC TIMES, Feb. 21, 2022, https://economictimes.indiatimes.com/news/company/corporate-trends/women-reluctant-to-join-company-boards-difficult-to-find-those-who-are-interested-nirmala-sitharaman/articleshow/89727412.cms (last visited Sep 19, 2024).
[31] Kakabadse et al., *supra* note 24.
[32] Divya J. Shekhar, *Women Hold 17% of Board Positions in Corporate India, but Only 11% Leadership Roles*, FORBES INDIA, Aug. 2020, https://www.forbesindia.com/blog/missrepresent-women-gender-sexuality/women-hold-17-of-board-positions-in-corporate-india-but-only-11-leadership-roles/ (last visited Feb 10, 2024).

opportunities due to the inherent biases of corporations.[33] The outcome is much less efficient and, in this sense, contrary to the whole idea of meritocracy. Scholars have argued that quotas for women and merit complement each other.[34]

As women are denied representation on corporate boards, their capabilities are negatively reflected. That sends a negative message in society by showing women to be inferior to men. It further leads to a lack of role models for the future generation of aspiring women directors.[35]

Lastly, while deciding upon the composition of the board of directors, the corporation's role, nature, and significance as one of the most potent social organisms cannot be overlooked. Their increasing power has placed them uniquely in a position where they greatly influence policy-making.[36] Moreover, being artificial persons, they substantially derive from society. Thus, as a prominent member of human civilisation, the corporations must comply with the prevalent moral and ethical demands. The United Nations adoption of 'gender equality' as a Sustainable Development Goal and social movements like 'Me Too' have made it abundantly clear that the demands of women cannot be overlooked anymore.[37] If corporations hesitate to embrace such ideals, the 'impartial spectator' will force it upon them.[38]

IV

Laws and Markets on the Appointment of Women Directors

Although studies highlighting the importance of women directors in corporate boardrooms have dominated a large part of corporate governance literature for about a decade, Indian corporations are progressing towards greater gender diversity at a snail's pace. In Indian corporate boardrooms, women account for

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[33] Branson, *supra* note 23.
[34] Ingo Forstenlechner, Fiona Lettice & Mustafa F. Özbilgin, *Questioning Quotas: Applying a Relational Framework for Diversity Management Practices in the United Arab Emirates*, 22 HUM. RESOUR. MANAG. J. 299 (2012).
[35] Branson, *supra* note 23.
[36] THOMAS FERGUSON, GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS (1995).
[37] United Nations has declared gender equality and women empowerment as an objective to be achieved under its Goal 5 of the Sustainable Development Goals programme. Also, the ongoing 'Me Too' movement is a very prominent example of the same.
[38] 'Impartial Spectator', an idea introduced by Adam Smith, is an imaginary entity that personifies the prevalent ethical norms of the society. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Ryan Patrick Hanley ed., 250. anniversary ed ed. 2009).

about 17 per cent.[39] Though that has been an 8.6 per cent increase since 2012, most of the new appointments have happened after the 2020 legal reforms pushed by SEBI. According to a Bloomberg study on gender diversity in board composition in ninety-one out of BSE-100 companies, conducted in 2019, "*women constituted only 14 per cent of the board, albeit higher than the median 10 per cent half a decade ago*"[40]. Considering that women constitute almost half of the society (48 per cent, according to Census 2001), their presence in the boards of Indian companies is abysmally low. To remedy this defect, both law and markets must work in tandem.

A contextual analysis of Indian laws on women directors in light of the international trend gives us a clearer picture of what more the government can do to increase gender diversity in corporate boardrooms. In this way, it tells us about the direction in which it must progress.

Mandatory Quotas and Voluntary Guidelines

Several countries, mainly from the West, have concluded that the gender disparity on corporate boards must be addressed. The prominent ones amongst them are from Europe. Norway was the first to develop a 40 per cent quota for women directors in 2004.[41] It was followed by similar mandatory quotas (Germany, France, Belgium, Iceland, and Italy) or voluntary goals (Finland, Austria, Sweden, Spain, and the UK).[42] Experience tells us that the rise in the number of women directors in these countries, irrespective of the mandatory or voluntary laws, has been similar, mostly hovering between 30 and 40 per cent.[43] However, the increasing emphasis on including women in directorship positions in Europe has not had a comparable influence across the Atlantic.

In the United States, the general view has been that a quota for women for directorship positions would be counterproductive, leading to less qualified

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[39] Shekhar, *supra* note 33.

[40] Kiran Kabtta Somvanshi, *Women on Boards Double in Five Years, but Representation Still Low*, THE ECONOMIC TIMES, Oct. 12, 2019, https://economictimes.indiatimes.com/markets/stocks/news/women-on-boards-double-in-five-years-but-representation-still-low/articleshow/72449938.cms?from=mdr (last visited Dec 9, 2024).

[41] Margarethe Wiersema & Marie Louise Mors, *What Board Directors Really Think of Gender Quotas*, HARVARD BUSINESS REVIEW, Nov. 2016, https://hbr.org/2016/11/what-board-directors-really-think-of-gender-quotas (last visited Sep 24, 2024).

[42] *Id.*

[43] Share of female directors on boards in the financial services industry in Europe in 2023, (2024), https://www.statista.com/statistics/1322153/europe-women-on-boards-financial-services-by-country/ (last visited Sep 29, 2024).

directors.[44] The general trend is aptly reflected in the companies' law of the State of Delaware. Delaware, with over 1.6 million registered companies, is the State with the maximum concentration of head offices of companies in the US.[45] However, the company law in this state provides no quota for women directors. The Delaware law leaves room for companies willing to institute a gender diverse board to voluntarily adopt enabling amendments to their director qualifications and board quorum provisions.

The State of California, on the other hand, became the first State to come up with a law to prescribe mandatory quotas for women in 2018.[46] The law requires every corporation headquartered in the State to have at least one female director from the beginning of 2020 onwards.[47] It further said that by the end of 2021, companies with five directors shall have at least two females on their boards, while those with six or more directors shall have at least three female directors.[48] It must be noted that the definition of 'female' under the Californian law includes not only biological females but "*an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth*"[49]. Thus, California is one step ahead in recognising transgender rights. Washington State has also treaded on a similar path by mandating public companies to include at least 25 per cent of women on the board.[50] Colorado and Pennsylvania have also developed legislation to encourage companies to have more women directors passively.[51]

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[44] Nilofer Merchant, *Quotas for Women on Boards Are Wrong*, HARVARD BUSINESS REVIEW, Jan. 2011, https://hbr.org/2011/09/quotas-for-women-on-boards-are (last visited Sep 28, 2024).

[45] Chauncey Crail, Rob Watts & Jane Haskins, *Why Incorporate in Delaware? Benefits & Considerations*, FORBES ADVISOR, Feb. 2024, https://www.forbes.com/advisor/business/incorporating-in-delaware/ (last visited Jul 10, 2024).

[46] Marina Gertsberg, *Gender Quotas and Support for Women in Board Elections*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2021), https://corpgov.law.harvard.edu/2021/03/03/gender-quotas-and-support-for-women-in-board-elections/ (last visited Feb 10, 2024).

[47] S. 301.3(a) of the Corporations Code of the State of California (added by CA Senate Bill No. 826).

[48] S. 301.3(b) of the Corporations Code of the State of California (added by CA Senate Bill No. 826).

[49] S. 301.3(f)(1) of the Corporations Code of the State of California (added by CA Senate Bill No. 826).

[50] Washington Business Corporation Act, 2020.

[51] Michael Gurian & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2020), https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/ (last visited Jun 10, 2024).

How did Corporations react in the State of California?

The way these laws have affected the appointments of female directors is worth highlighting. Until these laws were enacted in the United States, the S&P 500 companies had about 18.7 per cent of women directors.[52] After implementing the laws, their representation has increased to 30 per cent, marking an increase of about 11.3 per cent.[53] A silver lining here is that out of the new directors appointed by the S&P 500 companies, 43 per cent of them are women.[54] Also, all the companies reported having at least one 'Woman Director'.[55] In light of the national trend, it will be illuminating to look at the impact of mandatory quotas on California. To assess the current trend in the State, the present paper assesses data published in the March 2022 Report titled Diversity on Boards, published by the Government of California.[56] It is to be noted that the exact data for subsequent years is not available for California, as the Superior Court of the State of California has prohibited the Secretary of State from collecting data on the diversity of the Boards.[57]

According to the March 2022 report, out of 716 impacted companies, only 358 filed their disclosure statement in 2021. Of these, only 185 (about 52 per cent) complied with the women director mandate. The present status of women directors in the State has, thus, been summarised in the table below.

Table 1: Women Directors in the State of California

Total Number of Directors	Women Directors					Total Number of Companies
	3 or more	2	1	0	no data	
9 or more	125	42	8		1	176
6 to 8	49	64	38	1		152
5/-	2	3	17	1		23

[52] Wiersema and Mors, *supra* note 43.
[53] SPENCERSTUART – 2021 S&P 500 BOARD DIVERSITY SNAPSHOT, (2021), https://www.spencerstuart.com/-/media/2021/july/boarddiversity2021/2021_sp500_board_diversity.pdf (last visited Sep 16, 2024).
[54] *Id.*
[55] *Id.*
[56] SHIRLEY N. WEBER, *Diversity on Boards: March 2022 Report*, (2022), https://bpd.cdn.sos.ca.gov/div-on-boards/dob-report-2022.pdf (last visited Sep 19, 2024).
[57] Robin Crest, Earl de Vries v. Alex Padilla, (2022); Shirley N. Weber, *Women on Boards*, (2022), https://www.sos.ca.gov/business-programs/women-boards (last visited Sep 27, 2024).

4 or fewer	0	0	6	1		7
Total	176	109	69	3	1	358

According to the data, about 85 per cent of companies with six or more directors on the board have two or more women directors. At the same time, about 46 per cent of them do not satisfy the legal requirement of three or more women directors. Similarly, though the law requires companies with five directors to have at least two women directors, the compliance with this law is as low as 21 per cent. However, three companies out of the total sample reported no female directors.

The lessons from the above analysis are significant and may have important ramifications for global legal systems. Some such important points are listed below:

(i) Two factors directly influence the appointment of women directors: the size of the board of directors and the number of women directors already on the board.

   a. Size of the Board – Companies with larger boards of directors are more inclined to appoint more than one woman director. Appointment of a second woman director is 94 per cent likely on a board with nine or more members. The chance comes down to 74 per cent for boards with six to eight members and 21 per cent for boards with five members. Boards with four or fewer members have no more than one female director. Thus, the larger the board size, the greater the chance of such an appointment. This can probably account for a high percentage of women's participation in boards in the S&P 500 companies, as they are all likely to have a large board of directors.

   b. Number of women directors already on the board - If you are a woman seeking an appointment on the board of one of these companies, you have a 98 per cent chance of getting appointed if there are no women directors currently serving. The probability comes down to 79 per cent in the case of a woman director already on the board. And if two women directors are already present on the board, you intend to join, the chances come down to 49 per cent. This clearly shows that gender has a definite role to play in the appointment of women directors.

(ii) Even though about 52 per cent of companies find it challenging to fulfil the legal mandate regarding women directors, almost all of them have easily been able to appoint at least one 'Woman Director'. This belies the whole debate on meritocracy. As they have all been able to find and appoint women directors, this shows two things:

- There exists a 'major pool of untapped labour' in the case of women directors

- More than the lack of capability of women, the lack of appointment of women directors is due to the hesitancy of the corporations. To argue in the extreme, they can always adopt the *golden-sheep* phenomenon[58] To appoint a woman already appointed as a director by another company.

V

Laws and Markets on Women Directors in India

One would presume that with access to such overwhelming literature in favour of women directorships and the push by the government in the form of laws, corporations would open doors to their boardrooms for women and welcome them in huge numbers. However, that has not been the case. In India, most of the appointments of women directors seem to have happened to fulfil the mandatory quota requirements imposed by law. Markets have also largely failed to push these companies to appoint female directors beyond the statutory requirement.

Compulsory appointment of women directors under Indian law

Until 2013, there was no concept of 'woman director' under the corporate laws in India. With a significant overhaul in the company laws that began in 2013, the legislature took initiative to address the gender gap in the boards of directors. The Companies Act 2013 introduced the concept of women directors and made it mandatory for certain companies. Second Proviso to S. 149(1) of the Companies Act 2013 (the Act) read with Rule 3 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 mandates that there must be at least one 'Woman Director' in the companies that fall within the categories:

- every listed company, and
- every other public company having-

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[58] Ruth V. Aguilera, Venkat Kuppuswamy & Anand, *What Happened When India Mandated Gender Diversity on Boards*, HARVARD BUSINESS REVIEW, May 2021, https://hbr.org/2021/02/what-happened-when-india-mandated-gender-diversity-on-boards (last visited Sep 28, 2024).

- paid-up share capital of ₹1bn or more; or
- turnover of ₹ three bn or more

The importance of the 'Woman Director' concept can be gauged from the two provisos to Rule 3 of the Companies (Appointment and Qualifications of Directors) Rules, 2014. The first proviso says that every company that qualifies the above criteria shall appoint a woman director "*within six months from its incorporation*". And, according to the second proviso, an intermittent vacancy must be filled up either before "*the next board meeting or three months from the date of such vacancy, whichever is later*". Also, in case of failure to appoint a woman director within the stipulated period, according to S. 172 of the Act, the company and every officer in default will be punished with a fine between Rs. 50,000/- and Rs. 5,00,000.

In tune with the requirement of women directors under the Act, SEBI also mandated, under Regulation. 17(1)(a) of SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (L.O.D.R. Regulations), that every company that comes under its jurisdiction[59] is required to have at least one 'Woman Director' on its board of directors. Even before the L.O.D.R. Regulations 2015 came into effect, in compliance with S. 149 of the Act, SEBI had set 31st March, 2015 as the deadline for listed companies to appoint a woman director on their boards.[60] As a penalty for non-compliance with the stated requirement, SEBI prescribed a minimum fine of Rs. 50,000/- and a maximum of Rs. 1,42,000/- plus Rs. 5,000/- per day till the date of compliance.[61] Under the L.O.D.R. Regulations, SEBI went one step ahead and mandated that there should be at least one female independent director on the boards of the top 1000 listed companies regarding market capitalisation.

The decision to mandate the inclusion of at least one female independent director was made by SEBI on 28 March 2018, in one of its board meetings. It was finally introduced as a proviso to Reg. 17(1)(a) of L.O.D.R. Regulations. This proviso made it mandatory for the boards of top 500 listed entities to have at least one independent woman director by 1st April, 2019, and the boards of top 1000 listed entities to fulfil this criterion by 1st April, 2020. The rank of these companies was determined according to their market capitalisation. However, it is to be noted that due to

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[59] SEBI's jurisdiction extends to listed companies and to such non-listed companies that intend to get their securities listed. *Sahara India Real Estate Corporation Limited & Ors. v. Securities and Exchange Board of India*, 2012 (10) SCC 603.

[60] SEBI Circular on Corporate Governance in Listed Entities, bearing number CIR/CFD/Policy Cell/2/2014, dated 17th April, 2014.

[61] SEBI Circular on Fine Structure for non-compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement, bearing number CIR/CFD/CMD/1/2015, dated 8th April, 2015.

Covid-induced lockdowns, SEBI extended the deadline for the top 1000 companies to 30th June, 2020.[62]

Failure to abide by these requirements would attract fines imposed by SEBI, suspending trading in the company's securities, or even freezing promoters' shareholdings under S. 98 of L.O.D.R. Regulations. SEBI created a circular in January 2020 to add more teeth to the law. The circular stated that if it is found that the company has failed in complying with the stated requirement for the appointment of an independent woman director, it will be fined Rs. 5,000/- per day for each day until it complies with the requirement.[63] The circular also stated that if the company continues with such non-compliance for two consecutive quarters (180 days), the stock exchanges would suspend trading in its securities until it complies.

This step was taken based on the recommendations made by the Kotak Committee in 2017. The committee had recommended, among other things, that all listed companies have at least one independent woman director. It can be observed that SEBI implemented this recommendation, but not for all the listed companies. The rationale behind this could be that the market regulator expects to create a ripple effect and, thus, influence the smaller companies to follow suit.

How did corporations react in India?

Evidence suggests that corporations have hesitated to comply with the legal mandates for appointing women directors. As a response to SEBI's circular fixing 31st March, 2015 as the deadline for the appointment of a woman director, more than 500 companies listed on BSE and about half that number listed on NSE failed to make such appointments.[64] Concerning the mandatory appointment of independent woman directors, the relevant SEBI's decision of March 2018 received wide press

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[62] SEBI's Circular on Further relaxations from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (L.O.D.R.) and the SEBI circular dated 22nd January, 2020 relating to Standard Operating Procedure due to the Covid-19 virus pandemic, bearing circular number SEBI/HO/CFD/CMD1/CIR/P/2020/48, dated 26th March, 2020.

[63] SEBI's Circular on Non-compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and the Standard Operating Procedure for suspension and revocation of trading of specified securities, bearing circular number SEBI/HO/CFD/CMD/CIR/P/2020/12, dated 22nd January, 2020.

[64] ET Bureau, *SEBI May Take Action against Companies for Not Hiring Female Director*, THE ECONOMIC TIMES, Jul. 16, 2015, https://economictimes.indiatimes.com/news/company/corporate-trends/sebi-may-take-action-against-companies-for-not-hiring-female-director/articleshow/48091429.cms?from=mdr (last visited Jun 10, 2024).

coverage.[65] This meant the top 500 companies had at least a year to implement this change, while the top 501st to 1000th companies had two years to do the same. Still, fifty-one out of the top 500 companies missed the 1st April, 2019, deadline.[66] And 125 out of the top 1000 companies (including thirty-seven government companies) had not appointed an independent woman director by 1st April, 2020[67]. Similarly, data shows that the industry is generally prompt in complying with the legal requirement of at least one 'Woman Director'.

In a study conducted by IIM Ahmedabad and FICCI[68]It was found that out of the 1944 NSE-listed companies, fifty-two did not have any female directors. The study further pointed out that about 73 per cent of NSE-listed companies had only one 'Woman Director', while the number of companies having more than three women directors was at an abysmally low rate of 1 per cent. In contrast, 91% of those companies had more than three male directors. Some other significant issues that were highlighted by the study are as follows:

(i) that companies were merely concerned with fulfilling the legal requirement, as "*a majority of women directors were appointed close to the last date for implementation*";

(ii) the *golden-skirt* phenomenon has been at work as "*40 per cent of women directors received their second appointment within six months of the first one*";

(iii) very few women directors (around 24 per cent) were made executive directors with functional responsibilities, while the number of women serving as chairperson of the board of directors was even lower at 0.7 per cent; and

[65] M. Saraswathy, *SEBI Wants One Woman Independent Director in Top 500 Listed Companies. Is It Feasible?*, MONEYCONTROL, Mar. 2018, https://www.moneycontrol.com/news/business/companies/sebi-wants-one-woman-independent-director-in-top-500-listed-companies-is-it-feasible-2539047.html (last visited Sep 28, 2024).

[66] Anushika Srivastava, *51 of Top 500 Companies Fail to Get Independent Woman Director*, SHETHEPEOPLE, Oct. 4, 2019, https://www.shethepeople.tv/news/top-indian-companies-fail-independent-woman-director/ (last visited Feb 9, 2024).

[67] Sachin P. Mampatta, *Covid-19 Crisis: Over 100 Firms Missed Deadline to Appoint Women Directors*, BUSINESS STANDARD, Apr. 2020, https://www.business-standard.com/article/companies/over-125-firms-fail-to-appoint-women-directors-amid-covid-19-crisis-120041500409_1.html (last visited Feb 10, 2024).

[68] NEHARIKA VOHRA, *Women on Boards in India: Numbers, Compositions, Experiences and Inclusion of Women Directors*, (2020), http://www.primeinfobase.com/indianboards/files/IIM_Ahmedabad_FICCI_PRIME_WOB_report.pdf (last visited Apr 9, 2024).

(iv) The remuneration of women directors is significantly lower than that of their male counterparts.

Women's Participation in Indian Corporate Boards

The situation regarding the appointment of women directors has not changed much since the implementation of the laws in 2020. Data obtained from PrimeInfobase's website[69] From 2022, presented here under Table 2, has been analysed below. It is to be noted that the data being analysed hereunder relates to the year 2022 to make it feasible for a comparative analysis between India and the State of California, USA.

Table 2: Gendered data on Indian Corporate Directors

	Individuals	**No. of Directorships**	**Independent Directors**	**No. of Independent Directorships**
Women	2354	2975	1422	1930
Men	10368	12528	4834	6051
Total	12722	15503	6256	7981

As of 19th September 2022, 50 out of 1978 companies listed on NSE still had no female director; only 18.5 per cent of the total number of individuals holding directorship positions in NSE-listed companies are females. It increases marginally to around 22.7 per cent for women as a percentage of individuals holding independent directorships. These numbers go on to show that, even after so many years since the implementation of laws on women directors, Indian corporate boardrooms are still very much male-dominated. The position has not changed much at the time of writing this article.

The data very clearly shows that Indian corporations are content with just fulfilling the mandatory legal requirements. This is very apparent as the average number of women directors in an NSE-listed company is just 1.5, only 0.5 above the legal mandate.

It can be observed that SEBI's efforts to have a greater number of women appointed as independent directors have paid off. This step has largely been successful, as today about 64 per cent of all directorship positions women hold are independent. This is about thirteen points higher than the percentage for their male counterparts.

[69] Women Directors in Indian Boards, https://www.primeinfobase.com/index.aspx?ReturnUrl=%2f (last visited Feb 9, 2024).

The reason behind such efforts could be to ensure that the companies do not appoint women related to insiders to satisfy the legal requirements.

However, a critical area of concern that the data points out is regarding the chances of a woman director getting appointed to a directorship position in another company. Data suggests that a woman director is much more likely to find a directorship position with another company than it is for their male counterparts. While women independent directors have about a 35 per cent chance of being appointed to a similar position in another company, it is around 25 per cent for men. Similarly, being a woman director, one has a 25 per cent chance of receiving a directorship position in another company as opposed to 20 per cent for men. This shows that once a woman can make her way into the boardroom of any corporate house, it becomes easier for her to secure another directorship in a different company. Thus, the data substantiates the claim that the *golden-shears* phenomenon is at work in appointing women directors.

The concept of *the golden skirt* denies the opportunity to a greater number of women from being appointed as directors and, thus, needs to be curtailed. However, on the other hand, the data could also be interpreted to mean that the impact of this concept is not substantial, as the possibility of a woman receiving her second directorship appointment is just 5 per cent to 10 per cent higher than that of their male counterparts. If corporations valued women's perspectives in their board's decision-making, they could have freely indulged in this practice to enhance the proportion of women's participation.[70]

Conclusion

The fact that a gender diverse board can bring positive outcomes for the company is well acknowledged by the markets and the governments. The presence of women on a company's board is deemed necessary not only for organisational and social justice but also for increasing the overall efficiency. As women are more risk-averse and are less likely to fall prey to group thinking, boards with more women are sure to act more independently of the management; thereby performing their duty of better monitoring more effectively. At the same time, societal needs also require that corporate boards be made more inclusive.

Bringing about a change in the composition of boards, markets, and the state plays a significant role. Markets can influence board appointments by using their monetary or voting powers. It can exercise those powers in light of the ESG metrics

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[70] A person is allowed to hold up to ten directorships in public companies. *See* First Proviso to S. 165(1) of the Companies Act, 2013.

and thereby go on to ensure that corporations are governed more responsibly. By voting against non-gender diverse boards, they can create pressure for that particular company and the others. However, as investors' preferences and those of the shareholders are often profit-centric, the impact of such activism will always be constrained by the lure of getting more returns.

On the other hand, governments can carry forward the objective of changing the male-dominant character of corporate boards by effecting mandatory quotas or voluntary goals. India has chosen to go with the former option. However, the experience of compulsory quotas in India and the State of California tells us that it is not devoid of shortcomings. In both jurisdictions, companies have found it easier to appoint one female director. However, the chance of appointment of any additional female director keeps getting narrower with each appointment. Also, only companies with large boards usually appoint two or more female directors, thereby ensuring that women do not hold the majority. This zeal to keep women away from power is also visible in the fact that very few women are appointed to leadership positions. The companies also pay less to women directors than their male counterparts. In addition, companies engage in the golden-skirt phenomenon in the appointment of women directors, thereby substantially increasing the chances for a woman director to receive a second appointment with another company. However, it is also evident that the companies are unwilling to appoint women even if that is at the cost of violating the laws. The excuse of a lack of merit does not match the data on the appointment of women directors. Instead, the data suggests that an untapped pool of women directors exists who could be appointed by other companies as well.

The way forward depends heavily on how markets and governments approach this issue. Data suggests that companies do embrace women directors if there are legal requirements. However, such laws have failed to create the push necessary for bringing greater gender diversity to corporate boards. In the present circumstances, when corporations seem not to be picking up the cue, governments must adopt more aggressive standards, like those of Norway. In addition, the markets will have to take up the responsibility of enforcing gender equality propositions more vociferously in board appointments and not be cowed down by short-term profit seeking only when governments and markets act together towards promoting greater gender equality in our corporate boards that the timid corporations will eventually rise out of their narrow-sighted patriarchal mindset.