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Corporate Governance Regime in India: An Exigency for Reform

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ABSTRACT

Economic liberalisation and globalisation of the Indian economy pushed the government and corporate world to embark on a reform process in order to meet the challenge of global changes. The Indian business world responded to global developments as well, drawing cues from the growing relevance of corporate governance as a fair and transparent framework for managing enterprises in the interests of long-term maximising of shareholder wealth and benefit to society as a whole. This article discusses the shortcomings of the current Corporate Governance Regime and the necessity of reforming it for better regulation.

I. INTRODUCTION

A system of conventions, regulations, ethics, principles, regulations, and procedures that control a firm is referred to as corporate governance. In the enterprise, governance sets out a framework within which executives and directors are charged with accountabilities connected to the firm's management². The firm's norms should establish that its directors must not misuse their position, but instead acknowledge their obligations and responsibilities to the organization and operate to the business's greatest advantage in the broadest sense. Corporate governance is not an aim in itself; it is merely the beginning of an organization's ultimate success and stability³.

In the mid-1990s, when economic liberalisation and deregulation of businesses has become an actuality in India, corporate governance began to take shape.⁴ Arthshastra is a term widely used in India for corporate governance and it has been popular for decades. India used to have monarchs and disciples instead of merely CEOs, which have since been replaced by shareholders, but the fundamentals continue to be the same. Following independence,

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² Dalei P, Tulsyam P and Maravi S, "Corporate Governance in India: A Legal Analysis" <<http://psrcentre.org/images/extraimages/10.%20312018.pdf>> accessed November 16, 2021

³ Pande S, "An Overview of Corporate Governance Reforms in India" [2011] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958031> accessed 16 November 2021

⁴ Mayer, Colin, "Corporate Governance, Competition, and Performance" (1997) JLS 24[1] <<http://www.jstor.org/stable/1410607>> accessed 16 November 2021

entrepreneurs and business people expressed an interest in producing a variety of essential products whereby the government set and enforced fair rates. “Bureau of Industrial Costs and Prices and the Tariff Commissions” was established by the government during this time. In 1950, the Industries (Development and Regulation) Act⁵ and the Companies Act⁶ were enacted. In addition to normal business, the 1960s saw the establishment of large industries. Throughout the 1970 and mid-1980, costing, output, and profitability were examined as critical components of cost financial accounting.⁷

Investors, workers, lenders, shareholders, and the administration, among other participants in an institution's management platform, have a substantial effect on company governance. Corporate governance is thought to improve the performance of a company. The main purpose of implementing excellent corporate governance is to maximise long-term shareholder value and stakeholders⁸. Questions regarding strong corporate governance have skyrocketed after India's largest-ever corporate fraud and regulatory breakdown was revealed at Satyam Computer Services Limited.

II. NEED FOR CORPORATE GOVERNANCE FOR A COMPANY’S GOOD PERFORMANCE

The economic performance of a company is determined not just by its productivity, ingenuity, and customer orientation, but also by its commitment to principles of corporate governance. Applying corporate governance principles improves a company's financial situation and boosts systematisation in mature economies. Furthermore, the effectiveness of corporate governance measures is damaged by a lack of honesty and insufficient accountability.⁹ The significance of good corporate governance stems from huge corporate frauds and global financial crises and the government ensures the long-term growth and health of businesses. Corporate governance is to make economic processes easier to control and supervise. Its foundation is operating impartiality and openness, as well as greater disclosures to protect the interests of a range of stakeholders. Corporate governance is designed to help a company function better by enabling good decisions. "Corporate governance" is described as "a network of exchanges between the management, board members, investors, and stakeholders of a firm." Corporate governance "guarantees that businesses consider the objectives of a broad range of constituents, as well as

⁵ The Industries (Development and Regulation) Act 1950

⁶ The Companies Act 2013

⁷ Deakin, Simon, and Alan Hughes. “Comparative Corporate Governance: An Interdisciplinary Agenda.” (1997) JLS 24[1] < <http://www.jstor.org/stable/1410599> > accessed 16 November 2021

⁸ Afsharipour A, “A Brief Overview of Corporate Governance Reforms in India” [2011] SSRN Electronic Journal < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729422 > accessed 16 November 2021

⁹ Vivek Rao S, “Legal Framework and Corporate Governance: Analysis of Indian Governance System” [2005] SSRN Electronic Journal < <http://dx.doi.org/10.2139/ssrn.679001> > accessed 16 November 2021

the communities it serves and that their directors are responsible to the corporation and its shareholders," according to the World Bank (Organization for Economic Cooperation and Development, 1999)¹⁰. Corporate governance was created to defend the interests of shareholders, but it has increasingly grown in relevance for various stakeholder groups.

In early times, good governance wasn't really a legally mandated stipulation, and compliance was entirely consensual. However, as a result of corporate failures caused by unethical practices at the top-level management, often these countries have established mandating standards and guidelines to enhance corporate governance structure. The Cadbury Committee report¹¹ in the United Kingdom (UK) in 1992 and the Sarbanes Oxley (SOX) Act in the United States (US) in 2002 are regarded as fundamental developments in corporate governance rules, with equivalent codes of good governance being implemented in the rest of the world. Within a nation, governance laws get to be a form of prescriptive formal structures for uniformity.

III. DEVELOPMENT OF CORPORATE GOVERNANCE NORMS IN INDIA

To the most degree, the Indian legal system has embraced global practices in corporate governance. In principle, the following rules describe the corporate governance mechanisms in India:

1. The Companies Act of 2013 contains provisions governing board composition, business meetings, board processes, general meetings, independent directors, audit committees, related party transactions, financial statement reporting duties, and other matters.¹²
2. SEBI Guidelines: "The Securities and Exchange Board of India (SEBI)" is a governing organisation that regulates listed companies and establishes regulations and guidelines to safeguard investors.
3. Stock Exchange Standard Listing Agreement: For corporations that shares are traded on stock exchanges.
4. "The Institute of Chartered Accountants of India (ICAI)" has issued the following accounting rules: The Institute (ICAI) is a self-governing body that publishes auditing regulations and reporting suggestions for financial data. The accounting information must, among many other things, reflect a true and precise evaluation of the condition

¹⁰ OECD Principles of Corporate Governance < [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN\(99\)6&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En) >

¹¹ The Cadbury Report < <http://cadbury.cjbs.archios.info/report> >

¹² Bhagat S and Bolton B, "Corporate Governance and Firm Performance" (2008) JCF 14[2] < <https://leeds-faculty.colorado.edu/Bhagat/GovernancePerformance-JCF-June2008.pdf> > accessed 16 November 2021

of the business's or businesses' operations, as well as comply with the accountancy rules established by Section 133 of the Companies Act¹³. The elements presented in such accounting records must also follow accounting requirements, according to the report.

5. The Institute of Company Secretaries of India (ICSI) has developed the Secretarial Standards listed below: The ICSI is a self-governing organisation that sets secretarial standards in compliance with the Companies Act.

Corporate governance changes are critical for India as it moves to a more publicly accountable economic system of governance. The Indian economy was liberalised and privatised following the fiscal crisis of 1991. Finance was necessary for Indian businesses in order for them to grow and expand. Corporate governance reforms in India were necessitated by the need for international investment¹⁴. Since then, SEBI has placed a significant focus on high capital market governance. SEBI's frequent updates of principles, regulations, and laws to ensure transparency and accountability demonstrate this. Clause 49¹⁵ was incorporated by SEBI in 1999 from the Confederation of Indian Industry's (CII) code of governance, which is an autonomous group that works with the state on policy matters. It has been updated on a regular basis to ensure better conformity. India has implemented changes to improve corporate, societal, and environmental transparency. In 2011, the Government of India's "Ministry of Corporate Affairs released "National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business" (Ministry of Corporate Affairs, 2011)." To improve the quality of disclosures, the standards require listed businesses to produce a Business Responsibility Report (BRR).¹⁶

To summarise, corporate governance in India focuses on increasing openness and transparency, sanctioning prominent owners, and safeguarding minority shareholders' interests. This is in contradiction to the United States and the United Kingdom, which focus on increasing managerial accountability to dispersed shareholders.

IV. PRINCIPLES OF GOOD GOVERNANCE

1. Transparency

The more information you have, the more confident you will be. This is the credo that all of

¹³ The Companies Act 2013, s 133

¹⁴ Khanna, Vikramaditya S., "Corporate Governance Ratings: One Score, Two Scores, or More?" (2009) UPLRP 39[1] < <https://ssrn.com/abstract=1690573> > accessed 16 November 2021

¹⁵ Confederation of Indian Industries Clause 49

¹⁶ Ministry of Corporate Affairs Government of India https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

the stakeholders adhere to. Honesty pays off in the corporate sphere as well. Businesses that are transparent about their activities and finances earn the customer's confidence, which is priceless.¹⁷ Transparency is essential at all stages of a firm's management, but especially at the leadership when key decisions and plans are made. Getting investors and other stakeholders updated helps to foster a sense of trust and togetherness, which leads to greater valuations and easier access to capital.

2. Accountability

In its most basic form, accountability refers to a propensity or commitment to take accountability for one's conduct. Accountability is often viewed negatively and misunderstood by those who believe it is synonymous with the old "Blame Game."¹⁸ In reality, accountability addresses more than the question of who is responsible. It should also be perceived favourably since it recognises accomplishments.

Accountability provides shareholders with confidence in the company by guaranteeing that, in the case of a negative situation, those responsible are dealt with promptly¹⁹. Accountability develops a system in which everyone is held responsible for their work and responsibilities. Accountability keeps two systems in order:

- It allows management and ensures it is accountable to the Board of Directors.
- Guarantees the Board of Directors is answerable to the shareholders.

3. Independence

Independence is defined as the freedom to make judgments without even being constrained or influenced in any way. This is also something that has been demonstrated to be critical to the proper operation of organisations.²⁰ The ability to hold steady in the face of unfavourable pressures is defined as independence.

- The capacity to make unequivocal, solid conclusions on any issue.
- The ability to maintain a high level of professionalism and then do the right thing for the firm.

¹⁷ Gupta N and John M, "Marching Towards Convergence" <https://iica.nic.in/images/ARTICLE%20ON%20CORPORATE%20GOVERNANCE.pdf> (accessed 16 Nov 2021)

¹⁸ Correspondent JI, "Corporate Governance in India" (Journals of India 23 November 2021) <https://journalsofindia.com/corporate-governance-in-india/> > accessed 16 November 2021

¹⁹ Shardul S. Shroff, Rudra Kumar Pandey, Vishal Nijhawan, "Corporate Governance in India" (Lexology, 10 July 2018) <https://www.lexology.com/library/detail.aspx?g=673fd913-c212-42bc-9d9c-a0eb14002359> (accessed 16 Nov 2021)

²⁰ James Chen, "Corporate Governance" (Investopedia 04 July 2021) <<https://www.investopedia.com/terms/c/corporategovernance.asp> > accessed 16 November 2021

- It enables the individual to act with dignity and establish decisions and judgements that are in the best interests of all parties involved. This is why firms choose independent directors: to guarantee that no coercion is used because the director doesn't even have any close connections to the firm, obstructing his autonomy to make choices²¹.

V. REFORMS FOR GOOD GOVERNANCE

The Securities and Exchange Board of India (SEBI) is responsible for safeguarding investors' interests, as well as promoting and regulating the securities market in India. Its rules for publicly traded companies frequently go beyond what the law requires²². For example, SEBI laws limit a person's ability to serve as an independent director to no more than seven publicly traded businesses. Even SEBI's standards, however, do not stipulate a minimum level of academic requirements for directors. One of the most powerful antidotes to fraud is good corporate governance. Concise, straightforward, and effective laws must be established and implemented with zero tolerance for infractions in order to achieve this. Aside from the aforementioned, some more significant gaps have been identified²³. So, here are some easy proposals that can help improve corporate governance, particularly in publicly traded companies.

To begin with, a minimum academic qualification must always be required.

Each company director, whether independent or not, in a listed or non-listed firm, public or private company, should be a grad or have similar educational credentials. If the idea is deemed too extreme, at least 3/4th of the Board, or a plurality of the Board, should indeed be made up of Directors who possess the specified minimum competence.

Second, anyone having a questionable track record of breaking any law, not only the Companies Act, should not be chosen as Directors. The Act's clauses are, to put it mildly, benign in this regard. The ambit of Section 164²⁴ of the Act, which lays out several dismissals for Director appointments, needs to be improved. A person who has been guilty by a court of any crime, regardless of gross misconduct or not, and sentenced to prison for not less than six months, and a term of five years has not passed since the date of expiration of the punishment

²¹ Correspondent PT, "The Core Principles of Good Corporate Governance" (Pearse Trust 19 February 2014) < <https://www.pearse-trust.ie/blog/bid/108866/the-core-principles-of-good-corporate-governance> > accessed 17 November 2021

²² Reed, Ananya Mukherjee. "Corporate Governance Reforms in India." (2002) JBE 37[3] < <http://www.jstor.org/stable/25074753>. > accessed 16 November 2021

²³ Goel P., "Implications of corporate governance on financial performance: an analytical review of governance and social reporting reforms in India" (2018) AJSSR 3[4] < <https://doi.org/10.1186/s41180-018-0020-4> >

²⁴ The Companies Act 2013, s 164

is included in subclause (1)(d)²⁵ aforementioned section. According to the applicable Rules, "or otherwise" in the stated section refers to any crime for which he's sentenced by a court underneath this Act or the Companies Act, 1956. As a result of the foregoing, only two types of crimes are included by said subsection 164 of the Law: I moral turpitude offences, and (ii) offences under the Companies Act. Furthermore, in both situations, the exclusion is imposed after a sentence of at least six months' imprisonment.

For two main reasons, the above protections are woefully inadequate:

1. The range of applications is severely limited. As a result, a person implicated in laundering money, tax avoidance, Benami dealings, or ecological law violations, among other things, is not barred. Certainly, this was not the purpose of the legislators, and
2. the slowness with which justice is delivered is well documented. In the worst-case situation, no charges are ever filed. Even if they are brought, they might take years to resolve.

To close these loopholes, it is proposed that the section's purview be expanded to encompass any infraction of the legislation that a company is required to follow. Hospitals are obligated to follow around 100 laws and regulations! However, an entire list is impossible to compile because the law's applicability differs from firm to corporation.²⁶ Organizations in the industrial (based on the products), services (such as education and healthcare), and other sectors, for example, will face significantly diverse legislation.

Third, whether or not convictions have occurred, the emphasis must be on accountability and complete disclosure.

As already noted, verdicts in our nation are generally postponed exceedingly, negating the entire objective of the provision. As a result, it is recommended that, in the interest of full disclosure, all adjudicated and cases filed be fully disclosed at the time of induction. Any further case brought against the Director should be notified in detail to the Board and SEBI (in the instance of listed firms) within seven days of its lodging.²⁷ The Company's Board of Directors and shareholders can then determine whether or not to hire or retain the Director in question.

²⁵The Companies Act 2013, s 164(1)(d)

²⁶ Dr. Sanjiv Agarwal, "Reforms of Corporate Governance" (Taxmanagement India 12 January 2012) < https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=641 > accessed 16 November 2021

²⁷ Sarvesh Mathur, "Small Steps that can make Big Difference" (TimesofIndia 3 September 2017) < <https://timesofindia.indiatimes.com/blogs/valuesfirst/small-steps-that-can-make-make-big-difference-to-corporate-governance/> > accessed 16 November 2021

A concrete example best illustrates the significance of this approach. It is now public knowledge that the Registrar of Companies, Kolkata (ROC) found 14 directors of Price Waterhouse coopers Private Limited (Pwc)²⁸ criminally responsible for crimes under Sections 209²⁹, 211³⁰, 217³¹, 301³² of the Companies Act, 1956, as well as infringements of financial reporting standards, in an official investigation on the commands of the Ministry of Corporate Affairs (MCA) in 2012. The crimes were perpetrated over the course of four years. Pwc's books of accounts did not provide a truthful and fair perspective of the company's state of affairs for four years, according to the ROC. Mr. Deepak Kapoor, the former chairman of PwC, was among the directors convicted, and his nomination as an Independent Director of Tata Steel was subsequently condemned by none other than Mr. J.N. Gupta, the erstwhile Executive Director of SEBI. Remember, the objective is to resolve the greater issue of openness rather than the qualities of this nomination.

Fourth, excessive law must not disqualify a large pool of candidates from being appointed as Independent Directors (ID).

SEBI legislation regarding the eligibility requirements for nomination as an Independent Director. It forbids an independent director or a family from working for the company as a supplier or manufacturer, service provider, client, or as lessor or lessee.³³

The implications of the preceding are somewhat disturbing. Although if one or more kin is/was working as a junior employee in any of the aforementioned enterprises, an otherwise exceptionally talented and qualified individual would've been thrown out for employment as an ID in a lot of firms.

The legislators' objectives were laudable, to be sure. They intended to create a barrier to prevent any potential conflicts of interest. However, the drafting went too far. In its present form, the laws suffer from a "disparity" and a lack of understanding of the concept of "materiality."

As a result, two main modifications are suggested:

²⁸ Price Waterhouse & Co. And Ors. vs Sebi (2012) 348 ITR 306

²⁹ The Companies Act 2013, s 209

³⁰ The Companies Act 2013, s 211

³¹ The Companies Act 2013, s 217

³² The Companies Act 2013, s 301

³³ Afra Afsharipour, Manali Paranjpe, "Handbook of Corporate Governance in India" (University of Oxford 24 August 2021) < <https://www.law.ox.ac.uk/business-law-blog/blog/2021/08/handbook-corporate-governance-india> > accessed 16 November 2021

1. recruitment of "relatives" must not preclude appointment as ID unless such relative is in a senior position able to influence choices and the suggested ID makes full disclosure of information; and
2. sensible financial ceilings must be stipulated in the case of material vendors, service providers, and other corporation vendors.³⁴

This will render the laws more practical and assist in hiring appropriately educated and prepared staff to support successful governance while maintaining the essential controls.

Simple, effective steps can have a significant impact.

VI. CONCLUSION

The Indian Parliament, and also Indian enterprises, have been working hard to improve Indian Corporate Governance ever since the late 1990s. The present Indian Corporate Governance regime encompasses both optional and required obligations, such as the Ministry of Corporate Affairs' Voluntary Guidelines. The vast bulk of Clause 49 of the listing agreements criteria is necessary for listed firms. The Ministry of Corporate Governance's optional regulation on Corporate Governance serves as a baseline for Corporate Governance practises in Indian firms, and it is hoped that the corporate world will make use of it. India does have one of the greatest corporate governance legislative systems in the world, but poor execution, combined with pre-reform socialist programs, has harmed corporate governance. The Companies Act of 2013 is an enormously significant piece of legislation in the development of Indian corporate law, akin in so many respects to its antecedent Act of 1956, which ushered about fundamental changes in the way Indian firms were to be run at the moment. Without a doubt, the Act has flaws that need to be remedied. Despite the fact that it took more than a decade to complete, the final product was unquestionably worth the wait. There are many things that come into play when we talk about Corporate Governance, surely, we have come a long way but we also have a long way to go. Starting from minuscule policy and implementation changes would go a long way and will better the governance in India.

³⁴ Bhumesh Verma, "Evolution of Corporate Governance in India" (SCCOnline 13 November 2019) < <https://www.scconline.com/blog/post/2019/11/13/evolution-of-corporate-governance-in-india/> > accessed 16 November 2021

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