

# “FEMINIST INTERPRETATION OF CORPORATE LAW”

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Gender discrimination is a deep-rooted problem present everywhere around the world, more so in some countries such as India. The traditional norms that continue to be followed have relegated women to a secondary status in private and public sphere. These practices have majorly affected women’s financial, political and educational status. Most of the countries around the world have a depressing number of women participating in the decision making process of a company. India is a signatory to United Nations Convention on Elimination of all forms of Discrimination Against Women. This convention calls for putting an end to all ways in which women face discrimination in the field of employment.<sup>1</sup> The framers of the constitution in order to help enhance women’s status had included provisions which allow the government to practice “positive discrimination”. By the virtue of these provisions, reservations have come into force through which women are granted a special status and given an equal opportunity to change the popular belief of women being subordinate to men. Similar reservation has been made in The Companies Act, 2013 under Section 149(1)<sup>2</sup> which has made it mandatory to have at least one woman director on the Board of Directors. The report of the Parliamentary Committee on the Companies Bill, 2011 gave a simple justification for the same by stating that, “it is likely to be in line with the policy of the Government for encouraging more and more women participation in decision making at various levels”.<sup>3</sup> This will help in achieving gender diversity apart from giving more representation to women. In this paper, the researcher intends to answer why reservation for women is needed from both the governance and women’s rights perspective. In order to analyse this provision, we need to ask the Woman Question. A woman question is designed to identify the gender implications of a rule or a practice which otherwise seems to be objective. It exposes the latent effects of law that do not blatantly show prejudice towards a particular sex but display how social structures implicitly render women subordinate. It requires going deeper beneath the surface of law and recognising the gender connotation of rules and the assumptions that come along with it. This question insists upon application of rules that do not propagate

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<sup>1</sup> Article 11, *United Nations Convention on Elimination of all forms of Discrimination Against Women*, 1979.

<sup>2</sup> Sec. 149, Companies Act, 2013.

<sup>3</sup>The Parliamentary Committee *Report on the Companies Bill, 2011*, available at <http://www.scribd.com/doc/99565110/Parliamentary-Committee-Report-LokSabha-on-Companies-Bill-2011> (Last visited Jan 12, 2020).

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subordination of women. However, asking the women question does not necessarily mean that the answer should be in the favour of women. It is basically to highlight the gender bias by the researcher.<sup>4</sup> A question that can be asked for the purpose of this paper is, “why are senior positions in a company dominated by male presence?” or “why India is in dire need of reservations for woman?” The debate that follows is whether these reservations for women are fair? To answer this satisfactorily, the researcher will answer why reservation is required and the objective it aims to achieve. It is highly imperative to understand the objectives of providing reservation to a section of people. The reservations are not unfair but rather a method of compensating for the existing disparity in the society. Any person belonging to a minority in a society frequently deals with instances of discrimination. This unfair practice can be on the basis of religion, region, race, caste and gender, sexual orientation etc. Reservation essentially tries to provide this person a fair chance of helping themselves to reach a higher position of power. Moreover, it is meant to help the minorities have more representation amongst the powerful and privileged. It additionally, assists them in gaining financial independence. This also results in their further generations getting better opportunities. Reservations help the disadvantaged in earning the respect that is due to them by proving their competency and capabilities which otherwise would be lost in a world which continues to operate in a biased manner.

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### **WOMEN’S RIGHTS PERSPECTIVE**

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The reservations seem to be the only way of compelling the Corporates to include women in their decision making bodies. Women had always been a part of companies and enterprises but it was difficult for them to reach higher positions. But with reservations, there is a compulsion on the companies and favourable results can be expected. A major reason of subordination of women is their financial dependence on the male members of the family. It is tough for them to get jobs and earn sufficient money to become independent. Providing reservations will help solve this issue circuitously. If there are women directors, there are chances of more women being hired. This will open up more slots for women and help them move forward, which will ultimately prove beneficial for them and their families too. Having more women will also result in policy formulations that are necessary for women. For instance, providing childcare facilities, ease in sanctioning of maternity leaves, more flexible working hours, stricter action for offences against women at workplace. This will further encourage women to come forward and apply for jobs as they will be assured of safety and security at work. When women move together in a

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<sup>4</sup> Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARVARD LAW REVIEW* 829, 848 (1989).

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group rather than staying as isolated individuals, they move from powerless beings to powerful beings.<sup>5</sup>

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### CORPORATE GOVERNANCE PERSPECTIVE

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Another intriguing fact can be uncovered through statistics. The Credit Suisse Research Institute reported in the year 2013<sup>6</sup> that companies with women directors had an income growth of over 14%. Whereas, companies with no women directors had a growth rate of 10%. In addition to this, another report by Catalyst concluded that Fortune 500 companies with more women directors on an average were successful in outperforming the companies with fewer or no women directors on board.<sup>7</sup> In addition to this, having women on board surely helps in gaining a different perspective and coming up with diverse solutions which is absolutely necessary in a competitive era which demands creativity and innovation at every step. It helps in stronger decision making and also better risk management.<sup>8</sup> Norway, is an excellent example where the quota initially faced a lot of backlash as it was believed that this would result in loss of competitiveness and merit. However, the country was shown to be doing better with quotas in place in the World Competitiveness Yearbook, 2010.<sup>9</sup>

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### SHORTCOMINGS OF THE PROVISION

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It is being observed that, like many other provisions, there is vagueness present in the provision at hand as well. There are no rules or guidelines laid down specifying the selection criteria for these women who are applying for a position in the Board of Directors. There are no restrictions or qualifications as to who can be selected and who cannot. This is resulting in companies “hiring” their own relatives for the post. This results in no outsider being inducted and the formality of having a female member is complied with.<sup>10</sup> This is harming the prospects of other competent women who are highly educated and deserving for the post. It is proving to be unfair and difficult for women who have no family backing or connections to get into these enterprises.

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<sup>5</sup> Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up from The Bottom*, 2(1) JOURNAL OF GENDER AND LAW 1, 8 (1994).

<sup>6</sup> Karyn L Twaronite, *Moving from 'Why' to 'How'*, FORBES WOMAN (January 8, 2013), available at <http://www.forbes.com/sites/forbeswomanfiles/2013/01/08/women-on-boards-moving-from-why-to-how/> (Last visited on January 2, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> Rasheeda Bhagat, *Storming another male bastion*, THE HINDU BUSINESS LINE (July 20, 2000), available at <http://www.thehindubusinessline.com/2000/07/20/stories/042044rb.htm> (Last visited on January 3, 2020).

<sup>9</sup> Dwaipayan Chakraborty, *Reserve Board Positions for Women*, BUSINESS TODAY (2014) <https://www.businesstoday.in/magazine/b-school-debate/b-school-debate-on-reserve-board-positions-for-women/story/202676.html> (Last visited on January 6, 2020).

<sup>10</sup> *Woman on Boards: Why India Inc Needs the 'Diversity Edge'* DNA (April 6, 2015), available at <http://www.dnaindia.com/analysis/standpoint-women-on-boards-why-india-inc-needs-the-diversity-edge-2075206> (Last visited on January 3, 2020).

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This also perpetuates nepotism. Another cause of concern is that since these women are chosen merely for the lip service, they are hardly given any decision making powers or responsibilities. The Board of Directors continues to be dominated by the male opinion. There are several reports to support the researcher's arguments. Data has proven that about 57% of the listed companies on the National Stock exchange have appointed wives, sisters, daughters etc. just in a bid to avoid strict penalties for non-compliance on the last day.<sup>11</sup> This hurried action by the companies have absolutely undermined the potential of some of the more competent women. This practice defeats the very objective of the legislation. This is also contributing to the falling standards of the company and poor results as the selection is not based on professional capabilities. There is an urgent need for more transparency and accountability with regard to the selection process. A codified protocol would help. It will assist in appointing credible women on board. There should be pressure to go beyond the traditional means of selection so that the true objective of the legislation is achieved and the quality of the board is not compromised with. Even when a woman is selected on the basis of her qualifications and competence, she is often not given her due or the power she deserves by virtue of being a director because her entry into the firm is taken as tokenism. Additionally, there are no measures that have been taken up by companies to retain women at the higher levels. There is a dearth of talent due to the lack of policies and this also results in difficulty in finding qualified women for the superior posts. Figures published by the Ministry of Corporate Affairs depict that nearly 21% of the companies in the country have not had a woman director. It is upsetting to know that India is placed in the bottom ten countries of the world where women are known to hold merely 17% of the senior positions in management.<sup>12</sup>

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### **WHY INDIA'S SOCIO-CULTURAL PRACTICES MAKE RESERVATIONS A MUST?**

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Having quotas is the easiest and the fastest way of helping minorities (women in this case) climb up the ladder of success. However, certain elements of the society spread misinformation and false claims. One of them being, reservation for women is disadvantageous to men. As discussed earlier, understanding how the Indian society functions is sufficient to rebut this argument. Women do not have access to same kind of resources, they are discouraged from attending formal education, their duties are believed to be limited to being a wife and a mother, and do not extend to becoming a bread winner. The socio-cultural differences between the two genders has

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<sup>11</sup>*Id.*

<sup>12</sup> Ayushi Agarwal, *India's 'One Woman quota' on Board of Directors fails to bring about gender equality*, (Feb 28, 2018), Oxford Human Rights Hub, available at <https://ohrh.law.ox.ac.uk/indias-one-woman-quota-on-board-of-directors-fails-to-bring-about-gender-equality/> (Last visited on Jan 8, 2020).

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to be acknowledged. The progress and increase of women in the formal sector must not go unnoticed. However, women continue to only comprise 29% of the country's labour force.<sup>13</sup> It is not a surprise that the societal expectations and obligations are responsible for this dismal percentage. A study conducted for the book *Poverty and Social Exclusion in India* observes, "Over 89 percent of the women respondents doing only domestic work said that they did this because they were obliged. Over 56 percent said there was no other member of the household who would take on their household duties."<sup>14</sup> Under these circumstances, it is of utmost importance that a country like India must step forward and collectively work towards betterment of the status of women in the country. Reservation is only a small step; the real change will be possible only through an evolution of mindset. Indian policymakers must also acknowledge that merely putting a compulsion of appointing one woman, even though was a good start, does not seem to achieve the purpose. The women would continue to be in an insignificant and negligible minority in the Board. The quota should achieve a "critical mass". This term is a number that represents the minority considerably and not just as a "token". A single woman would still be subjected to stereotypes. A "critical mass" would be appointing at least three women on the Board for effectively improving the corporate affairs.<sup>15</sup> To conclude, the researcher would like to quote Former US President, Mr. Barack Obama, who recently has commented on women leaders and their abilities:

*"Now women, I just want you to know; you are not perfect, but what I can say pretty indisputably is that you're better than us [men]. I'm absolutely confident that for two years if every nation on earth was run by women, you would see a significant improvement across the board on just about everything... living standards and outcomes. If you look at the world and look at the problems it's usually old people, usually old men, not getting out of the way."<sup>16</sup>* Women of the world do not lack competence; all they lack is an opportunity. The policies formulated to help push the women up the ladder, should be updated regularly. Its implementation should be supervised and any deficiencies in the process should be rectified on an urgent basis. Merely bringing reservations would not help in completely defeating gender discrimination, but it does bring women out more in the public space where they get a chance to fight for themselves. It contributes to detaching stigmas and ending stereotypes and that is an important first step.

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<sup>13</sup> Kamalnath and Peddada, *Women in Boardrooms: formulating a legal regime for Corporate India*, 1(6) *Journal On Governance* 676, 684 (2012).

<sup>14</sup> *Id.*

<sup>15</sup> Agarwal, *supra* note 12.

<sup>16</sup> Saira Asher, *Barack Obama: Women are better leaders*, BBC SINGAPORE, (Dec 16, 2019), available at <https://www.bbc.com/news/world-asia-50805822> (Last visited on Jan 14, 2020).

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